



1.0



2.8



2.5

5.0



3.15



2.2

5.6



3.5



2.0

6.3



4.0



1.8

7.1



4.5



1.1



1.25



1.4



1.6

NATIONAL BUREAU OF STANDARDS
MICROCOPY RESOLUTION TEST CHART

START

**GREAT BRITAIN
LAW OFFICERS' OPINIONS**

Clive Parry
Editor

Erwin C. Surrency
Microfilm Editor

Dobbs Ferry, New York
Trans - Media Publishing Company
1976

**GREAT BRITAIN
LAW OFFICERS'
OPINIONS**

REEL

5

PROPRIETARY STATEMENT

This film cannot be reproduced in whole or in any substantial part by use of film or microfiche either commercially or for gift without the consent of the publisher, Trans-Media Publishing Company of Dobbs Ferry, New York. Users are free to make reproductions of the decisions for reference use.

Copies of this film may be purchased from Trans-Media Publishing Co.

Trans-Media Publishing Co.
Dobbs Ferry, New York 10522



1905

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. May 1906.

CONFIDENTIAL.

(8712)

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1905.



1905

LIST OF REPORTS.

(Arranged according to Countries.)

NOTE.—The Reports not addressed to the Foreign Office are marked 64, &c.

ARGENTINE CONFEDERATION.

No.		Date.	SUBJECT.	Page
1	Law Officers ..	Mar. 31, 1905	Bright's Light and Power Company. Decree turning it into an Argentine Company should be resisted, because it had been recognized for some years as a British Company, and because Executive was not justified in over-ruling decision of Law Courts on this point, even if empowered to do so by Argentine Law..	1

BORNEO.

2	Law Officers ..	Oct. 27, 1905	Brunei Order in Council as to taking fees in sterling. Approving draft of	3
---	-----------------	---------------	---	---

CUBA.

3	Law Officers ..	Mar. 30, 1905	Order in Council to carry into effect Extradition Treaty with Cuba. Approving draft of	5
---	-----------------	---------------	--	---

GENERAL.

4	Law Officers ..	Jan. 26, 1905	Position of New Zealand and Queensland in relation to the Industrial Property Convention of 1883 and Additional Act of 1900. Cannot advise generally as to whether a Treaty entered into for the United Kingdom binds the Colonies. New Zealand and Queensland bound by the Convention unmodified by the Additional Act, to which latter they are not bound. Mode in which His Majesty's Government may notify accession of New Zealand. Notification should be made to the Swiss Government	6
5	Law Officers ..	Jan. 31,	Marriages performed at foreign Embassies and Consulates in England. Opinion as to how far affected by 4 Geo. IV, cap. 76, and as to extent to which they can be regarded as valid in England failing compliance with the requirements of English municipal law. Question of discouraging them is a matter of policy, but foreign Governments should be warned as to extent of their validity	8
6	Law Officers and Mr. Scrutton	July 29,	Artistic works first produced in a foreign country which is a party to the International Convention acquire copyright in Canada. If decision is given to the contrary, it should be rectified by legislation	10
64	Law Officers for the United Kingdom to Board of Trade	Aug. 9,	Beam and otter trawling (fishing) in Moray Firth. All British subjects are bound under "Sea Fisheries (Scotland) Act, 1905." Crown has power to legislate for British subjects outside His Majesty's dominions	11
7	Law Officers ..	Nov. 1,	Diplomatic privileges. Extent of immunity of diplomatic servants from criminal jurisdiction. Approving reply as modified to question of Belgian Minister	12

[454]

LIST OF REPORTS.

iii

JAPAN.

No.		Date.	SUBJECT.	Page
8	Law Officers ..	Nov. 24, 1905	"Scotsman" condemned by Japanese Prize Court for carrying contraband of war to Vladivostok during war with Russia. No grounds exist on the evidence for asking Japanese Government to reconsider the decision	15

MEXICO.

9	Law Officers ..	Sept. 19, 1905	Detention of Alonzo Lewis by Indian Chief at Yalliche in 1902. It is not justifiable to claim compensation therefor from Mexican Government, because Lewis obtained licence to extract gum not from Mexican Government, but from that Chief under conditions which the Mexican Government would not have accorded had they been in effective occupation of the district. Some inexpensive form of arbitration might be resorted to	17
---	-----------------	----------------	--	----

NICARAGUA.

10	Law Officers ..	Nov. 10, 1905	Nicaraguan claim to exclusive turtle fisheries off the Mosquito Coast. Opinion that Sucre Cay, &c., are islands, the test being laid down in Report of Law Officers of March 25, 1875. Cannot form opinion as to claim of Nicaragua to sovereignty over Morrison Cays, which don't appear to be islands. Matter should be settled with Nicaragua	19
----	-----------------	---------------	--	----

PERSIA.

11	Law Officers ..	Feb. 11, 1905	Rights of local tribes to exclusive pearl fisheries on the Arabian Coast of the Persian Gulf and Coast of Bahrein. Their concurrent right exists within the 3-mile limit. Are of opinion that they have acquired an exclusive right of fishing over the pearl banks outside that limit. Case is different as regards the deep-water fisheries. Matter might be referred to Hague Tribunal if foreigners cannot be stopped from fishing by local measures, but better course is to stop such fishing indirectly	21
----	-----------------	---------------	--	----

RUSSIA.

12	Law Officers ..	June 29, 1905	"Hipsang" sunk by Russians during war with Japan. Concur in opinion that Russian Government should be informed that claim for compensation is not a matter for Prize Court, but should be dealt with diplomatically. Difference between this case and one of ordinary interference with vessel suspected of carrying contraband is one of essence, and not of degree	24
13	Law Officers ..	July 7,	Sinking of British vessels "St. Kilda" and "Ikhona" by Russian cruisers. Approving draft despatch to Sir Charles Hardinge, stating that claim compensation should be settled without reference to decision of Prize Court	25
14	Law Officers ..	Nov. 8,	Russo-Japanese war. Claims on account of capture, detention, and destruction of British vessels during. Cases of the "Allanton," "Calchas," "Cilurnum," "Hipsang," "Oldhamia," "St. Kilda," and "Ikhona." Opinion as to how they should be severally dealt with: how far they should depend on decisions of Prize Courts	28



1905

iv

LIST OF REPORTS.

SWITZERLAND.

No.		Date.	SUBJECT.	Page
15	Law Officers	May 6, 1905	Extradition Convention with Switzerland. Approving draft Order in Council to carry into effect ..	38

TURKEY.

16	Law Officers	Feb. 17, 1905	National status in Ottoman dominions of subjects of native States in India. British-protected persons are entitled to British protection abroad. Refers to Law Officers' Report of June 8, 1893. Nothing exists in the Capitulations to prevent such protection, and Ottoman Order in Council, 1899, plainly includes such people in its definition of "British subjects." They cannot be protected in a country where jurisdiction of His Majesty's Government is confined to British subjects in strict sense of British municipal law..	39
17	Law Officers	April 23,	Applications of Fatma Hanem and Rakel Riyan, widows of Ottoman subjects, for readmission to British nationality. Validity of their marriages. Are of opinion that section 10 (1) and (2) of Naturalization Act apply in cases of polygamous marriages in countries where they are lawful, even in the case of Christian women ..	41
18	Law Officers	May 15,	Patrolling of Cretan waters to prevent importation of arms. There being no war, real blockade cannot be resorted to. Pacific blockade not advisable. Operations must be confined to territorial waters and carried out under authority of territorial Sovereign ..	42
19	Law Officers	July 8,	Draft Ottoman Amending Order in Council. Approving ..	46
20	Law Officers	Oct. 14,	National status of children born in the Ottoman dominions of naturalized British subjects. Separate opinions as to cases of Kalim and Zaim Salamon, whose father was naturalized under Act of 1844, and of daughter of Knechtel, naturalized in 1900 under Act of 1870 ..	48

UNITED STATES.

21	Law Officers	Jan. 24, 1905	Supplementary Extradition Treaty with the United States. Conditions on which Mr. Choate's amendments may be accepted as to date of coming into force ..	50
----	--------------	---------------	---	----

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1905.

[The figures refer to the numbers of the pages.]

ACC—CLA.

A.

Accessions of Colonies to Industrial Property Convention. Mode of notifying, 7, 8.
Act (Additional). See Industrial Property Convention.
" See Naturalization.
" Allanton " seized by Russians for contraband. Claim, 28-30, 34-36.
Arbitration for settling claim for arrest in Mexico. Proposal, 19.
" See also Hague Tribunal.
" Ardova " detained by Russian belligerents. Mode of settling claim, 34.
Arms. Importation into Crete. Measures to stop, 42-46.
Artistic Copyright. See Copyright.

B.

Bennett, Chance, and Ferris, Messrs., 2, 3.
Blockade of Cretan coasts to stop importation of arms not enforceable, 46.
Bright, Charles, 1.
British-protected persons. General right of protecting, 39-41.
Brown, Mr. Valentine, 1, 2.
Brunei draft Order in Council for. Fees in sterling, 3, 4.

C.

" Calchas " brought before Russian Prize Court. Claim on account of, 30, 31, 34-37.
Canada. Position of under Copyright Conventions, 10, 11.
Capitulations in relation to nationality in Turkey, 49.
Cayman Islanders. Claims to Mosquito Cays fisheries, 19-21.
" Gilurnum. " Treatment by Russians as carrying contraband. Claims on account of, 31, 35-37.
Claim of Bright's Light and Power Company, 1-3.
" See also Company.
Claims. Treatment of British vessels by belligerents. Treatment of Lewis by Indian Chief, 17-19.
" in places beyond control of Central Government, 17-19.
" See Fisheries.

[454]

CLA—DNI.

Claims on account of British vessels sunk during Russo-Japanese war, 24-38.
" See also Vessels.
" as to preferring irrespective of decisions of Prize Courts, 24-38.
" Mr. Mackinnon's in relation to case of " Calchas. " See Mackinnon, Mr.
Colonies. How far bound by Treaties between United Kingdom and foreign Powers, 6-8, 10, 11.
" Mode of accession by to such Treaties, 6-8.
Company (Light and Power). Treatment of in Argentina, 1-3.
" " " " Status; improperly converted into non-British, 1-3.
Compensation. See Claims.
Concession by local Chief against laws of Mexico. Claims arising out of, 17-19.
Contraband. Alleged carrying by British vessels. See Prize Courts; Claims: Vessels.
" Carriage to non-blockaded port no excuse, 16.
" Letter seized from " St. Kilda " by the Russians as being, 32, 33.
Copyright Convention. Position of Canada under, 10, 11.
Court of Law. Decision annulled by Executive, 2, 3.
" See Prize Courts. Jurisdiction.
Crete. Stoppage of importation of arms. How to effect, 42-46.
" Extent of patrolling of coasts by cruisers, 42-46.
" Blockade not properly enforceable, 46.
" Operations should be confined to territorial waters, 46.
" Position of High Commissioner towards naval officers of Protecting Powers, 44.
Criminal jurisdiction over servants of Diplomats. See Jurisdiction.
Cuba. Extradition Order in Council, 5, 6.

D.

Deadman's Bar. Claims to fisheries about, 19-21.
" Is an " island. " 21.
Diplomatic privileges. See Servants of diplomatic Representatives.
" Dnieper. " Russian cruiser improperly sinks British vessel, 25-27.

b



EXT—LIG.

E.

Extradition (with Cuba). Order in Council, 5, 6.
" (Switzerland) Order in Council, 38, 39.
" Convention with United States. Date of publication, 50-52.

F.

Fees. Taking of in sterling. Order in Council, 3, 4.
Fisheries in Moray Firth (outside territorial waters).
As to Scottish bye-law compelling all British subjects, 11, 12.
" (Mosquito). Claims to about reefs, 19-21.
" Claim hangs on their being islands, 19-21.
" Pearl in Persian Gulf. Claims of tribes to exclusive, 21-23.
" depends as regards banks outside territorial waters on prescription, 22, 23.
" Mode of enforcing rights of tribes, 23.
" As to submitting to Hague Tribunal, 23.
" over banks and in deep waters. Distinction, 22, 23.

G.

Great Britain. See Naturalized British subjects.
" See Parliament.
" See British-protected persons.

H.

Hague Tribunal. As to reference of fishery dispute to, 23.
Ham Cays. Claims to fisheries about, 20, 21.
Hanam Fatma, 41.
"Hipsang" sunk by Russians as carrying contraband.
Claim on account of, 24, 25, 31, 34, 36, 37.
Holland, Professor, 26, 27.
Holt, Messrs., 30.

I.

"Ikhona" improperly sunk by Russian cruiser as carrying contraband, 25-27, 32-37.
India. Subjects of native States of. Protection in Turkey of, 39-41.
Industrial Property Convention and Additional Act.
See Colonies, position of.
" Mode of notifying accessions, 7, 8.
Islands carrying jurisdiction about waters, 19-21.

J.

Jurisdiction. Acts of, to be confined to territorial waters. See Crete, importation of arms into.
" Criminal over servants of Ambassadors, &c., 13-15.
" over islands and reefs (Mosquito Cays), 19-21.

K.

Knechtel, Mr., 48-50.
"Knight Commander." Sinking of by Russians during war with Japan, 34-36.

L.

Law, alteration in necessary before enforcing Treaty.
Letter taken out of ship. See Contraband.
Lewis, Alonzo, 17-19.
Light and Power Company. Treatment in Argentina, 1.

MAC—QUE.

M.

Mackinnon, P. G., 30, 34-36.
Mails searched as contraband of war, 32, 33.
Maimaran, Mrs. Abigail, 41, 42.
Maritime jurisdiction over Cays. See Fisheries, Islands.
Marriages at foreign Embassies, &c., in England.
Extent of legality and validity of, 8, 9.
" polygamous. Extent of validity in case of Christian women, 42.
Mexico. Treatment of Lewis in portion beyond control of Government, 17-19.
" His acts not sanctioned by Mexican law, 17-19.
" See also Claims.
Moray Firth. Fishing outside 3-mile limit in. All British subjects amenable to local bye-laws, 11, 12.
Morrison Cays. Claims to fisheries about, 20, 21.
" They are not "islands," 21.
Mosquito fisheries. As to whether certain cays are islands, 19-21.

N.

Nationality of widows of Turks. As to readmission to British, 41, 42.
" depends on validity of their marriages, 41, 42.
" of children of naturalized British subjects in Turkey, 48-50.
Naturalization Act. Application to issue of polygamous marriages in certain cases, 41, 42.
Naturalized British subjects. Nationality of their children in Turkey, 48-50.
New Zealand. Position of as regards Industrial Property Convention, 6-8.
Nicaragua. Claims to turtle fisheries. Question of Maritime jurisdiction, 19-21.
" See Jurisdiction.

O.

"Old Crawl." Disputed claims to fisheries about, 19-21.
" is technically an island, 21.
"Oldhamia." Sunk by Russians as carrying contraband. Claim, 28, 32, 35-37.
Order in Council (Brunei). Taking of fees in sterling, 3, 4.
" Extradition in Cuba, 5, 6.
" Ottoman amending, 46-48.
" [Extradition Treaty with United States.] Date of publication, 50-52.

P.

Parliament can legislate for all British subjects, 21.
Pearl fisheries in Persian Gulf. See Fisheries.
Peletz and Co., Messrs., 15.
Persian Gulf. See Fisheries (pearl).
Privileges of servants of Ambassadors, &c., 13-15.
Prize Courts. Japanese condemnation of "Scotsman," 15, 16.
" Decisions of in case of sinking of vessels. Claims to be preferred irrespective of their decisions, 24-28.
Protection in Turkey of British Indian protected persons, 39-41.

Q.

Queensland. Position of as regards Industrial Property Convention, 6-8.

RAN—TRE.

R.

Rankin, Gilmour, and Co., 32.
Rea, W. R., 28, 29.
Rivan, Rakel, 41, 42.

S.

"St. Kilda." Sunk by Russians as carrying contraband. Claims on account of, 25-27, 32-37.
Salomony, Kalim, and Zaim, 48-50.
" Anthony, 48.
" Scotsman" condemned by Japanese Prize Court during war, 14, 15.
Search of vessels carrying arms into Crete. See Crete.
Segura, Gonzalez, 1, 2.
Servants of diplomatic Representatives. Extent of immunity from local jurisdiction, 13-15.
Siveright, Bacon and Co., 32.
Society. See Company.
Sucre Cay to be defined as an island, 21.
Switzerland Extradition Order in Council, 38, 39.

T.

Tamay, General, 17-19.
"Terek" (Russian cruiser) improperly sinks British vessel, 25-27.
Territorial waters. See Jurisdiction; Fisheries; Islands.
"Thea." Treatment by Russians during war with Japan compared with case of "Allanton," 29.
Trawling Regulations. See Moray Firth.
Treaty. See Industrial Property Convention.
" See Copyright.
" Effect on Colonies. See Colonies.
" See Extradition.
" Date of enforcement, necessity to provide for by Law, 51.
" Mode of notifying accessions of Colonies to. See Accessions.

TRI—YAL.

Tribunal. See Hague Tribunal; Prize Courts; and Courts.
Turkey. See Protection in.
" See Order in Council.
Turtle fisheries (Mosquito). See Fisheries.

U.

United States. Extradition Convention. Date of coming into force, 50-52.

V.

Vessels. Alleged carrying of contraband of war. Case of "Scotsman," 15, 16.
" sunk by Russians during Russo-Japanese war. See Claims and names of vessels.
" (neutral). Sinking of differs from case of ordinary interference with, 25.
" See also Claims; Sinking of Vessels.
" Russians insist on right of sinking in certain cases, 25-27.
" Professor Holland's views on subject not official, 27.
" importing arms into Crete. Right of search. See Crete.

W.

War. Russo-Japanese. See Contraband; Vessels.
" See Claims (vessels sunk during).

Y.

Yalliche in Mexico. Detention of A. Lewis at, 17.



1905

Printed for the use of the Foreign Office. May 19 6.

CONFIDENTIALREPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1905.

ARGENTINE CONFEDERATION.

No. 1.

[March 31, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 4, 1905.

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit to you the papers noted in the accompanying list with regard to the treatment of Bright's Light and Power, Limited, by the Argentine Government.

Treatment
of Bright's
Light and
Power
Company:
its national
status.

This Company was formed in London in 1898, and duly registered in England according to the Companies Acts. In the same year Mr. Charles Bright sold to the Company Concessions granted to him by the Governments of the Provinces of Salta and Santiago del Estero, in the Argentine Republic, to light the two cities named with electricity. For these Concessions the Company paid 80,000*l.*, of which 35,000*l.* was paid in cash and the rest in shares. Shortly afterwards the Company issued in London a power of attorney to Mr. Valentine Brown to represent them in the Argentine Republic, and the Governments of the two provinces recognized the British status of the Company, which was registered as such in the Commercial Registers of their respective capitals.

The income derived from the working of the electric light stations was regularly received from the local Governments by the Company's duly appointed representatives, and remitted by the latter to the Directors in England until the year 1902. In July of that year Mr. Brown, on his own initiative, improperly transferred the power of attorney which he held on behalf of the Company to M. Gonzalez Segura, an Argentine gentleman, who had interests conflicting with those of the Company, but who for a time recognized the status of the latter as a British Company constituted in accordance with the requirements of English law. Difficulties with M. Gonzalez Segura then became accentuated, and the Company gave instructions, which were carried out, to revoke the power of attorney given to Mr. Brown, and consequently that held by M. Gonzalez Segura. The formal withdrawal of the power was notified to M. Segura, and brought to the knowledge of the Argentine Government. Moreover, the British Directors, on the 10th September, 1902, obtained a decision in the Chancery Division of the High Court of Justice, before Mr. Justice Swinfen Eady, to the effect that they, and not certain other individuals, were the proper persons to control the business of Bright's Light and Power, Limited.

In February 1903 Mr. Bright was declared a bankrupt in the Argentine Republic, and a person named Anatole appointed trustee. M. Gonzalez Segura, and others in Argentina, then obtained possession of the property and plant at Salta and Santiago del Estero, and proceeded to work the electric light stations for their own benefit, and to appropriate the profits. It is not quite clear by what methods this was done, but it



appears probable that M. Gonzalez Segura made use of the revoked power of attorney as an instrument against the British Directors, and also induced certain shareholders in Argentina to deny the authority of the British Directors to represent the majority of the shareholders of the Company.

At the request of Messrs. Bennett and Chance, solicitors to Bright's Light and Power, Limited (Paper A), Mr. Justice Swinfen Eady's order and judgment, duly authenticated, were transmitted to His Majesty's Legation at Buenos Ayres in May 1903 (Paper B), with instructions to forward them to the Government of the Argentine Republic, and to obtain, if possible, recognition of the order and judgment in that Republic, with a view to enable Bright's Light and Power, Limited, to obtain possession of their property situate within its territory. The documents were duly communicated to the Argentine Courts, but His Majesty's Chargé d'Affaires at Buenos Ayres reported in a despatch of the 18th June, 1903 (Paper C), that action before the latter was suspended, owing to the fact that friendly negotiations had been initiated between Messrs. Bennett and Henry, the representatives of the Company in Argentina, and M. Gonzalez Segura. It appeared from letters of the 7th June and 6th July, 1904 (Papers D and E), received from Messrs. Bennett, Chance, and Ferris, the Company's representatives in England, that the negotiations resulted in the signature of an agreement on the 24th June, 1903, by which M. Gonzalez Segura consented to hand over to Messrs. Bennett and Henry the electric light stations at Salta and Santiago, and also to surrender the power of attorney transferred to him by Mr. Brown, on consideration of being allowed to retain the income wrongfully collected by him and his friends up to the date of signature.

In their letter of the 7th June last, already referred to, Messrs. Bennett, Chance, and Ferris informed this Department that the Agreement of the 24th June, 1903, had not been carried out, and that the Company had not yet succeeded in obtaining possession of their property. It was stated that M. Gonzalez Segura had evaded this obligation by inducing the Argentine Government to declare the Company an Argentine instead of a British concern, and it was added that this had been obtained by bringing improper influences to bear on the Government. Mr. Haggard, His Majesty's Minister at Buenos Ayres, was consequently instructed (Paper F) to make an informal representation to the Argentine Government on the subject, and a despatch has recently been received from him (Paper G) reporting that the Minister of Justice has promised to give his personal attention to the case.

At the same time Mr. Haggard reports facts which appear to support, in a measure, the allegations of the Company, and which seem to Lord Lansdowne to raise important issues affecting the welfare, and even the existence, of many vast British enterprises in the Argentine Republic.

On the 16th November, 1903, the Argentine Government declared by Decree that Bright's Light and Power (Limited) was not to be regarded as a foreign, but an Argentine concern, and gave them ninety days to adapt themselves to their new character, under pain of having their authorization to carry on business withdrawn. This Decree was issued on the strength of an opinion expressed by Dr. Sabiniano Kier, the Attorney-General (Inclosure B in Paper G), and is in opposition to a decision, previously given by the Judge of First Instance, to the effect that the Company was not an Argentine concern. In this opinion Dr. Kier gave reasons for which he considered that the status of the Company was Argentine, and maintained that the Executive were themselves competent to decide the character and legal status (*personeria juridica*) of the Company, regardless of the legal decision mentioned above.

At a later date the Commercial Court of Appeal, in a final sentence, also declared Bright's Light and Power Company to be a foreign concern; but, in spite of this second decision, Dr. Kier presented another Report, upholding his former opinion and maintaining that the Executive had "the essentially administrative faculty of according or withdrawing the legal status (*personeria juridica*) from associations constituted in this or in a foreign country." Acting apparently on this opinion, the Argentine Government announced by a Decree, dated the 19th April, 1904, that, in view of the fact that the Company had neglected to conform to the Order contained in the Decree of the 16th November, 1903, their authorization to act as a Limited Company was withdrawn. (Inclosure D in Paper G.)

Lord Lansdowne is disposed to think that, although the Argentine Government possess the right to accord or refuse to a foreign Company the authorization to carry on business in the Republic, they are not entitled to act as they appear to have done in the present instance. The authorization had already been obtained, and enjoyed for a considerable time by Bright's Light and Power, Limited, when the Government

suppressed the legal existence of the Company in Argentina on the ground that the Company had failed to comply with the previous Decree, and to undergo reconstruction as an Argentine Company. His Lordship is also disposed to think that the Argentine Government have no right to dispute the status of a Company duly constituted in accordance with English law, in the absence of any proof that they have lost their original character.

I am to request that you will take these papers into your consideration, and that you will favour Lord Lansdowne with your opinion whether the case is one which calls for official representation, and, if so, on what special grounds such a representation can most advantageously be based.

His Lordship would also be glad to be favoured with any observations of a more general nature which you may be disposed to offer on the subject.

I have, &c.
(Signed) F. H. VILLIERS.

List of Papers.

(A.) Messrs. Bennett and Chance	..	..	May	11, 1903.
(B.) To Mr. Harford	..	.. (No. 4. Treaty)	May	19, "
(C.) From Mr. Harford	..	.. (No. 8. Treaty)	June	18, "
(D.) Messrs. Bennett, Chance, and Ferris	..	..	June	7, 1904.
(E.)	..	..	July	6, "
(F.) To Mr. Haggard	..	.. (No. 2. Treaty)	July	14, "
(G.) From Mr. Haggard	..	.. (No. 10. Treaty)	November 1,	"

Report.

In our opinion, the case is one which calls for official representation. We think the representation should be based on the grounds (1) that the Company was a duly constituted British Company, and had been recognized for some years as such by the Government of the Argentine Republic; (2) that the Courts of the country had decided in favour of the contentions of the Company, and that to overrule their decision by an executive act would appear to be contrary to justice; and (3) that, even if it was in accordance with the laws of the Argentine Republic that an executive act could override the decisions of the Courts, there were no grounds justifying the exercise of such executive power. It will, of course, be necessary in support of, and in order to explain, such contentions to state clearly the main facts of the case.

(Signed) R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice,
March 31, 1905.

BORNEO.

No. 2.

[October 27, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, October 17, 1905.

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit to you the accompanying copy of the Brunei Order in Council, 1901,* together with the draft of an Order in Council which has been prepared with a view to admitting of all fees, fines, &c., levied under the authority of the former Order, being taken in future in sterling values instead of, as hitherto, in the local currency.

Brunei draft
Order in
Council:
Taking of
fees in
sterling.

* Brunei Order in Council, 1901 [Confidential No. 7556*].



1905.

4

BORNEO.

His Lordship proposes that the conversion of the fees, &c., shall be effected on the same basis as in the recent case of the Table of Consular fees for China and Corea—viz., at the rate of 2s. to the dollar.

Lord Lansdowne will be obliged if you will take the draft Order into your consideration, and will favour him with your opinion as to whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

I have, &c.
(Signed) E. GORST.

Report.

In our opinion this draft Order in Council, as initialled by us, may properly be submitted for the approval of His Majesty in Council.

(Signed) R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice,
October 27, 1905.

Annex.

Brunei Draft Order in Council.

WHEREAS by "The Brunei Order in Council, 1901" (hereinafter referred to as the Principal Order), certain fines, penalties, and other sums of money are stated in terms of dollar currency, and it is expedient that the same should be stated in terms of British currency, provision being made for payments in dollars at temporary rates of exchange, and that those rates of exchange should apply to the ascertainment of value in cases where any value is required to be reckoned in terms of British currency;

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested, is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, as follows:—

1. The Principal Order shall be amended as follows:
Five pounds shall be substituted for fifty dollars in Articles 11, 16, 25, and 89;
Twenty pounds shall be substituted for two hundred dollars in Articles 64 and 86;
Fifty pounds shall be substituted for five hundred dollars in Articles 38, 41, 66, 68, 69, and 89;
Two hundred pounds shall be substituted for two thousand dollars in Article 69;
Five hundred pounds shall be substituted for five thousand dollars in Article 37.
2. All fees, fines, penalties, and other sums of money which, under the provisions of the Principal Order as amended by this Order, or of any other Order or any Rules or Regulations, are stated or imposed in terms of British currency shall, if not paid in British gold, be paid at the rate of ten dollars to the pound sterling, or at such other rate as may be from time to time fixed by the Lords Commissioners of His Majesty's Treasury.

The rate of exchange for the time being in force under this Article shall apply to the ascertainment of any value for the purposes of any limitation, security, or qualification in any case where, under the Principal Order (as amended by this Order), or any other Order, or any Rules or Regulations, such value is required to be reckoned in terms of British currency.

3. This Order shall take effect on such day not less than one month, nor more than two months, after it is first publicly exhibited at Brunei, as the Consul shall appoint.

4. This Order may be cited as "The Brunei Order in Council, 1905."

R. B. F.
E. C.

(5)

CUBA.

No. 3.

[March 30, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 8, 1905.

I HAVE the honour to transmit to you, by direction of the Marquess of Lansdowne, the draft of an Order in Council for the purpose of carrying into effect an Extradition Treaty between the United Kingdom and Cuba which was signed at Havana on the 3rd October, 1904, and of which the ratifications were exchanged on the 10th January last.

I am to inclose letters from the Home, Colonial, and India Offices, stating that the terms of the draft Order in Council are concurred in by those Departments respectively; and I am to request that you will favour Lord Lansdowne with your opinion as to whether it may, in its present form, be laid before the King in Council, for His Majesty's approval.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

(A.) Draft Order in Council.	
(B.) Home Office ..	February 17, 1905.
(C.) Colonial Office ..	February 14, "
(D.) India Office ..	March 2, "

Report.

We concur in the terms of the accompanying draft Order in Council, and are of opinion that it may properly be submitted for the approval of His Majesty the King in Council.

(Signed) R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice,
March 30, 1905.

Annex.

WHEREAS by the Extradition Acts, 1870 to 1895, it was amongst other things enacted that, where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, His Majesty may, by Order in Council, direct that the said Acts shall apply in the case of such foreign State; and that His Majesty may, by the same or any subsequent Order, limit the operation of the Order, and restrict the same to fugitive criminals who are in or suspected of being in the part of His Majesty's dominions specified in the Order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient;

And whereas a Treaty was concluded on the 3rd day of October, 1904, between His Majesty and the President of the Republic of Cuba for the mutual extradition of fugitive criminals, which Treaty is in the terms following:—

[Treaty between His Majesty and the President of the Republic of Cuba for the mutual extradition of fugitive criminals. Signed at Havana, October 3, 1904. Printed in Treaty Series No. , 1905.]

[454]

C



1905

6

CUBA.—GENERAL.

And whereas the ratifications of the said Treaty were exchanged at Havana on the 10th day of January, 1905:

Now, therefore, His Majesty, by and with the advice of his Privy Council, and in virtue of the authority committed to him by the said recited Acts, doth order, and it is hereby ordered, that from and after the day of , 1905, the said Acts shall apply in the case of Cuba and of the said Treaty with the President of the Republic of Cuba:

Provided always that the operation of the said Acts shall be and remain suspended within the Dominion of Canada so long as an Act of the Parliament passed in 1886, and entitled "An Act respecting the Extradition of Fugitive Criminals," shall continue in force there, and no longer.

GENERAL.

No. 4.

[January 26, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 10, 1905.

Accession
of New
Zealand and
Queensland
to Industrial
Property
Convention,
1883; and
their
position
as to
Additional
Act, 1900.

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit for your consideration the papers noted in the accompanying list relating to the accession of New Zealand to the Industrial Property Convention, 1883, as amended by the Additional Act of 1900, and the position of the Colonies of New Zealand and Queensland with reference thereto.

The Industrial Property Convention, of which a copy is inclosed (Paper B), was originally concluded at Paris on the 20th March, 1883. Her late Majesty the Queen acceded for the United Kingdom on the 17th March, 1884, on the understanding that power to accede on behalf of any Colony was reserved. Her accession on these terms was accepted on the 2nd April, 1884 (see "State Papers," vol. lxxv, p. 414).

On the 7th September, 1891, Her Majesty adhered, on behalf of New Zealand and Queensland, to the Convention of 1883 (Paper C).

It appears from a letter of the International Bureau at Berne to the Board of Trade of the 29th January, 1891* (see p. 18 of the Print, Paper A), that it was possible for British Colonies to join as independent parties or as forming one party with the mother country from the moment of their adherence. New Zealand and Queensland joined on the latter footing.

In 1900 the Powers, including Great Britain, joined in an "Additional Act," introducing into the Convention of 1883 a number of small amendments. Before signing the Act the British Delegates made a declaration to the effect that they acted on behalf of the United Kingdom alone, and reserved to Her Majesty's Government a right to adhere on behalf of any Colony (Paper D).

In 1903 His Majesty's Government instructed His Majesty's Representative at Berne to notify the accession of New Zealand to the Convention of 1883, as modified by the Additional Act of 1900 (Paper A, No. 4).

For certain constitutional reasons connected with the Federation of Australia a similar notification on behalf of Queensland was suspended.

After some correspondence as to whether the notification should be addressed to the Government of Belgium or that of Switzerland, the International Bureau at Berne adopted the attitude that, as Great Britain had joined in the Additional Act of 1900, New Zealand and Queensland, who had acceded before 1900, were already bound by the Additional Act, but they offered, if Belgium consented, to accept the notification of the adherence of New Zealand without prejudice to the question of principle (see No. 12 in the Print, Paper A, pp. 13-16).

In a Memorandum dated the 5th November, 1903 (see p. 17 of the Print, Paper A), Mr. Risley, Legal Assistant in the Colonial Office, advised Mr. Secretary Lyttelton that the contention of the International Bureau was correct, and that, so far as regards participation in the Additional Act, New Zealand must be regarded as

* Inclosed in Colonial Office letter of November 10, 1903 (No. 14 of print).

GENERAL.

7

an appendage of Great Britain, and already bound by the Act of the mother country. He also advised that, in the declaration of the British Delegates in 1900 that they signed only for the United Kingdom, the United Kingdom must be taken to have included Queensland and New Zealand. For the actual words of this declaration see Minute on page 23 of Paper A, paragraph 3.

This view is strongly contested by Sir H. Bergne, one of the Delegates making the declaration in question, who contends that this is neither the sense in which it was accepted by the Delegates nor in accordance with the plain and simple meaning of its language. This latter view is shared by the Librarian and also by the Heads of the Commercial and Treaty Departments of this Office (see pp. 19, 23, 29-33 of the Print).

On the other hand, both Mr. Davidson, K.C., the Legal Adviser to this Department, and Mr. Hurst, the Assistant Legal Adviser, applying to the case the rules of technical legal construction, have arrived at the same conclusion as the International Bureau at Berne and Mr. Risley (see pp. 24-27, and 30 of the Print, Paper A).

In the course of the correspondence the question was raised as to whether, as a general principle, a Treaty entered into by the United Kingdom is—in the absence of any express provision—binding upon the whole of His Majesty's dominions. Some-what divergent views on this point appear to be expressed in the Colonial Office letters of the 10th and 30th November, 1903 (Paper A, Nos. 14 and 15). It is, however, understood that while the letter of the 30th November contained an expression of Mr. Secretary Lyttelton's opinion on the point which he has so far seen no reason to revise, that of the 10th merely suggested a cautious form of reply to the Government of the Swiss Confederation, which would leave this important question still open.

I am to request that you will take these papers into your consideration and favour Lord Lansdowne with your opinion—

1. To what extent a Treaty entered into by His Majesty for the United Kingdom, is, in the absence of any expressed provision to the contrary, binding upon the whole of His Majesty's dominions?

2. Whether New Zealand and Queensland are or are not already bound by the Additional Act of 1900?

3. If not so bound, what is the present position of those Colonies with reference to (a) the Convention of 1883, and (b) the Additional Act of 1900?

4. What interpretation should be placed upon the declaration made by the British Delegates before signing the Additional Act of 1900?

5. Is His Majesty entitled to notify the accession of New Zealand to (a) the Convention of 1883 as modified by the Additional Act of 1900, or (b) to the Additional Act of 1900 alone?

6. To whom should any such notification be addressed?

His Lordship would also be glad to be favoured with any observation of a general character which you may have to offer.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

- (A.) Correspondence in Print (Nos. 1 to 18) [Conf. 8662].
(B.) Parliamentary Paper, Commercial, No. 28, 1884 [Treaty No. 729].
(C.) Accession of New Zealand and Queensland to Industrial Property Convention ["State Papers," vol. lxxxiii, p. 252], September 7, 1891.
(D.) Treaty Series No. 15, 1902 [Treaty No. 1140].

Report.

1. It is impossible to give a general answer to this question. It must depend upon the nature of the Treaty and the surrounding circumstances.

2. In our opinion, having regard to the declaration made by the British Delegates at the time of signing the Additional Act of 1900, New Zealand and Queensland are not bound.



1905

8

GENERAL.

3. The Colonies in question are still bound by the Convention of 1883 unmodified by the Additional Act of 1900.

4. Their signature was for the United Kingdom only.

5. We think the notification may be made in either form.

6. To the Swiss Government.

(Signed)

R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice,
January 26, 1905.

No. 5.

[January 31, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, December 20, 1904.

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit to you the accompanying papers, noted below, respecting an inquiry made by Baron Bildt, the Swedish-Norwegian Minister at this Court, as to whether the new Swedish Law of the 8th July, 1904, regulating the solemnization of marriages between Swedish subjects by Swedish Diplomatic and Consular officers abroad can be put in force in this country without coming into conflict with local jurisdiction.

No definite rule ever appears to have been laid down on the subject of Embassy and Consular marriages solemnized in this country by foreign officials.

The Act 4 Geo. IV, cap. 76, section 21, attaches a heavy penalty to the solemnization of marriages in this country by any person in any other place than a church, or such public chapel wherein banns may be lawfully published, and section 22 of the same Act provides that marriages so solemnized shall be deemed null and void for all purposes whatsoever.

As regards marriages performed in a foreign Embassy or Legation in this country, the question of diplomatic privilege arises, and upon this point some divergence of opinion would seem to exist. The late Lord Chief Justice of the Queen's Bench, Sir A. Cockburn, in a Memorandum attached to the Report of the Royal Commission of 1876 on fugitive slaves, held that a foreign Ambassador was in all respects exempt from the law, both civil and criminal, and therefore immune from all penalties.

Hammick, in "The Marriage Law of England," expresses a very similar opinion, but, with regard to the recognition of marriages solemnized at a foreign Embassy, he inclines to the view that a marriage between a British subject and a foreigner so solemnized would not by itself be recognized as legally binding upon the British subject for civil purposes in this country.

The Royal Commission on the Law of Marriage, in their Report of July 1868, touched upon the subject of marriages in foreign Embassies in England in cases where one of the parties to the marriage was a British subject, but they said nothing as to cases where both parties were subjects of the country in whose Embassy the marriage was solemnized: whether or not they considered the latter class as valid can only be gathered, if at all, by inference.

None of these opinions apply to marriages solemnized at foreign Consulates in this country, but the question of their validity has been raised on two occasions in recent years. In 1890 it came up in connection with a new Brazilian marriage law under which Consular marriages in Brazil could be recognized by the local authorities in cases where reciprocity was given in Foreign States, and in 1897 the Belgian Minister made similar inquiries as to the validity of Belgian Consular marriages in Great Britain. In neither case was any definite opinion expressed. In 1890 the point was referred to the Registrar-General, who replied that marriages at foreign Consulates in this country were entirely beyond his cognizance, and that the statutes which he administered did not recognize them in any way, and made no provision for making them valid in England; and accordingly in 1897, in response to his inquiry, the Belgian Minister was informed in the sense of the Registrar-General's reply. No mention was made, however, of the Act 4 Geo. IV, which purports to inflict penalties on persons solemnizing marriages in this country otherwise than in accordance with the provisions of that statute, and it seems difficult to avoid the conclusion that a

Marriages
at foreign
Embassies
and Consu-
lates in
England.
How far
legal.

GENERAL.

9

foreign Consul who enjoys no diplomatic privilege would, by performing such a marriage, render himself liable to those penalties, even though diplomatic privilege prevented proceedings being taken in the case of a marriage at a foreign Embassy or Legation.

No question is asked by Baron Bildt with regard to the recognition by English law of marriages solemnized by Swedish officials under the Swedish law now in question, but it would be of material assistance to Lord Lansdowne in determining what course to adopt to know whether you consider these marriages would be recognized in the English Courts.

I am to request that you will be so good as to take these papers into your consideration and furnish his Lordship with your opinion:—

1. Whether marriages solemnized at (a) foreign Embassies and Legations, and (b) at foreign Consulates in this country, are affected by the Statute 4 Geo. IV, cap. 76, and if so, to what extent in each case.

2. Whether marriages solemnized at (a) foreign Embassies and Legations and (b) at foreign Consulates in this country between (a) two parties, one of whom at least was a subject or citizen of the country represented by such Embassy or Consulate, and neither of whom were British subjects, and (b) between two parties, one of whom was a subject or citizen of the country represented by such Embassy or Consulate, and the other of whom was a British subject, would be regarded as valid in contemplation of English law.

3. Whether any, and if so what, steps should be taken to discourage the solemnization of marriages in this country by foreign Diplomatic and Consular Representatives.

Lord Lansdowne will also be glad to receive any further observations of a general nature which you may be good enough to offer on the subject.

I have, &c.

(Signed) ELDON GORST.

List of Papers.

- (A.) Baron Bildt, November 12, 1904.
(B.) Translation of the Swedish Law of July 8, 1904, regulating the solemnization of marriages before Swedish Diplomatic and Consular officers abroad.
(C.) Minutes by Mr. Oakes, Mr. Davidson, and Mr. Hurst.

Report.

1. In our opinion, marriages solemnized at a foreign Embassy in this country between subjects of the country to which the Embassy belongs are *not*, but that other marriages at Embassies and all marriages solemnized at a foreign Consulate *are*, affected by the Statute 4 George IV, cap. 76.

2. The only marriages solemnized at a foreign Embassy in this country which, in our opinion, would be regarded as valid in contemplation of English law are those between two subjects of the country represented by such Embassy. No marriage solemnized at a Consulate would be regarded as valid. We speak of cases in which the requirements of English municipal law have not been complied with.

3. This is a question of policy, but we think it might be well that foreign Governments should be made aware that no marriages at Embassies and Consulates, other than such as are mentioned as valid in No. 2, would be regarded as valid in contemplation of English law.

(Signed)

R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice,
January 31, 1905.

[454]

D



1905

10

GENERAL.

No. 6.

[July 29, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

*Foreign Office, March 27, 1905.*Position of
Canada
under
Copyright
Conventions.

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit herewith copies of documents, mentioned in the inclosed list, in connection with the question as to the competency of Canada to carry out her obligations as regards copyright for works of art under the International Copyright Convention of 1886, and the Additional Act of the 4th May, 1896.

In September last a Memorandum (Paper A) was communicated to this Office by the French Ambassador asking for information as to the position of Canada with regard to the International Copyright Convention of 1886, and inquiring whether foreigners—even if subjects of a State which is a party to the Convention—must, in order to obtain copyright in Canada, reprint their works in that country, and what law actually applies to such a case.

In reply, his Excellency was informed on the 2nd November (Paper B), that Canada is bound by the Copyright Convention of 1886, and by the Additional Act of 1896 (Papers C and D), and that by virtue of the British law, as completed by the International Copyright Act of 1886 (Paper E), and by the Order in Council of 1887 (Paper F), (1), the author of a book first published in any part of the King's dominions has, irrespective of his nationality, copyright in the book throughout the King's dominions for the term allowed by English law; and (2), that the author of a book first published in any country belonging to the Copyright Union, say at Paris, has copyright throughout the King's dominions for the same term or any less term allowed by the law of the foreign country for copyright under that law. It was further stated that by virtue of the Convention no further registration or formality is required in Canada for works which are entitled to copyright within the Union, and that there is, therefore, no obligation to reprint or republish, the mere fact that a work has copyright in the Union giving it copyright throughout His Majesty's dominions.

A notice of this reply was published in the "Droit d'Auteur" (Paper G), the official publication of the International Copyright Bureau, in which Lord Lansdowne is represented to have stated that literary and artistic works, of which the copyright is recognized by the Union, are not required to undergo fresh formalities or to be reprinted in Canada. This notice will be found on p. 9 of the inclosed copy of the "Droit d'Auteur."

As a matter of fact, the note of the 2nd November (Paper B), referred only to literary works, and is correct so far as it goes. The Report (Paper H) of the Inter-departmental Committee of 1892 related specifically to literary copyright alone, and assumed that the operation of the Imperial Copyright Acts extended to the whole of the British dominions, and this principle was affirmed in a decision of the Appeal Court in Canada in the case of *Smiles v. Belford* in 1877. There appears to have been no subsequent judicial decision to a contrary effect.

As regards artistic copyright, however, the Judicial Committee of the Privy Council of the 28th July, 1903, gave a judgment in the case of *Graves and Co. v. Gorrie* (Paper I) to the effect that the Imperial Act of 1862 (Paper J), which grants copyright to artistic works first published in the United Kingdom, does not extend to give protection beyond the limits of the United Kingdom, that is to say it does not give copyright in such artistic works in Canada.

The matter would therefore appear to be regulated by the Revised Statutes of Canada, 1886, cap. 62, sec. 5 (Paper K), which prescribes as the condition for obtaining copyright that literary, scientific, or artistic works shall be printed and published, or reprinted and republished in Canada.

The above-mentioned decision settles the law as regards an artistic work first published in the United Kingdom, but it is conceived that a foreign artist might perhaps be placed in a more favourable position than a British artist by reason of the closing words of section 9 of the Act of 1886 (the International Copyright Act) (Paper E), which enact that "the said Acts (that is to say, 7 & 8 Vict., cap. 12; 15 & 16 Vict., cap. 12; 38 & 39 Vict., cap. 12; and 25 and 26 Vict., cap. 68, sec. 12), and this Act, shall apply to every British possession as if it were part of the United Kingdom."

GENERAL.

11

An artist publishing in the United Kingdom would clearly have copyright there, and it might be possibly contended that these words operate to extend the foreigner's rights, though according to the decision above referred to, they do not so operate with regard to a British artist's rights.

I am to request that you will be good enough to take the inclosed papers into your consideration, and to favour his Lordship with your opinion as to whether, under section 9 of the International Copyright Act of 1886, artistic works first produced abroad in a country which is a party to the Berne International Convention of the 9th December, 1886, do acquire copyright in Canada as distinct from works first produced in the United Kingdom.

I have, &c.
(Signed) E. GORST.

List of Papers.

(A.) M. Cambon	September 28, 1904.
(B.) To M. Cambon	November 2, 1904.
(C.) International Copyright Convention (Treaty Library No. 794)	September 9, 1886.
(D.) Additional Act modifying Convention (Treaty Library No. 988)	May 4, 1896.
(E.) International Copyright Act, 1886 (49 & 50 Vict., cap. 33) (Library No. 106)	
(F.) Order in Council enforcing Convention [Conf. 5527*]	November 28, 1887.
(G.) "Droit d'Auteur" (see p. 9)	January 15, 1905.
(H.) Report of Departmental Committee (see p. 10)	May 20, 1892.
(I.) <i>Graves v. Gorrie</i> . Extract from "Times"	July 29, 1903.
(J.) Act amending Copyright Law in Works of the Fine Arts (25 & 26 Vict., cap. 68)	July 29, 1862.
(K.) Canada Copyright Act, 1886, cap. 62 (see p. 21).	

Report.

This question is one of considerable difficulty, but we think that it should be answered in the affirmative. Unless this view is correct no effect whatever is given in the British possessions to international copyright in works of art. We ought, however, to point out that section 3 of the Order in Council of 1887 may be open to a different construction, and may have been considered by the Canadian Government to affect the question. The point may be raised and decided at the instance of the owner of the foreign copyright by proceedings in the Canadian Courts with an appeal to the Privy Council. Until a decision to the contrary is given, we think that His Majesty's Government should act upon the view which we have above indicated. If the decision should be to the contrary, His Majesty's Government may consider it right to endeavour to correct by legislation the failure to carry out the terms of the Convention in this respect.

(Signed) R. B. FINLAY.
EDWARD CARSON.
J. E. SCRUTTON.

*Royal Courts of Justice,
July 29, 1905.*

No. 6^a.[In Board of Agriculture,
August 25, 1905.]

[August 9, 1905.]

CASE.

BY "The Herring Fishery (Scotland) Act, 1889" (52 & 53 Vict., cap. 23), which (section 2) "extends only to Scotland and to the parts of the sea adjoining Scotland," it is enacted:—

"7.—(1.) The Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam trawling and otter trawling shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, in any area or areas to be defined in such bye-law, and may from time to time make, alter, and revoke bye-laws for the purposes of this section, but no such bye-law shall be of any validity until it has been confirmed by the Secretary for Scotland."

Fishing in
Moray
Firth. As
to applica-
tion to
English and
Irish fisher-
men of
Scottish
bye-law for
regulating.



(2.) [For this sub-section the following provision is substituted by section 10 of "The Sea Fisheries Regulation (Scotland) Act, 1895":—]

"(4.) Any person who uses any such method of fishing in contravention of any such bye-law shall be liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding 100*l.*, and failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days, without prejudice to diligence by pointing or arrestment, if no imprisonment has followed on the conviction; and every net set, or attempted to be set, in contravention of any such bye-law may be seized and destroyed or otherwise disposed of by any Superintendent of the herring fishery or other officers employed in the execution of the Herring Fishery (Scotland) Acts. Provided always that, if no conviction shall follow, any net so seized shall be forthwith returned, and due compensation made for any loss or damage occasioned thereto by such seizure."

The Fishery Board for Scotland, under the powers given by the above section, made the following bye-law, dated the 27th September, 1892, and duly confirmed by the Secretary for Scotland on the 22nd November, 1892:—

"Whereas by the Act 52 & 53 Vict., cap. 23, being the aforesaid "Herring Fishery (Scotland) Act, 1889," it is enacted that the Fishery Board for Scotland may, by bye-law or bye-laws, direct that the method of fishing known as beam trawling or otter trawling shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, in any area or areas to be defined 'in such bye-law,' it is hereby declared that the foregoing provision shall apply to the whole of the area above specified.

"Within the aforesaid area, as above defined, no person, unless in the service or possessing the written authority of the said Fishery Board for Scotland, under the hand of the Secretary thereof, shall at any time, from the date when this bye-law shall come into force, use any beam trawl, or otter trawl, for taking sea fish."

The area defined by this bye-law is known as the Moray Firth. It includes a very large extent of sea outside the 3-mile limit; and the question has been raised whether it is competent for the Fishery Board for Scotland under the above Act to make a bye-law which would have the effect of preventing English and Irish fishermen from trawling in waters outside the 3-mile limit. His Majesty's Government have undertaken to submit this question for the Opinion of the Attorney-General and Solicitor-General for England, the Lord Advocate and the Solicitor-General for Scotland, and the Attorney-General and Solicitor-General for Ireland.

The Law Officers are therefore requested to advise whether an English or Irish fisherman, acting in contravention of the bye-law in question, is liable, on conviction, to the penalties imposed by section 10 (4) of "The Sea Fisheries Regulation (Scotland) Act, 1895."

The Attorney and Solicitor-General for England, the Lord Advocate and Solicitor-General for Scotland, and the Attorney and Solicitor-General for Ireland are requested to favour the Board of Agriculture and Fisheries with their Opinion on the question raised in the foregoing Case.

Opinion.

This question must be answered in the affirmative.

The power of the Imperial Parliament to legislate for British subjects, whether within or without His Majesty's dominions, is beyond question, and there is no ambiguity in the enactment.

(Signed)

R. B. FINLAY.
J. ATKINSON.
CHARLES SCOTT DICKSON.
EDWARD CARSON.
JAMES H. CAMPBELL.

August 9, 1905.

No. 7.

[November 1, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, October 6, 1905.

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit to you the papers noted in the accompanying list, which relate to an inquiry made by the Belgian Minister (see Paper A) as to what extent the servants of foreign Diplomatic Agents in this country enjoy immunity from criminal jurisdiction, and if it makes any difference whether these domestic servants are foreigners or British subjects.

The Minutes which accompany Count de Lalaing's note (Paper B), and the papers referred to therein (Papers C, D, and E), show that, after consideration of the matter, in the light of the information furnished by the archives of this Department, a draft reply to Count de Lalaing was prepared (Paper F), informing him of the practice habitually adopted in this country in such cases.

When this draft was prepared, however, Mr. Davidson, K.C., the Legal Adviser to this Department, expressed very great doubt whether the propositions it enunciated were sound, and it was therefore referred to the Home Office (Paper G) for their observations.

Two letters from the Home Office are also inclosed (Papers H and I), the latter of which contains a Memorandum setting forth very fully the information in the possession of that Department on the subject of diplomatic privilege.

I am to add, by way of explanation, that the Inter-Departmental Conference referred to in the later correspondence has not been held, but as the Belgian Minister wishes an early reply, his Lordship desires now to refer the matter for your consideration.

It appears to Lord Lansdowne that the Home Office Memorandum makes it clear that the law, *i.e.*, the exact extent and basis of the immunity, is ill-defined and vague, but that the practice—which is the important matter—is fairly correctly set forth in the draft reply to Count de Lalaing.

His Lordship assumes that the practice in these matters must be subject to the overriding right of a State to take such measures as may be necessary for its protection, and to the further limitation that no State would tolerate, and no Ambassador would countenance, flagrant breaches of the law on the part of the latter's servants. Subject to these limitations, however, the proposition that a Diplomatic Agent's servants are not prosecuted without the consent of their master appears to his Lordship to be correct.

In some parts of the Home Office Memorandum there are statements which throw doubt on the proposition that a servant could be prosecuted after dismissal for an act or offence committed before dismissal and while still in the service of the Diplomatic Agent.

His Lordship is advised that this proposition is correct; the immunity of the servant is purely derivative, and is the privilege of the master, being allowed to the latter in order to facilitate the exercise of his diplomatic functions, and to insure to him freedom from interference by the local authorities.

There appears, therefore, to be no reason for extending the immunity beyond those who are actually in his service.

I am to request that you will take the papers inclosed herewith into your consideration, and that you will favour his Lordship with your opinion whether the terms of the proposed reply to Count de Lalaing are, in the circumstances, right and proper, or whether they should be amended, and, if so, in what respect. His Lordship would also be glad to be furnished with any general observations in the matter which you may be good enough to offer.

I have, &c.
(Signed) F. A. CAMPBELL.



1905

14

GENERAL.

List of Papers.

(A.) Count de Lalaing	..	..	..	..	February 23, 1904.
(B.) Minutes on above.	..	..	..	..	December 27, 1898.
(C.) To M. Cambon	..	..	..	..	March 5, 1904.
(D.) Library Memorandum	..	..	..	..	November 15, 1853.
(E.) To Baron Bentinck	..	..	..	..	..
(F.) Draft reply to Count de Lalaing.	..	..	..	..	August 15, 1904.
(G.) To Home Office	..	..	..	..	.. 20, "
(H.) Home Office	..	..	..	..	October 11, "
(I.) Ditto	..	..	..	..	September 15, 1905.
(J.) To Home Office	..	..	..	..	October 2, "
(K.) Home Office	..	..	..	..	..

Report.

We suggest that the reply should be modified in the sense of the rider which we have appended to the draft.

We think that the present draft reply goes too far in the way of admitting immunity, and might entail very inconvenient consequences if any case of gravity, such as murder or rape, should unfortunately occur.

We think that the present practice of communicating with the foreign Minister and of discontinuing proceedings in trifling cases—if he claims exemption for his servants—is convenient, but that it should not be recognized as a matter of right, or as applicable to cases of gravity, especially when the crime is committed outside the limits of the Minister's residence.

(Signed) R. B. FINLAY.
EDWARD CARSON. >

Royal Courts of Justice,
November 1, 1905.

Annex 1.

Draft of Letter from the Marquess of Lansdowne to Count de Lalaing.

Sir, *Foreign Office,* 1905.
WITH reference to your note of the 23rd February, 1904, in which you inquire whether the servants of foreign Diplomatic Agents are exempt from local jurisdiction as regards criminal offences, and, if so, to what extent, I have the honour to inform you in reply [that the practice adopted in this country is as follows:—

If it is found that any person against whom criminal proceedings have been initiated is the servant of a foreign Diplomatic Agent, steps are taken to procure the suspension of the proceedings until the Diplomatic Agent has been communicated with, and they are not continued without his consent.

No distinction is for this purpose drawn between servants who are of foreign, and those who are of British, nationality.

If the Diplomatic Agent prefers to deal with the matter himself, and either punish or remove the servant out of the jurisdiction in the event of his being considered guilty, the criminal proceedings are discontinued.

On the other hand, if the Diplomatic Agent prefers to waive his privilege or dismiss the servant, so as to terminate his employment, the proceedings in the Criminal Court would follow their ordinary course.]

I have, &c.

Rider suggested by Law Officers in place of passage in brackets.

... that there is no Statute dealing with this matter, and there are no decided cases settling the question of legal liability.

It has never been held that the servants of foreign Diplomatic Agents enjoy an immunity from criminal process, and it cannot be conceded that such immunity exists as a matter of right—more especially in cases of gravity affecting the public peace.

If, however, it is found that any person against whom criminal proceedings have been initiated is the servant of a foreign Diplomatic Agent, it is the practice in this country, at once to communicate with that Diplomatic Agent, and it has not been unusual, in cases of a trifling character, to drop the proceedings if immunity is claimed for the accused.

GENERAL.—JAPAN.

15

Whether immunity should be conceded must depend upon the circumstances of each particular case, including the nature of the crime and the locality where it was committed, and the fact that the servant is a subject of this country may not be immaterial in this connexion.

R. B. F.
E. C.

Annex 2.

Sir Edward Grey to Count de Lalaing.

Foreign Office, December 20, 1905.

Sir,
WITH reference to your note to my predecessor of the 23rd February, 1904, in which you inquire whether the servants of foreign Diplomatic Agents are exempt from local jurisdiction as regards criminal offences, and if so, to what extent, I have the honour to inform you that there is no Statute dealing with this matter, and there are no decided cases settling the question of legal liability. It has never been held that the servants of foreign Diplomatic Agents enjoy an immunity from criminal process, and it cannot be conceded that such immunity exists as a matter of right—more especially in cases of gravity affecting the public peace.

If, however, it is found that any person against whom criminal proceedings have been initiated is the servant of a foreign Diplomatic Agent, it is the practice in this country at once to communicate with that Diplomatic Agent, and it has not been unusual, in cases of a trifling character, to drop the proceedings if immunity is claimed for the accused.

Whether immunity should be conceded must depend upon the circumstances of each particular case, including the nature of the crime and the locality where it was committed, and the fact that the servant is a subject of this country may not be immaterial in this connection.

I have, &c.
(Signed) EDWARD GREY.

JAPAN.

No. 8.

[November 24, 1905.]

Foreign Office to the Law Officers of the Crown.

Foreign Office, November 17, 1905.

Gentlemen,
I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit to you the papers noted in the accompanying list, which relate to the condemnation of the steam-ship "Scotsman," which vessel was seized on the 14th February last in the Tsugaru Straits by a Japanese torpedo-boat.

The "Scotsman," the property of the Lombard Steam-ship Company, of 20, Great St. Helens, E.C., was on a voyage from Saigon to Vladivostok with a cargo of about 20,000 bags of rice, consigned to that port by the agents in Saigon of Messrs. R. Peletz and Co.—the charterers of the steamer—and the bills of lading stated that the cargo was deliverable to order. The "Scotsman" left Saigon on the 24th January, 1905, without being furnished with a copy of the charter-party, her declared destination being Vladivostok, and, after calling at Hong Kong, was captured by the Japanese naval authorities as above stated.

The steamer was taken into the Yokosuka Prize Court for adjudication, and, on the 7th June, 1905, was condemned by that Court as a lawful prize. A translation of the finding of the Court will be found inclosed in Sir C. MacDonald's despatch No. 37, Treaty, of the 28th June last (Paper F).

The underwriters of the cargo appealed against this decision, and on the 5th September last the higher Prize Court confirmed the sentence of the lower Court, condemned the "Scotsman" as a lawful prize, and ordered her cargo to be confiscated. The text of the judgment of the higher Court is contained in Inclosure 2 in Sir C. MacDonald's despatch No. 64, Treaty, of the 6th October last (Paper P).

Meanwhile Messrs. Parker, Garrett, and Co., representing the underwriters, and Mr. W. C. Lockhart, representing the Shanghai Agency of the World Marine Insurance

"Scotsman"
condemned
by Japanese
Prize Court
during war
with Russia.



Company, have repeatedly urged His Majesty's Government to make a representation to the Japanese Government, through the diplomatic channel, against the decision of the Japanese Prize Court. The case for the underwriters is very fully set forth in the letter from Messrs. Parker, Garrett, and Co. of the 8th September last (Paper H).

Up to the present His Majesty's Government have maintained the attitude that, unless and until the British subjects interested in the vessel shall have exhausted the ordinary legal remedies open to them before the Tribunals of Japan with the result that a *prima facie* case of miscarriage or denial of justice appears, they will not be in a position to make a formal representation, on behalf of the parties, to the Japanese Government. The higher Prize Court having now finally condemned the "Scotsman" and her cargo, the question arises whether any representation on the subject should be made to the Japanese Government.

As at present advised, Lord Lansdowne considers that the answer to this question should be in the negative. In this case the owners of the "Scotsman" knowingly allowed their vessel to be used during a state of war for the purpose of carrying food-stuffs, the property of a belligerent Government, to Vladivostok, which at that time was a naval arsenal and harbour belonging to that belligerent Government. These facts are admitted by the solicitors to the underwriters, who, however, apparently contend that because Vladivostok was at the time a non-blockaded port, the vessel is therefore not liable to confiscation. As regards the latter contention, his Lordship is of opinion that the fact that Vladivostok was a non-blockaded port has no bearing upon the question. It seems abundantly clear that the "Scotsman" was condemned because her cargo was held, in the circumstances, to be contraband, and because the ship-owner was privy to its carriage. For these reasons, therefore, it appears to his Lordship that the case is not one in which a representation to the Japanese Government would be justified. Before, however, arriving at a final decision in the matter, I am to request that you will take the inclosed papers into your consideration, and will favour Lord Lansdowne with your opinion as to whether, having regard to the considerations stated above, his Lordship would be warranted in declining to submit the case of the "Scotsman" for the reconsideration of the Japanese Government.

His Lordship would also be glad to be favoured with any observations of a general character which you may desire to offer upon the papers now submitted to you.

I have, &c.

(Signed) F. A. CAMPBELL.

List of Papers.

(A.)	Sir C. MacDonald ..	(No. 9.	Treaty.	Telegraphic)	February	20, 1905.
(B.)	Messrs. Parker, Garrett, and Co. ..				June	21, "
(C.)	To Sir C. MacDonald ..	(No. 18.	Treaty.	Telegraphic)	June	23, "
(D.)	Sir C. MacDonald ..	(No. 35.	Treaty.	Telegraphic)	June	26, "
(E.)	To Messrs. Parker, Garrett, and Co. ..				June	26, "
(F.)	Sir C. MacDonald ..	(No. 37.	Treaty)		June	28, "
(G.)	To Messrs. Parker, Garrett, and Co. ..				August	14, "
(H.)	Messrs. Parker, Garrett, and Co. ..				September	8, "
(I.)	To ditto ..				September	15, "
(J.)	Sir C. MacDonald ..	(No. 60.	Treaty.	Telegraphic)	September	28, "
(K.)	To Messrs. Parker, Garrett, and Co. ..				September	29, "
(L.)	Messrs. Parker, Garrett, and Co. ..				October	3, "
(M.)	To ditto ..				October	10, "
(N.)	Mr. W. C. Lockhart ..				October	16, "
(O.)	To ditto ..				October	20, "
(P.)	Sir C. MacDonald ..	(No. 64.	Treaty)		October	6, "

Report.

In our opinion no valid grounds exist for submitting the case of the "Scotsman" for the reconsideration of the Japanese Government. There is ample evidence that "the object of the vessel's voyage was the carriage of contraband of war," as found by the higher Prize Court, and we see no reason for impeaching the conclusions at which it arrived.

(Signed) R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice,
November 24, 1905.

[September 19, 1905.]

Foreign Office to the Law Officers of the Crown.

Foreign Office, August 28, 1905.

Gentlemen,

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit to you the accompanying volume of correspondence and to call your attention more especially to the papers marked in the list inclosed herewith relative to the claim put forward by Alonzo Lewis, a British subject, against the Mexican Government on account of his arrest and forcible detention at Yalisco in Mexico in 1902.

The origin of the claim is given in a letter from the Colonial Office of the 10th July, 1902 (Paper A). From this it appears that in a remote part of the Republic of Mexico Mr. Lewis was engaged in bleeding trees for chicle gum, having obtained for this purpose the permission of a local Indian Chief, General Tamay, who exercised some kind of authority in the district. Mr. Lewis was grievously ill-used by some of the Indians under Tamay's orders while engaged in this occupation, and claimed 1,000*l.* as compensation. As this amount was considered somewhat excessive, Mr. Greville, His Majesty's Minister at Mexico, was instructed (Paper B), in making a representation to the Mexican Government on the subject, to claim only 700*l.*, this sum being considered sufficient to meet the merits of the case. A reply was received from His Majesty's Chargé d'Affaires (Paper C), in which he reported that the Mexican Government repudiated all liability, on the ground that they were not responsible for Tamay's actions, that their authority in the district of Ycaiche, where Yalisco is situated, was merely nominal, and that Mr. Lewis had entirely ignored all the Mexican laws which regulate the working of forests and the exportation of chicle. They adopted, in fact, the position that they could not be expected to pay compensation to a man who had broken Mexican law for his own purposes and had suffered ill-treatment at the hands of persons over whom the Mexican Government had no control, and for whose proceedings they were not responsible. They also pointed out that Mr. Lewis might have brought the case before the Mexican Courts of Justice.

His Majesty's Secretary of State for the Colonies, on the other hand, maintained (Papers D and E) that the Mexican Government ought to be held liable for Tamay's actions. This view is based upon the fact that in a report from the Governor of the State of Campeche (inclosure in Paper C) occurs a sentence to the effect that "there is in addition another canton submissive to the authorities through an intelligent Indian named Felipe Tamay, who calls himself General and makes his authority felt by the inhabitants of the canton, &c.," which is held to be an admission that the Mexican authorities exercise control over Tamay; and also upon the fact that the Superintendent of Police in British Honduras states in a Minute dated the 11th March, 1902 (inclosure in Paper A), that on one of the licences to bleed chicle, signed by General Tamay, there is a Mexican Government stamp.

This evidence does not appear to Lord Lansdowne to be very strong. The sentence in the Governor's Report may mean no more than that Tamay found it to his advantage to preserve some semblance of order in the hope that the Mexican authorities would then allow him to remain in peace; while, with regard to the second argument, his Lordship is disposed to think that it is more than likely a police officer in British Honduras might mistake a counterfeit stamp for a genuine one, and that, even if the stamp were genuine, it would be easy for the Mexican Government to say that it had been improperly obtained by the Indians. The real extent of the Mexican authority in the district is illustrated by a statement contained in Mr. Grant Duff's despatch No. 28 of the 22nd July, 1904 (Paper F), that the Government have not yet been able to communicate with Ycaiche, the centre of Tamay's influence, though it is now three years since the claim arose.

Lord Lansdowne believes it is essential to the success of the claim upon its present basis to establish conclusively the responsibility of Mexico for Tamay's action, and he is doubtful whether the evidence as yet adduced is sufficient for this purpose. In these circumstances, his Lordship requests that you will take the accompanying

Arrest of
Alonzo
Lewis by
Indian
Chief.
Claim on
Mexican
Govern-
ment.



1905

papers into your consideration, and favour him with your opinion as to whether the evidence at present in the possession of His Majesty's Government is sufficient to warrant the claim being pressed on the Mexican Government on its present basis.

It has been suggested to Lord Lansdowne that it might be possible to adopt the following line of argument in support of the claim, if it should ultimately be decided that the Mexican Government cannot be held directly responsible for Tamay's action:—

Mexico, as a State, is responsible for preserving within her territories a reasonable measure of good government, and traders and travellers are entitled to assume that the individuals whom they find exercising authority are the properly constituted officials of the Central Power. If they are not, the public should be warned that they enter the territory at their own risk, or else the State should cease to lay claim to the territory. Any State is entitled to close particular portions of her territory in time of rebellion or for other temporary cause, but in the present case no such warning was given, and the absence of effective control by the Mexican Government in the district concerned appears to be perennial. Every State is bound to provide throughout her territories reasonable facilities for enabling persons who have been the victims of injustice at the hands of others to obtain redress for their grievances; and as Mexico does not admit liability for the actions of General Tamay, and regards him as a private individual, she is bound to provide Mr. Lewis with reasonable facilities to recover damages from Tamay, by legal process or other means, for the injustice suffered at his hands. If she fails to do so, she must herself provide Mr. Lewis with compensation.

His Lordship will be glad to be favoured with your opinion whether His Majesty's Government could justifiably adopt the above or some analogous grounds as the basis of a claim on behalf of Mr. Lewis.

Lord Lansdowne also hopes that he may receive any observations of a more general nature which you may be disposed to offer.

I have, &c.
(Signed) F. H. VILLIERS.

List of Papers.

Volume of MS. correspondence relating to claim of A. Lewis, 1902 to 1904, with special reference to—

(A.) Colonial Office	..	..	..	July	10, 1902.
(B.) To Mr. Greville, No. 9	..	..	..	August	4, "
(C.) Mr. Grant Duff, No. 22	..	..	..	June	16, 1903.
(D.) Colonial Office	..	..	..	October	30, "
(E.) Ditto	..	..	..	December	8, 1904.
(F.) Mr. Grant Duff, No. 28	..	..	..	July	22, "

Report.

In our opinion His Majesty's Government would not be justified in insisting upon payment to Mr. Lewis.

Tamay appears to be for all practical purposes independent owing to distance and difficulty of access. This would not prevent Mr. Lewis from being entitled to compensation from the Mexican Government if he had proceeded to Tamay's territory under a licence from that Government. As the Mexican Government claims that Tamay's territory is part of their dominions, they would, in the case supposed, be answerable for his misconduct.

But Mr. Lewis did not act under any licence from the Mexican Government. He took his licence from the semi-barbarous Chief whom he found in actual control of the territory, and on terms which, according to the statement of the Mexican Government, were inconsistent with the laws of Mexico. Under these circumstances, it appears to us that he cannot claim to hold the Mexican Government responsible for the ill-treatment to which he was subjected by Tamay while acting under Tamay's licence. He chose to deal with the Indian tribe which he found in control of the territory on terms which he never could have obtained if the Mexican dominion then had been effective, and we think that he cannot now turn round and assert that he was entitled to the protection of the Mexican Government while so acting.

Of course a great deal depends upon the precise state of the facts, but, upon the materials before us, we do not think that His Majesty's Government would be

justified in treating the allegations of the Mexican Government as unfounded. If Mr. Lewis treated with Tamay and his tribe merely as owners of the land, and did not take the licence in any way in contravention of Mexican law, the case might have another aspect.

If the Mexican Government would agree to some inexpensive form of arbitration, it might be the best way of dealing with the situation which has arisen.

(Signed) R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice,
September 19, 1905.

NICARAGUA.

No. 10.

[November 10, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, September 29, 1905.

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit to you the papers noted in the accompanying list, which relate to a dispute which has arisen between this country and Nicaragua in connection with the turtle fisheries off the Mosquito Coast.

The facts of the controversy are set forth in a Memorandum drawn up in this Office, which is transmitted herewith for your information (Paper A), and from which it will be seen that the Nicaraguan Government Agents in April 1904 seized several schooners and their crews hailing from the Cayman Islands, a dependency of Jamaica. These vessels were engaged in catching turtle in the immediate neighbourhood of a "crawl," or shallow water inclosure for keeping the turtles awaiting shipment, which had been used by the Cayman Islanders for the purpose for thirty years. This "crawl" was situated about 8 miles outside the territorial limit of the two main Mosquito Cays, over which the Nicaraguan Government claim, and actually exercise, jurisdiction. His Majesty's Government have never recognized the sovereignty of Nicaragua over the waters which contain this inclosure, which is commonly known by the fishermen as "Old Crawl." It was thought at the time, however, on the information then available, that the "crawl" was situated within 2 miles of a rock called Sucre Cay, and it was considered by this Department that, for this reason, the "crawl" could not be held to be part of the high seas, but must be within the jurisdiction of that Power, if any, which exercised jurisdiction over Sucre Cay.

Some discussion took place between the two Governments as to the extent of Nicaraguan jurisdiction in those waters, in the course of which the Nicaraguan Government maintained that the Mosquito Banks, where the schooners were seized, had always belonged to Nicaragua, and that under their Civil Code they were entitled to claim as Nicaraguan territory the waters within 1 marine league, or three miles, of Nicaraguan territory, but that their rights of police extended over 4 marine leagues. They were informed that His Majesty's Government could not admit the Nicaraguan claim to exercise jurisdiction over British vessels, for police or any other purposes, outside the ordinary 3-mile limit of territorial waters.

The Nicaraguan Government thereupon expressed the opinion that the best way of deciding the extent of their territorial waters, would be to appoint a Mixed Commission to visit the Mosquito Cays and decide the question in conformity with international law. In March last a Commission of four was accordingly appointed, consisting of two British officers, Captain Tothill, of His Majesty's ship "Diamond," and Mr. Sanguinetti, Commissioner of the Cayman Islands, and of two Nicaraguans; and the Commissioners were instructed to examine the cays and banks constituting the groups known as the Mosquito Cays and Morrison Cays respectively,

Nicaraguan claim to turtle fisheries. Question of jurisdiction over islands and reefs.



1905

and to report all relevant facts and particulars, so as to enable the two Governments to determine which of such cays and banks are islands that would confer on Nicaragua jurisdiction over the waters surrounding them for 1 marine league.

In April last the Commissioners furnished their Report, and it was communicated to this Department almost simultaneously by the Admiralty and the Colonial Office. (Papers B and C.)

Since the Report of the Commission was received considerable correspondence (see packet marked D) has taken place between this Department and the Admiralty and the Colonial Office respectively, as the Lords Commissioners pointed out that if "Old Crawl" and Deadman's Bar are plotted on the Admiralty charts according to the latitudes and longitudes given in the Report, it brings those two places within 2½ miles of each other, and not 5 miles apart as stated in the Report.

Subsequent inquiries, however, which have been made by the Governor of Jamaica, have elicited the facts that the distance of 5 miles was actually computed by the Commissioners, whereas the latitudes and longitudes given were not the result of independent observations made by the Commission, but were copied from the Admiralty chart, and that there seems to be some reason to think that the Admiralty chart is inaccurate.

Under these circumstances, Lord Lansdowne proposes to accept and act upon the statement that the distance between "Old Crawl" and Deadman's Bar is 5 miles, and that "Old Crawl," the spot where the seizures took place, is on the high seas.

If in the course of the subsequent diplomatic correspondence with the Nicaraguan Government that Government should take the point that the latitude and longitude given show the intervening distance between the two places to be less than 3 miles, his Lordship would propose to reply that as the findings of the Report are manifestly contradictory, it would be desirable for the Commission to reassemble and inquire anew into the facts relative to these two banks.

The question of fishing in the future around these Mosquito Banks is of great importance to the Cayman Islanders, and it may be necessary for His Majesty's Government ultimately to come to some understanding with the Nicaraguan Government as to the terms on which the islanders may be allowed to make use of the facilities afforded by the Mosquito Cays.

Before doing so, however, it is very desirable for his Lordship to know how much of the fishing grounds must be regarded as within Nicaraguan jurisdiction, and this depends upon the question whether or not the banks subsequently referred to are islands.

Lord Lansdowne would therefore be glad to be furnished with your opinion whether in the light of the facts reported by the Commission, Sucre Cay and Deadman's Bar are, or are not, islands in the sense that they are capable of conferring sovereignty over the adjacent waters within 3 miles.

Different deductions have been drawn from the Report by the Lords Commissioners and Mr. Secretary Lyttelton, and the arguments in favour of each of the competing views will be found in the letters from the Admiralty and the Colonial Office. His Lordship would also be glad if you would express an opinion on the same point with regard to Morrison Cays and Ham Cays.

The Report of the Commission appears to show that Sucre Cay, Deadman's Bar, and Ham Cays are uncovered at normal high tide, but are all liable to be washed over by the sea during gales, and, in two cases, are probably liable to shift at such times. In Morrison Cays the ground is entirely submerged, but the mangrove bushes are permanently above water.

With regard to Sucre Cay, I am also to inclose (Paper E) a letter from the Admiralty dated the 11th January last, containing an interesting report with sketch and plan of that island by His Majesty's ship "Pelorus," though these do not seem quite to tally with the Report of the Commission describing the island as pear-shaped.

A Report by your predecessors (Paper F) dated the 25th March, 1875, mentioning incidentally that land, however small in extent, which is not submerged at ordinary high tides, is an island, is also inclosed.

I am further to express the hope that you will offer such observations of a general nature as you think will be of assistance to His Majesty's Government in dealing with the case.

I have, &c.
(Signed) F. H. VILLIERS.

List of Papers.

- (A.) Foreign Office Memorandum on Turtle Fisheries off the Mosquito Cays [Conf. 8463], March 30, 1905.
- (B.) Admiralty, May 9, 1905 (with chart).
- (C.) Colonial Office, May 11, 1905 (with Report of Commission).
- (D.) Packet of correspondence between Foreign Office, Admiralty, and Colonial Office.
- (E.) Admiralty, January 11, 1905.
- (F.) Law Officers to Colonial Office, March 25, 1875 (Confidential 4370, p. 54 A).

Report.

In our opinion Sucre Cay, Deadman's Bar, and Ham Cays must be considered as islands. We know of no test for determining such a question except that laid down by our predecessors in their Report of the 25th March, 1875, viz., whether the land is submerged or not at ordinary high tide, and we do not think it would be advisable in any event to depart from this view, which was acted upon in the case of islands in the South Pacific Ocean. As regards Morrison Cays, applying the same test, they would not be considered islands, but it may possibly not be worth while to draw any distinction.

There remains, of course, the further question as to whether the Nicaraguan Government can successfully claim sovereignty over these cays, and upon this point we are not in a position, upon the materials before us, to offer any opinion.

It is, we think, well worthy of consideration whether, having regard to the difficulty of defining the territorial limits of Nicaragua, it might not be better to attempt to have satisfactory conditions of fishing laid down in concert with the Nicaraguan Government.

(Signed) R. B. FINLAY,
EDWARD CARSON.

Law Officers' Department,
November 10, 1905.

PERSIA.

No. 11.

[February 11, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, October 19, 1904.

I HAVE the honour to transmit to you herewith, by direction of the Marquess of Lansdowne, the papers noted in the accompanying list, relative to the question of the steps to be taken to prevent foreign interference with the rights enjoyed by the tribes on the Arabian Coast of the Persian Gulf in the pearl fisheries.

It will be observed, from the India Office letter of the 30th June (Annex A), that the Government of India have called the attention of His Majesty's Government to the fact that, by the steps they have consistently taken for more than a century to maintain the maritime peace of the Persian Gulf, they have deprived the Arab Chiefs on the coast of the means of forcibly protecting their interests in the pearl fisheries, and that they therefore feel themselves to be under an obligation to defend those rights in so far as they can reasonably be substantiated.

They cite instances in the past in which they have successfully intervened to prevent the intrusion both of foreigners, by diplomatic means, and of British subjects.

They recognize, however, that the position is difficult, both in regard to British subjects and from the point of view of international law. They therefore desire to

[454]

G

Exclusive
Pearl
Fisheries;
Rights of
tribes in
Persian
Gulf.



1905

ascertain the extent to which they may be authorized to intervene, should the necessity arise.

The material facts may be stated as follows:—

1. The pearl fishery banks lie off the Arabian Coast of the Persian Gulf, and off the coast of Bahrein. They extend, as shown on the charts (Annex B) inclosed with the Government of India's letter, from Um-ul-Kawain to near the head of the Gulf. His Majesty's Government have identical Agreements (Annex C) with the Arab Chiefs of Raz-el-Khaimah, Um-ul-Kawain, Ajman, Shargah, Debai, Abu Dhabbi, and Bahrein, by which the Chiefs have practically surrendered their foreign relations into the hands of the British Government. The territory of these Chiefs comprises the Arabian Coast of the Gulf off which the pearl banks lie up to the Island of Bahrein, with the exception of the promontory of El Katr, with whose Chief the question of making a similar Agreement is now under the consideration of His Majesty's Government. North of Bahrein, the sovereignty over the Arabian shore of the Gulf belongs to the Sultan of Turkey, with the exception of the territory of the Sheikh of Koweit, who has special relations with His Majesty's Government.

2. Apparently all the tribes fish for pearls wherever they are to be found, and no tribe has exercised a right excluding the other tribes from any part of the fishery.

3. Only members of the tribes have hitherto fished for pearls in these waters.

4.—(a.) Portions of some of the pearl banks lie within the 3-mile territorial limit.

(b.) Some of the banks extend from within the 3-mile limit outwards for several miles.

(c.) Some of the banks are entirely outside the 3-mile limit.

In all these cases the tribes have exercised an exclusive and concurrent right of fishing for pearls.

5. The tribes have not fished for pearls in the deep waters off the banks, having no appliances for deep-water fishing. It is apprehended that dredging for pearls in such deep waters would materially injure the pearl fishery on the banks; and it is desired, if possible, to prevent dredging in such deep waters.

6. The action to be taken for the protection of the pearl fishery would appear to depend on (1) the legal right of the tribes to a monopoly; and (2) the power of the British Government to act on their behalf in maintaining that monopoly. It is conceived that some precise delegation of authority to the British Government to act on behalf of the tribes in this matter would be necessary. It must be added that none of the tribes have any judicial system or Courts of Law for dealing with trespassers or trespassing boats.

A selection of confidential correspondence respecting the Ceylon Pearl Fisheries, which took place in 1891-1892 (Annex D), and copies of the Argument (Annex E) and Counter-Case (Annex F) of Her late Majesty's Government in the Behring Sea Arbitration (certain passages in which are specially marked) are inclosed herewith for your information.

I am to request that you will take the papers transmitted herewith into your consideration, and that you will favour Lord Lansdowne with your opinion—

1. As to the legal rights of the tribes within, as also without, the 3-mile territorial limit;

2. As to the procedure to be followed in expelling interlopers and dealing with their boats and fishing appliances.

I have, &c.
(Signed) ELDON GORST.

List of Papers.

- (A.) India Office, June 30, 1904.
- (B.) Charts showing position of pearl fishery banks [inclosures in (A)].
- (C.) Agreement with Trucial Chiefs on the Arabian Coast, 1892 [communicated by India Office, June 30, 1902.]
- (D.) Correspondence respecting Ceylon Pearl Fisheries, 1891-1892 [6267 Confidential.]
- (E.) British Argument in Behring Sea Arbitration [6311* Confidential].
- (F.) British Counter-Case in Behring Sea Arbitration [6298* Confidential], 1892

Report.

1. The tribes have a right to the exclusive use of the pearl fisheries within the 3-mile limit and in any other waters which may justly be considered territorial.

As regards the fisheries beyond territorial waters, we think that a distinction must be drawn between the banks where the tribes have practised pearl fishing and the deep waters in which no such fishery has been carried on by them.

As regards the pearl banks, we think that, as a matter of international law, they are capable of being the property of the tribes to the exclusion of all other nations. In addition to the passage cited from Vattel, reference may be made to Puffendorf's treatise "De Jure Naturæ et gentium," Book IV, Chapter V, section 7, and to the recent work of Professor Westlake, "International Law," Part I, Chapter 9, at pp. 186 and 187, and the case of the protection of the Ceylon pearl banks is a striking illustration of the assertion of this right in practice. Whether such rights, in fact, exist with regard to these particular pearl banks in the Persian Gulf is a question the answer to which cannot be given with any certainty, as it depends on the evidence available of historical facts with reference to the enjoyment of these fisheries by the tribes and the exclusion of others from them. As far as we can judge, upon the materials before us, we think that there are grounds for asserting the existence of such an exclusive right, and we do not think that, in point of law, the fact that the enjoyment was by the tribes in common would prevent the acquisition of the right in question. Having regard to the relations of His Majesty's Government with the tribes on the west shore of the Persian Gulf, we think that the existence of this exclusive right may be properly maintained on their behalf by His Majesty's Government.

With regard to the deep waters in which pearl fishing has not been carried on by the tribes, we think the case is different. There is here no defined area at the bottom of the sea over which the right of fishing has been exercised to the exclusion of other nations, as there is some ground for saying was the case with regard to the pearl banks. We cannot see that the right claimed by the tribes to exclude other nations from these deeper waters could be asserted with any reasonable chance of success.

2. Having regard to the importance of protecting the deeper waters, and to the fact that for the reasons above indicated it cannot be regarded as certain that the right even to the pearl banks could be established to the satisfaction of any international Tribunal, we think that it would be preferable to discourage foreign interference by refusing supplies, &c., as suggested in the papers before us. If such measures prove inadequate it may be necessary, having obtained the authority of the Chiefs for this purpose, to compel the removal of vessels engaged in fishing on the pearl banks. Of course, measures of this kind must be taken with caution, as international complications might result from any precipitate action. It might also be practicable—whether it should be done or not is a matter of policy—to raise the question in a form suitable for decision by The Hague Tribunal. Fishing within the territorial waters may, of course, be prevented.

Generally, we desire to add that, having regard to the importance of the question to the tribes, and the fact that we cannot be certain of establishing the right claimed, it is probably desirable that the fishing by foreigners should, if possible, be indirectly stopped without raising the question internationally.

(Signed) R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice,
February 11, 1905.



1905

(24)

RUSSIA.

No. 12.

[June 29, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, June 20, 1905.

"Hipsang"
sunk by
Russians.
As to claim
on account
of being a
matter for
Prize Court.

I AM directed by the Marquess of Lansdowne to transmit to you the papers mentioned in the accompanying list, with respect to a claim for compensation against the Russian Government made by the owners of the British steam-ship "Hipsang," which was sunk by a Russian torpedo-boat near Pigeon Bay on the 16th July, 1904.

You will observe from the correspondence that the "Hipsang," a British vessel owned by the Indo-China Steam Navigation Company, left Newchwang on the 15th July, 1904, on a voyage to Chefoo, and, on the following morning, while off Pigeon Bay, in clear weather, and with her lights burning, was, without being previously signalled to stop, suddenly fired at by a Russian destroyer. The "Hipsang" at once stopped and hoisted the British merchant flag, but the Russian vessel, nevertheless, continued to fire, killing and wounding several Chinese on board the "Hipsang," and finally sank her with a torpedo.

His Majesty's Government regarded the proceeding as entirely unjustifiable, and His Majesty's Ambassador at St. Petersburg was instructed on the 16th August (see Nos. 32 and 33 of Confidential Print) to inform the Russian Government that His Majesty's Government considered the destruction of the "Hipsang" to be an act which was wholly unwarranted, and that it would be their duty to claim full compensation. A representation in this sense was accordingly made to the Russian Government by Sir Charles Hardinge on the 29th August, 1904 (Print No. 42).

The claim for compensation was drawn up by the owners of the "Hipsang," amounting to 47,679l. 2s. 1d., and, after being carefully supervised in this Department, was presented to the Russian Government by His Majesty's Ambassador on the 12th March last (Print, Nos. 63 and 64). Count Lamsdorff, replied on the 30th March (Print No. 66) that a Special Commission had been appointed to consider the claim, and, on the 31st ultimo, informed Sir C. Hardinge that the Commission of Inquiry had unanimously decided that there were not sufficient grounds to distinguish the case of the sinking of the "Hipsang" from the general category of prize cases, and that, therefore, the owners of the ship must address their claim to the proper port Tribunal.

Lord Lansdowne is, however, inclined to the opinion that the case is not of a kind with which Prize Courts are concerned, and his Lordship thinks that the owners of the "Hipsang" are reasonably entitled to expect His Majesty's Government to secure for them direct consideration of their claim at the hands of the Government of the offending ship without their being put to the trouble and expense of first ascertaining what Prize Court, if any, will admit jurisdiction, and then endeavouring to establish to the satisfaction of the Court the liability of the Russian Government and the details of their own losses.

It appears to the Secretary of State that the sphere of a Prize Court is the determination of cases where the belligerent Government comes into direct relations with individuals who are subjects of another, and a neutral State: cases where the individual has been committing some act—e.g., carrying contraband—which, by the practice of nations, the belligerent State is entitled to prevent, and where the neutral Government is not concerned. On the other hand, the protection of its subjects from belligerent outrage is a matter which very closely concerns the neutral State, and any claim put forward on account of such a proceeding becomes the claim of the neutral State, and should be dealt with directly between the two Governments concerned.

The Russian Government would, of course, be entitled themselves to refer the case to the Judges of a Prize or other Court or to a Commission, for the details to be investigated, especially if they admitted liability, or to create a Commission and to request that all future claims should be laid before it, but their action in the case of the "Hipsang" appears to Lord Lansdowne to amount to a refusal to entertain the claim at all diplomatically, and his Lordship does not consider that there is any justification for such a course.

RUSSIA.

25

The Secretary of State therefore proposes to instruct His Majesty's Ambassador at St. Petersburg to send back the claim to the Russian Government, with an intimation that His Majesty's Government see no reason for putting the owners of the vessel to the expense and delay of taking proceedings in a Prize Court, and consider that the claim should be dealt with diplomatically.

Before taking this step, however, Lord Lansdowne would be glad if you will take the papers into your consideration, and favour his Lordship with your opinion as to whether he is correct in taking the view that the difference between this case and an ordinary case of interference with a neutral vessel suspected of carrying contraband, is really one of essence, and not merely of degree, and, if so, whether His Majesty's Government are justified in adopting the course above proposed.

His Lordship would further be glad to be furnished with any general observations which you may be good enough to offer for his assistance in dealing with the case.

I have, &c.
(Signed) F. H. VILLIERS.

List of Papers.

"Hipsang," Confidential Print, Nos. 1 to 80 [Conf. 8639].
Sir C. Hardinge, No. 49 (Treaty), May, 31, 1905.

Report.

We agree with your Lordship's view that the difference between this case and an ordinary case of interference with a neutral vessel suspected of carrying contraband is one of essence and not of degree.

There is in our opinion no proper ground for asking the owners of the "Hipsang" to take proceedings in a Prize Court, nor do we see what question arising in the case could or ought properly to be referred to such a Court. We think, therefore, that His Majesty's Government are justified in adopting the course suggested.

Royal Courts of Justice,
June 29, 1905.

(Signed) R. B. FINLAY.
EDWARD CARSON.

No. 13.

[July 7, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 6, 1905.

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit to you the papers noted in the accompanying list, which relate to the sinking of the British merchant-vessels "St. Kilda" and "Ikhona" by the Russian cruisers "Dnieper" and "Terek."

The material facts in connection with the sinking of these vessels are set forth in the annexed Memorandum marked (A and B).

I am to state that, in his Lordship's opinion, the sinking of the "St. Kilda" and "Ikhona," following upon the cases of the "Knight Commander" and "Hipsang," which took place last year, furnishes His Majesty's Government with the strongest grounds for remonstrance, more especially in view of the assurance given by Count Lamsdorff in August last that no more British merchant-vessels would be sunk by the public ships of Russia.

It will be seen from the correspondence (Papers (C) to (I) inclusive) that the matter has already formed the subject of communication between His Majesty's Ambassador at St. Petersburg and Count Lamsdorff, and that it appears that the Russian Government still reserves in principle the right in certain special circumstances to sink neutral vessels, holding that the question of compensation for such

Russo-
Japanese
war:
Claim for
sinking of
"St. Kilda"
and
"Ikhona."

[454]

H

action is one which would follow the decision of a Prize Court in favour of the owners of the vessels.

As in the case of the "Hipsang," in regard to which you favoured his Lordship with a Report on the 29th ultimo (Paper (J)), I am to state that, in his Lordship's view, the difference between the case of the "St. Kilda" and the "Ikhona" and an ordinary case of interference with a neutral vessel suspected of carrying contraband is one of essence and not of degree, and that His Majesty's Government would not be justified in leaving the owners of these vessels, who have suffered such serious loss, to seek redress in a Prize Court which may or may not award them compensation.

His Lordship has accordingly caused the annexed instructions to His Majesty's Ambassador at St. Petersburg to be prepared (Paper (K)), requesting his Excellency to address a representation in the matter to the Russian Government, and to inform them that the claims of the parties concerned will be presented to them in due course, irrespective of any decision which may be arrived at by a Prize Court at Libau or elsewhere in regard to the action of the "Dnieper" and the "Terek."

I have the honour to request that you will take into your consideration the papers referred to herein, as well as those also inclosed for convenience of reference, and that you will, at your earliest possible convenience, favour his Lordship with your opinion whether in the circumstances the terms of the proposed instructions to Sir C. Hardinge are right and proper, or whether, and if so in what respects, they can with advantage be modified or amended.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

(A.) Memorandum: "St. Kilda"	.. .. .	June 26, 1905.
(B.) Memorandum: "Ikhona"	.. .. .	June 29, "
(C.) Sir C. Hardinge	(No. 37, Treaty. Telegraphic)	June 26, "
(D.) Ditto	(No. 39, Treaty. Telegraphic)	June 28, "
(E.) Ditto	(No. 41, Treaty. Telegraphic)	June 29, "
(F.) Ditto	(No. 68, Treaty)	June 26, "
(G.) Ditto	(No. 71, Treaty)	June 28, "
(H.) Ditto	(No. 73, Treaty)	June 29, "
(I.) Ditto	(No. 74, Treaty)	July 1, "
(J.) Law Officers' Report	.. .. .	June 29, "
(K.) Draft despatch to Sir C. Hardinge.	.. .. .	
(L.) "Neutral Duties," &c. (pamphlet), Professor Holland (F.O. No. (octavo) 8392)	.. .. .	April 12, "
(M.) To Sir C. Hardinge	(No. 93, Treaty)	August 10, 1904.
(N.) Memorandum: Destruction of Neutral Vessels (Mr. W. Finlay)	.. .. .	August 1905.
(O.) Russian Regulations respecting Naval Prizes: "London Gazette"	.. .. .	March 18, 1904.
(P.) Extract from "Times": Professor Holland's letter	.. .. .	July 1, 1905.

Report.

In our opinion the terms of the proposed instructions to Sir C. Hardinge are right and proper.

We would suggest for consideration a slight alteration (in red ink*) as to Professor Holland's view.

(Signed) R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice,
July 7, 1905.

Annex.

Draft despatch from the Marquess of Lansdowne to Sir C. Hardinge.

(No. . . Treaty.)
Sir,

Foreign Office, July . . . 1905.

I HAVE received your Excellency's despatches No. 68, Treaty, of the 26th, and No. 71, Treaty, of the 28th ultimo, in which you inform me of the communications which have passed between yourself and Count Lamsdorff respecting the sinking by the Russian cruisers "Dnieper" and "Terek," of the British steam-ships "St. Kilda" and "Ikhona" respectively.

* In erased type and italics.

In the second of these despatches your Excellency has, to a great extent, anticipated the instructions I am now addressing to you, and the language which you held in conversation with Count Lamsdorff correctly expresses the views of His Majesty's Government, and meets with their entire approval.

I observe that Count Lamsdorff, in his note of the 25th ultimo, refers to Professor Holland as upholding the right of a belligerent to destroy neutral prizes, and cites, in support of his argument, an article from the "Revue de Droit International," No. 3, 1905. This article is a French translation of a paper by Professor Holland which recently appeared in "The Proceedings of British Academy," of which institution he is a Fellow. A copy of this pamphlet is inclosed, together with a copy of a letter which appeared in the "Times" newspaper of the 1st instant from the Professor on the subject.*

It will be apparent from a perusal of these publications that although the naval instructions of certain of the Powers do contemplate in very exceptional circumstances the destruction of neutral merchant vessels—a fact which His Majesty's Government have never disputed—Professor Holland regards such a proceeding as greatly to be deprecated, and has doubts whether even overwhelming necessity would be sufficient to justify it.

But whatever view any independent writer may take on the subject is a matter of secondary consideration. Professor Holland is undoubtedly a theoretical jurist of eminence and reputation, whose opinions are entitled to every respect. His Majesty's Government are, however, in no way bound by them. Their views on the subject of destroying neutral prizes were very fully set out in the dispatch which I addressed to your Excellency on the 10th of August last, and they see no grounds for altering or modifying the opinion they then expressed, in support of which many eminent authorities, both British and foreign, were cited. His Majesty's Government conceive that these regrettable incidents, which have provoked so much irritation in this country, must be considered and dealt with from the stand-point of the special circumstances attending them, to which it is necessary briefly to refer.

In the month of August last, Count Lamsdorff gave your Excellency a very categorical and positive assurance, on the faith of which the Prime Minister felt warranted in publicly expressing himself as convinced that no more British merchant-ships would be sunk by the public ships of Russia. Upon that assurance His Majesty's Government placed such reliance that, although they were at the time seriously contemplating the adoption of effective measures to prevent the recurrence of such incidents, they abandoned the idea of taking such measures. His Majesty's Government do not for a moment suggest that Count Lamsdorff's assurance was given otherwise than in absolute good faith, and they readily admit that, for the best part of a year, the pledge has been honourably fulfilled, and that no act has been committed against British vessels by the Russian fleet to which exception could properly be taken on the ground of its being in contravention of that assurance. But whether it is due to the instructions which the Russian Admiralty sent last year to their naval Commanders having been cancelled, or not received by certain cruisers, or, if received, disregarded, the fact remains that on the 5th ultimo, the British steam-ship "St. Kilda" was sunk by the "Dnieper," while the British steam-ship "Ikhona" was sunk on the same day by the "Terek." This intelligence was naturally received both by His Majesty's Government and by the commercial and shipping community of this country with feelings of profound astonishment and concern.

The "St. Kilda" was bound from Hong Kong to Japan with a cargo, consisting for the most part of rice, as well as of some sugar, cotton, jute, and other general merchandize.

The "Ikhona" was bound from Rangoon to Yokohama also with a cargo of rice. According to the statement of the master of the last-named vessel, the Commander of the "Terek" informed him that, having a cargo of rice and wheat on board, the vessel must be destroyed, and accordingly after an unsuccessful attempt to blow her up with dynamite, the "Terek" fired at her till she sank. The contraband character of provisions, such as these vessels carried, has been admitted both by the Russian Government as well as by its highest Prize Court, the Supreme Admiralty Council, to depend upon whether they are ultimately destined for the enemy's forces, or for harmless purposes in the enemy country, a matter which a Prize Court alone could determine with anything approaching to certainty. But, this notwithstanding, the Commander of this Russian cruiser constituted himself the sole arbiter, and destroyed the vessel. Such a proceeding can only be characterized as intolerable, and seems, moreover, to be wholly unwarrantable by the terms of the Russian Naval Regulations themselves.

In all these circumstances, and in view of the fact that the assurances given by Count Lamsdorff have been rendered not only nugatory, but misleading, by the action of these two cruisers, His Majesty's Government do not feel justified in leaving the owners of the British vessels—who have suffered such serious loss—to seek redress in a Prize Court, which may or may not award them compensation. Such a course—even if the circumstances warranted it—only implies, as recent events have unfortunately proved, further delays and expense.

As soon, therefore, as the claims of the parties concerned have been formulated and examined, your Excellency will be instructed to present them to the Russian Government, and to press for their settlement, irrespective of any decision which a Prize Court at Libau or elsewhere, may arrive at with regard to the action of the "Dnieper" and "Terek."

Your Excellency will be good enough to communicate the substance of this despatch to Count Lamsdorff, and—if you think well—to furnish him with a copy of it.

R. B. F.
E. C.

* British Academy pamphlet; Professor Holland to "Times," ("Times" extract, July 1, 1905).



1905

28

RUSSIA.

No. 14.

[November 8, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 31, 1905.

Russo-Japanese war. Claims for capture, destruction, &c., of vessels during.

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit, for your consideration, the papers noted in the accompanying list, respecting claims pending against the Russian Government in respect of various British vessels captured, sunk, or otherwise destroyed by the public ships of Russia in the course of the war between that country and Japan.

The Russian Government appear to hold the view that in all these cases the parties interested, if they desire to obtain compensation for their losses, must initiate proceedings in the Russian Prize Courts in the manner provided in Article 88 of their Prize Law Regulations, of which a copy is inclosed (Paper A).

Lord Lansdowne, on the other hand, has been advised that where the claims have arisen from proceedings on the part of the Russian naval officers which are not justified by the ordinary rules of international law, and which constitute an unwarrantable interference with neutral shipping, or where the Prize Court which, under ordinary circumstances, would have jurisdiction over the case has been rendered unavailable, and the Russian Government decline to indicate another in its place, the claims should be dealt with diplomatically. In the former class of cases His Majesty's Government are, to a certain extent, pledged to the parties interested to support their claims irrespective of the decisions of the Russian Prize Courts.

Sir C. Hardinge, His Britannic Majesty's Ambassador at St. Petersburg, has, however, now informed the Secretary of State that he sees little probability that the attempts to get the claims settled through the diplomatic channel will be successful, and has urged that the ordinary rule should be observed in these cases, and that the parties should be informed that they must endeavour to secure compensation for themselves through the Prize Court and exhaust their legal remedies before the claims are made the subject of further diplomatic negotiation. He has also pointed out that other Governments seem to be following this course, and that His Majesty's Government stand alone in their attempt to secure a direct settlement of the claims.

The papers in connection with two of the cases, the "Allanton" and the "Oldhamia," were recently, by Lord Lansdowne's directions, submitted unofficially to the Solicitor-General, as it was thought that immediate instructions must be sent to St. Petersburg. As it has been found possible to suspend all action in connection with the claims, Lord Lansdowne now feels that it is desirable that the papers in connection with all the claims should be submitted to you, and that he should ask to be furnished with your opinion on the general principles involved.

It will be convenient, in the first place, to state briefly the present position of the various cases now pending in regard to which Lord Lansdowne is anxious to be favoured with your views.

The "Allanton."

This vessel, which is the property of Mr. W. R. Rea, of Belfast, was seized in June 1904, on her voyage from Muroran, in Hokkaido (North Japan), with a cargo of bunker coal for Singapore. The steamer was taken to Vladivostock, where, according to the master, an effort was made to purchase her. The Russian authorities also discharged a portion of the coal cargo before the decision of the Prize Court. Sir C. Hardinge, on making representations to the Russian Government, was informed that this was done in order to ascertain whether the "Allanton" contained any other cargo. The ship and cargo were condemned by the Vladivostock Prize Court on the 28th June, 1904.

An Appeal was brought against this decision, and was heard in October last at St. Petersburg.

The Supreme Prize Court decided as follows on the 22nd October:—

1. To recognize the steamer "Allanton" and her cargo as not subject to confiscation, and to return the steamer and the cargo to their owners;

RUSSIA.

29

2. To recognize that the steamer "Allanton" and her cargo had been detained on sufficient grounds and with the observance of established rules; and
3. That the decision of the Prize Court of the port of Vladivostock shall be annulled as regards the confiscation of the said steamer and cargo.

(The full texts of the judgments of both Courts are inclosed in packet (B).)

The owners of the "Allanton" thereupon sent a claim to the Foreign Office amounting to 39,000*l.* Upon this it was pointed out to them that, under paragraph 88 of the Russian Regulations, claims for compensation should be presented to a Port Prize Court. This they admitted, but observed that under paragraph 30 of the same Regulations "a special indemnity may be awarded to the original owner for losses caused by the seizure of the property *when it is recognized that the property was seized without sufficient reason*," but that, inasmuch as the Supreme Court had decided that the "Allanton" had, in fact, been detained on sufficient grounds, they were precluded from all chance of recovering a claim through a Port Prize Court, any proceedings in which were foredoomed to failure, and they therefore urged that their claim should be presented diplomatically.

The claim was therefore carefully scrutinized with the aid of a shipping expert, reduced by about 20,000*l.*, and forwarded to Sir C. Hardinge in March last, with instructions to present it to Russian Government and press for its early settlement.

Sir Charles Hardinge, who had meanwhile consulted with M. Scheffel, the advocate who had represented the owners of the "Allanton" before the Court of Appeal, still remained of opinion that the legal remedy should be employed first. He maintained that even if Mr. Rea was precluded from obtaining compensation for the detention of the vessel for the period between the date of capture and the hearing of the Vladivostock Court, such an argument could not hold good for the further period of detention which terminated with the release of the ship. He thought this argument should be worked up and presented to a Port Prize Court, and if ignored or disputed by that Court, then would come the proper time for diplomatic intervention.

When the advance of the Japanese forces rendered it impossible for Prize Court proceedings to be commenced at Vladivostock, an effort was made to get the Russian Government to nominate some other Tribunal, but this they declined to do, although Count Lamsdorff admitted that Vladivostock was unavailable, but the Government maintained that only the Prize Courts themselves could determine questions of their own jurisdiction and competency.

Consequently, as the Russian Government would not definitely indicate any Court that was clearly competent and available to entertain the claims of the owner of the "Allanton," Sir Charles Hardinge was instructed to present the claim of 18,000*l.* odd to the Russian Government and to request that it might be dealt with forthwith.

In pursuance of these instructions, he has drafted a note for presentation to the Russian Government which is inclosed in his despatch No. 103, Treaty, of the 9th August (see packet (B)).

His Excellency, however, urges that the same course should be followed by the "Allanton" claimants as that adopted in the case of the German vessel, the "Thea," and states that the owners of that vessel are about to commence proceedings at Libau to recover compensation.

The German steam-ship "Thea" was sunk on the 25th July, 1904, by the Russian cruiser squadron. The Prize Court at Vladivostock examined the case on the 11th August, and found both ship and cargo a lawful prize, apparently on the ground that she had been chartered on the 12th March for nine months by the Japanese "Hakoi Sanyo Hossi" Company, and had thus lost her neutral character, while the cargo, consisting of fish, fat, and oil, represented every property on board a ship which had lost her neutral character, and was therefore liable to confiscation.

On the 3rd December last Sir C. Hardinge telegraphed that the appeal against this sentence had been heard that day, and the sentence annulled. No motives were given, but the apparent reason was "question as to cargo."

His Excellency added that the question of right to sink was not raised.

Sir C. Hardinge reported on the 18th June last that the German Ambassador at St. Petersburg had lodged the owners' claim at the Ministry for Foreign Affairs, and had been officially informed that the owners must present the claim to the proper Prize Court. The Ministry suggested that as it was practically impossible to present the claim at Vladivostock the owners should address themselves to the Prize Court at

[454]

I



Libau. In the event of the Prize Court declaring its incompetency the owners would then be justified in demanding that the claim should be decided by the Supreme Prize Court in St. Petersburg.

It is, however, to be observed that as the Supreme Court at St. Petersburg annulled the finding of the Vladivostock Court in the case of the "Thea," the chances of a successful issue in any action that may be instituted before the Libau Court for compensation are greater than they would be in the cases of the "Allanton" and "Calchas" where the Supreme Court have held that the capture, &c., was justified.

The Solicitor-General has, however, semi-officially, expressed the opinion that, on the whole, the course advocated by Sir Charles Hardinge as regards the "Allanton" claims may be adopted.

In addition to the claims of the owners of the "Allanton" this Department has been requested by representatives of the Seamen's and Firemen's Union, on behalf of the crew, and by the Merchant Service Guild on behalf of the captain and officers, to put forward certain claims on account of the hardships and risks incurred by them.

If it is ultimately decided to present the larger claims of the owners to a Prize Court the question will arise whether claims on behalf of the officers and crew based on the hardships they endured and the risks they were exposed to, and not on any actual losses, can be brought within the terms of Article 88.

Further details with regard to this portion of the "Allanton" claim will be found in the papers in packet (C).

The "Calchas."

This vessel is one of Messrs. Holt's steamers, valued at about 100,000*l.*, and was captured by the Vladivostock squadron about the 27th July, 1904. She was on a voyage from Tacoma and Victoria to Japan. She had on board about 1,000*l.* worth of flour consigned to a British firm at Kobé, some timber which the Court held was for shipbuilding, and machinery. The chief hardship of this case is that she was not tried at Vladivostock until the 15th September, forty-nine days at least after her capture, and was, in the interval, taken by the Russian officer in charge to Korsakowsky in the Island of Saghalien. Here 2,000 bags of flour were, by order of Admiral Skrydloff, discharged and left there with the consent of the captain, who was furnished with a receipt. The "Calchas" did not reach Vladivostock until the 8th August.

The Judges of the Prize Court at that port confiscated the cargo intended for Japanese ports, consisting of 13,300 sacks of flour, 36 bales of cotton, and 97 pieces of rough timber. The cargo consigned to neutral ports—in quantity 3,423,413 lbs. and 41,610 cubic feet—was ordered to be released at once.

With regard to seventy pieces of machinery on board, the Prize Court decided that they were not to be regarded as destined for warlike purposes until the expiration of three months in which the owners might appeal.

The ship was not condemned, but her release was refused till the time had expired (one month) to allow the captor to appeal. The case has formed unfavourable comparison with that of the "Arabia," a German vessel with a similar cargo, also captured, but released in twelve days. The captor appealed against the non-condemnation of the "Calchas" on the ground that she carried enemy despatches. The ship accordingly could not be released without bail. Though undoubtedly a very hard case, there was just sufficient technical justification for the vessel's detention to make it difficult for His Majesty's Government to accede to the request of the owners and demand its unconditional release. From reports received by the owners from the captain, it is believed that the Russian authorities really wished to purchase the vessel at their own price to convert her into a transport. Bail was, however, ultimately accepted by the Russian Government and the vessel released. Appeals were lodged with regard to the condemned cargo of flour. These appeals, together with that in the case of the ship, were heard before the Supreme Admiralty Council at St. Petersburg.

The vessel was released on appeal (May 1905), but her arrest and detention were justified by Court. The flour was freed, but the cotton and timber confiscated, the former on the ground that Japanese gun-cotton works existed in the neighbourhood of the port of consignment. The owners notified to the Foreign Office that a claim for compensation would be presented. The value of the shipment of flour was recovered by its owners. A claim of Mr. P. G. McKinnon, in respect of some minting machinery, has been presented to the Russian Government, but has been returned within the last few days with an intimation that he should present a petition "to the competent Prize Court" (see Sir C. Hardinge's No. 107, Treaty, August 21, 1905). The owners of the vessel

have formulated a claim for detention amounting to 24,421*l.* 15*s.* 6*d.* with interest at the rate of 4 per cent. per annum until payment. It has been examined, and Sir Charles Hardinge was about to be instructed to present it to the Russian Government. In consequence, however, of the views set out in his despatch No. 106, Treaty, of the 12th August (see "Oldhamia" case) action has for the moment been suspended.

It will be observed that Sir Charles Hardinge expresses the opinion that if he does present the claim, the Russian Government will be certain to reply that it must be pursued in a Prize Court. On the other hand, the same considerations are present in this case as in that of the "Allanton," that is to say, the Vladivostock Prize Court is not available, and the Russian Government have not designated any other Court as the one in which such claims should be brought, and as the Supreme Court have held the seizure to be justifiable, there is little hope of a Port Prize Court entertaining the claim.

The judgment of the Vladivostock Prize Court as well as that of the Supreme Court, a Memorandum on the early history of the case of the "Calchas," to which is attached certain public statements by His Majesty's Ministers, and the more recent papers, including the claim on behalf of Mr. Mackinnon, will be found in Packet (D).

The "Cilurnum."

This vessel, the property of a Newcastle ship-owner, was proceeding from Shanghai to Kobé in June last with a cargo of beans, cotton, and antimony. She was stopped by the Russian cruiser "Rion" (formerly the Volunteer fleet ship "Smolensk") on the 3rd June, 1905, and the captain of the latter vessel threw overboard, for the purposes of destruction, such cargo on board the "Cilurnum," as he considered to be contraband, viz., 130 bales of cotton.

The papers are annexed (Packet E), and especial attention is drawn to Sir C. Hardinge's despatch No. 100 of the 8th August and the Minutes thereon. It will be noticed that by sending the papers to the President of the Libau Prize Court, the Russian Government must hold a *prima facie* opinion that the Port Prize Court at that place is competent to deal with it.

The "Hipsang."

This case has already been before you on a previous occasion. The vessel was the property of the Indo-China Steam Navigation Company, and was shelled, torpedoed, and sunk by the Russian destroyer No. 7 on the 16th July, 1904.

His Majesty's Government instructed Sir C. Hardinge on the 16th August, 1904, to call the attention of the Russian Government to a statement of the circumstances attending the sinking of the vessel, which had been furnished by the Indo-China Steam Navigation Company, and to inform them that, in the event of the telegraphic account being confirmed, His Majesty's Government could only regard her destruction as an act which was wholly unwarranted by the circumstances, and would submit such claims as might seem proper in due course. A claim for 47,679*l.* was accordingly presented to the Russian Government on the 12th March, 1905, and was referred by the latter to a Special Commission.

The Russian Commission decided that the case was one for a Prize Court (Vladivostock), and returned all the papers to His Majesty's Ambassador on the 31st May, 1905. His Majesty's Government contended that it was not a case for a Prize Court—there being no charge whatever against the vessel—and proposed to send back all the papers to the Russian Government and request the settlement of the claim. The Law Officers were consulted, and concurred, and a despatch was sent to Sir C. Hardinge on the 11th July, who has since again presented the claim with an expression of the views of His Majesty's Government. The last note which Sir C. Hardinge addressed to the Russian Government will be found in his Excellency's despatch No. 86, Treaty, of the 16th July. The Russian Government, as will be seen from Sir C. Hardinge's telegram of the 10th August and from his despatch No. 104 of the same date, are in no wise convinced by the arguments advanced by His Majesty's Government, and maintain that the matter must be brought before a Prize Court. The papers referred to above are inclosed (Packet F). Sir C. Hardinge has throughout held the view that this case, unlike others, was entirely one for settlement between the two Governments.

The "Oldhamia."

The managing owners of this vessel are Messrs. Sivewright, Bacon, and Co., of Manchester. The vessel was bound from New York to Hong Kong with a cargo of case oil, shipped by the Standard Oil Company of America. The cargo was, however, destined for Japanese ports, at which it was to be discharged *en route*.

The vessel was seized by the Russian cruiser "Oleg" on the 18th May; all the officers and the whole of the crew were transferred to Russian ships, and a prize crew took entire possession of the vessel, which was ordered to Vladivostock, escorted by the converted cruisers "Kuban" and "Terek."

The captain and three men were captured by the Japanese on board the Russian hospital ship "Orel" and released, and the remaining twenty-nine were subsequently landed at Swatow by a coasting steamer to which they had been transferred.

Nothing was heard as to the fate of the vessel until the 20th July, when information was received from His Majesty's Minister at Tôkiô that she had been wrecked off Iterup Island (Kurile Islands) and burnt by the prize crew.

On the 29th July Sir C. Hardinge forwarded a communication from the Russian Government, giving particulars of the transfer of the officers and crew of the "Oldhamia" after her seizure. The communication added that the vessel's papers were on board the Russian cruiser "Oleg," at present interned at Manila.

Lord Lansdowne was advised that the facts contained in the master's statement (see inclosure in Sir C. MacDonald's No. 33, Treaty, June 10, 1905) showed an intention on the part of the Russians to appropriate the vessel immediately and not to take her into port for the purposes of adjudication, and that therefore the claim of the owners could be dealt with diplomatically.

Sir C. Hardinge has reported that arrangements are being made for the claim of the American owners of the cargo to be dealt with in a Prize Court, and he has urged upon the Secretary of State the advisability of making the owners of the vessel put forward their claim in the same way and of declining to present the claim diplomatically until efforts have been made to secure adequate compensation through the Prize Court.

These views were set out in a semi-official letter to the head of the Treaty Department in this Office, and were submitted unofficially to the Solicitor-General, who was disposed to agree with Sir Charles Hardinge.

A further despatch has now been received (No. 106, Treaty, of the 12th August), in which the view is again most strongly pressed that His Majesty's Government would not be well-advised to deal with this case at present through the diplomatic channel.

The papers above referred to are inclosed in packet (G).

The "St. Kilda" and the "Ikhona."

The "St. Kilda," the property of Messrs. Rankin, Gilmour, and Co., was bound from Hong Kong to Japanese ports with a cargo of sugar, rice (38,000 bags), rape cake, copra, cotton, and other general merchandize; she was sunk by the "Dnieper" (late "Petersbourg") in the China Sea about the 5th June, 1905. The Chinese crew and mails were transferred to the Dutch steamer "Flores" and landed at Singapore. The European officers and engineers were detained on board the "Dnieper" until her arrival at Port Saïd, when they were handed over to the Senior British Naval Officer.

The claim of the owners of the vessel has been received and amounts to 36,950*l.*, and those on behalf of the charterers, the native crew, and the shippers amount to about 23,000*l.*

Messrs. Parker, Garrett, and Co. have notified that the claim in respect of the cargo is being prepared, and they were told on the 25th July that it will be supported by His Majesty's Government.

It was proposed to send in the owners' claim at once without waiting for those in respect of the cargo, which would have formed the subject of a further claim.

From later information received from Hong Kong and Singapore, through the Colonial Office on the 14th July, it appears that the commander of the "Dnieper," in handing over mails (seventy-eight bags and one case of mails) to the Dutch steamer "Flores" (which landed them at Singapore, whence they were returned to Hong Kong), stated that they were unaccompanied by any documents (*i.e.*, waybill, &c.), and that seventy-three bags and one case had been examined and resealed.

We have now learnt (31st July) from the Colonial Office, whom we asked to make inquiries on the 26th July, that in one of these bags was a registered letter addressed to the Japanese Foreign Office from Hong Kong, which has been abstracted by the commander of the "Dnieper," and is presumably now in the possession of the Russian Government.

The "Ikhona" is the property of the British-India Steam Navigation Company, and was bound to Yokohama with rice and mails from Rangoon. She was sunk while on the voyage by the Russian auxiliary cruiser "Terek" (late the "Columbia," of the Hamburg-American Line) on the 5th June, 1905. This cruiser is now interned at Batavia. The officers and crew of the "Ikhona" were landed at Singapore from the Dutch steamer "Perlak," to which they had been transferred.

No claim has as yet been received, but the owners have given notice that one will be put forward, and Messrs. Waltons, Johnson, and Co. stated on the 30th June that the Insurance Companies interested in the cargo would also make a claim, and were told on the 5th July that it should be sent to the Foreign Office for examination.

On the 16th and 26th June telegraphic instructions were addressed to Sir C. Hardinge respecting the cases of the "St. Kilda" and "Ikhona" respectively. In the first message his Excellency was instructed to point out the irritation which the sinking of the "St. Kilda" had produced in this country, and that this act was in direct contravention of the specific assurances given by Count Lamsdorff in August 1904 that no more neutral vessels would be sunk. His Majesty's Government expressed the hope that the Russian Government would share their regret at the incident, would disavow the action of the "Dnieper," undertake to provide compensation and to secure British shipping against such treatment in the future, and further asked that the Russian Commander should be instructed, on his arrival at Port Saïd, to hand over the officers of the "St. Kilda," and to tender suitable expressions of regret and an assurance that no further acts of the kind would be committed by his vessel. His Majesty's Government further offered to send cruisers to deliver the message.

In the second message Sir C. Hardinge was instructed to impress upon Count Lamsdorff the urgent necessity of dealing promptly with the case of the "Ikhona" on the lines indicated in respect of the "St. Kilda," and to say that, in the opinion of His Majesty's Government, the sinking of the "Ikhona" greatly aggravated the serious situation already created.

On the 28th June Sir C. Hardinge reported that he had discussed the whole question of the sinking of these two ships with Count Lamsdorff. The latter pleaded that the whole matter rested with the Ministry of Marine, the Ministry for Foreign Affairs merely acting as a channel of communication. He also informed Sir C. Hardinge that it was evident that Admiral Rojdestvensky had, on his arrival in the Far East, given his cruisers fresh instructions, cancelling those of last year, and promised to make inquiries on this point. These inquiries have, up to the present, led to no result.

Meanwhile, the Russian Government accepted the offer of His Majesty's Government to deliver instructions to the "Dnieper," as well as to the "Rion," "Kuban," and "Terek," to abstain from further hostile acts against British shipping, and promised to themselves send the instructions to these vessels as soon as located. His Majesty's ship "Perseus" has duly delivered the instructions to the three first-named ships at Jibuti, while the "Terek" received them through His Majesty's Consul at Batavia on her arrival at that port, where she is now interned.

On the 10th July, after reference to you and with your concurrence, a despatch was sent to Sir C. Hardinge setting out very fully the circumstances of the two cases, and intimating that claims would be presented by His Majesty's Government on behalf of the parties interested as soon as formulated, *quite irrespective of any decision arrived at by a Prize Court*. The words underlined were embodied in the despatch in consequence of a statement made by Count Lamsdorff in the conversation above referred to that any undertaking to provide compensation, without a decision to that effect having been rendered by a Prize Court, would prove the chief stumbling-block to the acceptance of the demands of His Majesty's Government.

A copy of these instructions, together with a despatch from Sir C. Hardinge dated the 22nd July, will be found in packet (H).

* Printed in italics.



Lord Lansdowne, speaking in the House of Lords on the 31st July with reference to these two cases, made use of the following words:—

"We have intimated that these claims will be pressed irrespective of the decision of the Russian Prize Court," though his Lordship had on the 13th July, in replying to Lord Muskerry's question as to the position of the shipping claims against the Russian Government, stated that: "It is essential in these cases the claimants should exhaust their legal remedies"; and the possible effect of these speeches is one of the circumstances that must be taken into account in determining how these claims shall be dealt with.

Sir C. Hardinge has, however, urged that in these cases also it would be desirable that Prize Court proceedings should take place, and states that there is some reason to hope that a satisfactory verdict would be obtained.

As reference is made in Sir C. Hardinge's despatch No. 106, and in his private letter, to the case of the "Knight Commander," it may be desirable to state that this vessel was sunk by the Russians about the 24th July, 1904, after she had been seized. Her papers were brought to Vladivostok, and the Prize Court decided that the sinking of the vessel was regular, as the Russian Regulations provide for sinking a prize if there are difficulties in the way of taking the ship to a Prize Court for adjudication.

A strong protest was addressed by His Majesty's Government to the Russian Government; and Count Lamsdorff was informed that full compensation would be claimed by the Secretary of State on behalf of the owners, quite irrespective of any decision that might be given in the Prize Courts.

The owners of the vessel, however, were encouraged privately to appeal against the Prize Court decision at Vladivostok in order that His Majesty's Government might not be exposed to the risk of an answer from the Russian Government that the parties were satisfied with the decision that the sinking of the vessel was justifiable, and had not troubled to appeal. (See pp. 33, 34, 95-99 of the "Knight Commander" print, packet (I)).

The decision of the Prize Court at Vladivostok was dated the 8th August, 1904; the appeal from that decision has not yet been decided, but the claim of the owners of the ship and cargo was presented to Count Lamsdorff on the 2nd March, 1905; apparently the Russian Government do not intend to consider it until after the appeal of the parties has been disposed of.

It may be mentioned that the claims of the owners of the "Ardova" for the detention of that vessel in the Red Sea in July 1904 by the Volunteer fleet vessel "Petersburgh" was presented to the Russian Government through the diplomatic channel on the 14th January, 1905, as a result of which a Commission was appointed to examine the claim at St. Petersburg. The Russian Government have made no demand in this case that the matter should be dealt with in a Prize Court, and by a note dated the 25th July, 1905, Count Lamsdorff informed Sir C. Hardinge that the Commission had come to a decision favourable in principle to the owner's claim, but raised certain questions as to the details, which are still under consideration.

It will be seen from the foregoing that His Majesty's Government are confronted with problems involving very weighty considerations both of law and policy. It is estimated that the claims against the Russian Government arising out of seizures, detentions, and destructions of British vessels during the war—some of which it is not necessary to include in the present reference—amount in the aggregate to between 300,000*l.* and 400,000*l.*

It is true that as a general principle every legal remedy should be exhausted before official aid can properly be invoked in ordinary cases; but the circumstances of many of the cases referred to above, especially that of the "Hipsang," are not of an ordinary character, and it has been shown how little prospect there is in the cases of the "Allanton" and "Calchas" of a Russian Prize Court of First Instance entertaining claims for compensation when the Supreme Admiralty Council have, on appeal, held that the seizures were justifiable; it is also not improbable that even if these cases eventually came before the Supreme Admiralty Council the result would be equally unsatisfactory. It is possible that in the end all these cases may have to be referred to arbitration, as Count Lamsdorff has more than once hinted, but no question of this kind arises at present.

I am, therefore, to request that you will take these questions into your considera-

tion, and that you will favour Lord Lansdowne with your opinion at your early convenience on the following points:—

1. The "Allanton": (a.) Whether the claim of the owners should be presented through the diplomatic channel, or whether the owners should be informed that they must initiate proceedings in a Prize Court;

(b.) If you consider that the claim should be presented diplomatically, whether you approve the draft note contained in Sir C. Hardinge's No. 103, Treaty, of the 9th August, and what further or other arguments you consider might be employed with advantage;

(c.) Whether the claim on behalf of the officers and crew comes within Article 88 of the Russian Prize Court Regulations;

(d.) Whether the claim on behalf of the officers and crew should be presented through the diplomatic channel, and if so, on what ground.

2. The "Calchas": Whether the claim of the (a) owners and (b) Mr. McKinnon should be presented diplomatically, or whether the parties should be informed that they must commence proceedings in a Prize Court.

3. "Cilurnum": Whether the owners of the jettisoned cargo of this vessel should be told to institute proceedings before the Prize Court at Libau, to which the papers have been forwarded, or whether the claim should be presented diplomatically.

4. "Hipsang": Whether the claim of the owners should for the third time be presented to the Russian Government, and, if so, what arguments you consider should be employed to meet the Russian contentions.

5. Whether the claims in connection with the "Oldhamia," "St. Kilda," and "Tkhona" should be brought before the Prize Court, or presented through the diplomatic channel.

6. Lord Lansdowne would also be glad to receive any observations of a general nature you may be good enough to offer on the subjects dealt with in this reference.

I have, &c.
(Signed) F. H. VILLIERS.

List of Papers.

(A.) Russian Naval Prize Regulations.

(B.) "Allanton" Case.

Judgment of Vladivostok Prize Court	[Conf. 8637, p. 97].		
Judgment of Supreme Admiralty Court of Appeal	[Conf. 8637, p. 163].		
Sir C. Hardinge	(No. 83. Treaty)	July	13, 1905.
To ditto	(No. 92. Treaty)	July	31, "
Sir C. Hardinge	(No. 91. Treaty)	July	22, "
Ditto	(No. 52. Treaty. Telegraphic)	August	4, "
To ditto	(No. 60. Treaty. Telegraphic)	August	9, "
Sir C. Hardinge	(No. 103. Treaty)	August	9, "

(C.) Claims of Crew, &c., of "Allanton."

Mr. Leonard Tubbs	.. .. .	April	11, 1905.
To ditto	.. .. .	April	19, "
Mr. Constantine	.. .. .	April	21, "
To ditto	.. .. .	April	29, "
House of Commons (Q. and A.), Mr. Robson	.. .. .	June	27, "
Ditto Mr. Nannetti	.. .. .	July	31, "
Mr. Tubbs	.. .. .	August	3, "
Merchant Service Guild	.. .. .	August	3, "
Memorandum by Mr. Hurst	.. .. .	August	10, "

(D.) "Calchas Case."

Memorandum by Mr. Maycock	} See Conf. 8635, pp. 57, 109, and 211.
Judgment of Vladivostok Prize Court	
Judgment of Supreme Admiralty Court of Appeal	

(Do.) Mr. Mackinnon's Claim.

Messrs. Lowless and Co.	.. .. .	June	1, 1905.
To Sir C. Hardinge	.. .. .	(No. 79. Treaty)	July 7, "
Sir C. Hardinge	.. .. .	(No. 107. Treaty)	August 21, "

(E.) "Cilurnum" Case.

Lloyd's	June 7, 1905.
Mr. Elliott	June 8, "
To Sir C. Hardinge	(Telegraphic) June 9, "
Sir C. Hardinge	(Telegraphic) June 22, "
Mr. Elliott	June 22, "
Sir C. Hardinge	(No. 85) July 15, "
To Sir C. Hardinge	(Telegraphic) July 20, "
Sir C. Hardinge	(No. 87) July 21, "
Ditto	(No. 100) August 8, "

(F.) "Hipsang" Case.

Sir C. Hardinge	(No. 86. Treaty) July 16, 1905.
Ditto	(Telegraphic) August 10, "
Ditto	(No. 104. Treaty) August 10, "

(G.) "Oldhamia" Case.

Sir C. MacDonald	(No. 33. Treaty) June 10, 1905.
Sir C. Hardinge	(No. 92. Treaty) July 25, "
Ditto	(Telegraphic) August 8, "
To Sir C. Hardinge	(No. 96) August 8, "
Ditto	(No. 97) August 8, "
Sir C. Hardinge to Mr. Maycock (with letter from Solicitor-General and Minutes)	August 8, "
Sir C. Hardinge	(No. 106) August 12, "

(H.) "St. Kilda" and "Ikhona" Cases.

2 Nos. of Hansard's Debates.	
To Sir C. Hardinge	(No. 81. Treaty) July 10, 1905.
Sir C. Hardinge	(No. 90. Treaty) July 22, "

(I.) Printed Correspondence respecting the Case of the "Knight Commander" [Conf. 8631].

Report.

1.—(a.) That we think that the claim of the owners of the "Allanton" should be presented through the diplomatic channel.

Any proceedings in the Prize Court in respect of this claim would, in our opinion, be futile, in view of the finding of the Supreme Court that the seizure was justifiable. The detention consequent upon the erroneous decision of the Prize Court at Vladivostok does not afford a basis for any legal claim which could be enforced by any further proceedings.

(b.) We do not think that this claim can be put forward diplomatically as a matter of right, but as it is clear that there was a miscarriage in the Vladivostok Prize Court, we think that there is a strong claim for equitable consideration. Beyond this we are unable to suggest any arguments in addition to those used in the draft note contained in Sir C. Hardinge's despatch No. 103, Treaty, of the 10th August.

(c.) We do not think that the claim on behalf of the officers and crew comes within Article 88 of the Russian Prize Court Regulations.

(d.) This claim does not appear to be a strong one, as some hardship must in cases of this kind be almost always occasioned to the officers and crew concerned. We think, however, that the circumstances may fairly be brought to the notice of the Russian Government, through the diplomatic channel, in connection with the claim in respect of the ship. The facts, as set out in the statements on behalf of the officers and crew, should be briefly stated, in order that the Russian Government may consider the propriety of making some compensation. The prolonged detention appears to have been incidental to the miscarriage in the Vladivostok Prize Court. The removal of some of the men on board the Russian flag-ship would appear to have been improper, and it is alleged that while there they were exposed to unnecessary hardships.

2. Proceedings in a Prize Court in respect of the "Calchas" would appear to be useless, as the Supreme Court has found that the arrest and detention were justifiable.

We think that claims on behalf of the owners and of Mr. MacKinnon may properly be presented diplomatically. There seems to have been great and unnecessary delay, offering a marked contrast to the dispatch used in the case of the "Arabia," and there

appears to be some ground for the suspicion that this delay is not unconnected with the efforts which were being made to induce the owners to sell the ship.

3. We think that, as a matter of policy on which we understand that our opinion is invited, it is probably desirable that the owners of the jettisoned cargo of the "Cilurnum" should be told to institute proceedings before the Prize Court at Libau, to which it is stated the papers have been forwarded. If they succeed in establishing the innocent nature of the cargo, they will obtain compensation on the ground that there was nothing to justify its destruction. There remains the broader ground, that even if the cargo were contraband it could only be brought in for adjudication, and that its destruction at sea entitles the owners to full compensation. We recommend that if it should be decided to advise the owners to take proceedings in the Prize Court, the Russian Government should be informed that His Majesty's Government reserves all rights in respect of the destruction of this cargo at sea, and will insist upon the payment of compensation whatever the result of proceedings in the Prize Court.

If redress is not obtained through the Prize Court, the claim may be pressed diplomatically, and may ultimately, with the other claims in dispute, be referred to arbitration.

4. This again is a question purely of policy. We understand that, in view of the assertion now made by the Russian Government that it was necessary to sink the "Hipsang" owing to her attempt to escape, Sir C. Hardinge has modified the opinion which he is stated, in the despatch under reply, to have held as to the propriety of dealing with this case through the diplomatic channel exclusively.

As the Russian Government now put forward this contention, it is difficult to say that we should refuse to allow it to be disposed of in the ordinary way through the machinery of the Prize Court, and it may be politic to advise the owners to take proceedings, as a finding in their favour on the question of fact would very much facilitate a satisfactory settlement.

We therefore recommend that this course should be taken. We must, however, at the same time observe that no country is bound to acquiesce in the finding of a Prize Court which is manifestly erroneous in point of law or perverse on questions of fact. The circumstances attending the sinking of the "Hipsang" are such that it appears impossible to conclude that she was sunk justifiably in order to prevent an escape.

We think, therefore, that His Majesty's Government should intimate to the Russian Government that all rights are reserved, and that even in the event—which they cannot anticipate—of a decision in the Prize Court that the sinking was justifiable, they would insist upon compensation.

Upon the materials before us the case appears to be a very flagrant one, but proceedings in the Prize Court may provide a way out of the deadlock, and, if properly guarded, need not prejudice the enforcement of the claim through the diplomatic channel.

5. The claims in connection with the "Oldhamia" should certainly be brought before the Prize Court in the first instance. It appears to us to be far from clear that the "Oldhamia" was not being taken into Vladivostok for adjudication when the wreck took place. The Prize Court is the appropriate Tribunal for determining all questions as to the character of the cargo and as to the wreck of the vessel and subsequent destruction of the cargo.

As regards the "St. Kilda" and the "Ikhona," His Majesty's Government would be quite justified in proceeding diplomatically, but it appears to us that, as a matter of policy, it is probably desirable that the course advocated by Sir Charles Hardinge of sending these cases, in the first instance, to the Prize Court should be adopted. The question whether the cargoes in these cases were contraband is independent of the broad principle asserted by His Majesty's Government that whether they were contraband or not, the destruction of the vessel at sea entitles the owners to compensation. If it be decided in the Prize Court that the cargo was innocent, the difficulty will be solved, and compensation will be awarded to the owners.

It is, however, essential, if the owners are asked to take proceedings, that it should be made quite clear to them and to the Russian Government that His Majesty's Government will, irrespective of any finding of the Prize Court, insist upon compensation on the broad ground of principle that the destruction of neutral vessels—without adjudication—entails in every case liability for the damages sustained.

6. We have only to add that if it should be decided, as a matter of policy, to invite the owners to take proceedings in the first instance—the owners in the cases of the "Cilurnum," the "Hipsang," the "St. Kilda," and the "Ikhona," should be informed fully of the grounds which render this course expedient, and that they, and



also the Russian Government, should be told that if it should become necessary ultimately to press for payment through the diplomatic channel the costs incurred by them in these proceedings will be added to their claims.

We do not think that there is in the statement which has been publicly made on behalf of His Majesty's Government, that claims in respect of sunk vessels would be pressed irrespective of the decisions of the Russian Prize Court, anything inconsistent with the policy of having these cases first taken before the Prize Courts. Indeed, on the 31st July, 1905, your Lordship, in answer to a question put by the Earl of Camperdown in the House of Lords, used language clearly indicating that you contemplated proceedings in the Prize Court in such cases (Hansard, vol. cl., 893). What has been said, however, makes it indispensable that the right of His Majesty's Government to enforce these claims should be reserved, and that it should be made clear that they in no way consent to be bound by the decisions of the Prize Court in such cases.

We have, &c.
(Signed) R. B. FINLAY.
EDWARD CARSON.

Law Officers' Department,
November 8, 1905.

SWITZERLAND.

No. 15.

[May 6, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 29, 1905.

Supple-
mentary
Extradition
Convention
with
Switzerland.

I HAVE the honour to transmit to you, by direction of the Marquess of Lansdowne, the draft of an Order in Council, carrying into effect a Supplementary Convention between the United Kingdom and Switzerland, which was signed at London on the 29th June, 1904, and of which the Ratifications were exchanged at London on the 29th March, 1905, amending Article XVIII of the Extradition Treaty of the 26th November, 1880.

I am to inclose the accompanying letters from the Home, Colonial, and India Offices, expressing concurrence in the terms of the draft Order in Council; and I have the honour to request that you will favour Lord Lansdowne with your opinion as to whether it may, in its present form, be laid before the King in Council for His Majesty's approval.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

Draft Order in Council ..	..	..	..	April 7, 1905.
Home Office ..	..	..	..	April 11, 1905.
Colonial Office ..	..	..	..	April 26, 1905.
India Office ..	..	..	..	

Report.

In our opinion the draft Order in Council, as initialled by us, may properly be submitted for the approval of His Majesty.

(Signed) R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice,
May 6, 1905.

Annex.

WHEREAS by the Extradition Acts, 1870 to 1895, it was amongst other things enacted that, where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, His Majesty may, by Order in Council, direct that the said Acts shall apply in the case of such foreign State; and that His Majesty may, by the same or any subsequent Order, limit the operation of the Order, and restrict the same to fugitive criminals who are in or suspected of being in the part of His Majesty's dominions specified in the Order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient;

And whereas a Treaty was concluded on the 26th day of November, 1880, between Her late Majesty Queen Victoria and the Swiss Federal Council, for the mutual extradition of fugitive criminals, in the case of which Treaty the Extradition Acts of 1870 and 1873 were applied by Order in Council of the 18th May, 1881;

And whereas a Supplementary Convention was concluded on the 29th day of June, 1904, between His Majesty and the Federal Council of the Swiss Confederation, amending Article XVIII of the said Treaty of the 26th November, 1880, for the mutual extradition of fugitive criminals, which Supplementary Convention is in the terms following:—

[For text see Treaty Series, No. 16, 1905 (Library No. 1194).]

And whereas the ratifications of the said Supplementary Convention were exchanged at London on the 29th day of March, 1905;

Now, therefore, His Majesty, by and with the advice of His Privy Council, and in virtue of the authority committed to him by the said recited Acts, doth order, and it is hereby ordered, that from and after the day of 1905, the said Acts shall apply in the case of Switzerland, under and in accordance with the said Treaty, as amended by the said Supplementary Convention above set forth.

Provided always that the operation of the said Acts shall be and remain suspended within the Dominion of Canada so long as an Act of the Parliament of Canada passed in 1886, and entitled "An Act respecting the Extradition of Fugitive Criminals," shall continue in force there, and no longer.

R. B. F.
E. C.

TURKEY.

No. 16.

[February 17, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 16, 1905.

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit to you a letter from the India Office and its inclosures, together with the other papers noted in the accompanying list which relate more particularly to the question of the status in the Ottoman dominions of subjects of the native States in India. The wider question of the status of such persons in foreign countries generally is also discussed.

It will be seen from Inclosure 2 in the India Office letter (Paper C) that Major Newmarch, Political Resident in Turkish Arabia and Consul-General at Bagdad, has recently referred, for the consideration of the Government of India, certain cases arising within his jurisdiction involving questions as to the Courts before which such persons should be tried, the administration of their estates, and generally as to the degree of protection which should be accorded them.

A further despatch from Major Newmarch of the 5th April, 1904 (Paper D), incloses the opinion of the Judge of the Supreme Court at Constantinople on these points.

The views of the Government of India, both on the questions thus raised and also on the wider question of the protection in foreign countries of the subjects of Indian native States, are fully set forth in their letter of the 17th March, 1904 (Paper B).

A note by the Legal Adviser, India Office, of the 13th May, 1904 (Paper E), is also inclosed; while the views and suggestions of the Secretary of State for India in

Status in
Ottoman
Dominions
of Subjects
of Native
States in
India.

* Date to be inserted by Council Office, and to be a date ten days after publication in "London Gazette."



1905

Council are contained in the India Office letter of the 7th July, 1904 (Paper A), which, in forwarding the above correspondence, incloses in addition correspondence which had passed between the Political Resident in Turkish Arabia and the Government of India in 1893-1894 (Paper F), when the matter was previously under consideration.

A Memorandum, which has been drawn up by Mr. Hurst, Assistant Legal Adviser to this Department, is also inclosed (Paper G).

The further papers (H to Q) are those referred to in the foregoing correspondence.

I have the honour to request that you will be good enough to take these papers into your consideration, and that you will favour Lord Lansdowne with your opinion on the following points:—

1. Whether the opinion of your predecessors expressed in their Report of the 8th June, 1893 (Paper H), paragraph 1, bears the interpretation: That the Secretary of State is entitled to extend to British-protected persons abroad the same measure of protection as to British subjects except in so far as the right or power to exercise which protection depends upon a Treaty Agreement or Law which excludes "or cannot be construed as including such protected persons," but that not being British subjects, they are not entitled to such protection as of right;

2. Whether, having regard to the terms of the Capitulations, the Secretary of State has the power to place such persons on the same footing in the Ottoman dominions as British subjects in the matter of protection and jurisdiction;

His Lordship will also be glad to be favoured with any observations of a general nature which you may desire to offer upon the papers now submitted to you.

I am to add that this reference has been submitted to the Secretary of State for India in Council for his observations, and that Mr. Brodrick concurs in its terms.

I have, &c.

(Signed) F. A. CAMPBELL.

List of Papers.

(A.) India Office	July 7, 1904.
(B.) Inclosure 1. Government of India	March 17, "
(C.) Inclosure 2. Major Newmarch	No. 702 November 2, 1903.
	No. 741 November 10, "
	No. 24 January 7, 1904.
	No. 287 April 5, "
(D.) Inclosure 3. Ditto	May 13, "
(E.) Inclosure 4. Legal Adviser, India Office	
(F.) Inclosure 5. Correspondence, 1893-94.	
(G.) Memorandum by Mr. Hurst	November 3, "
(H.) Law Officers' Report [Borneo]	June 8, 1893.
(I.) Foreign Office Circular [Library No. 2343]	July 3, "
(J.) Ottoman Order in Council [Confidential 7171*]	August 8, 1899.
(K.) Treaty with Muscat [Library No. 560]	April 14, 1873.
(L.) Treaty with Siam [Treaty No. 16, 1900. Library No. 1096]	November 29, 1899.
(M.) Treaty with Zanzibar [Africa No. 1 (1887). Library No. 782]	April 30, 1886.
(N.) Foreign Marriages Bill [House of Commons Bill 97 of 1904].	
(O.) Naturalization Act, 1870 [33 & 34 Vict., cap. 14].	
(P.) Capitulations (Ottoman dominions). Hertslet's "State Papers," vol. i, p. 747. [Confidential Library No. 86], 1875.	
(Q.) Law Officers' Report [Turkey]	August 18, 1904.

Report.

1. We do not think that our predecessors in their Report of the 8th June, 1893, laid down that British-protected persons abroad were not entitled as of right to protection, and, in our opinion, British-protected persons are so entitled.

When the whole control of foreign relations has been assumed by His Majesty's Government it appears to us that the duty of protection follows. What measure of protection can be given must depend upon the extent of the jurisdiction enjoyed by His Majesty's Government in the country where the protection is desired. If that jurisdiction is confined to those who are, in the strict technical sense of our municipal law, British subjects, it cannot be exercised in respect of protected persons.

2. We see nothing in the Capitulations to prevent the Secretary of State from placing British-protected persons on the same footing in the Ottoman dominions as British subjects in the matter of protection and jurisdiction, and we think that the

Ottoman Order in Council of 1899, in its definition of "British subject," plainly asserts this right which, so far as we know, has not been disputed by the Porte.

3. We think that the right asserted in the Order in Council to treat protected persons in the Ottoman dominions as on the same footing with British subjects should be adhered to.

(Signed)

R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice,
February 17, 1905.

No. 17.

[April 25, 1905.]

Foreign Office to the Law Officers of the Crown.

Foreign Office, March 16, 1905.

Gentlemen,

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit to you the papers noted in the accompanying list, which relate to applications made by Fatma Hanem, widow of the late Menshawi Pasha, an Ottoman subject, and Rakel, daughter of Helal Sassoon, and widow of the late Elyak Rivan, an Ottoman subject, for readmission to British nationality.

Fatma Hanem and Rakel Rivan: re-admission of to British nationality.

I am to invite your attention to the correspondence and Minutes (Paper G) which passed in 1899 with reference to an application made by Mrs. Abigail Maimaran, widow of Isaac Maimaran, a Moorish subject, for readmission to British nationality. These papers were amongst those submitted to, and discussed by, the inter-Departmental Committee appointed in 1899 to consider difficulties which have arisen with regard to the interpretation of the Naturalization Acts; the Committee, however, considered that the point involved was one relating rather to the law of marriage than to that of nationality, and did not make any recommendation with regard to it.

I am also to draw attention to the Report of the Judicial Adviser to the Egyptian Government for the year 1901 (Paper H), at p. 43 of which reference is made to the case of Fatma Hanem, and at p. 48 of which appear comments by Mr. Mellwraith on the general question of the nationality of a European woman marrying an Ottoman subject.

In the present cases it will be observed that, owing to the non-fulfilment of the conditions of residence prescribed by section 8 of "The Naturalization Act, 1870," by the applicants, no steps can be taken by His Majesty's Secretary of State for the Home Department for the grant of a certificate. The question, however, arises as to whether the marriages contracted by these ladies with Ottoman subjects were of a kind which would be recognized as valid by the English Courts on the ground that they were valid by the *lex loci*; and on the answer to this question depends whether Fatma Harem and Rakel Rivan can, in accordance with section 10 (1) of "The Naturalization Act, 1870," be deemed to be subjects of the State of which their late husbands were subjects, and consequently to have lost their status as British subjects.

I am to request that you will take these papers into your consideration, and that you will be so good as to favour Lord Lansdowne with your opinion as to whether, for the purposes of section 10 (1) of "The Naturalization Act, 1870," the marriage of an Englishwoman must be understood to mean such a marriage alone as is recognized as valid in contemplation of English law, or whether a marriage which, though not *per se* valid in contemplation of English law, is binding according to the *lex loci celebrationis* and the personal law of the husband will satisfy the requirements of the Statute.

I have, &c.

(Signed) F. A. CAMPBELL.



TURKEY.

List of Papers.

(A.) Lord Cromer	(No. 1. Consular.)	January 11, 1905
(B.) To Home Office	"	" 26, "
(C.) Consul-General D. Hay	(No. 1. Treaty.)	" 10, "
(D.) To Home Office	"	" 30, "
(E.) Home Office	"	" 31, "
(F.)	"	February 7, "
(G.) Printed correspondence and Minutes (case of Mrs. Maimaran)*	"	1899.
(H.) Report of Judicial Adviser to the Egyptian Government for the year 1901.†	"	April 26, 1902.
(I.) "Law Journal"	"	"
(J.) "Journal of Society of Comparative Legislation"	"	December 1901.
[Library (octavo) 7654]		

Report.

In our opinion section 10 (1) and (2) of the Naturalization Act refers not merely to marriage such as is contemplated by English law for the purposes of the construction of an English settlement or of jurisdiction of the Divorce Court. These provisions are of general application, and we think that they apply in the case even of polygamous marriages in countries where such marriages are lawful. This would clearly be so if the woman, being a Mohammedan subject of His Majesty or of any Mohammedan Power, contracted a polygamous marriage with a subject of another country in which polygamy is lawful. We do not think that an exception can be made from its provisions in the case of a Christian woman who contracts a polygamous marriage with a foreigner. When the marriage is valid according to the law of the country where it is contracted, we think the woman acquires the nationality as well as the domicile of her husband.

(Signed) R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice,
April 25, 1905.

No. 18

[May 15, 1905.]

The following papers relative to the patrol of the territorial waters of Crete by the public ships of the Patrolling Powers were referred to the Law Officers for their opinion:—

(No. 1.)

Consul-General Howard to the Marquess of Lansdowne.—(Received May 6.)

(No. 2. Treaty.)

My Lord,

Canea, Crete, April 22, 1905.

Importation
of arms into
Crete: pat-
rolling of
coasts.

I HAVE the honour to inform you that Captain Christian, of His Majesty's ship "Juno," upon receipt of instructions on the 18th instant from the Commander-in-chief of the Mediterranean Squadron ordering him to cruise round the Cretan coast and prevent the landing of arms, came to me and asked me upon what authority he could act for this purpose. He requested that the High Commissioner should issue authority to the ships of the four Powers to search suspected vessels in Cretan territorial waters and prevent disembarkation of arms and ammunition.

At a meeting of the Consuls, which was held immediately on the same day to consider the question, it was decided to ask Prince George to issue a letter of authority for the object in view. The doyen of the Consuls, Count Negri, went round at once to the Palace and asked, through His Royal Highness' aide-de-camp, whether the High Commissioner would object to issue this letter of authority. His Royal Highness sent back word that he considered that it was rather for the Powers than for him to give the required authority to their ships.

In view of this reply the Consuls drew up a *procès-verbal*, copy of which I inclose, authorizing the ships to search for arms in the neighbourhood of Cape Spada, that being the place indicated by the Commandant of Gendarmerie as the spot at which arms would probably be disembarked.

Your Lordship will observe that the operations of the ships contemplated in the

* Home Office print.

† In Lord Cromer's No. 55 of April 5, 1902.

TURKEY.

procès-verbal are of a more limited nature than those contemplated in the instructions issued from the Commander-in-chief.

Some of the Commanders of the foreign stationnaires are, I understand, averse to undertaking operations on such a large scale, on the ground that they would appear to be more in the nature of a blockade than of mere police measures within territorial waters, which are all that are required at present.

The question has also been raised whether the authority of the Consuls, failing that of the High Commissioner, is sufficient to warrant the search in Cretan territorial waters of suspected vessels, no matter what flag they may fly.

It seems that vessels suspected of hostile intent in time of peace, under which description those carrying arms for insurgents might be included, may be legally subjected to search in the territorial waters of a State. Therefore, as the stationnaires are the ships of the Protecting Powers of the island, it would appear that the authorization either of the Consuls of these Powers or of the Local Government to search vessels and seize arms and ammunition in territorial waters ought to be legally sufficient. The case, however, being a new one, and the question being also one which might not improbably lead to difficulties with sailing-vessels of foreign Powers, I should be greatly obliged if your Lordship would inform me, at as early a date as possible, how you consider that the search and seizure of arms on the Cretan coast may best be carried out without incurring any risk of violations of international law.

Captain Tupper, of His Majesty's ship "Venus," suggested that it would be as well for ships engaged in this patrol duty to have a few gendarmes on board who could board Greek, Turkish, or Cretan ships, and who could land and arrest persons guilty of infringing the Cretan Law against the carrying of arms. This suggestion was approved by the High Commissioner, the Consuls, and the foreign naval officers, and has, therefore, been put into execution.

I have, &c.
(Signed) ESME HOWARD.

P.S.—My Italian and French colleagues called on me last night, and said that the plan of patrolling operations arranged between Captain Tupper and the foreign naval officers at Suda was more extensive than they thought advisable at present. My French colleague went further, and said that his instructions would not permit his concurrence in such an extended programme on the part of the French stationnaire "Condor." The French, he said, had only one ship at Suda, and he did not consider it well to send her away for too long at a time. They also pointed out to me that this plan of operations was quite different from that contemplated in the *procès-verbal* of the Consuls inclosed in this despatch, which restricts the operations of the vessels to the neighbourhood of Cape Spada.

I pointed out that this was too limited a field of operations, and that I had talked once on the matter to the Commandant of the Gendarmerie, who considered that the coast-line from Rethymo on the north, round the west coast to Sphakia on the south, might all be patrolled with advantage, but I agreed that, beyond this, it appeared for the present useless to go.

To this they consented, and the French Consul-General has telegraphed to his Government for permission for the "Condor" to act within the limits above stated.

E. H.

Inclosure.

Procès-Verbal of Consular Meeting of April 6 (19), 1905.

LES Consuls-Généraux des Puissances Protectrices ont reçu de M. le Commandant de la Gendarmerie Crétoise une lettre en date du 3 (16) Avril leur signalant l'éventualité possible de tentatives de débarquement du côté du Cap Spada d'armes à feu destinées aux insurgés et leur demandant de faire exercer une surveillance dans ces parages par l'un des stationnaires.

Les Consuls-Généraux en ayant référé à Son Altesse Royale le Prince, Haut Commissaire, pour avoir de Son Altesse Royale une approbation confirmative de cette démarche, le Haut Commissaire a bien voulu leur faire connaître à ce sujet qu'à son avis il appartenait aux Puissances Protectrices de pourvoir directement aux mesures tendant au maintien du statut politique de l'île de Crète. En conséquence, les Consuls-Généraux se jugent autorisés à faire droit à la demande qui leur a été adressée par le



1905

Commandant de la Gendarmerie Crétoise et à y donner suite par l'exercice de la surveillance qu'elle peut comporter ; ils sont donc unanimement d'accord pour requérir, aux fins d'assurer cette croisière pendant le laps de temps qui sera nécessaire, leurs stationnaires respectifs, au moyen d'un service de roulement à organiser par entente entre leurs Commandants.

(Signé)

NEGRI.
A. DE BRONIEWSKI.
ESME HOWARD.
L. MAUROUARD.

Xalépa, le 6 (19) Avril, 1905.

Minutes.

So long as the operations are confined to the territorial waters of Crete, I do not think that any questions of difficulty with the non-Protecting Powers are likely to arise ; but of course, directly anything is done to a merchant vessel flying the commercial flag of a non-guaranteeing Power on the high seas, the fat will be in the fire, and a great conflagration may ensue.

Consul-General Howard's despatch does not confine the question in terms, or indeed, at all distinctly, to operations within Cretan territorial waters, but I assume that probably his observations, and also the Admiralty instructions, only contemplate this case, and I am, therefore, in this Minute only dealing with such interference within territorial waters.

I think that His Royal Highness Prince George could not properly give authority or orders to the ships of the Protecting Powers.

The natural course would appear to me to be for the High Commissioner, as the responsible spokesman for the internal Government of Crete, to call the attention of the Protecting Powers to the fact that peace and good order was being seriously imperilled by the illicit introduction of arms, &c., contrary to the laws, Ordinances, or Proclamations of his Government, and to request the Protecting Powers to assist the Government of Crete by policing such parts of the Cretan territorial waters as were specially open to these operations.

It would be neither unnatural nor unprecedented, nor, so far as I can see, in any way objectionable that the Powers should comply with this request, and assist the Government of Crete thereby to maintain the peace and good order which they have guaranteed, but which the Cretan Government is now powerless to maintain without their assistance.

To mention two somewhat analogous instances : we have, at the request of Persia, allowed a gun-boat to police Persian waters, and to seize, on behalf of the Persian Government, arms which were being introduced into Persia with, as was believed, an ultimate destination beyond Persia. We have also acted in a similar manner within the territorial waters of Muscat.

The essential point is that there should be a request on the part of the Sovereign or nominal Ruler, without which, of course, the foreign State would be guilty not only of a violation of the territorial waters, and an offence against the sovereignty of the Ruler, but also of an offence against the State to the nationals of which the merchant vessel which was interfered with belonged, for the public ship of the foreign State would, in this case, be acting entirely without authority from any person who was entitled to confer it.

Possibly, as this is a very important question, Lord Lansdowne would like the Law Officers to see the papers before any instructions are given to Mr. Howard. I have written rather a long Minute in anticipation of that course being followed, and for the purpose of saving time if it be followed.

Unless the Protecting Powers were prepared to recognize the insurgents as belligerents (which I assume that they are not prepared to do), it would, I think, be very unwise to take any measures outside Cretan waters.

W. E. D.

Foreign Office, May 9, 1905.

(No. 2.)

Consul-General Howard to the Marquess of Lansdowne.—(Received May 19.)

(No. 3. Treaty.)
My Lord,

Canea, Crete, May 13, 1905.

WITH reference to your Lordship's telegram No. 45 of the 10th instant, requesting me to send home by post copies of Cretan movement Ordinances, Proclamations, &c., regarding customs control, importation of arms, right of search and seizure within territorial waters, I have the honour to report to your Lordship that there have never been any Ordinances or Proclamations issued by the present Cretan Government on the subject, the only document ever published referring to the importation of arms in Crete was a Circular addressed to the Customs authorities ; but it has been impossible for me to obtain a copy of it, and it seems to have been lost by the authorities to whom it was addressed. However, the Director of the Customs at Canea informed me that the Circular in question contained the following paragraph :—

"If the importers of arms are merchants, they must obtain a written declaration from the Prefect of the town ; if, on the other hand, they are simply private persons, they must have a permission for carrying arms."

With regard to the right of search, the Customs Law, copy of which I have the honour to inclose, deals with the matter on p. 44.

The right of seizure is likewise treated in the Customs Law, Chapter XII, p. 54.

I have, &c.

(Signed) ESME HOWARD.

Inclosure.

Extract from Chapter IX of the Customs Laws of Crete.

ARTICLE 101. La visite d'un bateau battant pavillon étranger se fait, après que les autorités Consulaires respectives auront été avisées, en compagnie du drogman ou d'un autre employé Consulaire.

Article 102. Les Capitaines ou Commandants des bateaux sont obligés de montrer les marchandises aux commis des douanes qui font la visite, à leur ouvrir les endroits fermés du navire et à faire toutes facilités pour l'exécution du service de ces derniers. Si une contravention de la Loi est constatée, procès-verbal en est dressé, signé par les commis de la douane et le Capitaine ou le Commandant. A son refus, mention en est faite au procès-verbal. Si aucune infraction n'a été constatée, il n'est pas dressé de procès-verbal.

Minute.

I am afraid that the "Loi Douanière" does not help us much, nor does anything contained in this despatch either.

It seems to me still, as I have said on a previous occasion, that Prince George of Greece cannot give orders to the British Senior Naval Officer direct.

This, as I understand it, was His Royal Highness' own view when the doyen of the Consular Body (Count Negri) made application to him on the subject.

The proper course would seem to me to be that Prince George, as the mandatory of the Powers, should request the Powers to aid him in preserving the peace and good order of the island by patrolling the territorial waters against the introduction of arms and ammunition—a matter which he is personally powerless to carry out himself, as His Royal Highness has no sufficient naval force at his disposal.

It is then for the Powers, having accepted the appeal thus made to them, to give the requisite orders to their respective naval officers accordingly.

W. E. D.

Foreign Office, May 19, 1905.

L.



1905

46

TURKEY.

Report by the Law Officers.

The only point for our opinion arising upon these papers is as to the patrolling of the waters round Crete for the purpose of preventing the importation of arms.

As no state of belligerency has been recognized, it is not possible to proclaim a blockade in the proper sense of the term. And the attempt to enforce what is called a pacific blockade might give rise to serious difficulties with other Powers.

It appears to us that the operations must be confined to the territorial waters, and must be carried out under the authority of the territorial Sovereign. It seems to be assumed in the papers that the right to exercise territorial sovereignty is vested in Prince George as High Commissioner; so, if this be so, the Powers would be justified, with his consent, in directing their vessels to prevent within territorial waters any attempt to bring arms for debarkation in Crete, and such measures might be taken against the offenders as the local law permits.

R. B. F.
E. C.

House of Commons, May 15, 1905.

Minute.

I am not sure that the 'patrolling' of the waters round Crete would be strictly confined to the actual territorial waters unless strict and clear injunctions to that effect were given to the naval officers responsible, and I therefore thought it best to raise the question in my Minute.

The Law Officers agree with the views therein expressed, and, if Lord Lansdowne approves, I think they may now safely serve as a basis for such further instructions as it may be considered advisable to issue.

W. E. D.

Foreign Office, May 15, 1905.

No. 19.

[July 8, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, May 30, 1905.

I AM directed by the Marquess of Lansdowne to transmit to you the accompanying proof of an amending Order in Council for the Ottoman Dominions, drafted by Mr. A. Gray, and providing for—

1. The appointment of a Crown Prosecutor in Egypt;
2. The employment of interpreters, when necessary, for the interpretation of evidence;
3. Allowances to prosecutors and witnesses;
4. Penalties for unduly delaying to obtain probate.

The correspondence which led to the drafting of this amending Order is inclosed herewith, for your information, together with a copy of the original Order in Council—"The Ottoman Order in Council, 1899."

The draft amending Order in Council has received, in so far as its provisions concern that Department, the approval of the Lords Commissioners of His Majesty's Treasury, and I am to request that you will take it and the accompanying correspondence into your consideration, and will be good enough to inform Lord Lansdowne whether it may, in your opinion, be properly submitted to the King in Council for His Majesty's approval.

I have, &c.
(Signed) E. GORST.

Draft Ottoman amending Order in Council.

TURKEY.

47

List of Papers.

Ottoman Order in Council, 1899 [Conf. 7171*].
Correspondence, in original, relating to proposed amending Order.
Draft amending Order in Council (revise of April 27, 1905).

Report.

In our opinion, the draft Order in Council initialled by us may properly be submitted to the King in Council for His Majesty's approval.

(Signed) R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice,
July 8, 1905.

Annex.

OTTOMAN DOMINIONS.

Draft Order in Council.

WHEREAS by Treaty, capitulation, grant, usage, sufferance, and other lawful means, His Majesty the King has jurisdiction within the dominions of the Ottoman Porte;

And whereas it is expedient to amend "The Ottoman Order in Council, 1899" (hereinafter referred to as "The Principal Order");

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise, in His Majesty vested, is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, as follows:—

1. Article 49 of the Principal Order is hereby repealed, and the following provisions are substituted in lieu thereof, that is to say:

"Subject to Rules of Court made under this Order, the Court may, out of any moneys in its hands arising from fees of Court or other fees, or moneys received under the Principal Order, or this Order, order payment of allowances in respect of their reasonable expenses to any complainant or witnesses attending before the Court on the trial of any criminal case with a jury or assessors (including the preliminary examination of the accused antecedent thereto), and also fees and costs to legal practitioners and allowances to jurors, assessors, interpreters, medical practitioners, and other persons in respect of services rendered in criminal cases.

"Subject as aforesaid, where on the conclusion of a preliminary examination the accused is discharged, the Court may, for special reasons to be recorded in the Minutes, order payment of the like allowances as are above mentioned to any complainant or witnesses attending before the Court at the preliminary examination."

2. Article 136 of the Principal Order shall extend to authorize the Supreme Court by Rules of Court to prescribe a scale of allowances for the purposes of Article 1 of this Order.

3. Article 136 of the Principal Order shall further extend to authorize the Supreme Court by Rules of Court to prescribe the fees to be taken in respect of proceedings in or by any Consular Court in relation to cases in Ottoman Tribunals to which any British subject may be a party.

4. The powers of the Ambassador under Article 163 of the Principal Order shall with respect to King's Regulations, in so far as they extend to Egypt, be exercised by the Agent for Egypt.

5. The Secretary of State may from time to time appoint a competent person to act as Crown Prosecutor in Egypt, on such terms of remuneration as may be approved by the Treasury.

6. (i.) The Crown Prosecutor shall have such powers and shall perform such duties with respect to the commencement and prosecution of criminal proceedings, including preliminary examinations and trials, and also the framing and alteration (before trial) of charges, as may be prescribed by Rules of Court.

(ii.) Except so far as the Crown Prosecutor, under Rules of Court, may be required to intervene, or may exercise any discretionary power of intervention, in any criminal proceedings this Article shall not affect the duties or powers of a private prosecutor.

(iii.) Subject to Rules of Court, the Crown Prosecutor shall act in accordance with any instructions of the Secretary of State.

7. Article 115 of the Principal Order is hereby repealed, and the following provisions are substituted in lieu thereof, that is to say:—

"If any person named executor in a will takes possession of, and administers or otherwise deals with any part of the property of the deceased, and does not obtain probate within one



month after the death or after the termination of any proceedings respecting probate or administration, he shall be liable to pay double the amount of any fees chargeable on obtaining probate, and he shall also be liable to a fine not exceeding 100l."

8. This Order may be cited as "The Ottoman Order in Council, 1905."
And the Most Honourable the Marquess of Lansdowne, K.G., one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein.

R. B. F.
E. C.

No. 20.

[October 14, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 26, 1905.

I HAVE the honour, by direction of the Marquess of Lansdowne, to inclose, for your consideration, the papers noted in the accompanying List respecting the national status of children born in the Ottoman dominions of naturalized British subjects.

The first case is set out in a despatch from Mr. Drummond Hay, His Majesty's Consul-General at Beyrout, inclosing a petition from two persons named Kalim and Zaim Salamony, born in Syria in 1875 and 1877 respectively, that they may be registered as British subjects. They are the sons of one Anthony H. Salamony, who was naturalized in this country, in 1868, under the Act of 1844, and was not re-naturalized under section 7 of "The Naturalization Act, 1870." It will be seen, from the opinion of the Law Officers of the 13th May, 1884, of which a copy is inclosed, that section 10 (5) of the Act of 1870 cannot be deemed to have a retroactive effect, and, in pursuance of this opinion, it has hitherto been the practice not to regard children born abroad, in these circumstances, as British subjects. There have been several departmental decisions to that effect.

The second case is an application from a Mr. Knechtel, of Austrian origin, who was naturalized in London in 1900, that the birth of his daughter may be included in the Consular register of births of British subjects born at Constantinople. It is one of those cases which are referred to in paragraphs 53-56 of the Report of the recent Departmental Committee on Naturalization, of which a copy is inclosed, and, had the case arisen in a foreign State other than one in which His Majesty exercises extra-territorial jurisdiction, it is clear that the child could not be deemed to be a naturalized British subject.

The question, however, arises whether, having regard to the opinion expressed in your Report of the 18th August, 1904, of which a copy is inclosed, the provisions of the Naturalization Acts above cited have any application to these two cases and to others of a similar kind, which may hereafter arise in countries where the King exercises extra-territorial jurisdiction.

You stated, in your Report of that date, that the Acts of 1730 and 1773 had no application to the persons whose status was then under discussion, and held that they were British subjects at common law, as they were born within the King's allegiance and not under the legiance of another Sovereign.

The reasoning you there adopted appears to cover the cases mentioned in the papers inclosed herewith, as the individuals referred to were born to British subjects, and are individuals to whose allegiance the Porte appears to make no claim.

The status of the issue of naturalized persons was not, however, under consideration at the time when that Report was given, and Lord Lansdowne desires to have your opinion before applying it to the present cases.

I have accordingly to request that you will take these papers and circumstances into your consideration, and that you will favour Lord Lansdowne with your opinion—

(a.) As to whether the petition of Messrs. Kalim and Zaim Salamony to be registered as British subjects at Beyrout can properly be entertained; and

(b.) Whether His Majesty's Consul at Constantinople should be authorized to include the name of Mr. Knechtel's infant daughter in the register of births of British subjects at Constantinople.

Status of
children of
naturalized
British
subjects:
Cases of
Salamony
and
Knechtel.

His Lordship would further be glad to receive any observations of a general character which you may have to offer as to the treatment of similar cases which may arise in countries where His Majesty exercises extra-territorial jurisdiction other than the Ottoman dominions.

I have, &c.
(Signed) F. H. VILLIERS.

List of Papers.

(A.) Mr. Drummond Hay	..	(No. 3, Treaty)	July 18, 1905.
(B.) Mr. Knechtel	..	..	August 1, ..
(C.) Law Officers [Confidential Print 7333, p. 80]	..	..	May 13, 1884.
(D.) Law Officers [Confidential 8498, p. 152]	..	..	August 18, 1904.
(E.) Naturalization Act, 1844 (7 & 8 Vict., c. 66).	..	..	..
(F.) Naturalization Act, 1870 (33 & 34 Vict., c. 14).	..	..	..
(G.) Report of Departmental Committee on Naturalization. [Parliamentary Paper C. 723]	..	..	July 21, 1901.

The Attorney-General's Opinion.

(a.) In my opinion Messrs. Salamony should not be registered.

I agree with the opinion of the Law Officers in 1884, that section 10 (5) of the Act of 1870 does not apply in the case of certificates granted under the Act of 1844. Nor can the claim be supported on the ground that the applicants were born within the allegiance of the British Crown. They were born in Syria, and the certificate held by their father excepted from the grant to him of the rights of a British subject any such rights out of the dominions of the British Crown other than under a passport.

The grounds on which we held, in our Report of the 18th August, 1904, that the children of natural-born British subjects born in Turkey should be considered as born within the allegiance of the British Crown have, therefore, no application to the present case.

I observe, moreover, that the certificate determined in case of absence from the United Kingdom for six months without a licence. The father of the applicants was in Syria from 1875 to 1878, and it is not stated that he had a licence.

There does not appear to have been, in cases such as that of the present applicants, any such well-established practice as existed in the case on which we reported in 1904, and which, in our opinion, would have justified the treatment of the persons in question as British subjects within the meaning of the Capitulations, even if not British subjects for all purposes. This application should therefore be refused.

(b.) I think that the application in the case of Mr. Knechtel's infant daughter should be granted. The father holds a certificate, under the Act of 1870, which is unqualified, and confers on him, according to what, in my opinion, is the true construction of the somewhat clumsy provisions of section 7, the privileges of a British subject everywhere, except in Austria, if he remains an Austrian subject.

The provisions of section 10 (5) have no application to the case of children born within the allegiance of the British Crown. Such children are British subjects at common law, and to read section 10 (5) as depriving such children, when the father is a naturalized British subject, of their status as British subjects, unless they had resided with him in the United Kingdom, would be to put them in a worse position than the children of an alien, who, by the mere fact of birth within the allegiance, are British subjects. The provisions of section 10 (5) apply only to the case of children born out of the allegiance, and confer on them the privilege of naturalization subject to the condition of residence in the United Kingdom with the parent.

In my opinion an alien who has been naturalized under the Act of 1870 stands, for the purposes of the present question, on the same footing with a natural-born British subject. M. Knechtel was never a Turkish subject, and, for the reasons given in our Report of 1904, I think—though the question is, as we there stated, one of difficulty—that his children born in Turkey should be treated as born within the allegiance of the British Crown, and that they are, therefore, entitled to be registered.

I have nothing to add, in the way of general observations, to what I have said above, in giving my reasons for my conclusions.

(Signed) R. B. FINLAY.



1905

50

TURKEY.—UNITED STATES.

The Solicitor-General's Opinion.

(a.) I agree with the opinion of the Attorney-General.
 (b.) In my opinion the infant daughter of Mr. Knechtel is not a British subject. The Act of 1870 does not place the children of a naturalized British subject, in all respects, upon the same footing as those of a natural-born British subject, and, in my opinion, such children, if born in a foreign country over which His Majesty exercises extraterritorial jurisdiction, would not be held to have been born within the allegiance of the British Crown.

Having regard, however, to the opinion of the Attorney-General and the difficulties of the question, I think the safer course would be to accede to the application of Mr. Knechtel.

(Signed) EDWARD CARSON.

Royal Courts of Justice,
 October 14, 1905.

UNITED STATES.

No. 21.

[January 24, 1905.]

Foreign Office to the Law Officers of the Crown.

Supple-
 mentary
 Extradition
 Convention
 with the
 United
 States.
 As to date
 of publica-
 tion.

Gentlemen,

Foreign Office, January 12, 1905.

WITH reference to your report dated the 16th November, 1904, relative to the proposed Supplementary Extradition Convention between this country and the United States, I have the honour, by direction of the Marquess of Lansdowne, to transmit to you the accompanying correspondence with the United States' Ambassador (Papers A and B) with regard to the terms of the last paragraph of Article II of the draft Convention.

It will be seen that, for the reasons mentioned in his note of the 6th instant, Mr. Choate is of opinion that the terms of this paragraph, which were suggested in your report of the 16th November, would, so far at any rate as the United States is concerned, render the Convention nugatory.

A copy of your report of the 16th November, 1904, is also inclosed (Paper C) for convenience of reference.

I have the honour to request that you will take this further correspondence into your consideration, and will favour Lord Lansdowne with your opinion whether any further, and if so what, amendment should be made in the wording of this paragraph in order to meet the objections raised by his Excellency.

I have, &c.

(Signed) F. A. CAMPBELL.

List of Papers.

(A.) To Mr. Choate ..	..	..	..	November 21, 1904.
(B.) Mr. Choate ..	..	..	..	January 6, 1905.
(C.) Law Officers' Report ..	..	..	..	November 16, 1904.

UNITED STATES.

51

Report.

We are unable to follow the reasoning in Mr. Choate's note of the 6th instant. But, although we do not think the form of words proposed by Mr. Choate very happy, the point is not one of any great consequence. So long as it is clearly understood that publication is to be made by this country only when the necessary alteration in the law has been effected, Mr. Choate's formula may be accepted.

(Signed) R. B. FINLAY.
 EDWARD CARSON.

Royal Courts of Justice,
 January 24, 1905.

Annex.

Mr. Choate to the Marquess of Lansdowne.

American Embassy, London, January 6th, 1905.

My Lord,

REFERRING to . . . our conversations since on the subject of the date at which our proposed Treaty adding bribery and offences against Bankruptcy Law shall come into force, I have the honour to say that I did not intend that the formula proposed by me for the last paragraph of Article II of the draft Convention should be ambiguous, and was a little surprised that it was thought to be so.

Perhaps I did not state to you with sufficient clearness what my idea on the subject was, and you will permit me to restate it.

I proposed to have that clause read, "It shall come into force ten days after its publication in conformity with the laws of the High Contracting Parties" &c., exactly as it does in our Convention of 13th December, 1900, which differed from its form in our Convention of 12th July, 1889, wherein it read, "In conformity with the forms prescribed by the laws of the High Contracting Parties," &c.

It seemed to me that, with the clause expressed as I have proposed, as long as there was no law authorizing or approving the Treaty, there could not possibly be any "publication of it in conformity with the law of England." Such a publication of it, without an Act of Parliament authorizing or approving the Treaty, would be contrary to the law of England instead of in conformity with it, and you would have full control of it by simply withholding the publication. I did not intend my expression "as merely referring to publication according to law," so you may possibly be able to reconsider this somewhat minute point.

There is a difficulty in the phraseology of the clause, as indicated in red ink on the draft inclosed in your Lordship's note of 21st November, which I will endeavour to explain. In seeking to meet the objection which I made to your original draft, that it made the Treaty, though the same should be executed, incomplete and a dead letter until a further Agreement should be entered into between the parties, fixing the date when it should come into force, it uses this language:—

"It shall come into force . . . days after the publication of the Treaty by the High Contracting Parties, and such publication shall be made whenever the laws of the High Contracting Parties then in force provide for the granting of extradition in the cases hereinbefore mentioned."

This seems to have been drawn upon the theory that as it will require an Act of Parliament on your part to include bribery and offences against Bankruptcy Law in the list of extraditable crimes, so it will require an Act of Congress on our part to effect the same result. But the Treaty itself, when it comes into force, after its execution under the authority of the President and its ratification by the Senate alone, without the House of Representatives, becomes by the Constitution the supreme law of the land, and will have on our part the desired effect, but until it does come into force it does not become law. Now the clause, as drafted in red, provides that the Treaty shall not come into force until . . . days after publication, and in the same breath that it shall not "be published until after it has come into force," so that it is difficult to see exactly how it could come into force at all. The law of our "Contracting Party providing for the granting of extradition in the cases mentioned" would be the Treaty itself, coming into force by its own terms. The result, then, would be that it would not come into force until . . . days after publication, and publication should not take place until after it had come into force. If I am right in the interpretation of the language proposed, it would create an *impasse*, and the Treaty would not come into force at all.

Should your Lordship still be of opinion, after reconsidering what I have said about the form proposed by me, that it would still leave the matter ambiguous and so be inadmissible, would it not be well, as the approaching Session of Parliament is now so near, to prepare and introduce, at the very beginning of the Session, the necessary Act, adding "bribery" to the



1905

UNITED STATES.

schedules of the existing Acts? I assume that "offences against Bankruptcy Laws" are already included by the Amending Act of 1873, as I see it is one of the enumerated crimes contained in most of your recent extradition Treaties. This might be done without waiting for the Treaty to be signed. Enough that the Act of Parliament shall have included this added crime within the schedule list.

If this were done I cannot help thinking that the Act would, in a few days after the opening of the Session, be finally passed, and this difficulty be put out of our way.

I have, &c.

(Signed)

JOSEPH H. CHOATE.



1906

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. July 1907.

CONFIDENTIAL.

(9007.)

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1906.



LIST OF REPORTS.

(Arranged according to Countries.)

NOTE.—The Reports not addressed to the Foreign Office are marked *1A*, &c.

FRANCE.

No.		Date.	SUBJECT.	Page
1	Law Officers ..	Oct. 19, 1906	W. J. Messiah, born abroad, can claim British nationality, as marriage of parents, though polygamous, was in accordance with law of their domicile and <i>lex loci</i> , and therefore valid <i>ad hoc</i> . Refers to liability to military service in France	1

GENERAL.

1A	Law Officers to Treasury	Mar. 27, 1906	Sir E. Law not entitled to diplomatic pension, as he had not completed fifteen years' service. He might be entitled if he continued to be a member of the Diplomatic service after taking up his Indian appointment	8
1B	Law Officers and Mr. Rowlatt to Board of Trade	Apr. 11,	Foreigners can claim pilotage certificates on complying with the requirements of the law. Not unanimous as to whether new law preventing their doing so would violate Treaty rights. Refers to cases of "Hanna" and "Vesta." Solicitor-General considers most-favoured-nation clause in Treaties refers only to fiscal matters, and does not exempt foreigners from compulsory pilotage or similar matters. Position of Sweden under Treaty	9
1C	Law Officers to Home Office	Aug. 18,	Prisoners of war. Provision should not be made in Army Act for. Proposed Rules as to can be enforced without legislation	10A
2	Law Officers ..	Nov. 29,	Consular fees. Draft Orders in Council (General, Japan, China and Corea) approving	11

ITALY.

3	Law Officers ..	April 30, 1906 and May 22,	Detention of "Briardale" at Genoa. Italian Courts may have jurisdiction, but should represent to Italian Government that power of mere personal creditor of owner of part share in a ship to cause arrest and sale of a whole ship is most vexatious. Mr. Elder, having mortgaged his interests, should not have been treated as part owner. Approving drafts of letters	12
---	-----------------	----------------------------	--	----

JAPAN.

4	Law Officers ..	Feb. 20, 1906	Seizure and subsequent release of "Lincluden" for contraband by the Japanese during war with Russia. Search having been justifiable, claim for demurrage cannot be put forward. <i>Salucci v. Johnson</i> cannot be invoked as a precedent	18
5	Law Officers ..	May 25,	Award of Hague Tribunal in Japanese House Tax Arbitration. Opinion as to extent to which land-renters in former foreign Settlements are exempt from taxation under Treaty of 1894. Agree on other points in the Memorandum as to interpretation of the Award	20

[455]

LIST OF REPORTS.

iii

JAPAN (continued).

No.		Date.	SUBJECT.	Page
6	Law Officers ..	Dec. 13, 1906	Seizure of "Hsiping" and "Pehping" by Japanese during war with Russia and condemnation of cargo destined for Newchwang—mostly rice. Japanese Regulations should distinguish between absolute and conditional contraband. Destination for Russian army was not proved in all cases. Articles <i>ancipitis usus</i> should not have been seized, but held liable to pre-emption	24

LIBERIA.

7	Law Officers ..	June 25, 1906	Concessions granted by Liberian Government to a Company of exclusive right to collect and export rubber practically limits rights of trade. Wording of Treaty prohibitive of monopolies very strong, but does not restrict rights of State over public lands. Exclusive right of export clearly opposed to Treaty rights	26
---	-----------------	---------------	--	----

NICARAGUA.

8	Law Officers ..	April 3, 1906	Draft Order in Council to enforce Treaty of Extradition with Nicaragua. Approving	29
---	-----------------	---------------	---	----

PACIFIC ISLANDS.

9	Law Officers ..	Feb. 6, 1906	Claims of Burns, Philp, and Co. in respect of trading licence fee imposed by German authorities in the Marshall and Caroline Islands. Complaints as to prohibition of trade and of acquiring land. Declaration of 10th April, 1906, does not limit right of Germany in respect of internal taxation. Declaration includes Caroline Islands as well as other future possessions. The German Government has granted the Jaluit Company a position incompatible with the Declaration in giving them the administration of the Marshall Islands. Extent to which claims may be pressed	30
9A	Law Officers to Colonial Office	Oct. 12,	Marriage of Petch and Coffin on merchant-vessel by the master at Pitcairn Island is valid at Common Law, as modified in case of <i>R. v. Millis</i> . Queen's Regulation 1 of 1896 not in point. Provision should be made in the Order in Council for civil marriage officers in addition to religious marriages	41

PORTUGAL.

10	Law Officers to Colonial Office	Mar. 15, 1906	Admission of Mozambique Colony to South African Customs Union. Foreign Powers could under most-favoured-nation clause claim benefits of, unless most-favoured-nation clause is made the subject of exception in favour of a Customs Union. Doubtful whether South African is complete. This country interprets most-favoured-nation clause strictly	43
10A	Law Officers to Colonial Office	Aug. 11,	Extent of application of Article IV of <i>modus vivendi</i> between Mozambique and the Transvaal as to railway rates. Proper reading of <i>modus vivendi</i>	45
10B	Law Officers to Colonial Office	Nov. 23,	New Brankpan-Witbank line. Article IV applies only to traffic passing between Lourenço Marques and Johannesburg by the line existing at date of the above <i>modus vivendi</i>	46



1906

iv

LIST OF REPORTS.

RUSSIA.

No.		Date.	SUBJECT.	Page
11	Law Officers ..	May 30, 1906 and Aug. 14,	Sinking of "Knight Commander" for carrying contraband during war with Japan is contrary to international law. Complaint is against Russian Government. They, and not Prize Courts, sanction such proceedings. If rejected, claim should be submitted, with others, to Special Tribunal rather than to Hague Conference. Points to be submitted	47
12	Law Officers ..	June 16, and Sept. 21,	Seizure of "Calchas" and "Allanton" by Russians for contraband during war with Japan. As regards former, claim should be pressed owing to removal by captors of bags of flour without order of Prize Court, to delay in bringing vessel to trial, omission to provide Prize Court, and to rules as to compensation. International Agreement might be arrived at as regards mode of exercising right of search and compensation. Approving draft letters to Holt and Co., &c...	51

SIAM.

13	Law Officers ..	Feb. 24, 1906	Draft Siam Order in Council to replace that of 1903. Approving. Submits that Article 41 is a considerable extension of the power of the Court ..	56
----	-----------------	---------------	--	----

SPAIN.

14	Law Officers ..	May 7, 1906	Claim on account of collision between "Valencia" and Spanish gun-boat "Doña Maria de Molina" should be made, but not upon a supposed defect in Spanish law. Might be represented that in practice British Government accepts responsibility in such cases; in theory the wrong-doer is responsible as in Spain ..	58
----	-----------------	-------------	---	----

UNITED STATES.

14A	Law Officers to Home Office	July 6, 1906	Cancellation of certificates of American nationality. Cannot operate to restore holders to their position of British subjects ..	59
14B	Colonial Office to Law Officers	Oct. 20,	<i>Modus vivendi</i> with United States as regards fisheries in Newfoundland. Order in Council should not suspend particular sections of local Acts. Mode in which local legislation incompatible with Treaty rights of United States should be nullified. Lines on which <i>modus vivendi</i> should be drawn up. Courts cannot question orders of His Majesty which are proper and necessary for giving effect to the Convention of 1818 ..	61
14C	Law Officers to Colonial Office	Nov. 30,	Fishery rights of United States' citizens in Newfoundland. <i>Modus vivendi</i> with the United States is a Treaty. Consider that <i>modus vivendi</i> should be limited to safeguard rights secured by Treaty of 1818 or other Treaties concluded before passing of the Colonial Acts, and not to abrogate Acts to which His Majesty has given his consent	64
14D	Law Officers to Colonial Office	Dec. 28,	Hay-Bond Convention relative to commercial relations between the United States and Newfoundland. Act of Parliament to carry into effect necessary before it is ratified ..	65

LIST OF REPORTS.

v

URUGUAY.

No.		Date.	SUBJECT.	Page
15	Law Officers ..	Feb. 16, 1906	Claim to compensation for seizure of "Agnes G. Donahoe" on charge of illegal sealing and for treatment of crew. Better prosecute appeal before resorting to diplomatic channel. Appeal cannot give master adequate redress, but will simplify the controversy on the diplomatic claim ..	66

ZANZIBAR.

16	Law Officers ..	Feb. 27, 1906	Draft Order in Council for Zanzibar to replace former Orders. Approving as initialled ..	70
----	-----------------	---------------	--	----



ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1906.

[The figures refer to the numbers of the pages.]

ABE—BER.

A.

- Abensur, Isaac Aaron, 1.
 Act, Colonial. *See* Fishery Rights of Americans in Newfoundland.
 " " Partial suspension by Order in Council, irregular, 63.
 " " Does not supersede Orders necessary to enforce Treaty, 63.
 " " Effect of fishery *modus vivendi* with United States on, 64, 65.
 " 59 Geo, 3, cap. 38, as to American fisheries. Powers of His Majesty under, 63.
 " Colonial (Fisheries). Suspension by *modus vivendi* objectionable, 65.
 " Imperial. Necessary before ratification of Hay-Bond Convention, 66.
 " Agnes G. Donahoe." Seized for illegal sealing, 66-69.
 " " Confiscation of and of cargo, 66-69.
 " " Imprisonment of master and crew, 66-69.
 " " Legal remedies should be first exhausted, 69.
 " Allanton." Seized for contraband of war, 50-56.
 " " Claim owing to irregular proceedings, 50-56.
 Arbitration *re* taxation in former foreign Settlements in Japan, 20-24.
 " Sinking of "Knight Commander" as carrying contraband of war, 47-50.
 " Special Tribunal better than Hague Conference *ad hoc*, 49, 50.
 " Proposal for as regards action of Russian Prize Courts, 53, 55.
 Army Act. Application to prisoners of war. *See* Prisoners of war.
 Award in Japanese House Tax Arbitration. Reading of, 20-24.

B.

- Bail. Arrest of vessel for debt. Refusal of. *See* "Briardale."
 Baird v. Walker, 64.
 Bateson, Warr, and Wimbust, 58, 59.
 Belligerents. *See* Internment.
 Berlin Act in relation to monopolies in trade and property in Liberia, &c., 27, 29.

BRA—CLA.

- Brakpan-Witbank Railway. Rates on, 46.
 " Briardale." Detained at Genoa at suit of personal creditor of part owner, 12-18.
 " " Claim of foreigners to own part of cannot be admitted, 14.
 " Should have been set free on bail, 14.
 Burns, Philp, and Co., 30-41.

C.

- " Calchas" seized for contraband of war. Claims, 50-56.
 Cargo removed from vessel without sanction of Prize Court. Claims, 52, 54.
 Caroline Islands. Treatment in of Burns, Philp trading with, 30-41.
 " Prohibition of trade in. Treaty rights, 40.
 " Affecting by Treaty concluded previous to acquisition of by Germany, 37, 40, 41.
 " Is in sphere of Treaty which is consequently applicable, 37, 41.

Certificates. *See* Nationality.

- Claims. Treatment of vessels by Russian Prize Courts, 47-56.
 " to be presented irrespective of decision of Prize Courts, 47-49.
 " *See also* Prize Regulations (Russian).
 " Damage by collision with Spanish gun-boat. As to Government or wrong-doer being responsible, 58, 59.
 " against owner of part share in a ship. Arrest of whole vessel. *See* "Briardale."
 " Search of vessel for contraband and subsequent release, 18, 19.
 " of Burns, Philp, and Co. in respect of trading licences and restrictions in the Marshall and Caroline Islands, 30-41.
 " Ditto. German Government willing to effect a compromise, 37, 38.
 " Sinking of "Knight Commander" for contraband, 47-49.
 " *See* Arbitration.
 " Seizure of British vessels by Russians during war with Japan. *See* Holt and Co.; West of England, &c. Association; "Calchas"; "Allanton"; and "Hipsang."
 " Seizure of vessel and treatment of crew. Alleged illegal sealing. *See* "Agnes G. Donahoe."

COE—FEB.

- Coe, Mrs. Henry, 12-14.
 Coffin, Esther Godfrey, 42.
 Cohen and Coles, Messrs., 64.
 Collision with Spanish gun-boat. As to Commander, not Government, being responsible, 58, 59.
 Colonial legislation. *See* Acts (Colonial); Fisheries (Newfoundland).
 Commercial relations. United States and Newfoundland Convention. As to ratification, 65, 66.
 Company, Liberian Development. Monopolistic nature of Concessions to, 26-28.
 " Monrovia Rubber. Monopolistic nature of Concessions to, 27, 28.
 " trading, also administering district. Objections to. *See* Marshall Islands.
 Compensation. *See* Claims.
 Concession of land in Liberia. Bearing of Treaties, 29.
 " of sole right to export rubber in Liberia, 27-29.
 Congo (Free State and French). Exclusive trading rights in, 27-29.
 Consular fees. *See* Order in Council.
 Contraband of war. Claim on account of detention of vessel for "Lincluden," 18, 19.
 " " Japanese treat foodstuffs, &c., as absolute, 24-26.
 " " Same should be pre-empted, not confiscated, 25, 26.
 " " Objections to Japanese Regulations, 25, 26.
 " " *See* "Knight Commander," sinking of; Prize Courts; Claims; Vessels; Prize Regulations.

Courts. *See* Prize Courts.

- " Cannot question Orders necessary to give effect to Treaties, 63.
 " Italian. Judgments in case of arrest of British ship for debt of shareholder, 12-18.
 " *See* Hague Tribunal.
 Criminal proceedings. *See* Trial.
 Customs duties. *See* Export Duty.
 " Union (South African). As to admission of Mozambique to, 43-45.
 " " As to South African being a complete one, 44, 45.
 " " Rights of Treaty Powers to special privileges of parties to, 43-45.
 " " Precedent of Bulgaria, 44.

D.

- Debt (personal) of part owner of vessel. *See* "Briardale."
 Demurrage claims. *See* Contraband; Prize Courts.
 Diplomatic service. *See* Pension.
 " channel. Legal remedies to be exhausted before having recourse to, 70.
 Domicil. Prevention of acquisition in Marshall and Caroline Islands. Effect on trade. *See* Burns, Philp, and Co.
 " Dona Maria de Molina." *See* Collision.
 Duties. *See* Export Duties.

E.

- Elder, G. H., 12-18.
 Erlanger, Emile, and Sons, 26.
 Export trade. Monopoly in Liberia violates Treaty, 29.
 " duty on copra in Marshall Islands, 35.

F.

- Fees, Consular. *See* Order in Council.
 Fee. Trade licence in Marshall and Caroline Islands. Oppressive nature of, 30-41.

FIS—LAN.

- Fisheries in Newfoundland. Colonial legislation repugnant to American rights, 61-65.
 " " *Modus vivendi*, 61-63.
 " " Ditto. Its effect on certain colonial Statutes, 61-65.
 " " Rights of Americans. Mode of securing. *See* Order in Council.
 " " Powers of His Majesty under 59 Geo 3, cap. 38, 63.
 " " *Modus vivendi* relating to is a Treaty, 65.
 " " Ditto. It should limit rights to those granted by Treaty of 1818, 65.

G.

- Grant, Abdul Kerim, 2.
 Great Britain. Subjects. *See* Nationality.

H.

- Hague Tribunal. Award in Japanese house-tax question, 20-24.
 " Proposed reference to of sinking of "Knight Commander."
 " *See* Prisoners of war, custody of.
 " Hanna," 10, 11.
 " Hipsang" seized for contraband. Claim rejected, 50.
 Holt and Co. Messrs., 51, 52, 54.
 House Tax Arbitration, Japanese, 20-40.
 " Hsiping" seized by Japanese for contraband of war, 24-26.

I.

- Internment of belligerents in British territory. legality of, 10 n.

J.

- Jaluit Trading Company's position as Administrators of Marshall Islands, 41.
 Jaluit Trading Company. Their monopoly of trade in violation of Treaties, 30-41.
 Japanese House Tax Arbitration. Rights of land renters, 20-24.
 Johnstone, Sir H. H., 26, 28.
 Judicial proceedings. *See* Trials.
 Jurisdiction over British vessels in foreign ports. Cases of debt, 15.

K.

- "Knight Commander" sunk during war as carrying contraband, 47-50.
 " " Complaint is against Russian Government, not Prize Court, 49.

L.

- Land monopoly in Liberia. How far opposed to Treaty rights, 29.
 Land. British firm cannot lease in Marshall Islands, 31, 36.



LAW—NEW.

Law, Sir Edward F., 3, 7, 8, 9.
 Layard, Sir H. Austen, 3, 6.
 Lease of land. *See* Land.
 Legal proceedings. *See* Trial.
 " remedies to be exhausted before diplomatic channel is resorted to, 70.
 Legislation, colonial, in conflict with American fishery rights, 61-63.
 Lertora, Brothers, 12-14.
 Liberia. Concessions in. As to conflict with Treaty rights, 26-29.
 " Lincluden" searched for contraband. Claim for demurrage, 18, 19.
 Lobster fisheries. *Modus vivendi* with France in nature of a Treaty, 64.

M.

Marshall Islands (trade with). Treatment of Burns, Philp, and Co., 30-41.
 " " Jaluit Company monopolize administration and trade in, 30.
 " " Prevention of acquiring land for trading purposes, 31.
 " " Export duty on copra in, 35.
 Marriage, polygamous. Nationality of issue, 1, 2.
 " " When valid in English law, 1, 2.
 " at Pitcairn Island by master of vessel valid at common law, 41-43.
 " of necessity. Application of doctrine in Pitcairn Island, 42, 43.
 " at common law. Order in Council does not exclude, 43.
 " Civil. Order in Council should provide for, 43.
 Messiah, Wilfred Judah, 1, 2.
 Milburn, Sir J. D., 12.
 Military service in France by person claiming British nationality, 1, 2.
 Millis, Reg. v., 43.
Modus vivendi. Transvaal v. Mozambique. Railway rates under Article IV, 45, 46.
 " " with United States as to Newfoundland fisheries. *See* Fisheries.
 Monopoly in property and trade in Liberia, &c., in relation to Treaty rights, 26-29.
 " of exports in Liberia is in violation of Treaties, 29.
 " of trade and rights over public lands, 29.
 " of trade of Jaluit Company in Marshall Islands, 30-41.
 Most-favoured-nation clause in Treaties does not apply to pilotage, 9-11.
 " " " in relation to special privileges of a Customs Union, 44.
 Mozambique. As to admission to South African Customs Union, 43-45.
 " and Transvaal Railway rates under *modus vivendi*, 45, 46.

N.

Nationality. Claim to. Polygamous marriage of parents, 1, 2.
 " Cancellation of United States' certificates of, 59-61.
 " Holders do not become thereby British subjects, 59-61.
 Naturalization. *See* Nationality.
 Newfoundland Fisheries Act does not supersede Order in Council enforcing Treaty, 63.
 " " *See also* Fisheries, rights of Americans.

ORD—SET.

O.

Order in Council (China and Corea). Consular fees, 11, 12.
 " " (Pacific). *See* Marriage.
 " " (Siam), 56, 57.
 " " Comprehensive powers of Courts under, 57.
 " " to enforce Treaty with United States as to fisheries, 63.
 " " not superseded by Colonial legislation, 63.
 " " to enforce Treaties should not formally suspend Colonial laws, 63.
 " " Terms in which they should be drawn up, 63.
 " " new, for Zanzibar, 70-80.

P.

Pauncefoot, Sir Julian, 3-6.
 "Pehping." Seizure by Japanese for contraband of war. Claim, 24-26.
 Pelton, Mr., 67, 69.
 Pension. Sir E. F. Law's claim to diplomatic, 3-9.
 " Precedents governing doubtful cases, 3-9.
 Petch, Walter Henry, 42.
 Pickard, Messrs., 12.
 " Mr. D., 18.
 Pilotage certificates. Rights of foreigners under Treaty, 9-11.
 " " Compulsory. How far applicable to foreigners, 9-11.
 " " Position of Swedish vessels as regards, 9-11.
 Pitcairn Island. Validity of civil marriages in, 42.
 Prisoners of war. Proposed regulations for, 10A-10E.
 Prize Courts. As to pressing claims irrespective of decision of, 47-49.
 " Claim for delay in bringing vessels before, 52, 54.
 " Claim for omission of Russians to set up, 52, 54.
 " Decisions of Russians. Proposal for arbitration, 53, 55.
 " Sinking of vessel not matter for, 47-49.
 " Claim for removal of cargo without sanction of, 52, 54.
 " Regulations (Russian). Claims owing to defects in, 48, 52, 54, 56.
 Property, real. *See* Land.

R.

Railway rates. Transvaal-Mozambique *modus vivendi*, 45, 46.
 " " on Brakpan-Witbank line, 46.
 Ratification of Hay-Bond Convention. Imperial Act necessary previous to, 66.
 Rice improperly treated as contraband of war, 24-26.
 Right of search. Mode of exercise by Russians, 52.
 " Should be amended by international Agreement, 52.
 " " No compensation for reasonable exercise of, 19.
 Ryan, Mr. (skipper of "Agnes G. Donahoe"), 66-69.

S.

"Sado Maru," 18.
 Salucci v. Johnson (case of contraband of war), 19.
 Sealing. Vessel charged with illegal. Treatment of. *See* "Agnes G. Donahoe."
 Settlements (former, in Japan). Taxation in. Treaty rights, 20-24.

SMU—TRU.

Smuggling. Illegal sealing treated as. *See* "Agnes G. Donahoe."
 South African Customs Union. Admission of Mozambique to, 43-45. *See also* Customs Union.
 Statutes (colonial). *See* Acts.
 Sweden. Position of citizens of respecting pilotage certificates in the United Kingdom, 10, 11.

T.

Tax on vessels trading with Marshall and Caroline Islands, 30-41.
 Trade monopolies in Liberia in violation of Treaty rights, 26-29.
 " Export. Monopoly of opposed to Treaty, 29.
 " in German Pacific Islands. Excessive licence fees, restrictions, &c., 30-41.
 " Ditto. As to Treaty rights in matter, &c. *See* Burns, Philp, and Co.
 " Ditto. Jaluit Company offers a compromise, 33.
 " with Caroline Islands. Absolute prohibition, 32, 36.
 Trading Company also Governors. *See* Marshall Islands.
 Transvaal-Mozambique *modus vivendi*. Railway rates under, 45, 46.
 Treaties do not forbid trading taxes in Marshall Islands, 40.
 " *See* Customs Union, special privileges.
 Treaty rights of foreigners to pilotage certificates in the United Kingdom, 9-11. *See also* Most-favoured-nation clause.
 " " in relation to taxation in former foreign settlements in Japan, 20-24.
 " " in relation to monopolies in trade, land, &c., in Liberia, 26-29.
 " " in connection with trade restrictions. Fees in German Pacific Islands, 30-41.
 " " of United States' citizens as regards fisheries. *See* Fisheries.
 " Hay-Bond Convention. *See* Ratification.
 " with Germany relative to Pacific. Application of to subsequent acquisitions in area affected by, 37, 41.
 " *See Modus vivendi* (Transvaal-Mozambique).
 " *Modus vivendi* with United States as to fisheries is in nature of a, 64, 65.
 Trial. Claims against owners of British vessel, 15.
 " Arrest of vessel. Refusal to liberate on bail. *See* "Brierdale."
 " Pilotage Regulations for foreign vessels. *See* Pilotage.
 " Contraband cases. *See* Prize Courts.
 " in Venezuela. Vessel charged with illegal sealing, 67.
 Tribunal. *See* Hague Tribunal; Prize Courts; Trial.
 Trumpy, H., 12-14.

UNI—Y80.

U.

Union. *See* Customs Union.

V.

Vessels seized during war as carrying contraband. *See* "Lincluden"; "Pehping"; "Hsiping"; "Calchas"; "Allanton"; "Hipsang"; Claims; Contraband; Prize Courts.
 " *See* Pilotage.
 " neutral. Sinking during war. Question of arbitration respecting practice, 47-50.
 Vessel, neutral, sunk during war. *See* "Knight Commander."
 " damaged by collision. Refusal of Spanish Government to accept responsibility, 58, 59.
 " Arrest for personal debt of part owner. *See* "Brierdale."
 " Jurisdiction of foreign Courts in cases of claims against, 15.
 " Search for contraband of war. Claim for demurrage, 18, 19.
 " Charges on and treatment in Marshall Islands. *See* "Ysobel."
 " Claim for removal of cargo without order of Prize Court, 52.
 " charged with illegal sealing. Maltreatment. *See* "Agnes G. Donahoe."
 " Vesta," 10, 11.

W.

War, Russo-Japanese. *See* Claims; Contraband; Prize Courts; Vessels; Prisoners; Internment.
 West of England Steam-ship Owners' Protection and Indemnity Association, 51, 53-55.

Y.

"Ysobel." Trading fee imposed on in Marshall Islands, 31-35.
 " Refused water, &c., 31, 32, 35.



1906

Printed for the use of the Foreign Office. July 1907.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1906.

FRANCE.

No. 1.

[October 19, 1906.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 30, 1906.

I HAVE the honour, by direction of the Secretary of State, to transmit to you the inclosed papers relating to an application for a certificate of British nationality made by Mr. Wilfred Judah Messiah, of Oran, in order to enable him to claim exemption from military service in France.

W. J. Messiah's claim to British nationality to escape military service in France.

The application was forwarded by His Majesty's Consul-General at Algiers on the 23rd April last (Paper 1), and is supported by the accompanying documents, viz.:—

(a.) Contract of marriage at Mogador (27th August, 1862), in accordance with Hebrew religious law, between the father and mother of the applicant, Moses Messiah and Esther Youli (or July).

(b.) Certificate of the birth of the applicant, Wilfred Judah Messiah (20th April, 1885), at Oran.

(c.) Certificate of the birth of the father of the applicant, the aforesaid Moses Messiah, at Gibraltar, the 13th March, 1828.

The documents were forwarded to the Home Office in order that the necessary steps might be taken in the matter, and I am to inclose a letter from that Department in reply (Paper 2), stating that the marriage of the father of the applicant, on the validity of which the claim of the latter for a certificate of British nationality depends, appears to have been of a polygamous character (see passages underlined in the Marriage Contract); but that, having regard to the case of Isaac Aaron Abensur in 1897, Mr. Gladstone proposes, subject to the concurrence of Sir E. Grey, to issue the desired certificate.

With regard to the case of Isaac Aaron Abensur referred to, I am to inclose a copy (in print) of the correspondence, &c., which passed in the matter (Paper 3), and I am especially to call attention to the Memorandum on p. 9, in which the facts of the case and the opinions expressed thereon are fully set forth, and also to the subsequent opinion of the then Lord Chancellor (Lord Halsbury). The decision arrived at in the matter will be found on p. 38 in a Minute of the late Lord Salisbury, as follows:—

"This opinion" (that of the Lord Chancellor) "must be accepted as the best exposition of the existing law that we can obtain, in the absence of any decided case. Therefore Mr. Abensur's children must be registered."

Sir E. Grey feels, however, some hesitation in accepting the decision arrived at in the Abensur case as conclusive of the question whether the offspring of a polygamous



1906

2

FRANCE.

marriage, contracted according to the Hebrew religious law prevailing in Morocco, are, according to English law, legitimate, inasmuch as the views of the late Lord Chancellor differed in some material respects from those of the then Attorney-General (now Lord Chief Justice of England) and the then Solicitor-General (Sir Robert Finlay), besides being directly in conflict with the opinion of previous Law Officers given in the case of Abdul Kerim Grant (see p. 25 of print).

Moreover, so far as Sir E. Grey is aware, none of the other legal authorities, before whom the case indirectly or directly came, took quite the same view as the then Lord Chancellor; and in these circumstances he is disposed to think that it would be dangerous to accept as finally conclusive of the question what was not a judicial decision, but merely an opinion of the ex-Lord Chancellor, without at any rate giving the matter fuller consideration.

I am therefore, in forwarding these papers, to request that you will be good enough to favour Sir E. Grey with your opinion, whether in the present case the applicant for a certificate of British nationality, Mr. Wilfred Judah Messiah being the offspring of a marriage of a polygamic character, is to be regarded as legitimate in contemplation of English law, and, if so, on what ground?

Sir E. Grey would also be glad to receive any observations of a general nature which you may be good enough to offer on the papers now submitted to you.

I have, &c.

(Signed) ERIC BARRINGTON.

List of Papers.

- (1.) Consul-General Hay-Newton, No. 6, Treaty, April 23, 1906; and documents A, B, and C.
- (2.) Home Office, June 30, 1906.
- (3.) Correspondence relative to the registration of the children of I. A. Abensur in Morocco (Confidential No. 7323). 1897-1899.

Report.

We understand the facts to be that Moses Messiah, the father of the applicant, is a natural-born British subject who, at the time of his marriage with Esther Youli, was domiciled in Algeria, and that such marriage is valid according to the Jewish law and to the law of the domicile of the parties, and of the place where the marriage was contracted, namely, Algeria.

We think that such marriage, in spite of its polygamous character, is valid by English law for the purpose of conferring British nationality upon the offspring on the ground that it is a good marriage according to the law of the domicile of the parties and of the place where the marriage was contracted, and also of their religion, if that be material, although such marriage would be considered in England as invalid for the purpose of succession to land in England, or of claiming the assistance of the matrimonial Courts there.

We think, therefore, that the applicant is entitled to British nationality on the ground that he is the legitimate (for this purpose) son—born out of His Majesty's dominions of a natural-born British father.

We offer no opinion on the question whether the possession of a certificate of British nationality will enable the applicant to escape military service in France.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
October 19, 1906.

(3)

GENERAL.

No. 14.

[Treasury Solicitor.]

[March 27, 1906.]

"My Lords,

"Foreign Office, November 27, 1905.

"I HAVE the honour to submit Sir Edward Fitzgerald Law's claim to receive a diplomatic pension in respect of his services as Commercial Attaché, for which he has qualified under the Act 32 & 33 Vict., cap. 43. I would refer your Lordships to the correspondence which passed on the subject between the two Departments in 1890, and more especially to Sir F. Mowatt's letter of the 21st June (3458), in which it was stated that the Treasury were empowered, on the recommendation of the Secretary of State, to award Sir E. Law, on retirement, a pension not exceeding 700*l.*, subject to the limitation as to service and residence.

Sir E. F. Law's claim to Diplomatic Pension under 32 & 33 Vict., cap. 43.

"With reference to the provisions of the Act, I have to state that Sir E. Law entered the Diplomatic Service and received his first commission on the 9th August, 1887, as Commercial Attaché; was promoted to be Commercial Secretary on the 8th March, 1894; and was continuously employed on active service abroad in the above capacities to the 31st December, 1898. He was appointed a member of the Council of the Governor-General of India on the 29th November, 1899.

"I think it right to state, for your Lordships' information, that Sir E. Law's diplomatic services were of exceptional value, and I strongly recommend the grant to him of an adequate pension of the fourth class from the date when he ceased to draw salary as a member of the Council in India.

"Sir E. Law's salary as Commercial Secretary on the 31st December, 1898, was at the rate of 1,000*l.* a-year, with a rent allowance of 100*l.* a-year, and he was born on the 2nd November, 1846.

"I have, &c.
(Signed) "LANSDOWNE.

"The Lords Commissioners of
His Majesty's Treasury."

The above letter was referred to the Treasury Solicitor by the following Minute of the Secretary of the Treasury:—

"Lord Desart,

"Sir E. F. Law received his first commission in the Diplomatic Service, as 'Commercial Attaché,' on the 9th August, 1887; he became 'Commercial Secretary' on the 8th March, 1894; and he resigned this appointment as from the 31st December, 1898, having actually served abroad for more than ten years.

"The period of fifteen years which must elapse from the date of his first commission, in order to qualify him for a pension under section 7 of 32 & 33 Vict., cap. 43, expired on the 8th August, 1902, when he had for some time ceased to be a member of the Diplomatic Service; and he has not since been reappointed to that service. Is he now legally qualified for a pension under section 7?

"Please consider the case in connection with your opinion on Sir J. Pauncefote's case (10056/98)—you were then of opinion that the fifteen years must have been completed before the date of final retirement.

"The only other case, so far as I know, in which the same question could have arisen, is that of Sir H. Layard (12666/84), who was recalled from Constantinople in 1880, and to whom a pension was awarded in 1884 without further employment. Probably he did not actually resign; but no other post in the Diplomatic Service was offered to him. His case was referred to the Law Officers, but on another point; and the present question was not raised or noticed in any way.

(Initialled) "G. H. M.

"January 10, 1906."



The following is a copy of the Minute of the Treasury Solicitor thereon :—

"Sir G. Murray,

"I have again considered the provisions of the Statute of 1869, and can find no reason to alter the opinion I expressed in Lord Pauncefote's case. The application of that opinion to a particular case may be another matter. By final retirement I meant when an officer ceased to belong to the service and the Government had no claim at all on him—that is, when he has ceased to be available for public duties and had become a private and independent individual.

"The resignation of a particular appointment does not, in my judgment, necessarily involve retirement from the Diplomatic Service, and I believe it is, in fact, usual for men in that service to be for considerable periods of time 'en disponibilité' or otherwise available in case of necessity, though they may, in fact, never be again employed. A man in that position might, I think, be granted a pension at the expiration of the period of fifteen years from the date of his first commission if he had complied with the other provisions of the section as to the qualifications for such pension. If my view is the correct one, the question here is one of fact, and I do not consider that the acceptance of an appointment in another service would necessarily involve final retirement from the Diplomatic Service in the sense in which I used it, though there might be circumstances in which it would have that effect. The matter, if it be a doubtful one, is of importance; and it may be that the Foreign Office, if not disposed to accept my opinion, would desire that it should be submitted for the consideration of the Law Officers.

(Initialled) "D.

"January 15, 1906."

The following are copies of the letters and Minutes in the case of Sir J. Pauncefote referred to by the Secretary of the Treasury :—

"Sir,

"Foreign Office, June, 17, 1898.

"I am directed by the Marquess of Salisbury to request that you will state to the Lords Commissioners of Her Majesty's Treasury, that Sir J. Pauncefote, Her Majesty's Ambassador at Washington, will, in the course of the present year, reach the limit of seventy years of age, but that he has been granted an extension of time until the 2nd April, 1899. As at present arranged, he will then retire from the public service and become eligible for a pension.

"As regards length of service abroad and residence at his post as Ambassador, Sir Julian will, on his retirement, have fulfilled the necessary conditions prescribed by Act of Parliament; but, on the other hand, fifteen years will not have elapsed since the date of his first commission until March 1900. Until this last condition is satisfied, the grant of the highest diplomatic pension seems barred.

"It is presumed, however, that from the date of his retirement in April 1899, Sir Julian might be awarded a pension under section 12 of 'The Superannuation Act, 1859,' calculated on his salary at the date of his leaving the Foreign Office; that when March 1900 is reached this pension might be cancelled, and that, when all the conditions imposed by the Diplomatic Pensions Act have been satisfied, he might be awarded a first class diplomatic pension of 1,700*l.* a-year.

"I am to inquire whether their Lordships see any objection to such a course; and, if not, whether they would be prepared to follow it.

"I am, &c.

(Signed) "F. H. VILLIERS.

"The Secretary to the Treasury."

"Minute of the Treasury to the Treasury Solicitor."

"The Solicitor is requested to advise on the following points :—

"The Diplomatic Pensions Act 32 & 33 Vict., cap. 43, sec. 7 (1) provides that a person shall not be qualified for receiving a pension of any class until the expiration of fifteen years from the date of his first commission.

"Do these words require that the person should be actually serving at the date of the expiration of the fifteen years, or, would he be qualified if, having retired, after

fourteen years, he deferred applying for a pension until fifteen years had expired from the date of his first commission?

"Assuming the latter question to be answered in the affirmative, the following question arises in the case of Sir J. Pauncefote.

"He retires on the 22nd April, 1899, and will then be awarded a superannuation allowance under the Act of 1859.

"But in the following April, fifteen years will have expired from the date of his first commission, and he will then, on the assumption made above, become qualified for a larger pension under the Diplomatic Pensions Act.

"If he thereupon resigns his first pension, will the fact that he has received it during the preceding year disqualify him from claiming the second pension from the date on which the conditions of the Diplomatic Pensions Act are fulfilled?

(Signed) "FRANCIS MOWATT.

"June 29, 1898."

"Minute of the Treasury Solicitor in reply to the foregoing Minute.

"Sir F. Mowatt,

"In my opinion, the date from which the fifteen years must be calculated is that of the officer's final retirement from the Diplomatic Service, and that if at the time of that retirement fifteen years have not expired since the date of the first commission he does not become qualified for a pension under 32 & 33 Vict., cap. 43.

"The section does not, as it seems to me, provide that where an officer has only been ten years in the Diplomatic Service he may become qualified for a pension under the Statute, even though such pension cannot be granted to him on his retirement. It would not have been difficult, if that had been the intention, to make it clear in the words of the Act; but such a provision would be inconsistent with the principles on which other pensions are granted, viz., that they are to be based on a period of service calculated up to the date of the officer's retirement from the public service.

"I can find no words in section 7 of the Act which lead me to think that it can be so interpreted, and I am confirmed in my view by the words of section 5, which authorize the Treasury, on the recommendation of the Secretary of State, to grant pensions to persons in Her Majesty's Diplomatic Service, because I do not think it can be said that a person who has retired and left that service can be said to be a person in the service. Even apart from section 5, I should, however, be of opinion that, to entitle an officer to pension, his first commission must have been dated fifteen years prior to the date of his retirement. The effect of a different view may be illustrated by applying it to the circumstances of this particular case. By section 2 of 'The Superannuation Act, 1859,' 22 Vict., cap. 26, superannuation allowance may be granted to persons who have served in an established capacity in the permanent Civil Service of the State, for whom 'provision shall not otherwise have been made by Act of Parliament.' If Sir Julian Pauncefote is entitled in the year 1900 to be awarded a diplomatic pension, he is (although he cannot receive it between 1899 and 1900) a person for whom provision has otherwise been made by Act of Parliament, and thus would be deprived of the benefits of the Superannuation Act of 1859. The result of that would be that a person in his position, although otherwise qualified under sections 2 and 12 of the Superannuation Act of 1859 to superannuation, might be in receipt of no pension at all for, it might be, several years, being a person for whom provision had been made by the Act of 1859, although he had not actually benefited under that Act. He might, indeed, never benefit, if he died before the period had elapsed.

"If, on the other hand, he can be granted a superannuation allowance under the Act of 1859, it must be on the ground that he was not at the time of his retirement a person for whom provision had been made.

"In my view, either he is or is not a person for whom provision has otherwise been made. If he be, he cannot have his pension under the act of 1859. If he is not, one ground on which he gets that pension is that he can receive no pension under any other Act of Parliament; and I do not, as I have said, think he can acquire that privilege after his retirement.

"Assuming that my view is not correct, I should answer your second question in the affirmative; but holding the views I do, that question does not arise.

(Signed) "H. CUFFE.

"July 4, 1898."



"(No. 10056/98.)

"Sir,

"I am directed by the Lords Commissioners of Her Majesty's Treasury to acquaint you, for the information of the Secretary of State, that they have very carefully considered the points submitted in Mr. Villiers' letter of the 17th ultimo, as affecting the claim to pension of Sir J. Pauncefote, Her Majesty's Ambassador at Washington, under the provisions of the Act 32 & 33 Vict., cap. 43, sec. 7. Their Lordships are advised that the words of the said section 'until the expiration of fifteen years from the date of his first commission' apply to a period ending with the officer's retirement from the service and that if, at the time of that retirement fifteen years have not expired, he cannot subsequently, by the lapse of further time not passed in the service, become qualified.

"In these circumstances, it appears to their Lordships that the only means by which the object in view can be obtained is by Sir Julian's retention in the service till March 1900, at which date it is stated that fifteen years will have expired since he received his first commission.

"I am, &c.
(Signed) "FRANCIS MOWATT.

"The Under-Secretary of State,
Foreign Office."

There are sent herewith for reference the papers in Sir H. Layard's case referred to by the Secretary of the Treasury.

By section 6 of "The Diplomatic Salaries, &c., Act, 1869" (32 & 33 Vict., cap 43), the Secretary of State may grant pensions during life to persons in His Majesty's Diplomatic Service limited in amount and varying according to the class of pension which the officer may be qualified to receive.

The qualifications applicable to all classes of pensions under the section are—

1. That fifteen years must have elapsed since the date of the officer's first commission.
2. That the officer must have served as prescribed in some foreign State or States for a period of ten years.

There is no question in this case as to the second qualification, but, as will have been seen, the point is raised whether an officer who, before the expiration of fifteen years from the date of his first commission, ceased to be a member of the Diplomatic Service either by definite and final retirement or removal, or by resignation of his post, and not having received any further appointment in that service, is qualified for pension.

In Sir J. Pauncefote's case the Treasury, after consulting the Treasury Solicitor, adopted the view that in the case of final retirement prior to the expiration of fifteen years from the date of an officer's first commission he could not by the lapse of time acquire that qualification. The reasons for this view are given in the Treasury Solicitor's Minute and Treasury letter set out above.

That is the main question on which the opinion of the Law Officers is sought—and (assuming the view taken in Sir J. Pauncefote's case to be right) whether an officer who had not been finally removed or finally retired from the service, but had merely resigned his post and not been further employed, could by lapse of time acquire this qualification. The latter point may be a question to a large extent of fact, and be open to decision as a matter of discretion rather than of law. It is, however, one on which the Treasury would desire to know the views of the Law Officers, and also as to the particular case now under the consideration of the Treasury.

The Act of 1869 by section 4 repeals the provision of 2 & 3 Wm. IV, cap. 116, relating to diplomatic salaries and pensions. Those repealed sections in effect authorized a charge upon the Consolidated Fund of a certain sum to defray the charge of, *inter alia*, pensions granted to persons "having served His Majesty at Foreign Courts," the qualifications to which this case relates being practically the same as under section 7 of the Act of 1869. The effect may be the same, but it is to be noted that whereas the Act of Wm. IV provided for the payment of pensions to persons "having served His Majesty at Foreign Courts," section 6 of the Act of 1869 provides for the grant of pensions to persons "in Her Majesty's Diplomatic Service," while section 5 of the Act of 1869 describes the payments under that Act as salaries,

allowances, and pensions payable to persons "in Her Majesty's Diplomatic Service." It is true that a pensioner can hardly be said, strictly speaking, to be in the Diplomatic Service, but still less, as it is submitted, can any one be in the Diplomatic Service who has resigned or been removed at a time anterior to that of the grant of the pension. Further, in this connection, the language of sections 8, 9, and 10 of the Act of 1869 would appear to have some bearing on the point now under consideration. Section 8 provides for the grant of an allowance in case of retirement from infirmity of mind or body to an officer "before the completion of the period which would qualify him for a pension under the other provisions of this Act," and the same language is used in section 9 in the case of retirement by reason of severe bodily injury, which would seem to imply that the qualifying period of fifteen years must be a period of service or liability to service. Further, section 10 provides for the grant of an allowance in the case of interruption of service to an officer "before he has completed the term of service and period of residence which under the provisions of this Act would entitle him to a pension for having served in such capacity." It may, however, be that these words only refer to the service of ten years, and the period of residence in some specified capacity, and not to the period of fifteen years from the date of the first commission.

On the other hand, the Act does not in terms, as it might have done, prescribe as a qualification either an actual service or liability to service of fifteen years (unless the limitation of grants of pensions to persons in the Diplomatic Service has that effect), and the only statutory service specifically required is for a period of ten years; so that, if that is fulfilled and is sufficient, the mere effluxion of time might, if that be the true construction, enable a man who has once been in the service to acquire this qualification for pension, although he did not possess it at the time of his quitting the service.

The above case was sent by the Treasury Solicitor to the Foreign Office for their observations, and the following correspondence has passed:—

"Dear Davidson,

"Treasury, January 20, 1906.

"I have been instructed by the Treasury to submit a Case to the Law Officers on the general question raised in this matter, which is probably known to you, and presumably as to the application of whatever may be the right principle to the particular case of Sir E. Law. I have also (most properly) been instructed to send you the Case for any observations, additions, or amendments you may desire should be inserted on the part of the Foreign Office, so that all proper considerations may be before the Law Officers. This, I am bound to say, I should have done in any case without any instructions from the Treasury, as one knows from experience how difficult it is to satisfy one's self that one has stated impartially a Case on which one has already formed and expressed an opinion. I accordingly inclose the draft Case which I have prepared, in order that you may deal with it as suggested above, and shall be glad to discuss the matter with you at any time that may be convenient to you.

"You will see that I committed myself to an opinion on the point some years ago, from which opinion I am, as at present advised, unable to recede (though of course I quite appreciate that I may well be wrong), and it was because on seeing these papers I formed the impression that the Foreign Office did not altogether accept my view that I suggested to the Treasury the desirability of a reference to the Law Officers.

"Yours very truly,
(Signed) "DESART."

"My dear Desart,

"Foreign Office, February 27, 1906.

"I now 'after many days,' send you back the draft Case on the subject of Sir E. F. Law's pension—with a replica of my opinion in the matter, and a copy of the Minutes which passed between Sir C. Hardinge and myself: you can of course add both to the Case if you like; I also return your letter to me, in case you desire also to embody that and have no copy of it.

"When the Law Officers have given their opinion, I daresay you will kindly let me have a copy of the Case and opinion.

"Ever yours,
(Signed) "W. E. DAVIDSON."



GENERAL.

"Copy of Minutes between the Permanent Under-Secretary of State for Foreign Affairs and the Legal Adviser."

"Sir C. Hardinge,

"Please see the papers herewith (which explain themselves), and Lord Desart's private letter to me of the 2nd February, 1st paragraph.

"I do not myself think that there is any doubt at all about the matter, but as Desart has already prepared a Case I see no reason why it should not go to the Law Officers, and probably Sir E. F. Law would like to have the benefit of an appeal to them from the opinion of the Divisional Court below.

"However, that is for you to settle. I am quite ready to risk being upset by the Law Officers.

(Initialed)

"W. E. D.

"February 16, 1906."

"Legal Adviser,

"I entirely agree with your opinion, of which I think there can be no doubt; but it would perhaps be more conclusive to Sir E. Law if that opinion were confirmed by the Law Officers.

(Initialed)

"C. H."

Minute of the Legal Adviser to the Foreign Office.

I so entirely agree both in the conclusions and the reasoning of the Treasury Solicitor's Minute of July 4, 1898, on the case of Sir Julian Pauncefote and of his Minute of January 15, 1906, on the case of Sir Edward Fitzgerald Law, that it appears hardly necessary for me to add anything further, beyond stating my entire concurrence in Lord Desart's views.

The matter is no doubt an important one, and it may on that ground—especially as the Treasury Solicitor has already prepared a "Case" for that purpose—be desirable to submit it to the Law Officers of the Crown.

I cannot, however, say that it appears to me to be doubtful as a matter of law on the construction of the Statute (32 & 33 Vict., cap. 43) that Sir E. Law has not at present fulfilled the conditions entitling him to a pension under that enactment.

The answer to question (1), which is propounded in the draft Case herewith, is, in my opinion, in the negative; and, assuming that this be so, it is unnecessary, so far as the present case of Sir E. F. Law is concerned, to answer the other questions (2 and 3).

(Signed)

W. E. DAVIDSON.

February 16, 1906.

The Attorney and Solicitor General are requested to favour the Lords of the Treasury with their opinion:—

1. Whether an officer who has left the Diplomatic Service before the expiration of fifteen years from the date of his first commission can become qualified after final retirement or removal from that service for a pension under the provisions of sections 6 and 7 of 32 & 33 Vict., cap. 43.

2. If not, could an officer who had resigned a particular post in the Diplomatic Service before the expiration of fifteen years from the date of his first commission, and had received no further appointment in that service, become by lapse of time qualified to receive a pension under the provisions of that section?

3. If so, whether Sir E. F. Law is so qualified?

Opinion.

1. The answer to the first question is in the negative. It is, in our opinion, clear that the provisions of sections 6 & 7 of "The Diplomatic Salaries, &c., Act, 1869," are applicable only in favour of members of the Diplomatic Service, and accordingly an officer who has left that service before the expiration of the period of fifteen years mentioned in section 7 (1), cannot be qualified for a pension under the Act.

GENERAL.

2. Yes, if he still remained a member of the Diplomatic Service, although unemployed therein.

3. This depends upon whether Sir E. Law's appointment as a member of the Council of the Governor-General of India was incompatible with his continuing a member of, and necessarily terminated his connection with, the Diplomatic Service, as, for example, if the terms of his appointment were such that he could not properly resign it were he called upon to serve in the Diplomatic Service. This is a question of fact depending upon the Rules of the Service and the terms of Sir E. Law's appointment.

We may add that we agree in all respects with the opinion expressed by Lord Desart.

(Signed)

JOHN L. WALTON.
WM. S. ROBSON.

Law Officers' Department,
March 27, 1906.

Sir,

Treasury Chambers, April 7, 1906.

The Lords Commissioners of His Majesty's Treasury have had under consideration Lord Lansdowne's letter of the 27th November last, submitting Sir E. F. Law's claim to a pension under the Act 32 and 33 Vict., cap. 43, in respect of his services as Commercial Attaché and Commercial Secretary.

Sir E. Law resigned the last mentioned office as from the 31st December, 1898, when he had not completed the period of fifteen years which must elapse from the date of his first commission in order to qualify him for a pension under the Act, and my Lords understand that he has not, since that date, been a member of His Majesty's Diplomatic Service.

In these circumstances my Lords are unable, for the reasons given in their letter of the 7th July, 1898, with regard to the case of Lord Pauncefote, to regard Sir E. Law as qualified for a diplomatic pension.

I am, &c.
(Signed)

G. H. MURRAY.

The Under-Secretary of State,
Foreign Office.

Note.—The papers showing the steps taken by the Treasury to arrive at their decision—Minutes of Treasury Solicitor, Report of Law Officers, &c.—were not officially communicated, but submitted privately, to this Office.

No. 1^B.

[In Board of Trade letter
of April 25, 1906.]

[April 11, 1906.]

From Board of Trade, March 21, 1906, to the Law Officers of the Crown
and Mr. Rowlatt.

THE Law Officers and Mr. Rowlatt are requested to advise—

1. Whether under Treaty stipulations the subjects of Greece, Japan, and San Salvador can claim to have granted to them a pilotage certificate upon compliance with the provisions of section 599 of "The Merchant Shipping Act, 1894."

2. Whether the subjects of nations with whom a Treaty has been entered into granting most-favoured-nation treatment have also a right to claim the same privileges, &c., as would be granted to subjects of the States mentioned in question No. 1.

3. Whether the rights claimable by subjects of the nations indicated in question No. 2 is an absolute right by reason of the operation of the most-favoured-nation clause, or whether the right is one which is claimable only if and when the subjects of the States mentioned in question No. 1 have claimed and had granted to them the particular privilege now under consideration.

4. Generally upon the case.

[455]

As to
Treaty right
of Aliens
to Pilotage
Certificates.

*Opinion of the Law Officers of the Crown and Mr. Rowlatt on Case above submitted.*

1. We are of opinion that, as the law now stands, the subjects of the countries mentioned can claim to have the certificates in question granted to them upon compliance with the provisions of section 599 of "The Merchant Shipping Act, 1894." The nationality of the candidate for such a certificate is, in our opinion, not a matter which, under the present law, ought to be taken into consideration in deciding upon his case.

There remains the question whether, if the law were altered so as to make foreigners ineligible for these certificates, a breach of the Treaties with these countries would be committed. We are not entirely agreed upon this point.

The Attorney-General and Mr. Rowlatt are of opinion that the Anglo-Greek Treaty of 1886 gives to owners and masters of Greek ships a right of access by navigation to British waters, and that such access must not be encumbered by any condition affecting the ship, whether imposed from the fiscal or from the traffic regulation point of view which national ships can avoid. They do not think that this requires Great Britain to admit foreigners to the exercise of the profession of a pilot in British waters merely because all ships, foreigners included, are obliged to take such pilots; but they regard certificates under section 599 as, in substance, a means whereby ships officered by persons of sufficient competence are exempted from compulsory pilotage, and that to deny this to foreign ships would be a breach of the Treaty.

The Solicitor-General is of opinion that the equality of treatment stipulated for is in respect of fiscal matters only, and that these certificates may rightfully be withheld from foreigners on the ground that the selection of persons to exercise in any way the functions of a pilot is a matter concerning national safety, in respect of which His Majesty's Government ought not to be held to have limited their freedom of action.

2. Yes.

3. This must depend upon the true construction of the particular most-favoured-nation clause upon which it may arise; but, speaking generally, we are of opinion that the right extends to the treatment which the most favoured nation is entitled to, whether actually claimed or not. On the other hand, the treatment accorded in actual practice would be very material upon the construction of the Treaty upon which it depends.

4. In considering what position it is, practically speaking, possible to take up with regard to this question, it is necessary to bear in mind what recently occurred in the case of Sweden. It was held in the "Hanna" L.R., 1, A. and E., 283, and the "Vesta" L.R., 7, P.D., 240, that Swedish vessels were liable to compulsory pilotage in certain cases where British ships were not. This was objected to by Sweden as differential treatment in the matter of "charges" within the meaning of a Treaty of 1826. His Majesty's Government [did not consider that the claim to exemption could be made under the Declaration of 1824, but] promised legislation, and "The Merchant Shipping (Exemption from Compulsory Pilotage) Act, 1897," was passed to repeal the British exemption. It was, moreover, specifically pointed out to the Swedish Government that pilotage certificates were open to Swedish masters on the same terms as to British. It seems to us that it will not now be easy to deny that equality of treatment, such as that provided for in the Anglo-Greek Treaty of 1886, extends both to pilotage generally and to pilotage certificates.

(Signed)

JOHN L. WALTON.
W. S. ROBSON.†
S. A. T. ROWLATT.

† Memorandum by the Solicitor-General.

I think, perhaps, I ought to make a somewhat fuller statement of reasons for my Opinion that the pilotage certificates granted to masters of ships may be limited to British subjects only, without any infraction of the most-favoured-nation clause in the Greek Treaty.

Wide as the wording of that clause is, it is, in my opinion, purely fiscal in its scope. Thus the privileges and exemptions which are there stipulated to be given to either contracting party are such as are "enjoyed by native subjects without having to pay any tax or impost greater than those paid by such subjects." It is a clause

* The words in brackets were added in this Office as being necessary to complete the quotation.

aimed against differential "taxes or imposts" of a fiscal character; but it has been conclusively decided in the cases of the "Hanna" and the "Vesta" that a charge for compulsory pilotage imposed on a foreign ship, and not on a British ship, is not a "charge" upon vessels within the meaning of Treaties of Commerce. Compulsory pilotage is a regulation instituted for their benefit, and the payment for it is not a tax or impost. In fact, the grant of equivalent privileges, exemptions, &c., is in relation to a different subject-matter than that with which we are concerned in dealing with the national Regulations as to pilotage. This is a view which foreign nations are scarcely in a position to dispute, for, so far as I am aware, none of them will allow a British subject to acquire a pilotage certificate at all. The only difference between us and them in the application of the same principle is that we allow some of our pilots the privilege of being masters of ships, whereas they do not.

It seems to me that we are still bound by the decisions of our own Courts in the "Hanna" and the "Vesta." The correspondence between the British Government and Sweden in reference to these decisions is not before me; but the mere fact of our having deprived our own ships of the exemption from compulsory pilotage in a particular locality complained of by Sweden does not lessen the authority of those decisions in reference to the point of law now involved. If the British Government had thought these decisions wrong, it could, and would, have passed a Statute depriving them of effect. But it preferred to make a concession to Sweden by giving up the benefit of the decisions in a particular case. If the words of the clause in the Greek Treaty were to receive the full and unrestricted meaning which has been given them by my learned colleagues, I do not see why they should not extend so far as to enable a Greek subject to own a British ship. That would clearly be within the literal meaning of the clause, and yet obviously beyond its intended scope. I find, on reference to the Opinions of previous Law Officers (Sir R. Reid, Sir F. Lockwood, and Sir R. Webster) on the claims raised by Sweden, that their view is substantially the same as the view I have above expressed.

(Signed)

W. S. ROBSON, Solicitor-General.

Law Officers' Department,
April 11, 1906.

No. 1^c.

[In War Office letter of
May 3, 1907 (14505).]

[August 18, 1906.]

PRISONERS OF WAR.

Case for the Opinion of the Law Officers of the Crown.

THE opinion of the Law Officers is desired on behalf of the Army Council with regard to certain questions arising as to some proposed Regulations for the custody, &c., of prisoners of war.

The following letter was addressed by the Admiralty to the Army Council, dated the 27th November, 1905:—

T. 4766/1905.
Sir,

Admiralty, November 27, 1905.

I am commanded by my Lords Commissioners of the Admiralty to acquaint you, for the information of the Army Council, that they have had under consideration the question of the custody, maintenance, and treatment of prisoners in the event of a war in which His Majesty's navy is involved.

2. My Lords consider that there is no necessity for the separation of naval from military prisoners, as the same organization can equally deal with both classes; and that their confinement on board ship would only be resorted to for the purposes of transport from the scene of capture to shore prisons at a British port, or under special circumstances as a temporary measure, the use of hulks for their detention being objectionable and not in accordance with modern principles of international law.

Custody of
prisoners of
war:
proposed
Regula-
tions.



3. My Lords see no difficulty in framing the few Regulations required in respect to prisoners on board ship, but they desire to invite the special attention of the Army Council to the question of their treatment ashore, with a view to obtaining concurrence in the general principles involved, so that the detailed arrangements can be gone into subsequently, if necessary, by a Joint Committee.

4. In view of the fact that in war with a European Power the first strain must fall upon the navy, and would be very severe, it appears to my Lords that the duty of guarding prisoners ashore, whether soldiers or sailors, should be recognized as belonging to the army, and that the arrangements should be such as would admit of quickly relieving the navy of prisoners temporarily in their charge for transit oversea. It is essential at such a time that the services of *all* naval ranks and ratings should be immediately available for active service with the fleet at sea.

5. It is suggested that on the outbreak of war special prisoners' barracks or camps should be at once provided in suitable situations for the reception of all prisoners, and placed under retired officers of the army, the necessary guards being provided from the army or the police, as may be most convenient. The barracks, &c., should be managed as the Army Council may deem best, under instructions to be drawn up by the War Office.

6. If my Lords' suggestions are concurred in, such Regulations as may be necessary in regard to prisoners on board ship will be drafted by the Admiralty and referred for consideration of the Army Council.

I am, &c.
(Signed) C. I. THOMAS.

The Secretary,
War Office.

The Army Council agreed that there was no necessity for the separation of naval and military prisoners of war, and that the same organization could equally deal with both classes, and were prepared to accept the principle that the duty of guarding prisoners of war, on shore, whether naval or military prisoners, should properly fall on His Majesty's land forces (the incidence of cost for their accommodation, maintenance, &c., being borne by naval and military votes proportionately).

As a result of the late war in South Africa, considerable experience has been gained as to the housing, treatment, and control of prisoners of war, and it was determined to frame Rules and Regulations to be generally applicable on shore. The Regulations that may be necessary on board ship will be drafted by the Admiralty.

A Joint Conference was held at which the War Office, Admiralty, and the Foreign Office (by their Legal Adviser, Mr. Davidson, K.C., C.B.) were represented, and the proposed Rules (copy herewith) were forwarded by the War Office for the consideration of the Judge Advocate-General and the Treasury Solicitor, as appears from the following Minutes:—

17.

Judge Advocate-General,
Treasury Solicitor,

April 26, 1906.

The inclosed proposed Rules for prisoners of war interned in the United Kingdom are forwarded for any remarks you may deem desirable to make thereon.

2. With reference to Rule 3 and section 8 of The Hague Convention, the Adjutant-General would be glad if you will kindly favour him with your opinion as to whether it is advisable to make provision in the Army Act for the application of that Act to prisoners of war.

3. Will you also kindly favour the Adjutant-General with your opinion as to whether the application of Rule 18, or of these Rules generally, can be brought into operation in the United Kingdom, or in British territory elsewhere, without coming into conflict with municipal or other law?

(Signed) W. E. FRANKLYN,
D. P. Services.

18.

D. P. Services,

These Rules are founded on the Rules of The Hague Convention, and are generally in harmony with the laws of this country.

2. In order to bring prisoners of war within the provisions of the Army Act, it will be necessary to amend the Act in that respect.

3. Although it is a recognized rule of the laws and customs of war, is justified within the areas of martial law, and, it may be, in the theatre of war, that a prisoner of war may be shot or otherwise killed in attempting to escape, I can find no authority for the justification of the homicide in the laws of the United Kingdom if committed in this country.*

So far as the Rules affect the putting down of organized disturbances by force of arms, I am of opinion that if the authority is exercised with discretion it will be within the law. I think these questions ought to be submitted to the Law Officers of the Crown.

(Signed) T. MILVAIN,
Judge Advocate-General.

May 1, 1906.

19.

C. 2,

In view of the opinion of the Judge Advocate-General above, will you please refer the two questions in paragraphs 2 and 3 of Minute 17 for the opinion of the Law Officers of the Crown?

(Signed) W. E. FRANKLYN,
D. P. Services.

May 1906.

20.

Treasury Solicitor,

We have been at some pains to discover the authority for the Regulations governing the internment of prisoners of war in this country during the Napoleonic wars and the Crimean, the latter war being the last occasion on which prisoners were confined in this country. We have traced the Regulations in a Report of a Committee of the House of Commons printed in 1798. These Rules were issued by the Transport Department (a branch of the Admiralty), but do not appear to be based on any statutory authority. It is probable that these Rules governed the treatment of the Russian prisoners in 1854, but no definite evidence to this effect can be produced. Under any circumstances there was no statute on the point. During the South African war prisoners of war were interned in Bermuda, Ceylon, St. Helena, and India under martial law declared by Order in Council.

We have also inquired as to the Regulations in France and Germany. It appears that prisoners of war are in France regarded as subject to martial law, and in Germany as subject to the Laws and Ordinances of the locality in which they may be interned, particularly to the Regulations issued to the troops of the State in question, so that in neither country is there any specific statute to govern prisoners of war.

The question now raised is whether it is expedient to depart from our own custom prevailing hitherto and from that of the two leading European Powers, and provide specifically by statute in the Army Act for the provision of prisoners of war.

(Signed) B. B. CUBITT

May 28, 1906.

P.S.—We found in the Annual Register a case of an inquest on a French prisoner of war shot while endeavouring to escape from Dartmoor, in which the jury returned a verdict of justifiable homicide.

* See Coroner's jury case referred to in Minute No. 20.



It will be seen that, on the advice of the Judge Advocate-General, the opinion of the Law Officers is desired on the questions mentioned in paragraphs 2 and 3 of General Franklyn's Minute of the 26th April, 1906.

The Law Officers are referred to "The Laws and Customs of War on Land," by Professor Holland, K.C., an official publication for the use of the army; section 8 of The Hague Convention (mentioned in General Franklyn's Minute of the 26th April, 1906) is reproduced in Article 32, p. 12.

The questions raised by the Director of Personal Services and the Judge Advocate-General go to the general position of prisoners of war in regard to the municipal laws of England or any other portion of the British dominions in which they may be confined.

It is apprehended that there can be no serious question as to the legality, according to the municipal law of England, of the custody by the Crown of prisoners of war. See the cases *R. v. Schiever*, 2 Burr., 765 (1759), the three Spanish sailors, 2 W. Bl., 1324 (1780), and *Furly v. Newnham*, 2 Dougl., 419 (1780), in all of which a *habeas corpus* applied for on behalf of prisoners of war was refused; see also the Act 52 Geo. III, cap. 156, making the offence of assisting prisoners of war to escape one punishable with transportation. Any other condition of the law would be an intolerable absurdity, and of course, as a matter of history, prisoners of war were kept in large numbers in this country during the Napoleonic and Crimean wars, and in various parts of the Empire, such as Bermuda, St. Helena, Ceylon, and British India during the Boer war. The principle of law to which this power of the Crown may be referred is perhaps that principle which recognizes that an act of State—i.e., the acts of the Crown as representing this country towards an alien State—are not cognizable in any Municipal Court of Law; in illustration of this the Law Officers may be referred (among many other cases) to the case of *Buron v. Denman*, 2 Exch., 167 (an act of war by the Commander of a man-of-war), and to two recent cases of *Cook v. Sprigg*, 1899, A.C., 572, and *Salaman v. Secretary of State for India*, 1906, 1 K.B., 613.

It is submitted that the custody of prisoners of war is in fact part of the operations of the war, whether it be carried out in a foreign country or in British dominions at home or abroad, and in the treatment of prisoners of war the Crown is only controlled by international Treaty or custom, and that no legislation is required in any part of the British Empire to legalize such custody or any Regulations that may be made by the Crown.

The Law Officers are referred to a case laid before their predecessors in 1901 and to their opinion of the 28th January, 1901, affirming the legality of the custody of Boer prisoners of war in Ceylon.

It is submitted also that this power of the Crown must extend during such reasonable period after the actual cessation of the war as may be necessary for the repatriation of the prisoners.

Reference may also be made to the well-known rule that an alien enemy has no rights in British Courts during the war (see *Brandon v. Nesbitt*, 6 T. R., 23), and to certain cases which have arisen as to the right of a prisoner of war to sue on contracts made by him during his captivity, with the licence of the Crown, namely, *Sparenburgh v. Bannatyne*, 1 Bos. and Pul., 170 (1797), and *Maria v. Hall*, 1 Taunt., 33, &c. The particular question at issue in these cases may not be material, but there are passages throwing some light on the general position of prisoners of war, e.g., per Eyre, C.J., 1 Bos. and Pul., p. 775, "He is in the hands of the King till he is ransomed, or set at liberty by the King's command;" per Keith, J., *ib.*, p. 779, "His body is at the King's disposal." It would also appear that a prisoner of war is liable to the ordinary law for criminal offences (see case in note (p. 778) of an indictment of a prisoner of war for stealing), and also that criminal offences, e.g., murder committed against a prisoner of war, are indictable; and in *Maria v. Hall*, in the argument, a case is cited of an indictment for murdering a prisoner of war. The case of *R. v. Depardo*, 1 Taunt., 26 (1807), implies throughout that a prisoner of war can be indicted for crime committed in England.

With regard to the case, e.g., of the murder of a prisoner of war, this would not arise in the case of his execution by his custodians under the authority of the Crown, which would be, in accordance with the principle above suggested, "an act of war." The case of *Exp. Marais*, 1902, A.C., 109, is merely mentioned for the purpose of distinguishing it; that deals with the right of the Crown against its own subjects and proceeds on a different principle; the existence in the place of custody of the circumstances justifying a general application of martial force is clearly not necessary to the legality of the custody of prisoners of war.

The right of the Crown to "intern" belligerents entering neutral British territory

(which was exercised in the Russo-Japanese war in the case of the officers and crews of a Russian man-of-war which took refuge at Hong Kong) would seem to rest on the same basis as the right of the Crown over prisoners of war.

Turning to the questions specifically asked in General Franklyn's Minute, the proposal to make the Army Act applicable to prisoners of war appears to be suggested by Article 32 of Professor Holland's book. There may be some doubt as to the exact meaning of the first paragraph of that provision; possibly it may have been intended, primarily, to refer to the treatment of prisoners in the actual theatre of war. However that may be, it is clear that prisoners of war can be subject to the laws, &c., in force of the army of the capturing State only so far as applicable to their peculiar position. Part I of the Army Act, to which the proposal must (in substance) be confined, is inapplicable in many respects to prisoners of war; it constitutes many offences which prisoners of war cannot commit (see, e.g., among many other provisions, sections 4, 5, and 6), and the punishments vary according to whether the troops are "on active service" or not, and include long terms of imprisonment, which could hardly be enforced against prisoners of war except for ordinary offences against the criminal law of the country.

The constitution of courts-martial would also require serious consideration. But it is hardly necessary to labour the point that a wholesale application of the Army Act—or Part I thereof—to prisoners of war would be quite impracticable. It would seem necessary that a Special Code, following the lines of the Army Act so far as applicable, should be prepared for dealing with disciplinary and other offences by prisoners of war.

With regard to the question put in paragraph 3 of General Franklyn's Minute of the 26th April, 1906 (as to which see especially paragraphs 3, 5, 13, 17, and 18 of the draft Rules), if the view suggested above is correct, there is no restriction imposed by municipal law upon the Crown in its custody and control of prisoners of war; and it would appear (in reference to paragraph 3 of the Judge Advocate-General's Minute of the 1st May, 1906) that the killing of a prisoner of war under the orders and Regulations laid down by the Crown would not be cognizable in any municipal Court in the British Empire.

It is submitted, therefore, that no statutory enactment is necessary to give the necessary powers over prisoners of war; should, however, any such enactment be thought desirable, it should not, it is suggested, go beyond giving a general power to the Crown to make Regulations having statutory effect.

The draft Rules may raise various questions for consideration, but points of detail will be more conveniently considered when the opinion of the Law Officers has been obtained on the general questions which have been raised.

It may perhaps be worth observing that, should it be desired to make Regulations binding on British civilian subjects as regards their dealings with prisoners of war, special statutory powers appear to be necessary, except so far as the place of custody may (in the United Kingdom and elsewhere where similar enactments exist) be capable of regulation by bye-laws under the Military Lands Acts, or by the ordinary rights of the Crown as owner of the land.

Prints of a Memorandum dealing with general questions with regard to prisoners during the South African war, and of certain reports with regard to the Boer prisoners at St. Helena, Bermuda, Ceylon, and British India, are forwarded for the general information of the Law Officers, particular attention being called to the general regulations and orders that were found necessary in these cases.

The Law Officers are requested to Advise—

1. Whether it is advisable to make provisions in the Army Act for the application of that Act to prisoners of war.
2. Whether the proposed Rules can be brought into operation in the United Kingdom or elsewhere in the British dominions without legislation.
3. Generally.



1906

10 F

GENERAL.

Opinion.

1. In our opinion it is unnecessary, and we do not think it advisable to make provision for the application of the Army Act to prisoners of war.
2. Yes.

(Signed)

J. L. WALTON.
W. S. ROBSON.*Law Officers' Department,
August 18, 1906.*

GENERAL.

11

No. 2.

[November 29, 1906.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, November 20, 1906.

I HAVE the honour, by direction of Secretary Sir E. Grey, to inform you that the Lords Commissioners of His Majesty's Treasury have recently sanctioned the adoption of certain changes in the existing Tables of Fees levied by His Majesty's Consular officers under the authority of the three Orders in Council of which copies are inclosed, viz. :—

Consular
Fees
(General,
China, &c.)
Orders in
Council.
Drafts of

- "The Consular Fees (General) Order in Council, 1892";
- "The Japan (Consular and Marriage Fees) Order in Council, 1900;" and
- "The China and Corea (Consular and Marriage Fees) Order in Council, 1904."

It has consequently become necessary that fresh Orders in Council should be issued repealing these three Orders, and establishing the revised Tables of Fees.

I am therefore to transmit to you the accompanying draft Orders in Council which have been prepared for this purpose, viz. :—

- "The Consular Fees (General) Order in Council, 1906";
- "The China and Corea (Consular and Marriage Fees) Order in Council, 1906"; and
- "The Japan (Consular and Marriage Fees) Order in Council, 1906."

A copy of "The China and Corea (Shipping Registry) Order in Council, 1904," which is referred to in the draft Order relating to China and Corea, is also inclosed for convenience of reference.

As it is important that these Orders should come into force on the 1st January next, Sir E. Grey will be obliged if you will take the draft Orders in Council into your consideration, and will favour him, at your early convenience, with your opinion as to whether the terms of these Orders are fit and proper for submission to the King in Council for His Majesty's approval.

I have, &c.
(Signed) ERIC BARRINGTON.

Report.

These draft Orders in Council may, in our opinion, properly be submitted for the approval of His Majesty in Council.*

(Signed) JOHN L. WALTON.
W. S. ROBSON.

*Law Officers' Department,
November 29, 1906.*

* The Orders in Council in question are contained in the "London Gazette" of December 28, 1906 (Confidential, No. 8808* and No. 8809*).



(12)

ITALY.

No. 3.

[April 30 and May 22, 1906.]

Foreign Office to the Law Officers of the Crown.

Arrest of
British
steam-ship
"Briardale,"
at Genoa.

Gentlemen,

Foreign Office, March 16, 1906.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit, for your consideration, the papers noted in the accompanying list relating to the detention of the British steam-ship "Briardale" at Genoa.

The facts of the case may be briefly summarized as follows:—

The "Briardale" is a British steam-ship, 5,000 tons, registered at Newcastle-upon-Tyne.

Her late managing owner was Mr. G. H. Elder, and her present managing owner is Sir J. D. Milburn.

Mr. Elder was adjudged a bankrupt at the Newcastle County Court on the 13th March, 1905, and Mr. W. Swan was appointed Trustee under his bankruptcy.

At the time of the bankruptcy 28/64th shares were registered in Mr. Elder's name, but as they were subject to certain registered mortgages he had ceased to have any saleable interest in the ship.

On the 16th June, 1902, Mr. Elder had mortgaged twenty of these shares to the York City and County Bank, and on the 21st January, 1904, he mortgaged four more of the remainder to the bank to secure his current account.

These mortgages were duly registered by the bank at the custom-house on the 22nd January, 1904.

Mr. Elder had previously mortgaged four other shares to Messrs. Pickard to secure advances, and these mortgages were also duly registered in January 1904, and the whole of his original 28/64th shares were therefore subject to mortgages, as above mentioned.

The full value of the "Briardale" is estimated not to exceed 20,000*l*.

At the time of Elder's bankruptcy the "Briardale" was discharging a cargo at Genoa, and on the 16th March, 1905, she was arrested at the suits of Mr. Henry Coe, Mr. H. Trumpy, and Lertora Brothers (three separate parties), of whom only the first-named was a British subject.

The contention advanced by these gentlemen was that Mr. Elder had sold to each of them, for 523*l*, one share in the "Briardale." Messrs. Lertora's total claim, however, is for 3,768*l*. 13*s*. 11*d*., the amount being made up of claims against other vessels managed by Mr. Elder as well as of various personal claims, none of which has any connection with the "Briardale" whatever.

Messrs. Lertora have never been able to produce any bill of sale, while those produced by the other claimants were never registered.

The case came before the Court several times in April, but the Court persisted in reserving their judgment.

On the 12th May, 1905, as the delay still continued, and the detention of the ship was involving the mortgagees in enormous losses, their agent at Genoa offered to give bail to the amount of 6,000*l*., being a little more than the claim of the three claimants, to answer any claims that might be held to be good against the "Briardale."

The claimants, however, refused to accept any bail unless it were made to attach to any claim they might succeed in establishing against Mr. Elder's bankrupt estate as a whole. These conditions were clearly unacceptable to the mortgagees.

The case was not brought to the notice of the Foreign Office until the 14th June, some three months after the arrest of the vessel, and after the litigation had already been in progress in the Italian Courts. Messrs. Ingledew and Fenwick, acting on behalf of the mortgagees, then asked for the intervention of His Majesty's Government in obtaining the release of the vessel. In the first place His Majesty's Embassy was instructed to make unofficial representations, but without result.

ITALY.

13

After a careful reconsideration of the case, the conclusion was come to that the action of the Italian Courts in taking cognizance of the suit from the outset was entirely opposed to international practice, and it was decided, apart from the individual interests involved, to make strong official representations to the Italian Government on the ground that the conflict of jurisdiction was a matter of the greatest importance to the general shipping community of the country. The necessary instructions, to which reference will be made later, were sent to His Majesty's Chargé d'Affaires at Rome, who addressed a note to the Italian Government on the 27th September last.

No reply was received to this note until the 11th November, when the Italian Government merely referred to the fact that the Court had authorized the release of the ship upon the master of the "Briardale" giving bail on certain conditions, and that as the master refused to agree to the conditions imposed by the Court (which it will be remembered were quite unacceptable) the responsibility for the further detention of the vessel rested with him.

This reply being entirely unsatisfactory, a further note was addressed to the Italian Government on the 17th November, in which it was pointed out that the question of the bail, although the conditions imposed with regard to it were in themselves clearly open to objection, was no more than a side issue, and that the essence of our representations was the far larger plea, viz., the conflict of jurisdiction.

The official reply to this note, which was only received by the Ambassador on the 27th ultimo, maintains:—

1. The impossibility of intervention on the part of the Italian Government while the case is still *sub judice*.
2. Their inability to understand on what basis of law or International Agreement the statement rests that the Italian judicial authorities are incompetent to take cognizance of a case referring to a foreign merchant-vessel in Italian waters.

The notes by the Minister of Justice and the Minister of Marine, which are inclosed in the note of the Minister for Foreign Affairs, seem to show that those Ministers do not understand or, at any rate, fully appreciate the contention put forward by His Majesty's Ambassador.

On the 7th December the case came on again for hearing, and the result was so far satisfactory that Mr. Trumpy and Mr. Coe were non-suited and condemned to pay half costs, but they were absolved from liability to damage for the detention of the ship. Messrs. Lertora's claim was reduced to 1,023*l*. 8*s*. 9*d*., but as to these items further proof was allowed. Bail has again been offered for the reduced amount, but the conditions imposed by the Court are that the bail shall be subject to any claims that Messrs. Lertora may make good as against Elder in his capacity as manager, after his interest in the "Briardale" has ceased.

Three separate appeals, viz.:—

1. The appeal of the owners against the condition of the bail.
2. An appeal by Lertora Brothers against the reduction of their claim.
3. An appeal by Mr. Coe and Mr. Trumpy against the decision of the Court to non-suit them on the ground that the bills of sale produced by them were never registered, were lodged, and the Court, after hearing the pleadings on the 2nd and 3rd ultimo, reserved judgment. It is not expected that the decision will be announced for another fortnight or three weeks.

I am to invite your special attention to the instructions issued to His Majesty's Chargé d'Affaires at Rome, on the 21st September last, to which reference has already been made. The line of policy indicated therein is based on the fact that under the provisions of "The Merchant Shipping Act, 1894," no person not being a British subject can own a British ship or shares, therein. Ships or shares which become the property of an alien (except by transmission by death or marriage, in which case the interests are sold by the Court) become forfeited to the Crown, consequently any attempt to register the bills of sale to Mr. Trumpy and Messrs. Lertora would have led to proceedings for the forfeiture to the Crown of their two shares. The share sold to Coe was never registered in his name, and he has, therefore, legally no right in the ship.

It is stated on behalf of the "Briardale" that no sums are owing to Messrs. Lertora for services rendered to that vessel (see letter of the 16th December, 1905, by Messrs. Bruna inclosed in Messrs. Ingledew and Fenwick's letter of the 4th January,



1906), and, therefore, the only ground on which they, or Mr. Trumpy or Mr. Coe, can be entitled to take proceedings against the vessel, is that they own a share, or shares, in the ship—whether they claim under the abortive bills of sale, or merely as creditors of Elder is immaterial for the present argument; consequently the suits are in reality suits for the possession of the ship or of shares therein.

Sir E. Grey is advised that the rule of the Admiralty Court in this country is to decline to entertain suits as to the possession or ownership of a foreign ship in British waters unless the suit is brought by consent of the parties or with the approval of the Consul of that particular country; and there would appear to be good grounds for objecting to the Italian Courts entertaining a suit for possession of a British ship in the converse case. The rights of Mr. Coe, Mr. Trumpy, and Lertora Brothers to the ship or any shares in her as against either the registered mortgagees on the one hand, or the receiver of Elder's bankrupt estate on the other hand, must depend on the provisions of English law, and "the Court . . . will not be instrumental in depriving foreigners of rights to which they may be entitled by the law of their own country" (Williams and Bruce's "Admiralty Practice" (?), 3rd edition, p. 24).

With regard to the question of bail, the Secretary of State is advised that the course of Admiralty practice in this country is that when a vessel has been arrested for the purposes of a suit, bail is put in and the ship is released. The bail is merely the substitution of one form of security for another, and the object of this substitution is to enable the ship to be employed and to continue to earn money. The liability of the bail, therefore, cannot extend beyond the liability of the ship.

It seems from the papers, however, that the Italian Courts have declined up till now to allow the "Briardale" to be released on bail unless the sureties make themselves responsible for the sums owed to Coe, Trumpy, and Lertora Brothers by the bankrupt Elder, *i.e.*, for debts which cannot be enforced against the "Briardale"; the net result of this is that they would escape from the superior title of the registered mortgagees of Elder's shares, and also from the operation of Elder's bankruptcy in England, in which Coe and Trumpy have already lodged proofs.

The parties have naturally declined altogether to give any such bail, and the ship has now remained under arrest for over twelve months.

In normal circumstances no case for diplomatic intervention arises until all legal remedies have been exhausted, but for the reasons indicated above the Marquess of Lansdowne, then Secretary of State for Foreign Affairs, considered that he was justified in approaching the Italian Government on the subject without waiting for the conclusion of the litigation.

This opinion is shared by Sir E. Grey, but in view of the very serious losses which are being inflicted on the owners of the "Briardale" by her continued detention at Genoa, and the probability of questions being asked in Parliament on the subject, he desires to learn whether you consider the attitude adopted by him and by his predecessor to be correct, and whether you can suggest any other grounds on which he can again approach the Italian Government.

He will at the same time be glad to be favoured, for his assistance in dealing with the case, with any observations of a general nature which you may have to offer on the papers.

I have, &c.
(Signed) ERIC BARRINGTON.

List of Papers.

Messrs. Ingledew and Fenwick	..	June	14, 1905.
North of England Freight Demurrage and Defence Association	..	"	14, "
Messrs. Ingledew and Fenwick	..	"	19, "
Ditto ..	..	"	20, "
Sir E. Egerton ..	(No. 77. Commercial)	July	26, "
Ditto ..	(Telegram)	"	28, "
To Sir E. Egerton ..	..	"	27, "
Sir E. Egerton ..	(No. 80. Commercial)	"	30, "
Messrs. Ingledew and Fenwick	..	"	28, "
To Messrs. Ingledew and Fenwick	..	August	3, "
Messrs. Ingledew and Fenwick	..	"	6, "
Ditto ..	..	"	9, "
Mr. Wellesley to Mr. Law ..	..	"	21, "
To Mr. des Graz ..	..	September	21, "
Mr. des Graz ..	(No. 93. Commercial)	"	28, "
Sir E. Egerton ..	.. (No. 110)	November	17, "
To Messrs. Ingledew and Fenwick	..	December	1, "
Messrs. Ingledew and Fenwick	..	"	4, "
Ditto ..	..	"	12, "
Ditto ..	..	"	13, "
Ditto ..	..	"	14, "
Sir E. Egerton ..	(Telegraphic)	"	15, "
To Messrs. Ingledew and Fenwick	..	"	13, "
Messrs. Ingledew and Fenwick	..	"	18, "
Ditto ..	..	January	4, 1906.
To Messrs. Ingledew and Fenwick	..	"	16, "
To Sir E. Egerton ..	..	"	16, "
Messrs. Ingledew and Fenwick	..	"	6, "
Sir E. Egerton ..	(No. 2. Commercial)	"	6, "
Consul-General Keene ..	..	"	12, "
Messrs. Ingledew and Fenwick	..	"	15, "
Ditto ..	..	"	17, "
Ditto ..	..	"	19, "
To Consul-General Keene ..	..	February	3, "
Messrs. Ingledew and Fenwick	..	January	22, "
Mr. Wellesley ..	..	"	23, "
Messrs. Ingledew and Fenwick	..	"	29, "
Sir E. Egerton ..	..	"	15, "
Ditto ..	..	"	19, "
Messrs. Ingledew and Fenwick	..	February	6, "
Ditto ..	..	"	9, "
Mr. Wellesley to Mr. Hurst ..	..	"	7, "
To Law Officers ..	..	March	16, "
To Consul-General Keene ..	..	"	16, "
Sir E. Egerton ..	(No. 8. Consular)	February	28, "
Ditto ..	(No. 11. Consular)	March	7, "

Report.

The attitude adopted in this case by your Department has not, we think, been based upon correct grounds, but the case does, in our opinion, give rise to matters upon which you can approach the Italian Government, and which may properly be made the subject of diplomatic representation to them.

In our opinion the proceedings in Italy were not suits for the possession of the ship or of shares therein, although if they had been of that nature we could not concur in the view that the Italian Courts would necessarily have had no jurisdiction in the matter. The ship being in Italian waters the jurisdiction of the Italian Courts in relation to it depends upon Italian law, and we entertain no doubt that the Italian Courts would have jurisdiction to cause a foreign ship in Italian waters to be arrested in respect (*inter alia*) of claims against that ship, as distinguished from mere personal claims against an alleged part owner of the ship. The original proceedings in Italy were undoubtedly founded purely upon claims of the latter character, that is to say, they were merely claims by personal creditors of Mr. Elder; but the judgment of the 30th November 1905, of the Civil Tribunal at Genoa, while asserting the right, according to Italian law, of a personal creditor of one of a number of shareholders in a ship to arrest the whole ship, rejected those claims on the ground that Mr. Elder's interest was disposed of by way of mortgage. It accordingly limited the case of the foreign plaintiffs to claims against the ship as distinguished from personal claims against Mr. Elder, and while the right asserted by the judgment is, in our opinion, one that if it exists raises a question of grave importance to British shipping



interests, the effect of the judgment was not open to any objection. It is true that the Court postponed the question of giving bail upon the basis of the judgment until after the hearing of an appeal, but we are unable to say that that fact alone would be sufficient to justify diplomatic intervention. The question that calls, in our opinion, for representation to the Italian Government on the part of your Department arises by reason of the extent of the right to arrest a ship alleged to exist according to Italian law.

The judgment of the Court of Appeal in Genoa appears to establish—concurring in this respect with that of the Civil Tribunal, while dissenting from that judgment's view of Mr. Elder's position as a mortgagor—that a mere personal creditor of an owner of a share in a ship is entitled to arrest the share of his debtor, and for that purpose to have the whole ship arrested by the Court pending the determination of his personal claim. If this judgment be correct, it would necessarily follow that bail to release the ship would have to be in respect of the debtor's alleged interest in the ship, and not merely in respect of claims against the ship, and that accordingly the conditions actually imposed as regards bail would not be open to objection in point of law. If Italian law gives the Courts in Italy such a jurisdiction, and even if in addition it enables them in such circumstances to order a sale of the ship to satisfy the claim, we cannot say that they may not properly exercise it in regard to foreign ships in Italian waters; but it is undoubtedly a jurisdiction that would subject such ships to a most dangerous and uncertain liability, and, if it exists, would tend to seriously prejudice the commercial relations between this country and Italy. It is certainly not a jurisdiction that could be exercised by the Court in this country, and, in our opinion, you may properly represent to the Italian Government the serious effect that would be produced in the commercial relations between the two countries if Italian law entitles a creditor, or alleged creditor, of a shareholder in a British ship as distinguished from a person having a claim against the ship itself, either to arrest or dispose of the ship. We have not failed to observe that in this case Mr. Elder as a mortgagor had, according to the law of England, no interest in the ship available for his creditors, but, while having regard to that fact, it may be well in any representations made to the Italian Government not to treat Mr. Elder as a shareholder—the erroneous decision of the Court of Appeal upon this point is not in itself a matter upon which diplomatic intervention could be based.

We may add that, whatever be the correct view as to the right of arrest in Italy, the judgment of the Court of Appeal appears to be erroneous, having regard to Mr. Elder's position as a mortgagor, and the case would accordingly appear to be a proper one for appeal to the Court of Cassation, both on that ground and upon the question of the right of arrest.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
April 30, 1906.

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, May 14, 1906.

I have the honour, by direction of Secretary Sir E. Grey, to acknowledge the receipt of your letter of the 30th ultimo, in which you furnish him with your Report on the case of the steam-ship "Briardale."

I am now to transmit to you the draft of a despatch which Sir E. Grey proposes to address to His Majesty's Ambassador at Rome, instructing his Excellency to make representations to the Italian Government in the sense indicated in your letter, and also the draft of letters to be addressed to the firms and other interested persons who have been in communication with this Department in regard to the case.

I am to inquire whether you concur in the terms of these drafts.

I have, &c.

(Signed) F. A. CAMPBELL.

Report.

We concur in the terms of the drafts, as altered* and initialled by us.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
May 22, 1906.

Draft of Despatch from Sir Edward Grey to Sir E. Egerton.

(No. 22. Consular.)

Sir,

Foreign Office, May 1906.

With reference to previous correspondence on the subject of the arrest and detention at Genoa of the steam-ship "Briardale," I transmit, for your Excellency's confidential information, a copy of the opinion furnished by the Law Officers of the Crown on the case.

Your Excellency will observe that the Law Officers do not concur in the view hitherto held in this Department, which was that the suit was one for the possession of a British ship, and that the Italian Courts had therefore no jurisdiction in the matter. The Law Officers hold that the Italian Courts have jurisdiction in respect of claims against the ship, as distinguished from mere personal claims against an alleged part owner of the ship, and, although the original proceedings were founded on claims against Mr. Elder of the latter nature, the judgment given by the Civil Tribunal at Genoa on the 30th November rejected those claims, on the ground that Mr. Elder's interest was disposed of by way of mortgage, and limited the case to claims against the ship.

But while the effect of the judgment *is* was not (*so long as it stood*), in the opinion of the Law Officers, open to objection, the judgment did raise a question of grave importance to British shipping, in that it asserted the right, according to Italian law, of a personal creditor of one of a number of shareholders in a ship to arrest the whole ship.

If this assertion, in which the Italian Court of Appeal concurred, and on which it acted, be correct, it would necessarily follow that bail to release the ship would have to be in respect of the debtor's alleged interest in the ship, and not merely in respect of claims against the ship, and that, accordingly, the conditions actually imposed as regards bail would not be open to objection in point of law.

If Italian law gives Courts in Italy such a jurisdiction, and even if in addition, it enables them in such circumstances to order a sale of the ship to satisfy the claim, the Law Officers are not prepared to say that the Courts may not properly exercise it in regard to foreign ships in Italian waters; but it is undoubtedly a jurisdiction which would subject such ships to a most dangerous and uncertain liability, and would tend seriously to prejudice the commercial relations between this country and Italy. It is certainly not a jurisdiction that could be exercised by the Court in this country.

The Law Officers also state that they consider the decision of the Court of Appeal in regard to Mr. Elder's continued interest in the ship to be erroneous, but this is not a matter upon which diplomatic intervention could be based.

I request your Excellency to ask for an interview with the Minister for Foreign Affairs at the earliest possible moment, and represent to him that, if the decision is confirmed, that Italian law entitles a creditor or an alleged creditor of a shareholder in a British ship, as distinguished from a person having a claim against the ship itself, either to arrest or dispose of the ship, the effect on the commercial relations between the two countries, which have hitherto been so amicable, is likely to be immediate and disastrous.

I shall myself make a similar communication to the Italian Ambassador at this Court.

I am, &c.

J. L. W.:
W. S. R.

Draft of Letter from Foreign Office to Messrs. Ingledew and Fenwick†

Gentlemen,

Sir,

Foreign Office, May 1906.

As you are aware, His Majesty's Government have given the closest consideration to the case of the steam-ship "Briardale," now detained at Genoa, and I am directed by Secretary Sir E. Grey to inform you of the opinion at which they have arrived as to the main facts of the case, and as to the representations which must be made to the Italian Government.

Sir E. Grey is advised that as the case was limited by the decision of the 30th November of the Civil Tribunal at Genoa to *alleged* claims against the ship, as distinguished from personal claims against Mr. Elder, that judgment in effect was not open to objection, and that in any view the jurisdiction of the Italian Courts over a ship in Italian waters is not open to dispute. He is further advised that the suit cannot be considered as one for possession of a British ship. But the

* Alterations printed in italics.

† Identical letters were addressed to Messrs. Wilkinson and Marshall, Mr. T. Cairns, M.P., and Mr. D. Pickard, with the addition of the two paragraphs at the end to Mr. Pickard only.



assertion of the Civil Tribunal, confirmed and acted upon by the Court of Appeal, that a mere personal creditor of an owner of a share in a ship is entitled to arrest the share of his debtor, and for that purpose to have the whole ship arrested by the Court pending the determination of his personal claim, involves a most dangerous principle.

His Majesty's Government will take prompt steps to warn the Italian Government that, if this decision be confirmed, the effect upon the commercial relations between the two countries will be immediate and most prejudicial.

With regard to the decision of the Court of Appeal respecting Mr. Elder's continued interest in the ship, Sir E. Grey is advised that that decision is probably erroneous, and that the case would accordingly appear to be a proper one for appeal to the Court of Cassation both on that ground and upon the question of the right of arrest.

I am, &c.

J. L. W.
W. S. R.

To Mr. D. Pickard only:—

I have just received your letter of the 22nd. I do not think that it can be said that there has been anything in the nature of unreasonable delay in this case.

It was absolutely necessary in the interests of the parties concerned to obtain the opinion of the Law Officers of the Crown in the matter. The Law Officers found that the case involved extremely complicated legal issues, and naturally were not prepared to give an opinion without having had a reasonable period for consideration. In these circumstances, I regret that you should not have appreciated the fact that some little time would necessarily elapse before any action could be taken by His Majesty's Government in the matter.

JAPAN.

No. 4.

[February 20, 1906.]

Foreign Office to the Law Officers of the Crown.

Gentlemen, Foreign Office, December 20, 1905.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you the papers noted in the accompanying list, which relate to the seizure and detention of the steam-ship "Lincluden," the property of the Lincluden Steam-ship Company, by a Japanese war-ship on the 16th May last, in respect of which a claim has been put forward by the owners against the Japanese Government.

The "Lincluden" was on a voyage from Nicolaief to Vladivostok with a cargo of barley. She left the former port on the 28th January, 1905, but, on her arrival at Woosung on the 12th May, received orders from the owner to proceed to Kobe and there to discharge her cargo. While on her voyage to the latter port she was seized by the Japanese war-ship "Sado Maru" on the 16th May on suspicion of carrying contraband of war.

The "Lincluden" was taken in for adjudication in due course, and it will be observed from the judgment of the Sasebo Prize Court, dated the 21st May (Paper C) that, while the Court held that the action of the "Sado Maru" in seizing the vessel was justified, inasmuch as the evidence was not sufficient to determine the fact that the steamer had actually changed her port of destination, it nevertheless decided that there was no doubt that Kobe was her true objective, and released the vessel.

The owners of the "Lincluden" have now presented a claim to this Department amounting to 493*l.* 15*s.* 6*d.*, the principal item of which is a charge for six days' detention at the rate of 6*d.* per gross registered ton per day, amounting to 411*l.* 18*s.* It appears, however, to Sir E. Grey that the sum claimed for demurrage is excessive, having regard to the fact that the proceedings of the steamer warranted her detention by the Japanese authorities, and that in a letter from the Customs, dated the 18th March last (Paper A), the name of the "Lincluden" appears in a list of vessels suspected of being in attendance upon the Russian fleet. In the event, therefore, of the claim being put forward, Sir E. Grey proposes to inform the owners that the rate of demurrage must be reduced from 6*d.* to 4*d.* per gross ton.

The main question of principle underlying this claim is whether His Majesty's

Seizure of
"Lincluden" by
Japanese
during war
with Russia.

Government are entitled to demand compensation in a case in which the circumstances amply justified the seizure of a vessel and the subsequent proceedings before a Prize Court, but in which, after investigation of the case, no grounds for condemnation were found to exist. Sir E. Grey, as at present advised, is inclined to think that any neutral State is at liberty to ask for compensation from a belligerent State in such circumstances, and that, consequently, the claim of the owners of the "Lincluden" should be put forward by His Majesty's Government.

I am to request that you will take the inclosed papers into your consideration, and that you will favour Sir E. Grey with your opinion as to whether, having regard to all the circumstances attending upon the seizure of the "Lincluden," the case is one in which His Majesty's Government can properly ask the Japanese Government to pay compensation.

Sir E. Grey would also be glad to be favoured with any observations of a general character which you may be good enough to offer upon the papers now submitted to you.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

(A.) Customs	..	..	..	..	March	18, 1905.
(B.) Sir C. MacDonald	(No. 26, Treaty. Telegraphic.)	..	..	..	May	18, ..
(C.) Sir C. MacDonald	.. (No. 35, Treaty.)	..	..	..	June	26, ..
(D.) Messrs. Botterell and Roche	..	..	..	..	September 5,	..
(E.) Mr. Anderson to Mr. Hurst	..	..	..	..	September 28,	..
(F.) Japanese Prize Court Regulations	[Confidential, No. 8859, p. 41], March 1, 1904					
(date of amendment).						

Report.

Having regard to the fact, found by the Prize Court and admitted by the British Government, that there were reasonable grounds for the seizure of the "Lincluden" and for the subsequent proceedings before the Prize Court, a claim for compensation for detention cannot, in our opinion, be sustained.

There is no doubt that if a belligerent interrupts the voyage of a neutral vessel by taking it before a Prize Court for adjudication the captor must justify his conduct by proving that some circumstances existed in connexion with the ship or cargo affording reasonable ground for the belief that one or both may prove on further inquiry to be lawful prize. If the captor cannot give such proof, he is liable to pay costs and damages to the neutral vessel.

We can, however, find no sufficient authority for the suggestion that where the search and subsequent proceedings have resulted in a decree for the restitution of the neutral vessel the latter is entitled—on that fact alone—to recover damages for the detention from the captor or his Government. There is one case (*Salucci v. Johnson*, 4 Douglas 224 A.D. 1785), which may perhaps be cited as an authority for the proposition that the searcher acts at his peril and pays costs or damages unless he finds something on board to justify him, but that case is not treated as an authority in subsequent cases, and the later authorities proceed on the principle that the owner of the neutral vessel has no remedy for loss of voyage or for other injury occasioned by the reasonable exercise of the right of search.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
February 20, 1906.



[May 25, 1906.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

*Foreign Office, April 2, 1906.*Award in
Japanese
House Tax
Arbitra-
tion:
Reading of
Bearing of
Treaties.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you the accompanying papers in connection with a Memorandum that has been drawn up in Paris by Agents of the British, French, and German Governments as to the interpretation to be placed on the Award pronounced at The Hague on the 22nd May, 1905, in the Japanese House Tax Arbitration between Great Britain, France, and Germany on the one side, and Japan on the other, and the results that follow from such Award.

The point at issue in this Arbitration was whether the Japanese Government were entitled to impose taxation on the houses belonging to the land-renters in the former foreign Settlements in Japan.

Questions in connection with this Arbitration have already been referred to your predecessors on the 11th September, 1901, on the 11th August, 1903, on the 9th December, 1903, and on the 21st April, 1904 (Papers A, B, and C).

The case turned upon Article XVIII of the Anglo-Japanese Treaty of 1894 and the corresponding portions of the French and German Treaties under which the Powers surrendered their rights of extra-territorial jurisdiction in Japan. Article XVIII provided as follows:—

"Her Britannic Majesty's Government, so far as they are concerned, give their consent to the following arrangement:—

"The several foreign Settlements in Japan shall be incorporated with the respective Japanese Communes, and shall thenceforth form part of the general municipal system of Japan.

"The competent Japanese authorities shall thereupon assume all municipal obligations and duties in respect thereof, and the common funds and property, if any, belonging to such Settlements shall at the same time be transferred to the said Japanese authorities.

"When such incorporation takes place, the existing leases in perpetuity under which property is now held in the said Settlements shall be confirmed, and no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property. It is, however, understood that the Consular authorities mentioned in the same are in all cases to be replaced by the Japanese authorities.

"All lands which may previously have been granted by the Japanese Government free of rent for the public purposes of the said Settlements shall, subject to the right of eminent domain, be permanently reserved free of all taxes and charges for the public purposes for which they were originally set apart."

The contention of the Japanese Government was that, in accordance with Japanese law, they were entitled for all fiscal purposes to separate the land from the buildings standing on it, and to limit the privileges given by Article XVIII to the land, as it was only the land that was held under the lease, the houses having been erected by, and being the actual property of, the lessee.

The arbitration which was agreed to for the settlement of the dispute, involved a close investigation of the origin and nature of the privileges of the land-renters and the status which they had enjoyed up to 1899, the date when the Treaty concluded in 1894 came into force. Voluminous cases ("Mémoires") and counter-cases were prepared on both sides. The "Mémoire" and the "Contre-Mémoire" which had been prepared in Paris by the Agents of the three Powers were submitted to your predecessors on the 9th December, 1903, and the 21st April, 1904, respectively (Paper C).

The Award of the Tribunal was pronounced on the 22nd May, 1905, and was favourable to the contentions of the three Powers (Paper D).

On the 1st September, 1905, His Majesty's Minister at Tôkiô reported that the Japanese Government were proposing to levy income tax on foreign Settlement property at Yokohama, and from subsequent communications it became clear that they were also proposing to impose in full the business tax on the land-renters.

As these proposals indicated that the Japanese Government placed a different interpretation upon the Award from that placed upon it by the three Powers, the

Secretary of State felt that it was desirable to have a clear and definite statement of the taxes and charges from which the land-renters could, in view of the Award, claim exemption. For this purpose it was decided that the Agents of the three Powers should again meet in Paris and draft an identic note for presentation to the Japanese Government by their Representatives at Tôkiô, setting forth the deductions drawn by the three Powers from the Award, and specifying the taxes and charges from which they consider the land-renters should be exempt. This draft has now been prepared in the form of a Memorandum, of which a copy is inclosed, together with a translation for convenience of reference (Papers E and F).

You will observe that the claims advanced in this Memorandum comprise six heads, which in the main follow the "Conséquences" which the "Mémoire" (Paper N)* sets out as being the result which the three Powers considered would follow if an Award were pronounced in their favour. The question of the transfer to Japanese subjects of a property held under perpetual lease, which is referred to in the Memorandum, is, however, not comprised in these "Conséquences," and Sir E. Grey is not prepared to concur in the inclusion of this claim in the Memorandum. No such point was raised in the correspondence between His Majesty's Minister and the Japanese Foreign Office, which preceded the agreement to refer the dispute to arbitration in 1902, and the question is not in any way connected either with the Arbitration or the Award.

The paragraphs numbered 1, 2, 3, 4, and 5 of the Memorandum are in conformity with the claims made in the "Conséquences" set out on pp. 51 and 52 of the "Mémoire," and the Secretary of State sees no objection to the inclusion of these in the Memorandum.

The passage in the Memorandum, beginning with the third paragraph on p. 5, "as already explained" *et seq.*, raises a question of great difficulty, and it is as to this point in particular that Sir E. Grey desires to be furnished with your advice. The claim is in effect one for the complete exemption of the land-renters from all rates and taxes imposed for local purposes, and as such a claim might prove extremely burdensome to the Japanese authorities Sir E. Grey does not consider that it would be expedient, for political reasons, to advance it unless a good case can be made out in its favour.

Taxation for municipal purposes is not in Japan, as in this country, raised solely by means of rates imposed on property, but is very largely derived from proportional additions to the Imperial taxes levied in the district. For instance, the business tax is imposed for Imperial purposes, but in some districts an additional amount equivalent to half the business tax is raised for municipal purposes, and consequently a substantial portion of the taxation imposed for municipal purposes is not taxation directly imposed upon the property held under perpetual leases. The Japanese law governing this matter is the Law of 1888 for the organization of cities, towns and villages, copy of which is inclosed, and the explanation of the system will be found on pp. 82 to 89 of Paper G.

Where the Imperial tax on which the municipal rate is levied is charged on the property (*e.g.*, the land tax and the house tax), the Japanese Government do not contest the right of the land-renters to exemption; but the land-renters claim, in addition, exemption from a municipal rate on any Imperial tax, and it is this claim which is embodied in that Memorandum.

The importance to the land-renters of the claim for exemption from taxation for municipal purposes lies in the fact that unless some such exemption can be secured, it might be possible for the Japanese authorities to shift the basis of the local taxes, and by ceasing to impose taxes such as the "Raokuzai," which is imposed on the property, and by raising all the money required for municipal purposes by means of proportional rates on such Imperial taxes as are not charged on the property, to reduce to a minimum the value of the privilege, which the land-renters enjoy under the Award, of freedom from taxes imposed on the property.

The Secretary of State has not the materials on which to decide whether or not there is any real danger of this being attempted by the Japanese authorities. The exemption, however, is one to which great importance is attached by the land-renters.

It may probably be of some assistance to you in considering these points if the various stages through which this claim has passed are described.

No allusion appears to have been made to it in the correspondence that passed at Tôkiô between the Japanese Foreign Office and the various Legations prior to the Agreement of the 28th August, 1902, for arbitration at The Hague.

In the draft of a joint case, prepared in Japan (Paper G), the claim is limited to

* Sub-annex to Paper B.



one for exemption for the owners of Settlement property from rates on national taxes for municipal purposes. This case, however, when sent home for consideration was not accepted, and the preparation of a fresh draft was commenced.

A Memorandum, prepared in this Department at the time, copy of which is inclosed (Paper I), deals with the question of exemption from municipal taxes in Part II, and this Memorandum, together with other papers, formed the subject of the above-mentioned reference to your predecessors of the 11th August, 1903.

Municipal taxation is dealt with in the "Mémoire" of the three Powers on pp. 31-34, and in "Conséquence" 6, p. 52, and in the "Contre-Mémoire" on p. 43, and the Japanese view in opposition to the above will be found in pp. 63 *et seq.* of the Japanese Counter-Case (Paper J).

The decision pronounced by the Tribunal at The Hague (Paper D) merely decided the specific point submitted to arbitration, but some of the recitals forming part of the judgment have a material bearing on the question, and in particular § 8 on p. 8 ("Whereas it would be easy to account for the care taken," &c.), and the paragraphs on p. 9, dealing with the *status quo*.

The Memorandum now prepared in Paris (Paper E) claims entire exemption for the land-renters from any taxation whatever for municipal purposes. The reasoning by which this contention is arrived at is that under the old Regulations, forming part of the contract, embodied in the leases, the necessary municipal services were to be performed by the Japanese Government in return for the ground-rent received. As the Japanese Government continued to perform all these services up till 1899 without any attempt to tax the land-renters for the purpose, the intention of the Treaty, the admitted object of which was to maintain the *status quo*, must have been to preserve this exemption.

If this reasoning be sound, the result must bear very hardly on the Japanese authorities.

Since the date when the early land Regulations and arrangements for the Treaty ports were made, the municipal life of the towns has enormously developed, and many municipal institutions are now maintained, and municipal services rendered which were then unheard of.

Sir E. Grey is also advised that the soundness of the arguments on which this claim is based is open to doubt.

An examination of the old "Arrangements" relative to each of the Treaty ports will show that in several cases the land-renters were intended either to tax themselves or to make specific payments for certain specially enumerated services. Gradually, however, this practice came to an end, and at almost every port municipal services were entirely paid for by the Japanese Government, and the renters contributed nothing beyond the ground-rent. It is believed that the cause of this state of affairs was that the land-renters were found to have no power to tax themselves and to enforce payment of such taxes; and, in consequence, the Japanese authorities had no alternative but to undertake all the services themselves, whether specifically imposed upon them or not under the early Conventions and Regulations.

The non-taxation of the land-renters for municipal purposes, other than those specifically imposed upon the Japanese Government, would therefore seem, at any rate in part, to be due to their extraterritorial position in Japan, and to be of little value as evidence that the Japanese Government interpreted the contracts with the land-renters as exempting the latter from all taxes for municipal purposes, and that they intended to perpetuate this exemption in the Treaty.

As an alternative to the contention advanced in the Paris Memorandum on this question of municipal taxation, Mr. Hurst, Assistant Legal Adviser to this Department, has suggested that the claim should be limited to one for exemption at each foreign Settlement from taxation for such services as, under the old arrangements relative to the Settlement, can be shown to have been specifically imposed upon the Japanese Government, leaving the Japanese authorities free to levy charges (other than charges imposed—directly or indirectly—upon Settlement property) for all other municipal purposes, such as the up-keep of hospitals or lunatic asylums, or other local services which have come into existence in recent times. The arguments in support of this alternative scheme, together with the objections which can be urged against it, will be found in a Memorandum (Paper K) inclosed.

It would seem to follow from the grounds on which this proposal is based that, where land-renters were liable to be taxed by municipal bodies of their own appointment, or by the Consular authorities, for particular purposes, such as lighting or cleaning the streets, the Japanese authorities may impose taxes for the purpose now.

If you consider that the arguments in support of Mr. Hurst's proposal are valid, Sir E. Grey would be willing to suggest to the French and German Governments as an alternative to that put forward in the Memorandum (Paper E).

I am to request that you will take the Memorandum prepared in Paris and the accompanying papers into your consideration and favour Sir E. Grey with your opinion—

1. Whether, under the Treaty of 1894 and the corresponding French and German Treaties, the land-renters are entitled to exemption from all taxes and rates on taxes levied for municipal purposes, whether such taxes are imposed upon the Settlement property or not.

2. In the event of your answering question 1 in the negative, whether the land-renters, in addition to freedom from taxes or charges imposed on a Settlement property, are entitled to exemption in each Settlement from taxation in respect of municipal services specifically assigned to the Japanese Government in the arrangements relative to that Settlement.

3. In the event of your answering question 2 in the affirmative, whether, in cases where the old foreign Settlement was smaller in area than the modern Japanese district in which it has been incorporated, the land-renters are liable to taxation in respect of such services outside the area of the old Settlement, but inside the limits of the modern district.

4. Whether the remaining portions of the Memorandum, not touched by the above questions, may properly be concurred in by His Majesty's Government.

Sir E. Grey will also be glad to be favoured with any observations of a general character that you may have to offer.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

(A.) Reference to Law Officers	.. .. .	September 11, 1901.
(B.) " " "	.. .. .	August 11, 1903.
(C.) References to Law Officers	.. .. .	December 9, "
(D.) Award of The Hague Tribunal. (Parliamentary 4311)	.. .. .	April 21, 1904.
(E.) Paris Memorandum.	.. .. .	May 22, 1905.
(F.) " " (Translation).		
(G.) Tokio Case.		
(H.) Japanese Law of 1888.		
(I.) Memorandum..	.. .. .	August 11, 1903.
(J.) Memorandum by Mr. Hurst	.. .. .	March 7, 1906.
(K.) Regulations, Conventions, &c., regarding Foreign Settlements in Japan. (Exhibit C, Annex No. 1.)		
(L.) The Case presented by the Japanese Government to the Tribunal of Arbitration. (Folio Library No. 1626.)		
(M.) The Counter-Case presented by the Japanese Government to the Tribunal. (Folio Library No. 1626.)		
(N.) Case presented by Great Britain, France and Germany at The Hague Tribunal. (Confidential 8461*.)		
(O.) Counter-Case presented by the three Governments. (Confidential 8187* and 8462*.)		
(P.) Objections of the Japanese Government to the Counter-Case and conclusions. (Folio Library No. 1626.)		
(Q.) Objections to the Japanese Counter-Case. (Confidential 8463*.)		
(R.) Replies of the Japanese Government to the objections of Great Britain, France, and Germany. (Folio Library No. 1626.)		
(S.) Reply of the three Governments to the Japanese objections. (Confidential 8464*.)		
(T.) Memorandum by Mr. Walford.		

Report.

1 and 2. We think the land-renters are not entitled to exemption from all taxes and rates on taxes levied for municipal purposes. They are entitled (1) to exemption from taxes or rates on the landed property in respect of which they pay the rent fixed in accordance with the arrangements and leases, and (2) to exemption from personal taxation for such municipal purposes as were specifically assigned to the



1906

24

JAPAN.

Japanese Government in the arrangements relative to the various foreign Settlements, but they are subject to personal taxation in respect of other municipal services.

3. In spite of the argument which may be founded on the provision in the Treaty of 1894 by which the common fund and property of the Settlement are to be transferred to the Japanese authorities, we think, on the whole, that the true construction of the Treaty is that the Settlements are incorporated in the modern Japanese district for all purposes, and that the land-renters are liable to taxation for the municipal purposes of the extended district, subject only to the exemptions above mentioned.

4. We see no objection to the remaining portion of the Memorandum not touched by the questions referred to us and not dealing with the question of the transfer of property held under perpetual lease to Japanese subjects.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
May 25, 1906.

No. 6.

[December 13, 1906.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, September 29, 1906.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit for your consideration the papers noted in the accompanying list, which relate to the seizure by the Japanese of the steam-ships "Hsiping" and "Pehping," the property of the Chinese Engineering and Mining Company, in July 1904, while on a voyage from Shanghai with general cargoes for Newchwang and other ports, and to the condemnation by the Japanese Prize Courts of certain portions of their cargoes, notably various shipments of rice, destined for Newchwang.

As you are doubtless aware, during the hostilities between France and China in 1885 the French Government declared their intention of treating rice as a contraband of war, and on that occasion His Majesty's Government addressed a protest to the French Government. (See note to M. Waddington of the 27th February, 1885. France No. 1. 1885, Paper A.)

In this note His Majesty's Government stated that they were unable to admit that, consistently with the law and practice of nations, and with the rights of neutrals, provisions in general could be treated as contraband of war, but that the test appeared to be whether there were circumstances relative to any particular cargo, or its destination, to displace the presumption that articles of this kind were intended for the ordinary use of life, and to show, *prima facie* at all events, that they were destined for military use. It will be observed that, from the Parliamentary Paper above alluded to, although subsequent notes were exchanged between the two Governments, the question remained unsettled until the termination of hostilities.

Since that date this principle has been consistently maintained by His Majesty's Government, and on the outbreak of the recent hostilities between Japan and Russia they felt it incumbent on them to reiterate their view to the Japanese Government, having regard to the ambiguous wording of paragraph 2 of the Japanese Contraband Regulations. (See correspondence inclosed, Paper B.)

Attached to Sir C. MacDonald's despatch No. 32, Treaty, of the 11th July last (Paper C) will be found a Minute by Mr. Hurst, the Assistant Legal Adviser to this Department, reviewing the cases of the "Hsiping" and "Pehping," and laying stress on the inadequacy of the evidence that the goods in question were destined for belligerent use, to which I am to invite your especial attention, and I am to request that you will take these papers into your consideration and will favour the Secretary of State with your opinion:—

- (1.) As to whether His Majesty's Government would be justified in entering a protest against the decision of the Japanese Prize Courts in these cases; and
- (2.) If so, on what grounds such protest could be most advantageously based.

Seizure of
"Hsiping"
and
"Pehping,"
by the
Japanese
during war.

JAPAN.

25

Sir E. Grey would be glad to be favoured with any observations of a general character which you may be good enough to offer upon the papers now submitted to you.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

- (A.) Parliamentary paper: "France. No. 1 (1885)" (pp. 15, 19, and 21). Library No. 2947.
- (B.) To Sir C. MacDonald (No. 8, Treaty), March 10, 1904.
Sir C. MacDonald (No. 36), February 12, 1904.
- (C.) Sir C. MacDonald (No. 32, Treaty), July 11, 1906, and Minutes thereon.
- (D.) Chinese Engineering and Mining Company, June 16, 1906.

Report.

In our opinion the decision of the Court is in some respects at variance with the principles of international law, and it may be properly made the subject of protest by His Majesty's Government if it is deemed desirable to do so. The Japanese Regulations relating to contraband recognize the distinction between absolute and conditional contraband, and so far they agree with the views maintained by this country, but the decision of the Court deprives the distinction of any practical effect. The most important part of the judgment is that which confiscates the articles of food consigned to Newchwang, and we think that such confiscation, so far as it relates to food not intended for European consumption, is unjustifiable, because the facts in evidence relied upon by the captors did not show that such provisions were intended for the use of the Russian army, but rather supported the contrary inference. Particularly is this the case with the rice as to which the Court did not even purport to find its destination, but only that it was suitable for consumption by Russian troops. The case of provisions suitable only for consumption by Europeans is capable of distinction, and on the facts before us we cannot say that these goods were improperly condemned.

The condemnation of the silver coins is, in our opinion, open to objection on the same grounds, namely, that its destination to the Russian army was not proved. Other portions of the cargo appear to have been treated as absolute contraband, and in the absence of detailed information it is impossible to say whether rightly or not; but the judgment as regards the iron wheels, iron tubes, old iron, iron ore, and timber referred to in Case No. 30, does not find, as required by the Japanese Regulations, that such articles were intended solely for use in war, but only that they might be employed directly for warlike purposes. Such a finding appears to recognize that they are articles *incipit usus*, and therefore they should be treated only as conditionally contraband.

The lead is properly treated as absolute contraband. Assuming, however, that the articles of food and other articles *incipit usus* were properly treated as contraband under the existing conditions, we think they should not have been held liable to confiscation, but only to pre-emption. Those States which recognize the distinction between absolute and conditional contraband do not in practice confiscate, but instead exercise the right of pre-emption, and although this practice may be regarded originally as a Concession, it is now so well established that a just cause of complaint arises against a State which fails to observe it. We notice that some portion of the cargo, though innocent, was condemned on the ground that its owner was also the owner of contraband articles carried on the same ship, and of this innocent cargo some was consigned to Newchwang and some to other neutral ports. The condemnation of such innocent cargo consigned to Newchwang is lawful, assuming that the other cargo was contraband, and perhaps in principle so is the condemnation of such innocent cargo consigned to other neutral ports.

The wording, if not the substance, of the Japanese Regulations relating to conditional contraband is objectionable, and may enable a Prize Court to condemn without the necessity of finding definitely that articles only conditionally contraband are, in fact, intended for the use of enemy forces.

If any protest be made, it should be confined as far as possible to questions of principle, and may include the non-application of the rule as to pre-emption, the

[455]

H



1906

26

JAPAN.—LIBERIA.

wording of the Regulations relating to conditional contraband, and the finding with regard to food not intended for European consumption.

(Signed)

JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
December 13, 1906.

LIBERIA.

No. 7.

[June 25, 1906.]

Foreign Office to the Law Officers of the Crown.

Foreign Office, April 24, 1906.

Gentlemen,

Concessions
in Liberia
in violation
of Treaty
Rights.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you various papers in connection with the validity of certain Concessions granted by the Government of the Republic of Liberia and the effect thereon of the Anglo-Liberian Treaty of 1848.

The financial embarrassments of that Republic had recently reached such a point as greatly to facilitate the designs known to be entertained by Germany upon its independence, the maintenance of which has for many years been a matter of great concern to His Majesty's Government.

When, therefore, in 1904 it came to the knowledge of this Office that the Liberian Development Company, of which Sir H. Johnston was Chairman, were endeavouring to negotiate a loan to Liberia of sufficient amount to put both their own finances and those of Liberia on a sound basis, it was thought desirable to give such unofficial encouragement and support as was possible to a scheme which seemed to offer the only means of averting the danger of German aggression, the Liberian Government being largely indebted to German firms.

Messrs. Emile Erlanger and Sons agreed to advance to the Liberian Government, through the Chartered Company, the sum of 100,000*l.*, the greater portion of which was to be spent on developing the resources of the country, road-making, &c., whilst some 30,000*l.* was to be used to pay off the existing debts of the Government to the German firms. Messrs. Erlanger, however, only agreed to advance the money on the understanding that the customs and financial system of the Republic were to be reformed, and accordingly made it a condition that His Majesty's Government would recommend to the Liberian Government two British officials for appointment as Customs Inspectors and Financial Advisers. This was agreed to, and the scheme was sanctioned by the Liberian Government early this year. Details of the scheme as finally passed will be found in Paper A.

It is to be noted that although His Majesty's Government have accepted no official responsibility in the matter beyond recommending the two officials above referred to, they are to a certain extent morally pledged to the support of the scheme.

The history of the Chartered Company is, briefly, as follows:—

A Charter was granted in January 1901 to the Union Mining Company of Liberia, and transferred soon after, with the sanction of the Liberian Government, to the West Africa Gold Concession (Limited).

This Charter (Paper B), which concerns the two counties of Montserrado, in the extreme west, and Maryland, in the extreme east of the country, conferred on the grantees sole and exclusive mining rights and also certain non-exclusive rights, such as those to open banks and build railways.

On the 16th April, 1903, Sir H. Johnston wrote to ask for information about the Company, having been invited to join the board. He was informed, in reply, that His Majesty's Government could not guarantee either the authenticity of the Charter or its validity according to Liberian law, and that the question of His Majesty's Government recognizing the Charter had never arisen; that there had been no reason to raise objections, and, of course, there had been no pledge to support any of the

LIBERIA.

27

clauses, and that, so far as His Majesty's Government were aware, their support had not been required, and their position had merely been that they hoped the enterprise might be successful.

The West Africa Gold Concession, with the consent of the Liberian Government, assumed, in December 1904, the style of the Liberian Development Company (Chartered and Limited).

This change of name was due to arrangements which were come to with another enterprise. The researches after minerals had not proved encouraging, and so the Company bought up the Liberian Rubber Syndicate, which held a Concession (Paper C) giving it the sole right to gather and prepare rubber on the public lands of Liberia and the exclusive right to export rubber from the Republic, subject to the payment of a royalty to the Liberian Government. These royalties have since been pledged to the service of the Liberian Government Loan of 1871 and to the amortization of the bonds deposited with the Council of Foreign Bondholders. This Syndicate was now reorganized as the "Monrovia Rubber Company," distinct for purposes of finance from, but otherwise closely affiliated to the Chartered Company, the offices and Secretary in London being common to the two Companies, as also to a great extent the employés and premises in Liberia.

In March 1904 the Liberian Government issued a notice (Paper D) explaining the scope of the Rubber Concession, and upholding their right to grant it.

Article II of the Anglo-Liberian Treaty of 1848 (Paper E) provides for reciprocal freedom of commerce between the two countries. It also stipulates that British subjects shall be allowed to buy from, and to sell to, whom they like, without being restrained or prejudiced by any monopoly, contract, or exclusive privilege of sale or purchase whatever. It also provides for most-favoured-nation treatment.

Article IV provides that all articles the produce of the Republic may be exported therefrom by British subjects and British vessels on as favourable terms as by the subjects and vessels of any other foreign country.

The principal European nations have Treaties with Liberia, drawn up in almost identical terms.

The question thus arises whether the two Concessions already referred to, the one belonging to a Company who, as explained above, are receiving a certain amount of support from His Majesty's Government, and the other, to a second Company in such close relationship with the first as to be practically identical with it, are inconsistent with the terms of these Treaties.

With regard to the Mining Concession, it may perhaps be argued that it does not amount to a monopoly, since exclusive rights are only granted over a portion of the territory of the Republic, and that, therefore, it is still open to other persons to obtain similar rights in the remaining portions of the country.

With regard to the Rubber Concession I am to explain that, with a view to meeting objections which might be made to the undertaking on the ground of its monopolistic character, the Company have established a system of licences under which all who so desire may work and export rubber on payment of a royalty to the Company. It is pointed out that this is a perfectly fair arrangement, as the Company are put to great expense in the work of opening up the country, replanting the rubber trees, conciliating native chiefs, &c., in the benefits of which those working rubber under the licences share equally with the concessionnaires, and to which it is reasonable that they should make some contribution.

Provision for this arrangement was made in an Agreement between the Company and the Liberian Government for the extension of the Concession for a further period (Paper F), which also stipulates that the Company shall not raise the amount of the royalty without the consent of the Liberian Government.

In deciding whether in granting these Concessions Liberia has infringed her Treaties with foreign Powers, it is of importance to take into consideration the attitude adopted by His Majesty's Government with regard to the establishment of the Concession system in the Congo Free State and French Congo, *i.e.*, that the grant of Concessions conferring exclusive rights over the natural produce of the soil is a violation of Articles I and V of the Berlin Act, the former of which provides that the trade of all nations shall enjoy complete freedom in the Congo basin, and the latter that no Power which exercises sovereign rights in that basin shall be allowed to grant therein a monopoly or favour of any kind in matters of trade. See the annexed despatch to His Majesty's Representatives abroad in regard to the affairs of the Congo Free State (Paper G).

A copy of the Berlin Act is also annexed (Paper H).



1906

28

LIBERIA.

The question of the claims of certain British firms against the French Government for the loss of their trade in French Congo, owing to the establishment of concessionary Companies, formed the subject of references, dated the 19th February and the 13th March, 1903, from this Department to the then Law Officers of the Crown.

Copies of these references, together with the reports received in reply, are annexed (Papers I and J).

It will be seen that in the latter of the two reports the Attorney-General and Solicitor-General disagreed. Since that date, however, His Majesty's Government have not ceased to press upon the French Government the view that the Concessions granted by them constitute an infraction of the Berlin Act, for which compensation is due to the British firms. The arguments used by the French Government have been similar in character to those adopted by the Liberian Government.

They draw a distinction between exclusive rights in property and exclusive rights in trade, maintaining that such of the vast stretches of territory as were ownerless at the time the French Congo passed under French sovereignty are now, together with their products, French property, and that they are free to grant them to concessionary Companies.

I have the honour, by direction of Secretary Sir E. Grey, to request you to take the above mentioned papers into your consideration, and to favour him with your opinion as to whether His Majesty's Government can, consistently with the attitude taken up by them with respect to the grant of exclusive Concessions in the Congo Free State and French Congo, maintain that the above-mentioned mining rights, as granted to the Liberian Development Company, or the Rubber Concession granted to the Monrovia Rubber Company, do not constitute an infringement of (1) the rights of other British subjects under the Anglo-Liberian Treaty of 1848, and (2) the rights of the subjects of other foreign Powers having similar Treaties or the right to most-favoured-nation treatment.

Sir E. Grey would also be glad if you would furnish him with such general observations as may occur to you on these papers.

I have, &c.
(Signed) ERIC BARRINGTON.

List of Papers.

(A.) Agreement between the Liberian Development Company and the Liberian Government (communicated by Sir H. Johnston) ..	January 22, 1901.
(B.) Memorandum of Agreement between H. Downing and H. Quick, London, and the "Union Mining Company of Liberia." ..	July. [?] 13, 1904.
(C.) Monrovia Rubber Company to Foreign Office ..	..
(D.) Notice issued March 1, 1904, by the Liberian Government as to the exclusive rights of the Monrovia Rubber Company.	..
(E.) Treaty of Commerce between Great Britain and Liberia. [Treaty Library No. 341] ..	Nov. 21, 1848.
(F.) Hon. D. E. Howard to Sir H. Johnston, August 5, 1904.	..
(G.) Circular to His Majesty's Representatives abroad ("Africa, No. 14 (1903)") ..	August 8, 1903.
(H.) Berlin Act. [Treaty Library No. 757] ..	Feb. 26, 1885.
(I.) Law Officers to Foreign Office ..	May 22, 1901.
(J.) Law Officers to Foreign Office ..	May 14, 1903.

Report.

In our opinion, there is very little difference in point of principle between the Concessions resisted by the British Government in the case of the Congo and those which are now under review in the case of Liberia. No copy of the Congolese Concession is before us, but we may gather its purport from the references to it in the cases laid before the ex-Law Officers and their opinion thereon. From these documents it appears that the French Government, by Presidential Decree of the 28th March, 1899, declared that all vacant and ownerless land in the Congo belonged to the State domain. Having thus assumed a right of property in these unoccupied lands, the French Government proceeded to grant to its concessionnaires the "jouissance et exploitation" of the rubber in the districts named. The interest thus conferred indicates a restricted right of property or possession, rather than one merely of trade-mark. It is by virtue of the same right of property that the Liberian Government has granted the Concession now before us. It clearly claims the land over which the

LIBERIA.—NICARAGUA.

29

Concession is to operate as State domain, and purports to confer an interest founded upon the proprietary rights. We think that His Majesty's Government may lay themselves open to a charge of inconsistency in reprobating such Concessions on the Congo while approbating them in Liberia. Generally, the legality of these Concessions depends on whether they are grants of property or grants of a trade monopoly.

The real difficulty, however, in the case turns on the question as to whether the subject-matter of the Concession, namely, minerals or india rubber, our vast tracts of unoccupied land can be called property in a real and substantial sense. So far as minerals are concerned, it is quite in accordance with the idea of civilized States that they should be regarded as absolute property of the State, and, therefore, capable of being given in whole or in part to any person on any terms the State may think fit, without infringing the provisions of the Treaty against purely trade monopolies. It is not so easy to bring the case of rubber under this principle, although it is difficult to draw any legal distinction between the vegetable and the mineral products of lands which are the property of the State. The areas from which the rubber is collected are apparently not capable of being reduced into possession in the same way as ordinary forms of property, and the rubber is probably collected by the natives as a natural product belonging to no one. Moreover, it seems to constitute practically the only article which the natives have to barter, and therefore an exclusive grant of rubber approaches in effect, at all events, to an exclusive right to trade. At the same time, if the Liberian Government is competent to make contracts and Treaties in the same form as other Governments, it must be regarded as having the right, inherent in any civilized Government, of dealing with ownerless or unoccupied lands within its boundaries so as to constitute them a State domain. Undoubtedly the substantial effect is to leave the general right of trade in operation, but greatly limited by rights of property. On the other hand, the grants of such exclusive rights of property are perhaps necessary in order to ensure development of the country, and there seems no clear principle on which it is possible to prohibit them and yet to reserve to each Government its full right to part with the property it is entitled to claim on its unoccupied lands.

The words of Article II of the Treaty of November 1848, giving to foreigners the right to buy and sell without restraint from any monopoly or exclusive privilege of sale or purchase, are undoubtedly very strong, but they do not express any restriction on the rights of the State over public lands, and the words of the Charter or Concession confer only the right of collecting and preparing india-rubber on public lands alone. The Treaty, therefore, may be said to prevent monopolies in trade, while the Charter confers only rights of property. On this view the Charter is valid, except as to the clauses stipulating for an exclusive right of export. This clause is clearly inconsistent with the rights of foreign nations entitled under the most-favoured-nation clause to the benefits of Article IV of the Treaty. It is also an infringement of the rights of British subjects other than the concessionnaires.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
June 25, 1906.

NICARAGUA.

No. 8.

[April 3, 1906.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 20, 1906.

I HAVE the honour, by direction of the Secretary of State, to inclose the draft of an Order in Council for giving effect to a Treaty of Extradition recently concluded between the United Kingdom and Nicaragua, of which the ratifications were exchanged at London on the 13th ultimo.

The various Departments of His Majesty's Government which are interested in

[455]

I

Draft
Extradition
Order in
Council
relating to
Nicaragua.



1906

30

NICARAGUA.—PACIFIC ISLANDS.

the matter have concurred in the terms of this draft, and I am now to inquire whether, in your opinion, it may properly be submitted to the King in Council for His Majesty's approval.

I have, &c.
(Signed) E. GORST.

Report.

In our opinion the draft Order in Council, as [altered and]* initialled by us, may properly be submitted to His Majesty for approval.

(Signed) JOHN L. WALTON.
WM. S. ROBSON.

Law Officers' Department,
April 3, 1906.

PACIFIC ISLANDS.

No. 9.

[February 6, 1906.]

Foreign Office to the Law Officers of the Crown.

Claims of
Burns,
Philp, and
Co. against
German
authorities
in the
Marshall
and
Caroline
Islands.

Gentlemen,

Foreign Office, November 14, 1905.

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit to you the papers noted in the accompanying list relative to the claim of an Australian firm, Messrs. Burns, Philp, and Co. (Limited), against the German Government for losses that they consider they have suffered through the action of the German authorities in the Marshall Islands and the Caroline Islands.

The case was originally brought to the notice of this Department in a letter from the Colonial Office, dated the 12th October, 1904, inclosing correspondence in which it was stated that the German authorities in the Marshall group were imposing a trading license fee upon British steamers at the rate of 225*l.* (4,500 marks) the first month—this being a minimum charge—and afterwards at the rate of 7*l.* 10*s.* (150 marks) a-day. It was further stated that in the German islands oil motor-vessels were compelled to pay the same rates as steamers, sailing-vessels paying half the above rates; that port dues were additional, and that only Germans were allowed to lease land for trading stations, whereas in the British Solomons, Gilbert and Ellice Islands, Germans are permitted to trade on precisely the same footing as British subjects.

Messrs. Burns, Philp, and Co. complained that they had been the victims of the imposition of these exorbitant dues, and that they were thus placed on a footing of trading inequality with the "Jaluit Gesellschaft," the German Company established at Jaluit, the capital of the Marshall Islands.

These allegations were at once brought to the notice of the German Government by His Majesty's Ambassador at Berlin, who was instructed on the 19th October in a despatch (Paper (A)) to call attention to the provisions of Articles 2 and 3 of the Declarations between Great Britain and Germany relative to their respective spheres of influence in the Western Pacific, signed at Berlin in April 1886, and to ask for an explanation of the absence of reciprocity which appeared to prevail.

Copies of these Declarations are appended (Papers (B) and (C)). Article 2 prescribes that—

"The subjects of either State shall be free to resort to all the possessions or Protectorates of the other State in the Western Pacific and to settle there, and to acquire and to hold all kinds of property, and to engage in all descriptions of trade and

* The Law Officers' clerk wrote later on to say that the words "as altered" should have been omitted. The Order in Council is contained in Confidential No. 8698*.

PACIFIC ISLANDS.

31

professions and agricultural and industrial undertakings, subject to the same conditions and laws, and enjoying the same protection and privileges as the subjects of the sovereign or protecting State."

Article 3 provides that—

"In the British and German possessions and Protectorates in the Western Pacific, the ships of both States shall in all respects reciprocally enjoy equal treatment as well as most-favoured-nation treatment; and merchandize of whatever origin imported by the subjects of either State, under whatever flag, shall not be liable to any other or higher duties than that imported by the subjects of the other State or of any third Power."

It was pointed out that in view of the above stipulations there did not seem, on the face of it, to be any adequate reason why British vessels should be compelled to pay far higher licence fees than were, or would be, paid by foreign vessels in the British groups of islands.

On the 9th December further information was received in a letter from the Colonial Office (Paper (D)) respecting the situation. It appeared that the "Jaluit Gesellschaft" was actually administering the Government of the Marshall Islands, and that in their official capacity they had refused a supply of fresh water to the "Ysabel," a steamer belonging to Messrs. Burns, Philp, and Co., although there was said to be a good stock of water available. The Company had dispatched this vessel upon a second trading voyage to the Marshall's in August 1904, in spite of the exorbitant fees for a trading licence imposed on the occasion of her first visit six months earlier, and paid these fees which were again demanded, viz., a minimum charge of 225*l.* for one month's licence, and thereafter a charge of 7*l.* 10*s.* per day. The "Ysabel" was obliged to return to Tarawa, in the Gilbert group, a distance of nearly 400 miles, to obtain a supply of water before continuing her voyage, and the projected extension of her voyage to the Carolines had to be abandoned.

The German Government offered an explanation to Sir F. Lascelles' representations in the shape of an *Aide-mémoire* (Paper (E)), communicated on the 7th December.

It was observed from this document that since the complaint made by Messrs. Burns, Philp, and Co., the charges in question had been doubled, and an export duty of 30 marks (1*l.* 10*s.*) imposed upon copra.

The German Government contended that all these Decrees held good for every one without respect of nationality, and did not therefore constitute an infringement of the Agreement concluded between Germany and Great Britain on the 10th April, 1886. They pointed out in this connection that Article 3 of this Agreement could not, in their opinion, be read to mean, as was alleged in Sir F. Lascelles' note of the 22nd October, that British ships must pay no higher dues in German possessions than German ships did in British possessions. In Article 3 of the Agreement the two Governments simply promised "to accord in their respective possessions a like treatment to each other's ships as to their own ships and to those of the most favoured nation."

A Contract had existed since the year 1888 between the German Government and the Jaluit Company, whereby the latter bore the costs of the administration of the Protectorate of the Marshall Islands and drew the receipts of the public taxes. This Contract, too, the contents of which were officially published at the time, was, it was maintained, not inconsistent with the Agreement of the 10th April, 1886, and during the seventeen years of its existence had never been objected to by His Majesty's Government.

If the taxes on ships in the Protectorate which did not belong to a resident firm had lately been raised and an export duty imposed on copra, these measures had no other object than to raise the revenues of the Protectorate so as to correspond with the growth in latter years of the expenses of the administration borne by the Jaluit Company.

It was pointed out that, by a Decree in force in the Marshall Islands since the year 1888, it was forbidden to conclude contracts with natives on the subject of the purchase of property or real rights in land, or the use of the latter. This Decree, too, applied without distinction to the subjects of all nations. As, therefore, the conclusion of a lease between a native Chief and the Jaluit Company was not legally admissible, the Imperial "Landeshauptmann" at Jaluit had been instructed to revoke the permission he had granted in that instance.



The German Government stated, however, that they were extremely anxious, in view of the very small practical interests of either side in the matter—the total trade of the Marshall Islands in 1903 did not quite amount to 1,000 000 marks (50,000 £)—to avoid a possible difference of opinion as to the meaning of the Agreement of the 10th April, 1886, leading to a dispute out of all proportion to the interests involved. They were, therefore, willing to consider the views of His Majesty's Government if they differed from their own, and would await a further communication on the subject.

The reply of His Majesty's Government to the German contentions was communicated to the German Government on the 27th January, 1905 (Paper (F)).

It was to the effect that, in the opinion of His Majesty's Government, the action recently taken in the Marshall Islands and the position which the Jaluit Company have been permitted to assume there, were contrary to the whole spirit of the Declaration of the 10th April, 1886. The intention of that Declaration was, they maintained, that British and German traders should have absolutely equal rights in both German and British possessions in the Western Pacific, and that, in pursuance of this intention, such places as the Marshall Islands should be a neutral region open to the trade of both nations on a basis of free competition. This view was confirmed by the correspondence preceding the signature of the Declaration, and by the recommendations of the Anglo-German Commission appointed to define the interests of Great Britain and Germany in the Western Pacific. The third of these recommendations was "that the two Governments agree not to grant any monopoly of any kind in matters of trade." This, it was true, did not specifically apply to the Marshall Islands, and in the subsequent negotiations it was dropped as unnecessary, but it showed what the Commissioners intended in regard to trade, and consequently what the two Governments agreed to embody in the Declaration of 1886, which had its origin in the recommendations of the Commission.

With regard to the state of affairs existing in the Marshall Islands, His Majesty's Government desired to point out that if, as was possible, there were no German firms trading in and with the islands except the Resident Jaluit Company, it followed that the increase of dues on steamers belonging to non-resident firms, though in form applicable to all without respect of nationality, was in practice a measure of discrimination against British and foreign vessels, and therefore, so far as the former were concerned, contrary to the Declaration.

Moreover, as the administration of the islands was entirely in the hands of that Company, a special disadvantage was imposed on British traders, owing to the fact that the taxes levied went to swell the revenues of the Company. A system was thus created quite incompatible with the principles of free competition which the Declaration was intended to promote, for even if British traders could establish themselves as residents in the islands, they would still be unable to carry on their trade on equal terms with a firm which had in its hands the whole machinery of administration, and was therefore enabled to use its powers of imposing taxation for the purpose of excluding all competition.

Attention was called at the same time to the want of hospitality shown by the Jaluit Company in refusing the supply of water to the "Ysabel."

In the meantime (on the 10th October), the "Ysabel" had set out (Paper (G)) on her third trading voyage to the Marshall Islands. Upon her arrival at Jaluit on the 19th she was informed by the German authorities that the licence fees for foreign vessels had been doubled since her last visit, and were now at the minimum rate of 450 £. per month, and thereafter at the rate of 15 £. per day. This was referred to in the German *Aide-mémoire*.

In such circumstances the "Ysabel" had no alternative but to abandon her projected trading cruise, and left the group without landing her inward cargo, consisting of trade goods specially ordered for Australia, some of it for British subjects, to the value of about 1,100 £.

On the 7th March the Colonial Office supplied further information furnished by Messrs. Burns, Philp, and Co., showing that trade in the Caroline group was excluded by an absolute prohibition and monopoly, except in the case of two small islands, the trade of which is of no practical value. Attention was also drawn to the refusal by the German authorities of permission to acquire land in the Marshall Islands and so secure domicile for trading purposes, already referred to in the *Aide-mémoire* communicated by the German Government on the 7th December, 1904. It appeared that a firm could only become domiciled in the Marshall Islands by buying or leasing land or buildings from non-natives or from the authorities, and this was refused.

Moreover, the evil results of the dual position of the Jaluit Company as administrative officials and traders now became more apparent. For though nominal equality of treatment was granted to all traders, yet in reality the Jaluit Company need only make a book entry—"a debit of taxation and a credit of revenue"—while the ship of any other trading Company must produce cash. Thus, in practice, the British ship paid and the German ship did not.

It may be mentioned here, parenthetically, that a proposal was made by the Jaluit Company to come to a compromise with Messrs. Burns, Philp, whereby the new licence fees in the Marshall Islands should be allowed to remain, so as to keep out the British firm, while in return the Jaluit Company should undertake to give up trading with the British Gilbert and Ellice Islands, with which they had a not inconsiderable trade. His Majesty's Government refused, of course, to be a party to an arrangement on such a basis, since it would be unfair to other British traders who might hereafter wish to trade with the Marshall Islands, nor could they encourage or directly sanction an arrangement which would establish a monopoly in direct contradiction to the Declaration of 1886.

An inquiry, on the part of Messrs. Burns, Philp, and Co., as to the charter and status of the Jaluit Company, the amounts of fees and duties leviable in the German Pacific Islands, and the amount of Government expenditure (besides subsidies) authorized in those possessions, having been referred to the German Government, a collection of notes throwing light on these points was furnished to His Majesty's Ambassador at Berlin, and will be found in his despatch No. 106 of the 17th April, (Paper (H)), to which attention is invited.

Messrs. Burns, Philp, and Co. at the same time put in a claim for 10,000 £. (Paper (I)) for losses caused by the German authorities in regard to the "Ysabel."

In putting forward their statement of claim they distinctly state that, in order that there might be no doubt as to the treatment their vessels would receive in the Caroline and Marshall groups, and before anything was done, inquiry on the subject was made at the office of the German Consulate in Sydney, and the reply of the Consul-General was to the effect that the vessels would be treated as German vessels were treated.

The facts of the case are stated as follows:—

The steamer "Ysabel" was dispatched from Sydney on the 11th March, 1904, for the Marshall and Caroline Islands. The request for the requisite licence to trade in the Marshalls was granted, but a previously unheard-of fee was demanded, viz., 4,500 marks (225 £.) for four weeks. This heavy fee was paid, and after transacting all the business possible on a first voyage, the "Ysabel" left for the Carolines.

On her arrival at the Carolines, application was made for a trading licence for that group. The supercargo was at once informed that the "Jaluit Gesellschaft" had a monopoly, except as regards two islands, viz., Ponapi and Kusae, for which a licence at the rate of 75 £. per annum was offered. As the trade of the two islands in question is practically nil, there was nothing to be gained by taking out a licence to trade there, and, as the authorities absolutely refused a licence for the islands where trade was possible, there was nothing for the steamer to do but leave without having accomplished anything.

The "Ysabel" reached the Marshalls on her second voyage at the beginning of August, and it was on this occasion that the authorities refused the permission to the Company to acquire land from a native Chief. The land in question was waste and uninhabited, and a lease of it was duly sought with a view to the erection of buildings, in order to establish a claim to domicile on the part of the firm.

The terms of the proposed Agreement with the Chief were similar to those on which the Jaluit Company had themselves recently acquired land from the same Chief for trading purposes.

On this voyage also the "Ysabel," having fallen short of drinking water, applied for and was refused a supply, as previously related.

In October the "Ysabel" proceeded on her third voyage to the Marshalls. Neither on this nor on the previous voyage did she touch at the Carolines—the prohibition there was complete. This time a further surprise awaited the representatives of the firm on their arrival at the Marshalls. They were informed that the licence fee for four weeks' trading had been raised from 4,500 to 9,000 marks.

Messrs. Burns, Philp assert that the steamer did not carry enough gold to meet, in addition to other requirements, the unexpected demand thus suddenly sprung upon



her. The supercargo offered to pay by draft on the owners, but this was refused, and there being no other course open, the "Ysabel" forthwith entered upon her return voyage to Sydney empty. The actual money loss of this trip is stated to have exceeded 1,000*l.*, the distance steamed being over 6,000 miles. The profit anticipated was, of course, entirely lost.

The firm drew attention to the fact that steamers of any nationality can trade in any one of the three adjoining groups—the Solomons, the Gilbert, and the Ellice, all British—for a fee of 100*l.*, covering the whole year, whilst in the Marshalls, the fee per voyage paid on two occasions equalled 2,925*l.* a-year, and this was raised on the last occasion to the equivalent of 5,850*l.* a-year, it being assumed that thirteen voyages might be made in a year. German vessels trade regularly at the British groups, paying only the 100*l.* a-year.

In hope of some change in the official attitude, and with a desire to keep faith with the native Chiefs, Messrs. Burns, Philp decided to again dispatch the "Ysabel" to the Marshalls, and with gold enough to pay the heavy fee now demanded. On the 16th November she was advertised to sail on the 19th. She was coaled, provisioned, her crew secured, cargo taken on board, and two passengers booked. On the 18th, when all arrangements for the sailing on the 19th were nearing completion, an intimation was received from the German Consulate in Sydney, in response to direct inquiry as to taxation, that, in addition to the licence fee of 9,000 marks for the voyage, an export tax of 30 marks per ton on all copra exported had been imposed. The fact that a fee of 450*l.* was to be supplemented by an export tax of 450*l.* (reckoning 300 tons copra), making together an aggregate taxation of 900*l.*, compelled the firm to review the position. The result was that the trip was cancelled; the crew were discharged, cargo and provisions relanded. This again represented considerable expenditure, which was absolutely lost.

In consideration of this series of restrictions placed on their trade, and the losses sustained on the several occasions recorded, the Company, as previously stated, put in a claim for 10,000*l.*

The Colonial Office, in forwarding the claim, stated that Mr. Secretary Lyttelton was of opinion that the British firm had an equitable claim on the German Government, for, while it was possible that the letter, though not the spirit, of the Declaration of the 10th April, 1886, might be held to justify the imposition of the licence fees (on the ground that they were applicable to all ships belonging to firms not domiciled in the Marshall Islands), and also the refusal of permission to Messrs. Burns, Philp, and Co. to lease land, yet, on the ground stated in paragraph 11 of Messrs. Burns, Philp, and Co.'s claims, viz., that the Jaluit Company appeared to unite the functions of a Government and the operations of a trading body, and that there was no reason to suppose that its own operations were affected in any way by abnormal fees or would be affected by an export tax on copra, the imposition of such a tax was clearly contrary to the Declaration, which guarantees equal treatment to British and German subjects in all descriptions of trade and to British and German ships in all respects.

As Messrs. Burns, Philp, and Co. pointed out, their payment of the export tax on copra was a *bond fide* payment, whereas that of the Jaluit Company was not. It was possible that the latter might urge, in reply, that they had to defray the expenses of the administration of the islands, from which their rivals were free; but that argument did not appear altogether relevant. If Messrs. Burns, Philp, and Co. were made, contrary to the Declaration, to pay heavier taxes than the Jaluit Company, it seemed no answer to say that the latter had heavier expenses to meet.

Before, however, such a claim could be presented, it was necessary that a more detailed statement of the damage sustained, together with any available supporting documents, must be obtained.

In this view Lord Lansdowne concurred.

The abstract of the claim and particulars of damage were subsequently communicated on the 19th October, and will be referred to later.

The official reply of the German Government to the British representations of the 27th January was received on the 13th March, and was as follows (Paper (J)):

"The Imperial Government think they may assume from the Ambassador's note of the 27th January of this year that His Britannic Majesty's Government do not deny that the letter of the Declaration of the 10th April, 1886, is not in itself opposed to the view of the Imperial German Government.

"If His Britannic Majesty's Government hold a different opinion concerning the spirit of the Treaty, the Imperial Government must, on their side, draw attention to the fact that the third recommendation in the preliminary draft of the two members of the Anglo-German Commission, . . . which provided for the prohibition of monopolies, was not included in the final text of the Declaration."

An explanation was also given of the refusal to supply the "Ysabel" with water in the following terms:—

"It must, in the first place, be stated that there are no public reservoirs of water in the Marshall Islands. The cisterns erected by the Jaluit Company at their own cost are intended for the use of the factory, the Imperial Administration, the Imperial men-of-war, and the mail-steamer. As a rule, the supply is large enough to provide drinking water for the natives, and for the ships which put into the harbour.

"The Jaluit Company are on that account convinced that the 'Ysabel' would not have been refused a supply of drinking water. According to information in the possession of the Jaluit Company, it was a question of supplying large quantities of fresh water for feeding the boilers, which could not be granted, in view of the Company's own requirements, of the fact that a long visit by the Imperial war-ship 'Condor' was in prospect, and that the arrival of the mail-steamer was expected in a few days. Moreover, the 'Ysabel' was not prevented from undertaking her projected voyage to the Carolines. Her stock of water was sufficient for the voyage from Jaluit to Tarawa, and consequently the trip to the Island of Kusaie, in the Caroline group, could have been continued, for the latter is exactly the same distance from Jaluit, and contains a supply of fresh running water."

While further representations to the German Government and replies to the arguments advanced by them on several points were under consideration, a note (Paper (K)) was received from Count Bernstorff, the German Chargé d'Affaires, couched in a most conciliatory spirit, and announcing a disposition on the part of the German Government to come to an early settlement respecting the questions in dispute.

It stated that, in the view of the German Government, the Convention of the 10th April, 1886, assured equal treatment to German and British subjects in the possessions of both Powers lying in the Western Pacific Ocean, but left to both Governments a perfectly free hand to impose taxes and duties in their own territories. The Regulations issued by the German Government with regard to shipping tolls and export duty on copra were applied equally to both German and British subjects, and were therefore in complete agreement with the Convention. Besides, there was no contradiction between the Convention and the Agreement concluded with the Jaluit Company in 1888, as the rights of each Government to administer independently their own possessions were not restricted by the Convention of 1886. His Majesty's Government, moreover, seemed to have shared this view hitherto, since otherwise sixteen years would hardly have elapsed without a protest being raised against the Agreement with the Company.

Although the German Government considered that their attitude was perfectly justified from the legal point of view, they did not desire that a matter of such trifling importance should lead to a serious difference of opinion between the two Governments. As His Majesty's Government maintained that the effect of the Agreement of 1888 had been to accord preferential treatment to the Jaluit Company, the German Government were prepared to take account of this cause of complaint. They would terminate the Agreement with the Jaluit Company at the end of the present financial year, i.e., on the 31st March, 1906, and the result would be that on the 1st April the administration of the Marshall Islands, and especially the collection of public revenues, would be transferred to the Imperial authorities.

The German Government would, moreover, proceed immediately to a revision of the Regulations at present in force in the Marshall Islands with regard to the levying of public revenues, and would remodel them on the basis of balancing revenue and expenditure. The measures adopted in this connection would come into force on the 1st October, 1905.

In view of these assurances and the changes contemplated, His Majesty's Government considered that no further representations were called for, either in regard to the increased licence dues or to the export tax on copra, since the



difficulties on both points would probably be met by the termination of the Company's Agreement.

But the question of the acquisition of land in the islands with a view of securing domicile for trading purposes, together with the question of the absolute prohibition to trade in the Caroline Islands, had been left untouched in Count Bernstorff's note.

It was therefore decided to call the attention of the German Government to these two points, and to request that prompt inquiry should be made.

Sir F. Lascelles accordingly addressed a note (Paper (L)) to the German Government, in which he requested fuller information respecting the acquisition of land, and at the same time asked for explanations respecting the exclusion of trade in the Caroline group by an absolute prohibition and monopoly, except in the case of the two small islands previously referred to.

It was pointed out that, though the Caroline Islands were acquired by Germany from Spain in 1899, subsequently therefore to the Declaration of 1886, the group lies clearly within the area to which the Declaration applies.

The Regulations in force in the Caroline Islands, as set forth in the notes communicated by the German Government, and already alluded to, did not contain provisions which in themselves involved any such absolute prohibition as that of which complaint is made. It would appear, therefore, that the refusal to issue a licence to trade to British vessels must have been the result of some illegal and locally imposed conditions, and not authorized by the German Government.

Sir F. Lascelles further informed the German Government that Messrs. Burns, Philp had presented a claim for compensation, but that no details were at present available as to the exact amount of the losses sustained by them, nor had any documentary evidence in support of their claim yet been received. Further information on other points was being obtained through the Australian Government.

As the British firm, who had been informed of the German explanations and assurances, were anxious to ascertain whether they would be able to resume trade with the Marshall Islands without unreasonable restrictions after the 1st October, or whether they would be permitted, in anticipation, to acquire lands in both groups with a view to domicile, further inquiries were made by His Majesty's Ambassador at Berlin on these points.

The German Government replied on the 8th July (Paper (M)). With regard to the question of the acquisition of land in the Marshall Islands with a view to securing domicile for trading purposes, they stated that the acquisition of land from natives had been forbidden by Decree since 1888 to all private individuals and firms of whatever nationality, including the Jaluit Company. The action of the Governor in sanctioning the lease of certain land by a native Chief to the Company, to which attention had been called by Messrs. Burns, Philp, and Co., was consequently illegal and had since been declared void. For the present the only land that could be bought or leased consisted of those areas which, before the German occupation, belonged to owners other than natives. The German Government, however, intended to extend the conditions under which native lands might be acquired in the Marshall Islands, by permitting the lease of land necessary for the erection of trading stations, so that Messrs. Burns, Philp would find it much easier to establish a domicile. At the same time, instructions would be sent to the Caroline Islands to grant Messrs. Burns, Philp permission to lease land for trading stations.

With regard to the absolute prohibition to trade in the Caroline Islands, the German Government pointed out that the Declaration of the 10th April, 1886, as to mutual freedom of trade, &c., was closely connected with the Declaration of the 6th April, 1886, respecting the delimitation of the German and British spheres of influence in the Pacific. There could, therefore, they maintained, be no doubt that the extent of their application was the same. The Declaration of the 6th April, 1886, did not apply "to any islands or places in the Western Pacific which are now under the sovereignty or protection of any civilized Power other than Germany or Great Britain." Shortly before the signature of both Declarations of 1886 both Germany and England recognized the sovereignty of Spain over the Carolines. Thus, neither the Declaration of the 6th April, 1886, nor that of the 10th April, applied to the Carolines. This being the legal aspect of the case, the German Government did not consider it necessary to discuss the legality of the official treatment of Messrs. Burns, Philp, and Co. at Parape. They intended, however, to revise the trade Decrees of the Carolines also, but merely with a view to bringing about a final settlement of trade questions in the whole of the German Protectorates in the Pacific.

Finally, the date on which new Regulations respecting trade would come into

force, both in the Marshall and Caroline Islands, was fixed for the 1st October. The German Government were occupied with a revision of the fiscal legislation in the Marshall Islands, in which their guiding principle would be to balance revenue and expenditure. The new Regulations would be communicated to Messrs. Burns, Philp through the German Consul-General at Sydney. The firm must, however, wait for their permission to lease land till October 1905, owing to the time required for postal communications between Germany and her South Sea Protectorates and the infrequency of the service.

The German Government declined to admit that there could be a legal foundation for a claim for compensation on the part of Messrs. Burns, Philp. They stated that their action in the Marshall Islands had in no way infringed the Declaration of the 10th April, 1886, and that, as pointed out above, this Declaration did not apply to the Carolines.

At an interview which took place shortly afterwards between Lord Lansdowne and the German Ambassador on the 29th July, Count Metternich asserted that the new system would in full measure meet the Australian wishes, and that he would shortly furnish a description of the new Regulations.

This information was communicated in a note dated the 4th August (Paper (N)). The Regulations, which would come into force on the 1st October, were stated as follows:—

"Commercial firms established in the Marshall Islands will have to pay from that date a trading tax of 6,000 marks per annum, payable in advance and in quarterly instalments at the beginning of each quarter. This tax, corresponding with the deposit which has been paid by foreign firms without protest since the establishment of the German Protectorate in the Marshall Islands, must be regarded as very light. It will be the only tax levied on commerce, since the former taxation of trading stations and the export duty on copra will have been abolished, and it will not nearly cover the costs of the administration of the Protectorate.

"The opportunity to acquire domicile in the Protectorate will, after that date, be offered to any one who desires to establish a commercial enterprise there. Although, for the purpose of protecting the indigenous population, the sale of native land to foreigners will not be allowed, it will in the future be open to every trader to lease, with official sanction, from the natives such land as he may require for the erection of warehouses. The Imperial Commissioner at Jaluit has been instructed to assist all merchants in the conclusion of such leases. The possibility of difficulties with regard to the establishment of domicile is in this manner excluded.

"In view of the fact that settlement in the Protectorate will be facilitated in this way, there would seem to be no obvious necessity of admitting the trade in ships not belonging to the Protectorate in addition to the commercial undertakings established there. The Imperial Government, however, have refrained from prohibiting this trade, since this might be characterized as a limitation of the freedom of trade. A tax of 2,000 marks per annum, payable in advance, will in future be imposed on ships not engaged in trade on behalf of commercial firms established in the Protectorate."

The German note further deals with the question of the Caroline Islands as follows:—

"Although the Imperial Government maintain their views that the Agreement of the 10th April, 1886, does not extend to the Caroline Islands, they have subjected the Regulations in force there with regard to commerce to revision, in order to effect a definite settlement. An order has been issued to the effect that the whole territory of the East Carolines (seat of Government Ponape) should be thrown open to all traders. The dues to be charged are based on the Ordinance of the 8th August, 1904, which will be enforced in the whole territory of the East Carolines on the 1st October next.

"The Imperial Officer at Ponape has been instructed to issue a trading licence to any individual who desires to trade in the East Carolines, on his paying the prescribed dues, and to avoid any limitation of such licences on the ground of the insufficient production of the islands.

"Further, no obstacle will be placed in the way of the acquisition of domicile there."

Count Oberndorff, of the German Embassy, in delivering the above note, observed that he was also instructed to say that the German Government, without



admitting liability, were desirous of settling in one way or another with Messrs. Burns, Philp, and Co., and were ready to examine any evidence which the firm could produce in support of their claim.

The Colonial Office, in a letter of the 4th August, stated that it would in all probability have a very good effect on Australian opinion if the German Government could see their way to meeting the wishes of the Commonwealth Government by granting permission to Messrs. Burns, Philp, and Co. to enter at once into preliminary negotiations for leasing land for trading stations, in anticipation of the formal enactment of the new Regulations. If the German Government were prepared to accept this suggestion, it would be useful, if the general character of the new Regulations could be indicated, for the guidance of Messrs. Burns, Philp, and Co. in their negotiations for the lease of native land.

Sir F. Lascelles, therefore, acting on instructions sent to him on the 26th August, addressed a note (Paper (O)) to the German Government which dealt with the further points raised by Count Metternich's note of the 4th August and the Colonial Office letter of the same date.

The German Government were reminded that at present they owned no landed property themselves in the Marshall Islands, and that they had no information as to the amount of land in the hands of private owners, other than natives, which might be available for acquisition by foreigners. His Majesty's Government assumed, however, that, in view of the present position of this question and of the smallness of the area likely to be thus available, Messrs. Burns, Philp, and Co., or other British firms, would have equal opportunities with the Jaluit Company, or other German purchasers, of acquiring such land. It might be desirable, as a measure of precaution, that the Imperial Government should discourage any further transfer of land in the islands, so as to prevent all the land now in the market being bought up in anticipation of the arrangements in contemplation, unless Messrs. Burns, Philp, and Co. could be permitted to enter at once into preliminary negotiations for the lease of land from natives.

With reference to the Caroline Islands, His Majesty's Government felt bound to record their dissent from the German contention that, in view of the intimate connection between the Declaration of the 6th April, 1886, respecting the delimitation of the British and German spheres of influence in the Pacific, and that of the 10th April, 1886, as to mutual freedom of trade and intercourse, there could be no doubt that the scope of the application was the same, and that the latter did not apply to the Caroline Islands, this view being based on the ground that the islands, being then "under the sovereignty of a civilized Power other than Great Britain or Germany," are specifically excluded from the operation of the earlier Declaration.

It was pointed out that to sustain this contention it would be necessary to construe the two Agreements as practically constituting a single document, but to this both the wording and the general composition of the Declarations appeared manifestly opposed.

The Declarations appeared to His Majesty's Government to be wholly distinct and self-contained. They referred to different subjects and were aimed at dissimilar objects. The earlier Declaration was made for the purpose of laying down a conventional line of demarcation between the British and German spheres of influence in those regions; and, with a view of avoiding misapprehension or objection on the part of third parties who had interests within the general geographical limits of that Agreement, it was necessary to exclude specifically certain definite areas such as Samoa, Savage Island, and places then "under the sovereignty or protection of any other civilized Power than Great Britain or Germany."

The second Declaration, which is of later date, dealt exclusively with the reciprocal freedom of trade and commerce in the British and German possessions and Protectorates in the "Western Pacific," and defined specifically in Article 1 the meaning and extent of that term for the purposes of the Declaration.

The Agreement was one of a general and permanent nature, applying to future acquisitions as well as to existing Protectorates and possessions, and as the Caroline Islands were within "that part of the Pacific Ocean lying between the 15th parallel of north latitude and the 30th parallel of south latitude, and between the 165th meridian of longitude west and the 130th meridian of longitude east of Greenwich," it seemed clear that they fell within the scope of the Declaration.

No such special limitations were inserted in the Agreement as those contained in Article 6 of the Declaration of the 6th April above referred to; and it was, in the

opinion of His Majesty's Government, not in accordance with the usually accepted canons of international law to restrict, by inference and implication, the clear meaning of an Agreement by importing into it limitations and reservations contained in a separate and distinct instrument bearing a different date and dealing with a different subject. Had it been thought necessary or desirable to limit the Declaration of the 10th April in the same manner and to the same extent as that of the 6th April, there seemed no reasonable doubt that the clause of limitations would have been inserted. The reason which prompted its insertion in the earlier Declaration was wholly absent in the later, and His Majesty's Government could not accept the view that the omission was accidental and that the restriction should now be presumed and inferred.

It was further pointed out that the Declaration of the 10th April did itself contain in Article 6 a specification of certain Colonies which were excluded from the scope of the Declaration in respect of "possessions and Protectorates in the Western Pacific"; and if other exclusions had been contemplated, specific provision would similarly have been made for them.

In these circumstances, His Majesty's Government were also unable to share the opinion of the German Government, who, acting on the above assumption, held that there could be no legal foundation for a claim for compensation on the part of Messrs. Burns, Philp, and Co. in respect of the restraint of their trade in the Caroline Islands.

It was, however, unnecessary to deal with the question in any detail at that moment, as an intimation had been received from Count Metternich that the German Government were prepared to examine any evidence which the firm might be able to produce in support of their claim.

Memoranda were subsequently communicated (on the 30th August) by the German Embassy, containing respectively the text of the new Regulations which are to come into force in the Marshall Islands (Paper (P)), entitled "Ordinance respecting the Prosecution of Commerce in the Marshall Islands," and (Paper (Q)) a "List of Ordinances rendered invalid according to Section 3 of the Ordinance respecting the Prosecution of Commerce in the Marshall Islands from the 1st October, 1905."

The detailed claim of Messrs. Burns, Philp, and Co. for compensation was presented by Mr. T. A. Coghlan, Agent-General for the Government of New South Wales (Paper (R)), and transmitted to this Department on the 19th October by the Colonial Office, who requested that, as the claim was causing irritation in Australia, immediate steps should be taken to come to a decision as to the questions of principle involved, and that the claim could then be presented to the German Government immediately upon the arrival from Australia of the documents necessary to enable His Majesty's Government to satisfy themselves, as far as possible, that the amounts claimed were reasonable.

The claim, as originally submitted in January 1905, was for 10,000*l.*; the present claim is for 17,500*l.*, the increase being ascribed to the fact that there has been a continuing loss to the firm during the current year, which loss would continue until full trading rights were again allowed them.

Mr. Coghlan has stated, however, that documentary evidence can be produced only in respect of the sum of 1,377*l.* for "actual out-of-pocket expenditure upon the abortive trip," and the sum of 425*l.* for "expenses in fitting out the vessel and subsequently discharging stores and laying up the ship when the voyage had been abandoned owing to the imposition of prohibitive export duty in addition to exorbitant licence fees."

The balance of the claim is for indirect damage arising out of loss of anticipated profits, the reasonableness of which, it is thought, could only be estimated on a basis of comparison with actual profits made on voyages to the Marshall and Caroline Islands previous to March 1904; but as the Company had not traded with these islands prior to that date, the calculation of such anticipated profits becomes a matter of considerable difficulty.

The Company have supplied an estimate (Paper (S)), to which special attention is called, setting out in detail the reasons by which they seek to justify the amount of this part of their claim, based upon their experience of trading with other of the Pacific Islands and the advice of their own agent who was specially sent to the Marshalls with a view to their opening up trading operations there.

Mr. Light, the Company's solicitor, however, apparently relies, for the establishment in principle of this part of the claim, on the analogy of the "Costa Rica



"Packet" case which was laid before the Law Officers on the 3rd April, 1894, and which finally, after submission to arbitration, resulted in an Award in favour of the Company.

Copies of the reports of your predecessors in this case, and of the Award of the Arbitrator, are sent herewith (Papers (T), (U), (V), (W), (X)) for convenience of reference.

In these circumstances Lord Lansdowne requests that you will take the accompanying papers into your consideration, and favour him with your opinion whether a claim on behalf of Messrs. Burns, Philp, and Co. can properly be supported by His Majesty's Government, and, if so, on what grounds, and how far the various items specified in the Schedule of the claims presented (Paper (S)) are admissible, if substantiated by evidence.

His Lordship will also be glad to receive any observations of a more general nature which you may be good enough to offer.

I have, &c.
(Signed) F. H. VILLIERS.

List of Papers.

(A.) To Sir F. Lascelles	..	..	..	(No. 218)	October	19, 1904.
(B.) and (C.) Declarations between Great Britain and the German Empire relating to the demarcation of the British and German spheres of influence in the Western Pacific. [Treaty. Library No. 754]	..	..	..	..	April 6 & 10, 1886.	..
(D.) Colonial Office	..	..	..	..	December	9, 1904.
(E.) Mr. Whitehead	..	..	..	(No. 278)	December	7, ..
(F.) To Sir F. Lascelles	..	..	..	(No. 15)	January	17, 1905.
(G.) Colonial Office	..	..	..	..	December	20, 1904.
(H.) Sir F. Lascelles	..	..	..	(No. 106)	April	17, 1905.
(I.) Colonial Office	..	..	..	..	March	7, ..
(J.) Sir F. Lascelles	..	..	..	(No. 58)	March	8, ..
(K.) Count Bernstorff	..	..	..	..	April	29, ..
(L.) To Sir F. Lascelles	..	..	..	(No. 122)	June	5, ..
(M.) Mr. Whitehead	..	..	..	(No. 186)	July	12, ..
(N.) Count Metternich	..	..	..	..	August	4, ..
(O.) To Sir F. Lascelles	..	..	..	(No. 227)	August	26, ..
(P.) and (Q.) Memoranda communicated by Count Bernstorff	..	..	..	..	August	30, ..
"Ordinance respecting the Prosecution of Commerce in Marshall Islands."						
"List of Ordinances rendered invalid according to § 3 of the Ordinance respecting the Prosecution of Commerce in the Marshall Islands from October 1, 1905."						
(R.) Colonial Office	..	..	..	..	October	19, ..
(S.) Ditto	..	..	..	..	October	27, ..
(T.) From Law Officers [Conf. 6508, p. 44]	..	..	..	..	April	19, 1893.
(U.) Ditto [ditto p. 46]	..	..	..	..	September	29, ..
(V.) Ditto [Conf. 6641, p. 90]	..	..	..	..	April	3, 1894.
(W.) Ditto [ditto p. 93]	..	..	..	..	August	15, ..
(X.) Papers relating to the Arbitration in the Case of the "Costa Rica Packet," 1897. ["Commercial, No. 3 (1897)."] Library No. 3789.]	..	..	..	..	..	..
Supplementary—Colonial Office	..	..	..	..	October	24, 1905.

Report.

Although the object of the Declaration signed at Berlin on the 10th April, 1886, is defined in the preamble to be "reciprocal freedom of trade and commerce" in the possessions and Protectorates of the two Governments within the limits therein specified, yet the operative words used in paragraph 2 of the Declaration do not exclude the contention of the German Government that either Government is left with a free hand to impose taxes and duties (however hardly they may tell on general commerce) in its own territory so long as they do not differentiate against the subjects of the other State. We think that it was not intended to limit the rights of either party in respect of internal taxation or administration applicable equally to the subjects of both States.

As regards the Caroline Islands, we think the view put forward by His Majesty's Government is correct. The exclusion of these islands from the Declaration of the 6th April, 1886, when they belonged to Spain was merely by way of reservation of the rights of third parties, but in their subsequent transfer to Germany they were brought

within the scope of the Declaration of the 10th April, 1886. That Declaration applies to all future as well as existing possessions and Protectorates within the area then defined (see Article 1), and no such reservation or limitation as appeared in the Declaration of the 6th April, 1886, was necessary or would have been appropriate having regard to the purpose of the later Declaration.

With regard to the Marshall Islands, the German Government has empowered the Jaluit Company to assume a position which is contrary to both the letter and the spirit of the Declaration of the 10th April, 1886. In effect, the German Government has conferred on a particular German subject, or group of subjects, the right to impose differential taxation against British subjects. In form the taxation appears to fall equally on the Jaluit Company, but this is a form only as that Company only pays such taxes into its own coffers.

We think a claim for damages by Messrs. Burns, Philp, and Co. (Limited) may properly be presented to the German Government, subject to the following observations:—

Caroline Islands.

First Voyage.—The actual expenditure incurred in the abortive voyage from the Marshall Islands is recoverable, together with an allowance for the loss of profit over and above such expenditure as they were reasonably entitled to expect.

This claim should be supported by vouchers, which ought to be in existence.

Second and Third Voyages.—The whole loss of profits cannot be claimed. The vessel could have been employed in other, though probably less profitable, trading, and no more than a reasonable allowance based on the usual earnings of a vessel of this class should be claimed. There probably will be difficulty in proving the amounts of anticipated profits alleged, and a much smaller sum than 1,500*l.* should be accepted.

Marshall Islands.

Third Voyage.—The actual expenditure list, which should be capable of being properly vouched, is recoverable, and, in addition, an allowance for loss of trading.

Projected Voyage.—The expenses claimed are recoverable, but they should be properly vouched. The excessive trading licence fee 450*l.* is recoverable. The claim for disturbance of business can hardly be sustained without stronger evidence than that supplied at present.

As to the further claim for 7,500*l.* This damage appears to be somewhat remote. The date of the contract is not given, and no notice of it was given to the German Government, but, if it was made on the faith of the existing Treaties, and has proved a loss by reason of the breach of such Treaties, some claim may not improperly be put forward.

(Signed) JOHN L. WALTON.
WM. S. ROBSON.

Law Officers' Department,
February 6, 1906.

No. 94.

[In Colonial Office letter
of October 24, 1906.]

[October 12, 1906.]

Law Officers of the Crown to Colonial Office.

My Lord,

Royal Courts of Justice, October 12, 1906.

WE were honoured with your Lordship's commands, signified in Mr. H. Bertram Cox's letter of the 12th July last, stating that he was directed by your Lordship to lay before us a despatch of the 7th May from the High Commissioner of the Western Pacific (with its enclosures) relating to a marriage ceremony performed on board a merchant-vessel by the master at Pitcairn Island, and to refer us to the Report of the 23rd November last, upon the validity of this marriage by our predecessors in office

Validity of
marriage on
a merchant-
vessel at
Pitcairn
Island:
further as
to.

[455]

M



and to the papers then submitted to them, and to request the favour of our Report upon further questions arising in connection with this marriage.

That it would be seen from paragraph 3 of the High Commissioner's despatch, that at the time of the celebration of this marriage two ministers of religion (being Seventh Day Adventists) had been registered for celebrating marriages in Pitcairn under Article 118 and the following Articles of the Pacific Order in Council 1893, a fact which was unknown to your Lordship's predecessor, and, therefore, not brought under the consideration of our predecessors in office when they favoured him with the Report above mentioned.

That it would appear, at first sight, that the presence of these registered ministers on the island, assuming that one of them was so present, which there was little reason to doubt, would exclude the doctrine of "necessity" mentioned in the Report of our predecessors in office.

That it was to be observed, however, that Article 118 *et seq.* of the Pacific Order in Council provided for the registration of ministers of religion and not of civil marriage officers, and for the celebration of marriages by a religious and not a civil ceremony, and that if, as might possibly have been the case in the marriage now in question, members of the Church of England or some other denomination declined on conscientious grounds to be married by a minister of the Seventh Day Adventists according to the religious forms of that Sect, the question arose whether such persons were legally bound to be married by such a minister according to such forms, so as to exclude the doctrine of necessity in their case.

That it was conceived that if the Order in Council had provided for a form of civil marriage that form would have had to be complied with by all persons, whatever their religious views or conscientious scruples might be, all denominations being treated alike in this respect. But that your Lordship hesitated to endorse any suggestion that the members of one religious denomination should be compelled by law to be married according to the forms of another denomination under a penalty of their marriage being invalid.

That in this connection, Mr. Bertram Cox was to refer us to the fourth question submitted to our predecessors in office and their reply, and to suggest, for our consideration, that the Pacific Order in Council should be amended so as to provide for civil marriage officers and a civil form of marriage, either in addition to, or in substitution for, the present provisions for registered ministers of religion and marriage by religious ceremony.

That Mr. Bertram Cox was to request us to take his letter (and enclosures) into our consideration and to report:—

(1.) Whether the marriage between Walter Henry Petch and Esther Godfrey Coffin was valid and, if so, upon what grounds?

(2.) Whether Queen's Regulation 1 of 1896 applied to Pitcairn, having regard to the fact that this Regulation was passed before Pitcairn was brought within the operation of the Pacific Order in Council?

(3.) If so, what was the effect of Section 21 of that Regulation with regard to marriages contracted *per verba de presenti* in Pitcairn?

(4.) Whether a law which compelled members of one denomination to be married by the minister and according to the religious forms of another denomination, excluded the doctrine of necessity, and, in the event of persons disregarding the law and contracting a marriage *per verba de presenti*, whether such a marriage was valid?

(5.) Whether we concurred in the answers of our predecessors in office to the third and fourth questions submitted to them, and whether, with regard to the fourth question, the Pacific Order in Council should not be amended so as to provide for civil marriage officers and a civil form of marriage, as suggested in the fifth paragraph of the letter of reference?

We have taken the matters into our consideration, and, in obedience to your Lordship's commands, have the honour to

Report—

(1.) That in our opinion, the marriage of Walter Henry Petch and Esther Godfrey Coffin is valid on the ground that it was contracted in accordance with the Common Law of Pitcairn which, we think, enables a marriage *per verba de presenti* to be contracted without the presence of a person in holy orders.

Assuming that the presence of such a person is necessary by the Common Law

of England, we think that the settlers at Pitcairn Island are subject only to so much of that law as can by possibility be applied, and their circumstances made it impossible to procure the attendance of a person in holy orders at their marriages. To that extent, therefore, the Common Law as laid down in *R. v. Millis* is modified in their case. The presence in the island of ministers of the Seventh Day Adventists does not affect the question, for—we presume—that they are not persons in holy orders, that is to say, episcopally ordained.

(2.) and (3.) This regulation has no bearing on the case now in question. It applied only to marriages of foreigners and of British subjects celebrated by a minister who is not a British subject. With that qualification it applies to Pitcairn Island.

(4.) As indicated in the foregoing answers, we think that the Pacific Order in Council and the Queen's Regulations do not make it necessary that all marriages should be contracted under its provisions in order to be valid. The Order provides a regular form which it is, no doubt, desirable should be used, but it does not expressly, and cannot by mere implication, invalidate marriages contracted under the Common Law.

(5.) We concur in the answer of our predecessors to the third and fourth questions submitted to them, and as regards the fourth, we think that the Order in Council should be amended so as to provide for civil marriage officers and a civil form of marriage in substitution for, or in addition to, the present provisions for a registered minister of religion and marriage by religious ceremony. If marriage by registered ministers of religion is retained, we think that power should be reserved to remove such minister from the register at the discretion of the High Commissioner.

We have, &c.
(Signed) JOHN L. WALTON.
W. S. ROBSON.

PORTUGAL.

No. 10.

[March 15, 1906.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 31, 1906.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit herewith the papers noted in the accompanying list respecting the possibility of admitting the Portuguese Colony of Mozambique as a member of the South African Customs Union.

It will be seen that it is stated in a letter, dated the 11th November, 1903, from this Office to the Colonial Office, that apparently no claim has been made on the ground of most-favoured-nation or national treatment clauses by a Power not a member of a Customs Union to the same treatment as that accorded by one member of such Union to another, and that if such a claim were made it would probably be rejected for the reasons set out in Mr. Farnall's Memorandum of March 1889, pp. 49 and 50.

The view adopted by Mr. Farnall in this Memorandum is that a Customs Union, in order to be in a position to reject such a claim to most-favoured-nation treatment as that indicated above, must be a "complete Union," *i.e.*, it must be established on the basis of a common Customs frontier as regards foreign nations and of the suppression of the Customs frontier as regards the States forming the Union.

In the case of the South African Union, the question arises whether, granting the necessity for the Union to be complete in the sense indicated by Mr. Farnall, it fulfils the conditions necessary to give it this character of completeness.

In paragraphs 4 and 5 of the Colonial Office letter of the 21st October, 1905, Mr. Lyttelton expresses doubts on this point, citing Articles XV, XVII, and XXII of the Customs Union Convention, which might, in his opinion, be regarded as impairing the completeness of the Union.

Among the papers transmitted will be found a list of the countries with which Treaty relations exist affecting the British Colonies, together with a Parliamentary

Mozam-
bique
Colony: as
to admission
of to South
African
Customs
Union.



1906

Paper, "Commercial No. 9 (1903)," entitled "Return of Most-favoured-nation Clauses in existing Treaties of Commerce and Navigation between Great Britain and Foreign Powers, &c."

The following facts connected with negotiations now proceeding for a new Commercial Arrangement between the United Kingdom and Bulgaria show that the Government of the latter country, which is bound by the Treaty of Berlin to give most-favoured-nation treatment to the States parties to that instrument, has considered it desirable to obtain a stipulation (whether as an admission of right or as a concession is not clear) to the effect that the special privileges granted as a consequence of a Customs Union shall not constitute a breach of the most-favoured-nation Article.

The proposal originally put before the Powers by Bulgaria was as follows:—
"Il est entendu que la clause de la nation la plus favorisée ne s'appliquera pas aux faveurs spéciales résultant d'une Union Douanière."

In the course of the discussions with His Majesty's Agent and Consul-General at Sophia the Bulgarian negotiators proposed the following Article, which had already been agreed to by Germany:—

"Les dispositions qui précèdent ne s'appliquent point—

"1.
"2. Aux obligations imposées à l'une des deux Parties Contractantes par les engagements d'une Union Douanière déjà contractée ou qui pourrait l'être à l'avenir.

This wording has been adopted in the Anglo-Bulgarian draft Treaty.

I am to request you to take the papers into your consideration, and to favour me with your opinion—

1. Whether under any of the existing Treaties of Commerce a foreign Power would be entitled to claim in any of the British South African Colonies treatment for its goods as favourable as that which would be accorded to those of the Colony of Mozambique if this Colony joined the South African Customs Arrangement;

2. Whether, if the above question be answered in the affirmative, it is necessary for a Customs Union to be complete in order to disentitle countries outside the Union to most-favoured-nation treatment; and

3. Whether, if so, the South African Customs Union can, having regard to Articles XV, XVII, and XXII of the Convention, be regarded as a complete Union.

4. Generally on the matter.

I have, &c.
(Signed) ERIC BARRINGTON.

List of Papers.

(A.) Memorandum by Mr. Farnall (Confidential 5842)	..	March	4, 1889.
(B.) Board of Trade	..	October	22, 1903.
(C.) To Colonial Office	..	November	11, "
(D.) Colonial Office	..	October	21, 1905.
(E.) Parliamentary Paper "Commercial No. 9 (1903)." [Library No. 4194.]			
(F.) List of Treaties of Commerce by which South African Colonies are bound:—			

Argentina ..	February	2, 1825.
Austria-Hungary ..	April	30, 1868.
Bolivia ..	December	5, 1876.
Colombia ..	September	29, 1840.
Costa Rica ..	February	16, 1866.
Corea ..	November	26, 1883.
Egypt ..	November	27, 1849.
Greece ..	October	29, 1889 (not applicable to the Cape of Good Hope).
Honduras ..	November	10, 1886 (not applicable to Cape).
Italy ..	January	21, 1887 (? not applicable to Cape or Natal).
Japan ..	June	15, 1883 (not applicable to Cape).
Liberia ..	July	16, 1894 (? not applicable to Cape).
Mexico ..	November	21, 1848.
Morocco ..	November	27, 1888 (not applicable to Cape).
Muscat ..	December	9, 1856 (two Treaties).
Netherlands ..	March	19, 1891 (not applicable to Cape).
Paraguay ..	March	6, 1856.
Peru ..	October	16, 1884.
Russia ..	April	10, 1850.
Salvador ..	January	12, 1859.
" ..	October	24, 1862.
" ..	June	23, 1886 (not applicable to Cape).
Servia ..	June 28 (July 10),	(not applicable to Cape).
	1893	

Tonga ..	..	November	29, 1879.
Uruguay ..	..	November	13, 1885.
" ..	..	July	15, 1899 (? not applicable to Cape or Natal).
Venezuela ..	..	April	18, 1825.
Zanzibar ..	..	April	30, 1886 (not applicable to Cape or Natal).

(G.) South African Customs Union Convention. Parliamentary
Paper C. 1599 March 26, 1903.

Report.

1. Under the existing Treaties of Commerce applicable to the South African Colonies a foreign Power having the benefit of the most-favoured-nation clause would, in our opinion, be entitled to claim in any of the British South African Colonies treatment for its goods as favourable as that which would be accorded to those of the Colony of Mozambique if that Colony joined the South African Customs Arrangement.

The object of the most-favoured-nation clause is to secure to each Party to the Treaty the fiscal benefits that the other Party may give by Treaty to other nations. There is nothing in the form of the clause usually adopted to suggest that it would be inapplicable merely because the Treaty with a third Party was unusually comprehensive in its scope, unless, of course, the most-favoured-nation clause is itself made subject to an exception in favour of a Customs Union as in the cases mentioned in Mr. Farnall's Memorandum.

There seems to be no general practice of nations in favour of the suggestion made in Mr. Farnall's Memorandum to the effect that a nation may join a Customs Union with another nation and yet not bring the most-favoured-nation clause into operation by so doing.

2 and 3. In any event, we think it is doubtful whether, having regard to Articles XV, XVII, and XXII of the Convention, the South African Union can be said to be a complete Union in the sense contended for by Mr. Farnall.

4. It is, of course, to be observed that hitherto this country has always maintained a strict construction of the most-favoured-nation clause, and has contended against any construction or device that would have the effect of limiting the full scope and operation of that clause.

(Signed) JOHN L. WALTON.
WM. S. ROBSON.

Law Officers' Department,
March 15, 1906.

No. 104.

[In Colonial Office letter
of August 16, 1906.]

[August 11, 1906.]

Law Officers of the Crown to Colonial Office.

My Lord,

Royal Courts of Justice, August 11, 1906.

WE were honoured by your Lordship's commands, signified to us by Mr. Bertram Cox in his letter of the 20th July last, stating that he was directed by your Lordship to transmit, for our consideration, a despatch from the High Commissioner for South Africa asking that our opinion might be obtained on two questions which had arisen as to the interpretation of Article IV of the *modus vivendi* between the Transvaal and Mozambique, viz:—

(i.) Did the terms of the *modus vivendi* as to rates, and particularly Article IV thereof, apply only to Johannesburg and stations east thereof along the Lourenço Marques-Johannesburg Line, or could they be said equally to apply to all stations in the Transvaal?

(ii.) In the event of a reduction in railway rates being effected from other ports, has the Central South African Railway Administration to give, under the terms of the *modus vivendi*, such a reduction to Delagoa Bay as would maintain the actual difference to be proportionate only?

That, in our opinion, of the 12th July, we dealt, *inter alia*, with the question of the applicability of the *modus vivendi* to lines constructed since it was negotiated.

[455]

N

Interpreta-
tion of
Article IV
of the
*modus
vivendi*
between
the Trans-
vaal and
Mozam-
bique.



1906

46

PORTUGAL.

That your Lordship would be glad if we would supplement that opinion by reporting on the two points now raised by Lord Selborne.

We have taken the matter into our consideration, and in obedience to your Lordship's commands, have the honour to

Report—

That, in our opinion, the terms of the *modus vivendi* as to rates apply only to stations between Johannesburg and Lourenço Marques on the line referred to in Article IV and not to stations on any other line. No other line is mentioned in that Article, and we can see no reason for extending the obligations of the *modus vivendi* to other lines.

We think that the difference to be maintained between the rates from Delagoa Bay and those from other ports is the proportionate and not the actual difference now existing between those rates. Any other construction of the *modus vivendi* might give rise to a discrimination much more in favour of one line by the other than appears to have been contemplated by the parties to the *modus vivendi*.

We have, &c.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

[In Colonial Office letter
of December 13, 1906.]

No. 10^B.

[November 23, 1906.]

Law Officers of the Crown to Colonial Office.

Brakpan-
Witbank
Railway:
Bearing of
*modus
vivendi*
between the
Transvaal
and Moz-
ambique.

My Lord,

Royal Courts of Justice, November 23, 1906.

WE were honoured by your Lordship's commands, signified to us by Mr. Graham in his letter of the 8th October last, stating that he was directed by your Lordship to draw our attention to paragraph 4 of our opinion of the 12th July, in which we dealt with the question whether Article IV of the *modus vivendi* between the Transvaal and Mozambique applied to lines of railway constructed since the South African war.

That in connection with this matter he was now to transmit, for our consideration, an extract from a despatch from the High Commissioner for South Africa, inquiring, with reference to the new Brakpan-Witbank Line shortly to be opened, whether Article IV was to be taken to apply to traffic reaching stations on lines existing before the war over lines which in part existed before the war and in part had been constructed since the war. That the railway map at the end of the inclosed General Manager's Report for 1905 would make the point raised by the High Commissioner clear, and a copy of the *modus vivendi* was also inclosed for convenience of reference.

That it appeared to your Lordship to follow from our previous opinion that Article IV did not apply to such traffic, for the new route to Johannesburg via the Bethlehem-Kroonstad Line, with regard to which that opinion was given was partly over lines and to stations existing before the war and partly over lines newly constructed. That he was, however, to invite an expression of our opinion on the point raised by the High Commissioner.

We were further honoured by Mr. Graham's letter of the 17th October stating that, with reference to his letter of the 8th, he was directed by your Lordship to transmit to us the copy of a despatch from the High Commissioner forwarding correspondence on the subject with the Transvaal Law Department.

We have taken the matter into our consideration and, in obedience to your Lordship's commands, have the honour to

Report—

That, in our opinion, Article IV of the *modus vivendi* applies only to traffic passing between Lourenço Marques and Johannesburg by the line which was in existence at the date of the *modus vivendi*.

We have, &c.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

(47)

RUSSIA.

No. 11.

[May 30 and August 14, 1906.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 19, 1906.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you the papers noted in the accompanying list relating to the case of the steam-ship "Knight Commander," which vessel, while on the voyage from New York to Kobe via Singapore with a miscellaneous cargo, a portion of which consisted of railway material, was captured and sunk by the Russian Vladivostock squadron on or about the 24th July, 1904.

The "Knight Commander's" papers were brought to Vladivostock, where the Port Prize Court on the 16th August, 1904, delivered judgment (Paper (A), p. 85), in which the sinking of the vessel was declared to be regular, inasmuch as by section 40 of the Russian Prize Regulations (Paper (B), p. 19) provision is made for the sinking of a prize if difficulty is experienced in taking it in for adjudication by a Prize Court.

The owners of the "Knight Commander," acting under informal advice from this Department to the effect that they should, independently of any action which His Majesty's Government might see fit to take, exhaust their own legal remedies before the Russian Prize Tribunals, appealed against the decision of the Port Prize Court, and meanwhile formulated a claim amounting to 102,733*l*, which was presented to the Russian Government on the 2nd March, 1905 (Paper (A), No. 140, p. 113), it being the view of His Majesty's late Government that the claim for compensation should be put forward irrespective of the finding of the Prize Courts. The Russian Government, however, contended that the question of compensation must rest with the Court of Appeal, and could not be considered pending the delivery of its judgment.

The appeal in the case of the "Knight Commander" came on for final hearing in the Supreme Admiralty Council at St. Petersburg on the 2nd December last, when the Court upheld the decision of the Vladivostock Prize Court condemning both ship and cargo and dismissed the appeals for compensation; and I am to inclose a despatch from His Majesty's Chargé d'Affaires at St. Petersburg, forwarding the text of the judgment (Paper (C)). I am to invite your especial attention to the observations on the judgment by Mr. Hurst, Assistant Legal Adviser to this Office, who, after summarizing its main features, points out that the effect of this decision is that a large portion of the vessel's cargo was rightly condemned by the Lower Court as contraband; that this portion exceeded half the cargo; that the ship was rightly declared a prize under the Russian Rules (Paper (B), No. 11 (b), p. 3); that the action of the Russian Commander in sinking the steamer is not a circumstance for the Prize Court to deal with at all, but a matter of naval discipline; that the Russian Naval Prize Code contemplates the sinking of neutral as well as of enemy vessels; and that, despite the views put forward by international jurists of repute, the Russian Court cannot go behind the provisions of the Russian Code. The Court also find that where the destruction of a vessel is necessary in the interests of a belligerent, parties interested ought not to suffer; but that since both the "Knight Commander" and her cargo have been adjudged prizes, the chief loss falls upon the captor State, and that owners of innocent property must recover compensation by initiating claims before a Prize Court.

The destruction of the "Knight Commander," as you are no doubt aware, provoked great indignation in this country at the time of its occurrence, and His Majesty's late Ministry characterised the incident in both Houses of Parliament as unjustifiable in international law, and pledged themselves to support claims for compensation irrespective of the finding of the Russian Courts. In this connection I am to

Russo-
Japanese
war:
Claim on
account of
sinking of
"Knight
Com-
mander."



refer you to the debates in both Houses of Parliament on the 11th August, 1904, and to Mr. Balfour's answer to Mr. Gibson Bowles on the 8th August, 1904 (Paper (A), p. 37).

I am to request that you will take these papers into your consideration, and that you will favour Sir Edward Grey with your opinion on the following points:—

1. Can His Majesty's Government, notwithstanding the finding of the Supreme Admiralty Council, further press the claim (which is still in the possession of the Russian Government) on their consideration, and, if so, what further arguments can they use beyond those already advanced (see especially despatch to Sir C. Hardinge, No. 93, Treaty, of the 10th August, 1904 (Paper (A), p. 41))?

2. In the not improbable event of the Russian Government declining to consider the claim, is it desirable that His Majesty's Government should propose that it be submitted to arbitration by a special Tribunal constituted for this purpose? In this connection I am to refer you to Sir C. Hardinge's Memorandum, and the Minutes thereon which are printed on p. 23 of the Papers, which were forwarded to you for perusal on the 1st February last, and of which another copy is inclosed (Paper (D)). From that Memorandum you will observe that Count Lamsdorff thought it unlikely that the Russian Judicial authorities would delegate these functions to a Court of Arbitration, and was of opinion that it would be better to wait till the second Hague Conference had pronounced itself on the question of principle relating to the destruction of prizes, both neutral and enemy. This is one of the subjects set down for discussion at the forthcoming Peace Conference at The Hague, but it is to be presumed that it will not be within the functions of the Conference to lay down what the law is at the time when it is sitting, and still less to declare what the law was when this case arose, so that the view held by the Conference shall be applied retrospectively to matters which took place before the date of its assembly was even fixed.

3. If you are of opinion that the case of the "Knight Commander" is one in which arbitration may eventually be proposed, I am to request that Sir E. Grey may be favoured with your views as to what particular points should be submitted to the Arbitrators.

4. Sir E. Grey would at the same time be glad to be furnished with any observations of a general character which you may desire to offer upon the papers now submitted to you.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

- (A.) "Knight Commander" print. ([Conf. 8631], 1904-5.)
- (B.) Russian Prize Regulations. (Inclosure in Sir C. Scott's No. 4, Treaty, February 18, 1904.)
- (C.) Mr. Spring-Rice, No. 3, Treaty, January 30, 1906, inclosing Judgment of Supreme Admiralty Council and Departmental Minutes thereon.
- (D.) Shipping Claims print, 1906.

Report.

In our opinion His Majesty's Government is justified in pressing the claim for compensation in this case on the consideration of the Russian Government. The decision of the Supreme Admiralty Council is founded entirely upon the Russian Naval Prize Regulations and instructions to naval officers, and it may well be that the Russian Courts have quite correctly construed these documents, but the real question is whether or not they are in conformity with international law. The Supreme Admiralty Council justifies its decision as being correct both according to Russian law and international law; but, so far as considerations of international law are concerned, the Council, according to its own view, could not act upon them. It finds that the question of the regularity of the sinking of a vessel according to the interpretation of the Russian law relating to prizes is a matter only for the superior officer of the person who had given

the order for the sinking, and not for a Prize Court; and it appears from Count Lamsdorff's note of the 11th August, 1904, that the decision of the Russian Government is in favour of its officers. The case therefore becomes one with the Russian Government itself, on the ground that it authorizes its officers to act in a manner which, in the opinion of His Majesty's Government, is at variance with the principles of international law. In any representation to be made to the Russian Government it should be indicated that the complaint of His Majesty's Government is against the Russian Government, and not made by way of appeal against the Supreme Admiralty Council, although its decision is not approved by His Majesty's Government.

2. In the event of the claim being rejected by the Russian Government, that Government should, in our opinion, be invited to join in submitting the claim to arbitration by a special Tribunal constituted for that purpose. The discussion of the subject by The Hague Conference would be an indifferent substitute for the decision of a specially appointed Tribunal, for the Conference is not likely to declare what the law was when this case arose, and any principles which it might recommend for adoption in the future would not in any way conclude this case. Moreover, if this case were to be made to depend on the action of The Hague Conference the attitude of the British Representative at the Conference in favour of the principle contended for by Great Britain would be open to the misrepresentation that he was merely trying to influence the Conference in order to assist his country in the prosecution of its claim against Russia, and the Conference would no doubt be extremely sensitive to any suggestion that it was being made an instrument for this purpose.

3. The substance of the questions to be submitted to the Arbitration Tribunal is:—

(1.) Whether the sinking of the "Knight Commander" by Russian naval officers is justified by the generally recognized principles of international law.

(2.) The assessment of compensation to be paid by Russia in respect of the ship and cargo in the event of the destruction being held to be illegal.

The exact forms of the questions, however, could be settled with more certainty on receipt of the final answer of the Russian Government.

4. Generally,—It is unfortunate that, on the merits of the case, it seems clear that the "Knight Commander" would have been properly condemned and confiscated if she had been taken in for adjudication in the ordinary way. We have not before us any complete statement by the owners or master, but, judging from the proceedings, the apparently undisputed facts are:—

- (1.) The bulk of the cargo was destined for use in Japanese military operations;
- (2.) The owners were privy to the carriage of contraband; and
- (3.) There was either destruction, concealment, or wrongful conduct relating to the ship's documents.

These are circumstances which will probably have some—though little, if any, legitimate—weight with the Arbitration Tribunal when it comes to consider the question of damages.

The owners of the ship can scarcely be said to be meritorious claimants, but the question of damages in this case is of much less importance than the principle of international law which is involved, and His Majesty's Government ought to succeed in obtaining a declaration of that principle.

If the case of the "Knight Commander" is submitted to arbitration, consideration should be given to the question whether the same Tribunal should be empowered to deal with any other claims which His Majesty's Government may have against the Russian Government arising out of losses to British shipping during the late war between Russia and Japan.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
May 30, 1906.



1906

50

RUSSIA.

*Foreign Office to the Law Officers of the Crown.**Foreign Office, July 27, 1906.*

Gentlemen,

I HAVE the honour, by direction of Secretary Sir E. Grey, to inform you that on receipt of your Report of the 30th May last in the case of the steam-ship "Knight Commander" (Paper (A)) a despatch in the sense of the first paragraph thereof was addressed to His Majesty's Ambassador at St. Petersburg (Paper (B)), instructing him to address a further representation to the Russian Government, and to invite their reconsideration of the claim for compensation put forward by the owners of the vessel.

A copy of Sir A. Nicolson's note to the Russian Government is annexed (Paper (C)), and I am also to inclose a copy of the reply which his Excellency has now received (Paper (D)), to the effect that the Russian Ministry for Foreign Affairs do not find sufficient grounds for altering the view expressed in their notes of the 5th (18th) December, 1905 (Papers (E) and (F)), on the cases of the steam-ships "Allanton," "Calchas," and "Hipsang," as to the fitness of diplomatic interference in Prize Court justice, and also on the question of the principles obtaining at present in the science of international law relative to the sinking of neutral ships by belligerents.

Sir E. Grey desires me to state that, with your concurrence, he proposes now to take action in the sense of the second and third paragraphs of your Report of the 30th May, viz., to invite the Russian Government to join in submitting the claim to arbitration by a special Tribunal constituted for that purpose. I am accordingly to request that you will be so good as to define the questions which in that case it would, in your opinion, be desirable to submit for arbitration by the Tribunal in question.

In addition to the papers above mentioned, those forwarded to you in my letter of the 19th April last are also inclosed for convenience of reference.

I have, &c.

(Signed) F. A. CAMPBELL.

List of Papers.

(A.) Law Officers' Report	..	..	May	30, 1906.
(B.) To Sir A. Nicolson	..	.. (No. 31. Treaty)	June	13, "
(C.) Sir A. Nicolson ..	..	.. (No. 33. Treaty)	"	17, "
(D.) Sir A. Nicolson ..	..	.. (No. 38. Treaty)	July	19, "
(E.) Mr. Spring-Rice	..	.. (No. 133. Treaty)	December	20, 1905.
(F.) Mr. Spring-Rice	..	.. (No. 134. Treaty)	"	20, "
(G.) "Knight Commander" print.	..	.. ([Conf. 8631]. 1904-5.)		
(H.) Russian Prize Regulations.	..	.. (Inclosure in Sir C. Scott's No. 4, Treaty, February 18, 1904.)		
(I.) Mr. Spring-Rice, No. 3, Treaty, January 30, 1906, inclosing Judgment of Supreme Admiralty Council and Departmental Minutes thereon.				
(K.) Shipping Claims print, 1906.				

Report.

In our opinion the reply of the Russian Government does not require any alteration or addition to the substance of the questions indicated in our Report of the 30th May, 1906, and these questions may be expressed as follows:—

1. Whether the sinking of the "Knight Commander" by Russian naval officers was justified by the generally recognized principles of international law.
2. If the sinking of the "Knight Commander" was not so justified, what damages should be paid by Russia to the owners of the ship and cargo?

In view of the difficulties which may arise in the presentation of the British Case, as to this vessel, to the Tribunal, we think it right to call attention to the last paragraph of our former Report.

(Signed)

J. L. WALTON.
W. S. ROBSON.

*Law Officers' Department,
August 14, 1906.*

RUSSIA.

51

No. 12.

[June 16 and September 21, 1906.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 9, 1906.

I HAVE the honour, by direction of the Secretary of State, to transmit to you the accompanying papers relating to claims put forward by the owners of the steam-ships "Calchas" and "Allanton" against the Russian Government in respect of the seizure and detention of these vessels during the recent war between Russia and Japan.

The particulars in regard to these vessels are summarized in a reference made by this Department to your predecessors on the 31st August, 1905—Paper (A), pp. 1 and 3—respecting the general question of claims pending against the Russian Government in respect of British vessels captured, sunk, or otherwise destroyed by the public ships of Russia in the course of that war; and the Report of the late Law Officers, to the effect that the claims in these two cases might be presented to the Russian Government through the diplomatic channel, will be found on pp. 9 and 10 of that Paper.

In consequence of that Report His Majesty's Chargé d'Affaires at St. Petersburg was instructed on the 27th November, 1905, to address notes to the Russian Government respecting the claims advanced. Copies of these notes are annexed (Papers (B) and (C)).

The reply of the Russian Government to these notes will be found in Paper (D), and amounted to a categorical refusal to deal through the diplomatic channel with the claims so put forward.

In the letter from this Department of the 1st ultimo, a copy of printed correspondence relating to these and other similar claims against the Russian Government was inclosed for your perusal. A further copy is inclosed herewith, and I am also to call your attention to the correspondence with Messrs. Holt and Co. and with the West of England Steam-ship Owners' Protection and Indemnity Association, which has taken place since the reply of the Russian Government was received. This correspondence, with the Minutes thereon, is marked on pp. 17, 21, 25, 28, and 60 of the Print (Paper (E)).*

It will be seen from the Minutes above referred to that, in view of the attitude of the Russian Government, the Secretary of State is inclined to the opinion that the claims in the case of the "Calchas" and "Allanton," put forward through the diplomatic channel, cannot well be further pressed. Letters have accordingly been prepared to Messrs. Holt and Co. and the West of England Association, informing them to this effect. Drafts of these letters are inclosed herewith (Papers (F) and (G)), and I have the honour to inquire whether, in your opinion, the terms of these drafts are, in the circumstances, right and proper.

I am further to state that Sir E. Grey would also be glad to receive any observations of a general nature which you may be good enough to offer with respect to the claims above referred to.

I have, &c.

(Signed) E. GORST.

List of Papers.

- (A.) From Law Officers, November 8, 1905.
- (B.) Mr. Spring-Rice to Count Lamsdorff, December 2, 1905 (in Mr. Spring-Rice's No. 127, Treaty, December 2, 1905).
- (C.) Ditto, December 5, 1905 (in Foreign Office to Mr. Spring-Rice, No. 129, Treaty, November 27, 1905).
- (D.) Count Lamsdorff to Mr. Spring-Rice, December 18, 1905 (in Mr. Spring-Rice's No. 134, Treaty, December 20, 1905).
- (E.) Confidential Print, Shipping Claims (Nos. 19, 24, 27, 30, and 50).
- (F.) Draft to Messrs. Holt and Co.
- (G.) Draft to West of England Association.

* The numbers in the print have been altered since it was submitted to the Law Officers.

*Report.*

With regard to the "Calchas," we are unable to concur in the statement that there is no question of principle at stake. The facts, as laid before us, disclose four points on which questions of principle may well be raised:—

1. The removal by the captors of 2,000 bags of flour, part of the vessel's cargo, at Kovsakovsky without any order from the Prize Court (assuming that there was no consent to their proceeding on the part of the captain, as to which the statement of facts is not quite clear);
2. The unexplained and apparently unreasonable delay in bringing the vessel to trial; and
3. The omission on the part of the Russian Government to provide a Prize Court having jurisdiction to deal with claims for damage arising under either of the two preceding heads;
4. The operation of Article 30 of the Russian Prize Regulations, as construed by Count Lamsdorff in his note of the 5th December, 1905, which precluded a Russian Prize Court from entertaining claims for compensation owing to irregularity and delay in the method of capture, where the fact of such capture was held to be justifiable.

In the draft letter it is stated that the practice of English Prize Courts is only to award costs and damages where it can be shown that a capture has been effected without ostensible cause or reason. This is not strictly correct, for English Prize Courts have laid frequent and emphatic stress on the necessity, incumbent on the captor, of bringing the vessel before the Prize Court without undue delay, and where the captor has been guilty of such delay, he has been made to pay damages. There is therefore no inconsistency in making a claim for damages for delay in bringing the vessel in for adjudication, although the seizure has been held to be justified.

We are unable to say from the facts before us whether the delay was due to the captor or the Prize Court. In the former case, the claim would be one proper for a Prize Court, if a Court with competent jurisdiction is available for that purpose. In the latter case, the claim would properly be put forward through diplomatic channels.

The delay of forty-nine days from the date of seizure to the date of adjudication seems *prima facie* unreasonable, especially having regard to the greater dispatch given in the case of the German vessel.

The principle above stated, in reference to delay by a captor, is one of international law, and should be acted on by Russian Prize Courts as well as English.

The view expressed by Count Lamsdorff in his note to Mr. Spring-Rice of the 5th December, 1905, of the effect of Article 30 of the Russian Prize Regulations would, if accepted by the Prize Court, preclude that Court from entertaining a claim for demurrage like that now in question, in face of its finding that the arrest and detention of the "Calchas" was justified. We think Count Lamsdorff's construction of Article 30 is probably correct. In that case the Russian law does not afford a remedy allowed by international law, and the failure to afford such a remedy raises a substantial question of principle.

In the case of the "Allanton" there does not seem to have been much delay in bringing her in, and although therefore the same questions of principle under Article 30 of the Prize Regulations arise, there does not appear to be any case upon which a claim for damage could be successfully maintained.

Generally: The manner in which the right of search was exercised during the late war seems to render it expedient that an effort should be made to secure by international agreement the right of adequate compensation for delay in all cases where the search turns out to have been mistaken.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
June 16, 1906.

Annex 1.

Draft of Letter to Messrs. Holt and Co.

Gentlemen,

Foreign Office,

1906.

IN my letter of the 19th January last you were informed of the communication which His Majesty's Chargé d'Affaires at St. Petersburg had received from the Russian Government, setting forth the grounds on which they found themselves unable to consider the claim made

through the diplomatic channel for compensation in respect of the seizure and detention of the steam-ship "Calchas."

The question of what, if any, further action on your behalf could be taken in the matter has since been very carefully considered by His Majesty's Government in consultation with the Law Officers of the Crown, and I am now directed by Secretary Sir E. Grey to inform you that, in the opinion of His Majesty's Government, there is no probability that the Russian Government would accept any proposal made by them to submit the matter to arbitration, since there is no question of principle at stake, and since the procedure followed by the Russian authorities in their treatment of the vessel was in accordance with Russian Prize Law, as laid down in the Russian Naval Prize Regulations of 1895.

The fact must, moreover, be remembered that the Supreme Admiralty Council, the highest Court of Appeal in Russia, acting doubtless in good faith and uninfluenced by any corrupt motive, has found, as a result of its deliberations, that the capture of the "Calchas" was justified, and, that being so, it followed as a natural consequence that the Court itself awarded no compensation. It cannot be maintained that the Court should have acted otherwise, for to award damages against the captor in such a case would be obviously inconsistent with its finding. In English Prize Court cases it appears to have been the practice only to award costs and damages where it can be shown that a capture has been effected without ostensible cause or reason, which, in the case of the "Calchas," the Court have not so found.

His Majesty's Government, as you are aware, have already pointed out to the Russian Government that, in their opinion, the claim put forward by you was such as to merit equitable consideration at the hands of the Imperial Government, but since the latter have found themselves unable to entertain this view it appears now to be practically impossible to obtain the compensation claimed on the ground of the undue detention of the vessel.

In these circumstances His Majesty's Government have reluctantly come to the conclusion that it would be useless further to press through the diplomatic channel the claim put forward in the case of the "Calchas." They have arrived at this decision with the more regret, inasmuch as it was largely due to the interest shown by His Majesty's Government in the case that the vessel was released on appeal by the Prize Court of Second Instance.

Annex 2.

Draft of Letter to West of England Steam-ship Owners' Protection and Indemnity Association.

Gentlemen,

Foreign Office,

1906.

WITH reference to your letter of the 18th January last and 27th ultimo, respecting the case of the steam-ship "Allanton," I am directed by Secretary Sir E. Grey to refer to my letter of the 17th January last, in which you were informed of the communication which His Majesty's Chargé d'Affaires at St. Petersburg had received from the Russian Government, setting forth the grounds on which they found themselves unable to consider the claim made through the diplomatic channel for compensation in respect of the seizure and detention of the steam-ship "Allanton."

The question of what, if any, further action in the matter could be taken on behalf of the owner of the vessel has since been very carefully considered by His Majesty's Government in consultation with the Law Officers of the Crown; and I am now directed by Secretary Sir E. Grey to inform you that, in their opinion, there is no probability that the Russian Government would accept any proposal which might be made by them to submit the matter to arbitration, since there is no question of principle at stake, and since the procedure followed by the Russian authorities in their treatment of the vessel was in accordance with Russian Prize Law, as laid down in the Russian Naval Prize Regulations of 1895.

The fact must, moreover, be remembered that the Supreme Admiralty Council, the highest Court of Appeal in Russia, acting doubtless in good faith and uninfluenced by any corrupt motive, has found, as a result of its deliberations, that the capture of the "Allanton" was justified, and, that being so, it followed as a natural consequence that the Court itself awarded no compensation. It cannot be maintained that the Court should have acted otherwise, for to award damages against the captor in such a case would be obviously inconsistent with its finding. In English Prize Court cases it appears to have been the practice only to award costs and damages where it can be shown that a capture has been effected without ostensible cause or reason, which, in the case of the "Allanton," the Court have not so found.

His Majesty's Government, as you were informed in my letter from this Department of the 22nd November, 1905, have already instructed His Majesty's Chargé d'Affaires at St. Petersburg to express the earnest hope that the claim of the owner of the "Allanton" might be favourably considered by the Russian Government, but in view of the categorical refusal of the latter to entertain this proposal it appears now to be practically impossible to obtain the compensation claimed for the seizure and detention of the vessel.

I am to state that, in these circumstances, His Majesty's Government have reluctantly come to the conclusion that it would be useless further to press through the diplomatic channel the claim put forward in the case of the "Allanton."



1906

54

RUSSIA.

*Foreign Office to the Law Officers of the Crown.**Foreign Office, August 2, 1906.*

Gentlemen,

SIR E. GREY has duly considered your Report of the 16th June last, favouring him with your opinion with regard to letters which it was proposed to address to Messrs. Holt and Co. and the West of England Steam-ship Owners' Protection and Indemnity Association, respecting the claims put forward against the Russian Government in the cases of the steam-ships "Calchas" and "Allanton."

I have now the honour to transmit to you drafts of the proposed letters (Papers A and B) as amended in accordance with the views expressed by you, as well as the draft of a despatch which Sir E. Grey proposes to address to His Majesty's Ambassador at St. Petersburg (Paper C), instructing him to make a further representation to the Russian Government in the case of the "Calchas."

I am to request that Sir E. Grey may be favoured at an early date with your opinion whether the terms of these drafts are right and proper.

For convenience of reference the papers which accompanied my previous letter of the Department of the 9th March are returned herewith.

I have, &c.
(Signed) ERIC BARRINGTON.

Report.

In our opinion the terms of the above-mentioned drafts are right and proper in the circumstances.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
September 21, 1906.

(A.)

Draft of Letter to Messrs. Holt and Co.

Gentlemen,

IN my letter of the 19th January last you were informed of the communication which His Majesty's Chargé d'Affaires at St. Petersburg had received from the Russian Government, setting forth the grounds on which they found themselves unable to consider the claim made through the diplomatic channel for compensation in respect of the seizure and detention of the steam-ship "Calchas."

The question of what, if any, further action on your behalf could be taken in the matter has since been very carefully considered by His Majesty's Government, in consultation with the Law Officers of the Crown; and I am now directed by Secretary Sir Edward Grey to inform you that it appears to His Majesty's Government that the facts of the case disclose four points on which questions of principle might justly be raised.

(1.) The removal by the captors of 2,000 bags of flour, part of the vessel's cargo, at Korsakovsky, without any order from the Prize Court. As regards this particular point, it would appear from the Master's letter to you of December 1904 that his consent was obtained under threat of compulsion.

(2.) The unexplained and apparently unreasonable delay in bringing the "Calchas" to trial before the Prize Court at Vladivostok.

(3.) The omission on the part of the Russian Government to make provision in the Naval Prize Regulations for a Prize Court having jurisdiction to deal with claims for damage arising under the preceding head, and

(4.) The operation of Article 30 of the Russian Prize Regulations, as construed by the Russian Government, which precluded such Court from entertaining claims for compensation owing to irregularity and delay in the method of capture, where such capture was held to be justifiable.

In these circumstances His Majesty's Ambassador at St. Petersburg has been instructed to press the foregoing considerations upon the Russian Government, and to renew the demand for compensation on your behalf.

RUSSIA.

55

If the Russian Government admit the validity of the points urged by His Majesty's Government, and are willing to make a monetary payment, it will probably be necessary to reduce and amend the claim you forwarded to the Secretary of State on the 26th July, 1905, as that claim was drawn up on the footing that the seizure of the vessel was wrongful, and that you were entitled to compensation for the entire period from the arrest of the ship to her liberation, and not merely for the delay in bringing her to trial.

(B.)

Draft of Letter to West of England Steam-ship Owners' Protection and Indemnity Association.

Gentlemen,

Foreign Office, 1906.

WITH reference to your letters of the 18th January last and 27th ultimo, respecting the case of the steam-ship "Allanton," I am directed by Secretary Sir E. Grey to refer to my letter of the 17th January last, in which you were informed of the communication which His Majesty's Chargé d'Affaires at St. Petersburg had received from the Russian Government, setting forth the grounds on which they found themselves unable to consider the claim made through the diplomatic channel for compensation in respect of the seizure and detention of the steam-ship "Allanton."

The question of what, if any, further action in the matter could be taken on behalf of the owner of the vessel has since been very carefully considered by His Majesty's Government in consultation with the Law Officers of the Crown, and I am now directed by Sir E. Grey to inform you that in their opinion there is no probability that the Russian Government would accept any proposal which might be made by them to submit the matter to arbitration, since the procedure followed by the Russian authorities in their treatment of the vessel was in accordance with Russian Prize Law, as laid down in the Russian Naval Prize Regulations of 1895.

The fact must, moreover, be remembered that the Supreme Admiralty Council—the highest Court of Appeal in Russia—acting, doubtless, in good faith, and uninfluenced by any corrupt motive, has found as a result of its deliberations that the capture of the "Allanton" was justified, and, that being so, it followed as a natural consequence that the Court itself awarded no compensation. It cannot be maintained that the Court should have acted otherwise, for to award damages against the captor in such a case would be obviously inconsistent with its finding.

His Majesty's Government, as you were informed in the letter from this Department of the 22nd November last, have already instructed His Majesty's Chargé d'Affaires at St. Petersburg to express the earnest hope that the claim of the owner of the "Allanton" might be favourably considered by the Russian Government, but in view of the categorical refusal of the latter to entertain this proposal, it appears now to be practically impossible to obtain the compensation claimed for the seizure and detention of the vessel.

I am to state that, in these circumstances, His Majesty's Government have reluctantly come to the conclusion that it would be useless further to press through the diplomatic channel the claim put forward in the case of the "Allanton."

(C.)

Draft of Despatch to Sir A. Nicolson.

Sir,

Foreign Office, 1906.

IN his despatch No. 134, Treaty, of the 20th December last, Mr. Spring-Rice forwarded to me a translation of a note from Count Lamsdorff, dated the 5th (18th) of that month on the subject of the claim put forward by His Majesty's Government on behalf of the owners and other persons interested in the steam-ship "Calchas" against the Russian Government in connection with the seizure and detention of that vessel by the Russian naval authorities in 1904. In that note Count Lamsdorff stated that his Government adhered to their view that the seizure and detention of the "Calchas" having been declared by the Supreme Prize Court to be in accordance with the provisions of the Russian Naval Prize Regulations, the Ministry for Foreign Affairs, as an administrative Department, could not interfere with the jurisdiction of the Special Prize Courts constituted by those regulations, and could therefore take no cognizance of any claims for compensation arising out of the seizure and detention of the vessels which might be presented to them through the diplomatic channel.

His Majesty's Government having carefully considered the case of the "Calchas" in communication with their legal advisers, regret that they are unable to share the view taken by the Russian Government. It appears to them that the facts disclose four points on which questions of principle may justly be raised:—

(1.) The removal by the captors of 2,000 bags of flour, part of the vessel's cargo, at Korsakovsky, without any order from the Prize Court. As regards this point, it is asserted by the Russian Government that the consent of the Master of the "Calchas" to the removal of the flour was obtained, but that officer has stated in writing that such consent was obtained under threat of compulsion, and it can scarcely be contended that his consent, obtained under such circumstances, was voluntary.

(2.) The unexplained, and apparently unreasonable, delay in bringing the "Calchas" to trial before the Prize Court.



1906

56

RUSSIA.—SIAM.

(3.) The omission on the part of the Russian Government to make provision in the Naval Prize Regulations for a Court having jurisdiction to deal with claims for damage arising under either of the two preceding heads.

(4.) The operation of Article 30 of the Russian Prize Regulations, as construed by Count Lamsdorff in his note to Mr. Spring-Rice of the 5th (18th) December, 1905, which precluded a Russian Prize Court from entertaining claims for compensation owing to irregularity and delay in the method of capture, where the fact of such capture was held to be justifiable. In this connection His Majesty's Government would observe that British Prize Courts have in the past laid frequent and emphatic stress on the necessity, incumbent upon the captor, of bringing a captured vessel before the competent Prize Court without undue delay; and in cases in which such delay has occurred, have awarded damages against the captor. In these circumstances His Majesty's Government are of opinion that they are warranted in presenting a claim for damages for delay in bringing the "Calchas" before a Prize Court for adjudication, even though that Court has held that her seizure was justified. They desire, moreover, to impress upon the Russian Government that, as has already been pointed out in the Marquess of Lansdowne's despatch to Sir Charles Hardinge, No. 214, Treaty, of the 21st November, 1904, the delay of forty-six days from the date of the seizure of the "Calchas" to the date of the decision of the Vladivostok Prize Court is, *prima facie*, unreasonable, especially having regard to the greater dispatch shown in dealing with the case of the German steam-ship "Arabia," which latter vessel was seized on or about the same date as the "Calchas," and was released by a decision of the Vladivostok Prize Court on the 3rd August, 1904. The principle above stated, with regard to undue delay by a captor, is, in the opinion of His Majesty's Government, one of international law, and, as such, should be binding equally upon Russian and British Prize Courts.

His Majesty's Government also consider that the view expressed by Count Lamsdorff in his note to Mr. Spring-Rice of the 5th (18th) December, 1905, of the effect of Article 30 of the Russian Prize Regulations would, if accepted by the Prize Court, preclude the latter from entertaining a claim for demurrage similar to that now in question, in face of its finding that the arrest and detention of the "Calchas" were justified. His Majesty's Government do not desire to imply that the construction put upon Article 30 by Count Lamsdorff is not correct, but in that case it appears to them that Russian law does not afford a remedy sanctioned by international law, and the failure to afford such remedy raises, in their opinion, a substantial question of principle.

His Majesty's Government therefore deem it their duty to press the foregoing considerations upon the Russian Government, and, in communicating them to M. Istolsky, I request that your Excellency will express the hope of His Majesty's Government that, upon reconsideration of the case, the Russian Government will be prepared to admit their justice, and will award compensation for the losses which these irregularities have imposed on the owners of the vessel.

SIAM.

No. 13.

[February 24, 1906.]

*Foreign Office to the Law Officers of the Crown.**Foreign Office, February 13, 1906.*

Gentlemen,

Draft Siam
Order in
Council.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you the draft of a Siam Order in Council under the provisions of "The Foreign Jurisdiction Act, 1890," in substitution for the existing Siam Order in Council of 1903.

The draft Order is based on and largely reproduces the existing Order of 1903, but a fresh Order in Council has been rendered necessary by the fact that the Lords Commissioners of the Treasury have agreed to the appointment of a second Judge of the British Court for Siam.

This appointment will render it unnecessary to continue the system of appeals from the Court for Siam to the Supreme Court at Singapore, an arrangement which has not been a success, and appeals will, under the draft Order, lie from the decisions of either of the Judges to the two sitting together at Bangkok as the "full Court."

The opportunity has also been taken to introduce certain other amendments which experience has shown to be desirable.

Under the 1903 Order, First and Second Assistants in the Consular Service for Siam cannot hold District Courts, but, as the Secretary of State considers that some of them are qualified to do so, the definition of "Consular Officer" has been extended to enable them to do so in future.

Article 14 of the draft takes the place of Article 9 of the 1903 Order, and is a return to the system enacted in Article 8 of the Siam Order in Council, 1889, as the

SIAM.

57

provisions of the 1903 Order as to District Courts were not found to be suitable to the present conditions in Siam, where there are only two Consular districts—viz., Bangkok and Chiangmai. Under Article 12, jurisdiction in the former is vested exclusively in the Court for Siam, and there is therefore no District Court. The latter, the Chiangmai district, constitutes the district of the International Court, in which jurisdiction under the Order remains in abeyance until a case has been transferred from the International Court to the extra-territorial Court. There are, consequently, at present no District Courts in Siam at all, and considerable inconvenience is the result, which will be obviated by returning to the system of the 1889 Order, under which the Minister can designate the places at which District Courts are to be held, and the limits of their jurisdiction.

Various alterations have also been made in Part 6 ("Registration of British Subjects"), to meet suggestions that have been offered by the Consular Officers in Siam, and are based on their experience of the working of the registration provisions in that country.

I am to request that you will take these papers into your consideration, and that you will favour Sir E. Grey with your opinion as to whether the terms of the draft Order are fit and proper for submission for the approval of His Majesty in Council, and also with such general observations as you may desire to offer on the matter.

The officer who has been selected for the appointment of Assistant Judge of the Court for Siam has already started for Siam, but his actual appointment cannot be made until the new Order has received His Majesty's approval. I am therefore to add that Sir E. Grey will be glad if you will favour him with a reply to this letter at your early convenience.

I have, &c.
(Signed) ERIC BARRINGTON.

List of Papers.

- | | |
|--|-----------------|
| (A.) Draft Siam Order in Council, 1906. | |
| (B.) To Treasury | August 22, 1905 |
| (C.) From Treasury | October 7, " |
| (D.) Judge Turner, No. 17 | " 23, " |
| (E.) Siam Order in Council, 1889 (Confidential No. 5860*). | |
| (F.) Siam Order in Council, 1903 (Confidential No. 7835*). | |

Report.

In our opinion, the accompanying draft Order in Council, as initialled by us, may properly be submitted to the King for the approval of His Majesty in Council. Perhaps attention should be drawn to an important difference between Article 41 of the new Order and the same Article in the old Order. Under the new Order power is conferred on the Court to send persons without qualification charged to Singapore for trial. In the old Order, only British subjects could be so sent. This seems a somewhat considerable extension of the power of the Court, but it is in conformity with the provisions of section 6 of "The Foreign Jurisdiction Act, 1890."

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
February 24, 1906.

NOTE.—The Siam Order in Council, 1906, is printed in Confidential 8666*.

[455]

Q



(58)

SPAIN.

No. 14.

[May 7, 1906.]

*Foreign Office to the Law Officers of the Crown.**Foreign Office, April 12, 1906.*

Gentlemen,
 I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you the papers noted in the accompanying list, which relate to a claim arising out of a collision between the British steam-ship "Valencia" and the Spanish gun-boat "Doña Maria de Molina."

Claim on
 account of
 collision
 between
 "Valencia"
 and "Doña
 Maria de
 Molina."

An account of the circumstances in which the claim arose is given in a letter of the 11th May, 1905, from Messrs. Bateson, Warr, and Wimshurst, the solicitors of the owners of the "Valencia." From this it will be seen that on the 27th May, 1904, the Spanish gun-boat "Doña Maria de Molina" collided, in the port of Santa Cruz de Tenerife, with the "Valencia," which was properly moored there, and caused considerable damage to the vessel and her cargo. The Commander of the gun-boat admitted that he was entirely to blame in the matter. The claim for compensation presented by the owners of the "Valencia" was brought before the Maritime Department at Cadiz, who acquitted the Commander of the gun-boat of blame, and decreed the provisional suspension of the case, admitting, however, "that the owners of the 'Valencia' would probably pursue, by the legal procedure open to them, the claims they had brought forward, the grounds for which, contained in the circumstances of the case, had been but little examined."

From a Report on the case furnished by the legal adviser to His Majesty's Embassy at Madrid (see Sir M. de Bunsen's despatch No. 58 of the 28th ultimo), it appears that it would be possible for the owners of the "Valencia" to apply for a reopening of the case, but that, though responsibility for the collision might then be brought home to the Commander of the Spanish gun-boat, it is very questionable whether, in Spanish law, the State could be made liable for the damage caused by the collision. It is suggested, at the same time, that little advantage would accrue to the injured parties from pressing their claim against the Commander in person, who, in contemplation of Spanish law, seems to be alone liable to pay compensation.

If this is a correct statement of the Spanish law in the matter, and there seems to be no reason to doubt the conclusion arrived at by Señor Azcarate, it appears to the Secretary of State to reveal a state of things most unsatisfactory to British subjects (or others) whose ships or cargo may have suffered damage from collision with Spanish public vessels. Indeed, to put an extreme case, were a Spanish torpedo-boat destroyer to run into, at full speed, and sink an ocean-going mail steamer on the high seas, doing damage, perhaps, to the amount of 300,000*l.* or more, the owners of the steamer would, it appears, in Spanish law, have no redress, except against the Commander of the destroyer, who would probably have little or nothing more than his scanty pay from which to make compensation.

In these circumstances Sir E. Grey would be glad to be favoured with your opinion (1) whether he would be justified in making a representation to the Spanish Government in connection with the case of the "Valencia," and, if so (2), on what grounds such representation should properly be based.

Sir E. Grey will be glad, at the same time, to be favoured with any observations of a more general nature on the case of the "Valencia" which you may be disposed to offer.

I have, &c.
 (Signed) F. A. CAMPBELL.

SPAIN.—UNITED STATES.

59

List of Papers.

Messrs. Bateson, Warr, and Wimshurst	.. ..	May	11, 1905.
Sir A. Nicolson	.. ..	(No. 145)	July 29, "
To Messrs. Bateson	.. ..	.. ..	August 10, "
Messrs. Bateson	.. ..	.. ..	August 14, "
Mr. Cartwright	.. ..	(No. 161)	September 12, "
To Messrs. Bateson	.. ..	.. ..	September 20, "
Sir A. Nicolson	.. ..	(No. 208)	November 21, "
To Messrs. Bateson	.. ..	.. ..	November 28, "
Sir A. Nicolson	.. ..	(No. 227)	December 12, "
To Sir A. Nicolson.	.. ..	(No. 4)	January 8, 1906.
To Messrs. Bateson.	.. ..	[Registry No. 342]	January 8, "
Mr. Cartwright.	.. ..	[Registry No. 5651]	(No. 31) February 13, "
Sir M. de Bunsen.	.. ..	[Registry No. 11289]	(No. 58) March 28, "

Report.

1. We think that you would be justified in making a representation to the Spanish Government in this case, but such representation should not be based upon a supposed defect in Spanish law in regard to the matter.

The law of Spain in relation to the liability of King's ships in cases of damage done by them appears to be identical in form with that of England. According to English law, legal responsibility in such cases attaches to the actual wrong-doer only, that is, the officer to whose negligence or misconduct the damage is to be attributed, and he alone can be sued. It is, however, the practice in England, in the interests of justice, for the Admiralty to undertake the defence of any proceedings against the officer sued, and to accept responsibility for any damages that may be awarded by the Court in an action against the officer.

Accordingly, we think that you may make a representation to the Spanish Government with a view to their accepting responsibility in the matter in the event of the gun-boat being found to be to blame.

2. Such representation should be based upon general grounds, founded upon the commercial and other interests of the respective countries, and upon the particular ground that, in a similar case of damage caused by one of His Majesty's ships, the British Government would accept responsibility.

Upon the facts it would seem clear that the gun-boat was to blame, but, assuming that the Spanish Government accept responsibility, it may be necessary to have the case reopened with a view to the fact that the gun-boat was at fault being established.

(Signed) JOHN L. WALTON.
 W. S. ROBSON.

Law Officers' Department,
May 7, 1906.

UNITED STATES.

No. 14^A.[In Home Office letter,
July 13, 1906.]

[July 6, 1906.]

Case for the Opinion of the Law Officers of the Crown.

THE Secretary of State desires to be advised by the Law Officers of the Crown in regard to a question which has arisen in connection with the interpretation of section 6 of "The Naturalization Act, 1870."

That enactment provides as follows:—

"Any British subject who has at any time before or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalized in such State shall, from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject and be regarded as an alien."

Cancellation
 of certi-
 ficates of
 United
 States
 naturaliza-
 tion.



1906

60

UNITED STATES.

His Majesty's Consul-General at San Francisco has recently reported that the Courts in that district have cancelled many American certificates of citizenship on the ground that the certificates were obtained by means of false and fraudulent declarations, and that, between August 1905 and February 1906, some twenty-four persons, formerly British subjects, have thus lost their American citizenship.

The question therefore arises as to the present status, in English law, of these persons.

These persons took all the necessary steps to acquire naturalization in the United States, presumably with the full intention and desire of renouncing their allegiance to the British Crown; and it would seem that they were for all practical purposes aliens in contemplation of English law down to the date of the cancellation of their certificates of citizenship. If any question as to their nationality had arisen in the Courts in this country before that date it is difficult to see how any other decision than that they were aliens could have been arrived at; and it would seem that, having become aliens, they could only have regained British nationality under the provisions of section 8 of the Act in regard to readmission.

Further, Article I of the Treaty between the United Kingdom and the United States dated the 13th May, 1870, runs as follows:—

"British subjects who have become, or shall become, and are naturalized according to law within the United States of America as citizens thereof shall, subject to the provisions of Article II, be held by Great Britain to be in all respects and for all purposes citizens of the United States, and shall be treated as such by Great Britain.

"Reciprocally, citizens of the United States of America who have become, or shall become, and are naturalized according to law within the British dominions as British subjects shall, subject to the provisions of Article II, be held by the United States to be in all respects and for all purposes British subjects, and shall be treated as such by the United States."

Presumably the grant of a certificate of citizenship renders a person "naturalized according to law within the United States of America as a citizen thereof," and the obligation of the British Government under the Treaty would begin as from the date of the grant and would involve the recognition of the grantee as an alien in English law.

On the other hand, the legal adviser of the British Embassy at Washington advises (though he is not aware of the circumstances of the particular cases) that the judicial decree of cancellation is based on the same principles as govern the cancellation by the Courts on the ground of fraud of any deed or instrument, and has the effect of adjudging that the party never was entitled to naturalization and never, therefore, became lawfully a citizen of the United States, and of declaring his naturalization as an American citizen void *ab initio*.

It has been suggested that the words "voluntarily become naturalized" in section 6 of "The Naturalization Act, 1870," mean "voluntarily become effectively naturalized," and that a naturalization which is thus declared void *ab initio* or is capable of being so declared is not effective. This theory might involve considerable practical difficulty as to the nationality to which the parties could claim to belong, between the grant and the cancellation of the certificates of American nationality, and would seem to leave that nationality in doubt until by some process the certificates were declared either good or bad.

The Secretary of State desires the opinion of the Law Officers:—

1. Whether the persons in question became, on the facts stated, aliens in pursuance of section 6 of the Naturalization Act;

2. If the answer to (1) is in the affirmative, whether on their naturalization as American citizens being declared void *ab initio* they revert to British nationality, without recourse to the provisions of section 8 of the Act in regard to readmission; or whether they are left in the position—not uncommon—of possessing no nationality.

Opinion.

The first question must be answered in the affirmative and the second in the negative. We understand that upon the grant of the certificates the persons in question became, according to American law, American naturalized citizens, and, in

UNITED STATES.

61

our opinion, they thereupon became, under section 6 of "The Naturalization Act, 1870," aliens to this country. The subsequent avoidance of their American nationality cannot, in our opinion, operate to re-vest in them their former British nationality.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
July 6, 1906.

No. 14^B.

[In Colonial Office,
January 15, 1907.]

[October 20, 1906.]

Law Officers of the Crown to the Earl of Elgin.

My Lord,

Law Officers' Department, October 20, 1906.

WE were honoured by your Lordship's commands signified to us by Mr. Bertram Cox in his letter of the 28th August last, stating that he was directed by your Lordship to lay before us copies of communications which have passed between His Majesty's Government and the United States' Government as to the conditions in which the American liberty of fishery on the coasts of Newfoundland, under Article I of the Convention of the 20th October, 1818, was to be exercised.

That it would probably be necessary to consult us before a reply was returned to the last communication of the United States' Government, but that in the meantime he was to state that, owing to the great divergence of view between the two Governments which that communication disclosed, it has been decided by His Majesty's Government, pending further discussion of the questions involved, and without prejudice to such discussion or to the rights and claims of either party, to endeavour to make with the United States' Government a provisional arrangement in the nature of a *modus vivendi*, which would enable the winter herring fishery (principally in the Bay of Islands) due to begin in the second half of October to be carried on in peace and good order.

That His Majesty's Government had not yet been able to obtain the consent of the Colonial Government to the making of such an arrangement, and it has consequently become necessary to consider how far His Majesty's Government were in a position to give effect to any such arrangement, independently of the consent and authority of the Colonial Government.

That the text of the Convention would be found on pp. 273-274 of the Cabinet print of 1852, and that on pp. 274-276 would be found the text of the Act 59 Geo. III, cap. 38, and the text of the Order in Council made under that Act on the 19th June, 1819.

That by section 1 of the Act His Majesty was empowered to make by Order in Council "such regulations and to give such directions, orders, and instructions to the Governor of Newfoundland, or to any officer or officers on that station, or to any other person or persons whomsoever as shall or may be from time to time deemed proper and necessary for the carrying into effect the purposes of the said Convention, with relation to the taking, drying, and curing of fish by inhabitants of the United States of America, in common with British subjects, within the limits set forth in the said Article of the said Convention, and hereinbefore recited; any Act or Acts of Parliament, or any law, custom, or usage to the contrary in any wise notwithstanding."

That by the Order in Council of the 19th June, 1819, the Governor of Newfoundland was instructed to "give notice to all His Majesty's subjects being in or resorting to the said ports that they are not to interrupt in any manner the aforesaid fishery so as aforesaid allowed to be carried on by the inhabitants of the United States in common with His Majesty's subjects on the said coasts, within the limits assigned to them by the said Treaty"; and it was further ordered "that the Governor of Newfoundland do conform himself to the said Treaty, and to such instructions as he shall from time to time receive thereon in conformity to the said Treaty, and to the above-cited Act, from one of His Majesty's Principal Secretaries of State."

That this Order in Council was still in force, and its significance was discussed with reference to the provisions of "The Newfoundland Foreign Fishing-Vessels Act, 1905," to which objection had been taken by the United States' Government in the Report of our predecessors of the 21st November last.

[455]

R

United
States'
Fishery
Rights.
*Modus
vivendi.*
Powers of
H.M. in
Council
under
59 Geo. III,
c. 38.



That our predecessors were of opinion that while the Order in Council applied to officials as well as to private persons, the fact that the acts complained of were authorized by an Act of the local Legislature would probably be an answer to any proceedings in respect of an infringement of the Order in Council, and that the provisions of the Order in Council were of so general a nature that it was doubtful whether the provisions of the local Act would be held void as repugnant to orders made under the authority of an Imperial Act of Parliament within 28-29 Vict., cap. 63, sec. 2.

That the Legislature of Newfoundland had this year passed an Act which enacted that the provisions of the Act of 1905 with reference to which the above opinion was given should not be applied to vessels exercising Treaty rights of fishery, but that as the Act of 1906 was expressed as requiring the approval and confirmation of His Majesty in Council before it was brought into operation, and that as it might be necessary or expedient to allow it to remain in suspense as part of the proposed *modus vivendi* if not for other reasons, your Lordship would be glad to have our advice as to whether it would be lawful for His Majesty in Council, under the Act of 1819, to give instructions to the same effect, i.e., to direct that the provisions of "The Foreign Fishing-Vessels Act, 1905," in question should not be applied or be held to be applicable to vessels from which inhabitants of the United States exercised the liberty of fishing under the Convention of 1818.

That on this point there was no difference of principle between His Majesty's Government and the Colonial Government; that the only question was whether His Majesty's Government had power by Order in Council to carry out in this respect the suspended Act of 1906.

That the difficulty with which His Majesty's Government were confronted was connected with the administration of certain other Colonial laws and regulations having the force of law, viz., the Act No. 19 of 1899, relating to light dues; the Act No. 13 of 1898, relating to customs; and the Colonial Fishery Regulations, made under the Act No. 3 of 1898. That His Majesty's Government have contended that these Acts and Regulations were binding upon United States' fishermen; that the United States' Government took the contrary view. That the proposed *modus vivendi* would probably involve some relaxation of these Acts and Regulations in favour of the United States' fishermen, but that to any such relaxation the Government of Newfoundland were at present strongly opposed, except as regards the liability to the payment of light dues, which they were prepared to waive.

That it was presumed that, if His Majesty's advisers, as responsible for the carrying out of His Majesty's Treaty obligations, were satisfied that the application of any of these Acts and Regulations to the United States' fishermen and their vessels was contrary to the true intent of the Convention, it would be possible and lawful for His Majesty by Order in Council to direct that any such Acts and Regulations should not be so applied, and to enforce any such direction through the naval officers on the coast, and that the validity of any such Order in Council or of any action taken under it could not be impugned on the ground that His Majesty's Government had placed an incorrect interpretation on the terms of the Convention.

That the point on which your Lordship felt some doubt was this: whether His Majesty's Government could properly pass an Order in Council to secure the provisional relaxation in favour of United States' fishermen of laws and regulations which they have contended, and, as at present advised, propose still to contend, were binding on them under the Convention.

That the matter was urgent. That your Lordship would therefore be obliged if we would take his letter into our early consideration, and favour you as soon as possible with our report on the following points, viz.:-

1. Whether His Majesty in Council had power under the Act 59 Geo. III, cap. 38, to order that the first part of section 1, and the whole of section 3, of "The Newfoundland Foreign Fishing-Vessels Act, 1905," should not apply or be applied to vessels from which inhabitants of the United States were exercising the liberty of fishing assured to them by the 1st Article of the Convention of the 20th October, 1818?

2. Whether His Majesty in Council had power under the same Act to direct that any other laws or regulations of the Colony, the enforcement of which on inhabitants of the United States exercising the Treaty right of fishery or on the vessels from which they were exercising it would, in the opinion of His Majesty's Government, be contrary to the Convention, should not be so enforced?

3. Whether the words in the same Act "such regulations, &c., as shall or may be from time to time deemed proper and necessary for the carrying into effect the

purposes of the said Convention" conferred on His Majesty's Government an absolute discretion, the exercise of which could not be questioned before a Court of Law on the ground that diplomatically His Majesty's Government were upholding a different construction of the Convention?

4. That if this were not the case, or it were doubtful whether it could successfully be maintained before a Court of Law, an Order in Council directing compliance with the terms of a *modus vivendi*, designed to facilitate the settlement of the question what were the real purposes of the Convention, was one which carried into effect purposes of the Convention and was therefore valid and enforceable?

5. What generally were the limitations, if any, on the exercise of the powers conferred on His Majesty in Council by the first section of the Act 59 George III, cap. 38?

We have taken the matter into our consideration, and, in obedience to your Lordship's commands, have the honour to

Report—

That, in our opinion, although "The Newfoundland Foreign Fishing-Vessels Act, 1905," may be disallowed by His Majesty in Council, or (so far as sections 1 and 3 are concerned) may be treated by the Courts as repugnant to 59 George III, cap. 38, and therefore void, under the Colonial Laws Validity Act (28 & 29 Vict., cap. 63, sec. 2), yet, while that Colonial Act stands duly allowed by His Majesty, it would not be in accordance with constitutional principle or practice for His Majesty in Council to order that the operation of particular sections should be suspended, either wholly or for such period as His Majesty in Council may be pleased to fix.

The Colonial Act in question is, however, incompetent to affect, and indeed does not assume to affect, the powers of His Majesty in Council under 59 George III, cap. 38, to make such regulations and give such orders, directions, and instructions as may be deemed proper and necessary under existing circumstances for carrying the Convention of 1818 into effect, and if such orders or instructions are inconsistent with sections 1 and 3 of the Colonial Act, the latter will be overruled in effect so far as American fishery rights are concerned.

2. We think that the powers of His Majesty in Council under 59 Geo. III, cap. 38, should be exercised strictly in the form permitted by the terms of the Act, viz., as regulations and instructions, and not as a revocation or suspension of Colonial legislative measures which have received the assent of His Majesty. All Colonial laws or regulations inconsistent with such regulations and instructions will be thereby rendered invalid.

3. The discretion conferred on His Majesty in Council under 59 Geo. III, cap. 38, is absolute, and the orders made in the exercise of that discretion could not be properly questioned in a Court of Law, except on the ground, not likely to be affirmed, that they were not in truth deemed by the Government to be proper and necessary for the purposes of the Convention. The mere fact that, in controversy with the United States, His Majesty's Government are contending for a construction of the Convention which would entitle them to subject the American fishermen to particular restrictions or interruptions does not compel them to impose such restrictions nor prevent them from issuing an Order inconsistent with them if they deem it proper and necessary with the object of maintaining the Convention under all the circumstances to do so, especially where the Order is temporary, and for the purpose only of a *modus vivendi*, until different regulations can be agreed.

4. The fact that the terms of a *modus vivendi* were designed to facilitate the discussion or settlement of some dispute which has arisen on the construction of the Convention would, in our opinion, be held by a Court to establish that such terms were "deemed proper and necessary" for carrying the Convention into effect, provided, of course, that they were such regulations as could be made under the Statute 59 Geo. III, cap. 38. If the *modus vivendi* were framed so as to be a formal and express suspension of subsisting Colonial legislation by the exercise of His Majesty's prerogative, the Order in Council would be objectionable on grounds independent altogether of the Statute in question.

5. We are not aware of any limitations on the exercise of the powers conferred on His Majesty in Council by section 1 of 59 Geo. III, cap. 38, other than such as appear from the limited purpose of the Statute and the general authority of the Imperial Legislature.

We have, &c.
(Signed) JOHN L. WALTON.
W. S. ROBSON.



1906

[In Colonial Office,
January 15, 1907.]No. 14^c.

[November 30, 1906.]

Law Officers of the Crown to Colonial Office.

My Lord,

Law Officers' Department, November 30, 1906.^cIs *modus vivendi* with United States a Treaty? Opinion of Messrs. Cohen and Coles as to its effect on Statutes.

WE were honoured by your Lordship's commands, signified to us by Mr. Bertram Cox in his letter of the 10th instant, stating that he was directed by your Lordship to transmit to us the copy of a telegram from the Governor of Newfoundland, communicating the case submitted to Messrs. Cohen and Coles as to the effect of the *modus vivendi* which His Majesty's Government have concluded with the United States' Government on the fisheries question on certain Colonial Statutes, and the opinion given by those gentlemen on the subject.

That he was also to forward copy of the correspondence between His Majesty's Government and the United States' Government, in which the *modus vivendi* was embodied.

That the opinion of Messrs. Cohen and Coles appeared to be in effect that the *modus vivendi* was a Treaty, but that the Colonial Statutes to which their attention was called saved only rights and privileges granted by Treaty at the time they were passed.

That, as to whether the *modus vivendi* was a Treaty, he was to observe that in the case *Baird v. Walker* (A.C. 1892, pp. 491-497) the *modus vivendi* made with France in 1890 over the lobster fishery question was discussed on the footing of its being a Treaty.

That a copy of the *modus vivendi* of 1890 was also inclosed.

That it should, however, be pointed out that the Treaty-making power of the President of the United States of America was subject to the approval of the Senate. That it might, therefore, be contended that the present *modus vivendi* not having been so approved did not constitute a Treaty. That, on the other hand, it was possible that strictly the *modus vivendi* of 1890 required ratification by the French Parliament.

That of the various Colonial Statutes referred to in the case submitted by the Colonial Government, it would be seen that the Bait Act mentioned was that of 1887, not that of 1889, now Chapter 129 of Revised Statutes of Newfoundland. That possibly the reason why the attention of Messrs. Cohen and Coles was directed to the earlier Bait Act was because it was specially confirmed, ratified, and finally enacted "by an Order of Her late Majesty in Council."

That sections in these Acts which safeguard Treaty rights ran as follows:—

(A.) Bait Act of 1887:—

"Nothing in this Act shall affect the rights and privileges granted by Treaty to the subjects of any State in amity with Her Majesty."

(That the same words appeared in Chapter 129 of the Revised Statutes with the substitution of "Chapter" for "Act.")

(B.) The Marine and Fisheries Act of 1898, 61 Vic., cap. 3:—

"Nothing in this Act or in any Rules or Regulations to be made hereunder shall be construed to affect the rights and privileges granted by Treaty to the subjects of any State or Power in amity with Her Majesty."

(C.) The Foreign Fishing Vessels Act, 1905:—

"Nothing in this Act shall affect the rights and privileges granted by Treaty to the subjects of any State in amity with His Majesty."

That with reference to the construction which Messrs. Cohen and Coles have put upon these provisions, he was to point out that Section 6 of Chapter I of the Consolidated Statutes of Newfoundland (Second Series), 1892, provided: "In the construction of Acts the following Rules shall be observed, unless otherwise expressly provided for, or such construction would be inconsistent with the manifest intention of the Legislature or repugnant to the context—that is to say, the words 'Queen' or 'Her Majesty' shall include 'Her Majesty, her heirs and successors.'"

That he was also to call attention to the general rule, discussed in *R. v. Smith*, L.R.I.C.C. 270, that the language of a Statute was extended to new things of the same

genus which were not known and could not have been contemplated by the Legislature when it was passed.

That he was to request that we would take his letter and its inclosures into our consideration, and favour your Lordship with our opinion on the following questions:—

(1.) Was the *modus vivendi* recently concluded with the United States' Government a Treaty?

(2.) Did the various sections in the Colonial Acts referred to, which safeguard rights and privileges granted by Treaty, apply to any rights and privileges granted to inhabitants of the United States by that *modus vivendi*, or only to rights under Treaties in existence when the Acts were passed?

We have taken the matter into our consideration, and, in obedience to your Lordship's commands, have the honour to

Report—

(1.) That in our opinion the *modus vivendi* recently concluded with the United States' Government is a Treaty within the meaning of the sections of the Colonial Acts referred to.

(2.) Assuming that the *modus vivendi* grants rights and privileges to the inhabitants of the United States, in excess of those granted by the Convention of 1818, the question involved—viz., the extent of the application of the clauses contained in the Colonial Acts safeguarding rights granted by Treaty—is one of considerable difficulty. If the object were to protect rights which had already been created by Treaties then existing, most appropriate words are used for that purpose; but if, on the other hand, it was intended to declare that the Treaty-making prerogative of the Crown should continue unfettered, even to the extent of creating new rights which might be inconsistent with the Acts, the words used are, if not wholly inappropriate, at least singularly inapt. The words of the clauses would undoubtedly be satisfied by a construction which limited their application to the Treaty of 1818, or any other Treaties concluded before the passing of the Acts. On the other hand, the extended construction suggested would involve a right upon the part of the Crown to entirely abrogate, in so far as foreigners were concerned, Acts to which the King had given his assent, and the Courts would, in the absence of the clearest words, shrink from adopting such a construction.

Having regard to the foregoing observations, although the point involved is not free from doubt, we are of opinion that the clauses referred to only apply to rights under Treaties in existence when the Acts in question were passed.

We have, &c.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

No. 14^d.[In Colonial Office letter,
January 20, 1907.]

[December 28, 1906.]

Law Officers of the Crown to Colonial Office.

My Lord,

Royal Courts of Justice, December 28, 1906.

WE were honoured by your Lordship's commands, signified to us by Mr. Bertram Cox in his letter of the 22nd November last, stating that he was directed by your Lordship to lay before us a copy of a Convention concluded with the United States of America on the 8th November, 1902, respecting commercial relations between that country and Newfoundland, and commonly known as the Hay-Bond Convention.

That, owing to the failure of the United States to approve this Convention, it had not yet been ratified either by the King or by the President of the United States. That the action of the Senate, as we were aware, had led to the withdrawal from United States' citizens of the privileges of purchasing bait, engaging crews, &c., in Newfoundland waters, and, consequently, to the present fisheries dispute.

That your Lordship understood that the Government of Newfoundland were still anxious for the ratification of the Convention. That you would, therefore, be obliged

[455]

S

Hay-Bond
Convention:
Proper time
for ratifica-
tion.



1906

if we would favour your Lordship with our opinion on a question which had not hitherto been officially discussed, viz., whether, having regard to the terms on the one hand of Article I of the Convention, and, on the other, of section 3 of the Imperial Act 59, Geo. III, cap. 38, an Act of the Imperial Parliament was not in strictness required to carry the Convention into effect, and, if so, whether it would be proper, unless and until such an Act was passed, to advise His Majesty to ratify the Convention, seeing that Article VI merely provided that the provisions of the Convention should go into effect thirty days after the exchange of ratifications.

That the printed Memorandum forwarded to us in the letter from your Department of the 10th instant contained some observations on the subject of your present letter.

We have taken the matter into our consideration, and, in obedience to your Lordship's commands, have the honour to

Report—

That, in our opinion, an Act of Parliament is necessary to carry the Convention into effect, and that it would not be proper to advise His Majesty to ratify the Convention unless provision is made for such an Act being passed.

We have, &c.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

URUGUAY.

No. 15.

[February 16, 1906.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, November 14, 1905

Seizure of
"Agnes G.
Donahoe"
and trial of
crew.

I HAVE the honour, by direction of the Marquess of Lansdowne, to transmit to you the papers noted in the accompanying list relative to the seizure and detention by the Uruguayan authorities of the Canadian schooner "Agnes G. Donahoe" on a charge of illegal sealing.

The facts of the case and the correspondence which has passed respecting the action of the Uruguayan Courts are recorded in detail in the accompanying historical Memorandum (Paper (A)).

The salient points may be summarized as follows:—

The vessel, under the command of Mr. Ryan, a British subject, of North Sydney, Cape Breton, and with a crew of eighteen, of whom all but one were British subjects, was seized on the 11th November, 1904, some three-quarters of a mile from shore and taken at once to Monte Video, where the captain was charged with illegal sealing, robbery, and smuggling.

The legal proceedings began with an investigation by the Juge d'Instruction, which lasted from the 12th November, 1904, to the 14th February, 1905.

It then became necessary, as the next step, for the "Fiscal," or Public Prosecutor, to draw up his "Acte d'Accusation" (Paper (B)), for which purpose the law allowed six days.

The "Fiscal," however, took six weeks, so that the counsel for the defence could only begin to prepare his reply on the 24th March.

That reply (Paper (C)) was put in without loss of time, but the Judge of the Correctional Court took six weeks to consider the case thus put before him, and it was not till the 16th May that judgment was eventually delivered.

By this judgment, which is textually recorded in Mr. Baring's despatches Nos. 42 and 52 of the 23rd May and the 21st June (Papers (D) and (E)), the master of the "Agnes G. Donahoe" was sentenced to three years' penal servitude on a charge of robbery and the mates to one year's imprisonment. The detention which they had already undergone was held to be sufficient punishment for the crew, but the cargo and ship were condemned to remain under embargo to meet the costs and any claims which might arise.

The proceedings throughout had been characterized by the grossest dilatoriness on the part of the Uruguayan authorities, and the numerous remonstrances against the delay of the Court in delivering that judgment which Mr. Baring was obliged from time to time to address to the Uruguayan Government, were consistently met by a failure to expedite the case and so relieve the anxiety and sufferings of the master, who continued in confinement on board his vessel.

An appeal to the Criminal Court against the sentence was immediately presented by the counsel for the defence. The translation of this appeal, which is technically known as the "Expresión de Agravios," will be found (marked Paper (F)) in the accompanying list.

While the outrageous character of the sentence was recognized, and though grave doubt was entertained as to whether a judgment condemning irregular sealing operations as acts of robbery could be justified by Uruguayan or any other known legal system, it was felt that the appeal to the higher Tribunal must be allowed to run its course, and that the moment at which His Majesty's Government would be entitled to interfere would, strictly speaking, only arrive when the Court of Appeal affirmed, if it did affirm, the conviction.

In order the better to secure justice at the final hearing, His Majesty's Government accepted an offer made by the Government of Canada to send Mr. Pelton, a Canadian lawyer, to assist His Majesty's Representative at Monte Video and the counsel for the defence in their efforts to obtain justice.

A further delay now occurred similar to that which had characterized the earlier proceedings before the Correctional Court, and, in spite of the repeated requests of Mr. Baring that the case should be expedited, and of the strong personal remonstrances which were addressed to the Uruguayan Chargé d'Affaires in London—as shown in the accompanying Memorandum—systematic, and apparently deliberate, obstruction was placed in the way of a finding by the higher Tribunal.

It was not till the 11th August that judgment was ultimately delivered (Paper (G)). The captain was condemned to ten months' imprisonment on the charge of smuggling, to date from the 11th November, 1904, the day of his arrest. The charge of theft was held not to be in accordance with Uruguayan law, and to be unfounded. The vessel and cargo were confiscated. The mates, although condemned as accomplices, were released without further imprisonment.

His Majesty's Chargé d'Affaires was requested on the following day to take steps to obtain the master's release, on the ground of legal doubt or on the plea of health, but so much delay was again made by the Uruguayan Government in dealing with this application that the period of ten months' imprisonment practically expired before any result was obtained. On the 10th September the master was released in due course, and the Courts ordered the schooner to be handed over to him, but retained the skins and guns on board pending further decision.

Since that date appeals have been received from the first and second mates (Paper (H)), and from the master (Paper (I)), claiming compensation from the Uruguayan Government for illegal detention.

A Memorandum (Paper (J)) has been drawn up by Mr. Pelton and Dr. Wilson, the counsel for the defence, containing their views on the judgment, in which they maintain that Mr. Ryan, the master of the schooner, should not have been convicted of the offence of smuggling, for the three following reasons:—

1. That there is no evidence whatever to sustain the judgment.
2. That such judgment is not warranted by any law of Uruguay. Article 1125 of the Commercial Code of Uruguay provides that all fines imposed for infringement of Police and Custom-house Regulations, &c., must be borne by the master of the ship, and not by the owners; and Article 152 of the Criminal Code of Uruguay provides for sequestration, &c., of the property of the accused, not of third persons.
3. That the Criminal Judge had no jurisdiction to try the offence of smuggling or to adjudicate in any way upon such a charge, either with respect to person or property.

By the Law of Uruguay of March 1877, a special Court is established, with sole jurisdiction to try and determine charges of smuggling, and it is held to follow, as a result of this enactment, that no other Court in the Republic has the right to assume the jurisdiction of this special Court, or to deal with that class of offences.

The expediency of an immediate appeal in regard to the sentence passed on Mr. Ryan was also considered by Mr. Pelton and Dr. Wilson, as recorded at the end of their Memorandum. They held, however, that, as the judgment decided that only the



It is suggested, for consideration, that to ignore the existence of a higher Tribunal by immediately presenting a claim diplomatically will be equivalent to a general condemnation of the Uruguayan judicial system, whereas an allegation that the conviction is unsound in point of law will doubtless call forth a retort from the Uruguayan Government that the proper Tribunal before which to urge this argument is the Court of Appeal.

F. H. V.

List of Papers.

- (A.) Historical Memorandum (not dated).
(B.) Public Prosecutor's "Acte d'Accusation."
(C.) Reply of Counsel for the defence.
(D.) Judgment of the Correctional Court (in Mr. Baring's No. 42 of May 23
(E.) and No. 52 of June 21, 1905)
(F.) "Expresion de Agravios" (i.e., appeal to Criminal Court).
(G.) Judgment of the Criminal Court, August 11, 1905 (inclosure in Mr. Peel's
No. 75 of August 19, 1905).
(H.) Claim for compensation of two of the mates (in Mr. Peel's No. 77 of
August 22, 1905).
(I.) Master's claim for compensation (in Mr. Peel's No. 82 of September 16,
1905).
(J.) Memorandum by Mr. Pelton and Dr. Wilson.
(K.) Extracts from Commercial Code of Uruguay.
(L.) Minute by Mr. Davidson.
(M.) Mr. Peel (No. 83) September 22, 1905.
(N.) Mr. Peel (No. 86) October 10, 1905.
(O.) Judgment of the Criminal Court concerning the skins and guns,
September 29, 1905 (in Mr. Peel's No. 85, October 4, 1905).



1906

70

URUGUAY.—ZANZIBAR.

Report.

We have carefully considered the facts of this case, and are, on the whole, of opinion that it is desirable to prosecute appeals before the Uruguayan Courts on behalf of the master and the owners of the cargo before presenting any claim for compensation through diplomatic channels. No judgment on appeal can now give the master adequate redress, as he has already suffered the penalty of a long imprisonment, but it may possibly reverse, or will at least more clearly define, the grounds of judgment. This will simplify the controversy which will arise on the diplomatic claim, and preclude the Uruguayan Government from saying that His Majesty's Government have not adopted the usual course of exhausting all the means of local redress before having recourse to diplomatic measures.

(Signed)

JOHN L. WALTON.
W. S. ROBSON.Law Officers' Department,
February 16, 1906.

ZANZIBAR.

No. 16.

[February 27, 1906.]

Foreign Office to Law Officers of the Crown.

Foreign Office, January 15, 1906.

Gentlemen,

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith the accompanying draft of an Order in Council for Zanzibar.

This draft Order is designed to replace the Zanzibar Order in Council, 1897, and the amending Orders of 1903 and 1904, copies of which accompany the papers, and has been prepared with a view to meeting the situation at Zanzibar created by the closing of the extra-territorial Courts of foreign Powers other than Great Britain, the Protecting Power.

An explanatory Memorandum is also inclosed.

Sir E. Grey will be glad if you will take the draft Order into your consideration, and will favour him with your opinion as to whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

I have, &c.

(Signed) F. H. VILLIERS.

List of Papers.

Zanzibar Orders in Council, 1897, 1903, and 1904. [Conf. 6934*, 8048*, 8229*.]
Draft Order in Council.
Memorandum by Mr. Hurst, December 22, 1905.

Report.

In our opinion this draft Order, as altered* and initialled by us, may properly be submitted for the approval of His Majesty in Council.

(Signed)

JOHN L. WALTON.
W. S. ROBSON.Law Officers' Department,
February 27, 1906.

* The alteration appears to have been merely in respect of a purely clerical error.

ZANZIBAR.

71

Annex.

Draft Zanzibar Order in Council approved by the Law Officers.

WHEREAS by Treaty, grant, usage, sufferance, or other lawful means, His Majesty the King has jurisdiction within the dominions of His Highness the Sultan of Zanzibar:

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

PART I.—PRELIMINARY.

1. This Order may be cited as "The Zanzibar Order in Council, 1906."

The limits of this Order are the Islands of Zanzibar and Pemba, including the territorial waters thereof, and any islets within those waters, which islands and waters are in this Order (except when the context requires a different construction) included in the expression "Zanzibar."

2. This Order is divided into Parts, as follows:—

Part I. Preliminary.

Part II. Application and effect of Order.

Part III. Constitution of Courts.

Part IV. Application of the Decrees of the Sultan of Zanzibar.

Part V. Criminal matters.

Part VI. Civil matters.

Part VII. Miscellaneous.

Part VIII. Repeal and transitory Provisions.

3. In this Order—

"The Secretary of State" means one of His Majesty's Principal Secretaries of State;

"Treasury" means the Commissioners of His Majesty's Treasury;

"The British Agent" means His Majesty's Agent and Consul-General for Zanzibar;

"British subject" includes a subject of His Majesty by birth or naturalization;

"British protected person" means a person (a) who, being a native of any place beyond the dominions of the Sultan of Zanzibar which is under the Protectorate of His Majesty, is temporarily within the limits of this Order; or (b) who, by virtue of "The Foreign Jurisdiction Act, 1890," or otherwise, enjoys His Majesty's protection in Zanzibar;

"British ship" includes a British ship within the meaning of "The Merchant Shipping Act, 1894," and also a ship owned by a British-protected person, provided that it is not registered under a foreign flag;

"Zanzibar subject" means a subject of the Sultan of Zanzibar;

"Foreigner" means a subject or citizen of a State in amity with His Majesty, other than Zanzibar, and any person under or claimed as being under the protection of such State;

"Treaty" includes any Convention, Agreement, or Arrangement made by or on behalf of His Majesty with any State or Government, King, Chief, people, or tribe, whether the Sultan of Zanzibar is or is not a party thereto;

"Administration" means (unless a contrary intention appears from the context) letters of administration, including the same with will annexed, or granted for special or limited purposes, or limited in duration;

"Ship" includes any vessel used in navigation, however propelled, with her tackle, furniture, and apparel, and any boat or other craft;

"Offence" means any act or omission made punishable by any law for the time being in force;

"Imprisonment" means imprisonment of either description—namely, (1) rigorous, that is, with hard labour, or (2) simple;

"Month" means calendar month;

"Will" means will, codicil, or other testamentary instrument;

"Oath" or "affidavit" includes affirmation or declaration;

"Person" includes Corporation;

Words importing the plural or the singular may be construed as referring to one person or thing, or to more than one person or thing, and words importing the masculine as referring to females (as the case may require).

4.—(1.) Where this Order confers a power or imposes a duty, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2.) Where this Order confers a power or imposes a duty on the holder of an office, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the holder of the office for the time being, or by a person duly appointed to act for him.

(3.) Where this Order confers a power to make rules, regulations, or orders the power shall be construed as including a power exercisable in the like manner, and subject to the



like approval and conditions (if any), to rescind, revoke, amend, or vary the rules, regulations, or orders.

5. In the event of the death, incapacity, removal, or absence from Zanzibar of the British Agent for the time being, all and every the powers, authorities, and immunities by this Order granted to him shall, until His Majesty's further pleasure is signified through the Secretary of State, be vested in the Senior Consular officer in His Majesty's service for the time being in Zanzibar.

PART II.—APPLICATION AND EFFECT OF ORDER.

6.—(1.) This Order extends to British subjects, to British protected persons, to foreigners with respect to whom the Sultan of Zanzibar has decreed or the Sovereign or Government whose subjects or citizens they are, or under whose protection they are or are claimed as being, has, by Treaty or otherwise, agreed with His Majesty for, or consented to the exercise of jurisdiction by His Majesty and to Zanzibar subjects in the regular service of such foreigners; and the expression "persons subject to this Order" shall be construed accordingly.

(2.) This Order also extends to (a) the property and all personal or proprietary rights and liabilities in Zanzibar of persons subject to this Order; (b) British ships, with their boats, and the property on board thereof; and (c) foreign ships belonging to persons who are, or if they were in Zanzibar would be, persons subject to this Order, so, however, that jurisdiction over such foreign ships shall not be exercised otherwise than according to the practice of the High Court in England in the exercise of jurisdiction over foreign ships.

(3.) This Order also extends, in the cases and according to the conditions specified in this Order, to Zanzibar subjects and to foreigners not otherwise subject to this Order.

7. If any question arises whether the Sovereign or Government of any country has agreed with His Majesty for or consented to the exercise of jurisdiction by His Majesty over all or any of his or their subjects or citizens, or over persons under or claimed as being under his or their protection, it shall be referred to the Secretary of State, and a certificate under his hand and seal shall be conclusive on the question, and judicial notice shall be taken thereof.

Provided that nothing herein shall be held to abridge or take away the jurisdiction of the Court to determine whether any particular individual is or is not a subject or citizen of such Sovereign or Government, or under or claimed as being under his or their protection.

PART III.—CONSTITUTION OF COURTS.

8.—(1.) There shall be a Court styled "His Britannic Majesty's Court for Zanzibar," hereinafter referred to also as "the Court for Zanzibar" and "the Court."

(2.) Subject to the other provisions of this Order, all His Majesty's jurisdiction in Zanzibar for the hearing and determination of suits shall be, and is hereby, vested in the Court for Zanzibar.

(3.) There shall be a Judge, and as many Assistant Judges of the Court as may from time to time be required, who shall respectively be appointed by His Majesty by warrant under His Royal sign manual.

(4.) The Judge and the Assistant Judges shall hold office during the pleasure of His Majesty.

(5.) A person appointed to be Judge or Assistant Judge must be a member of the Bar of England, Scotland, or Ireland, and must be of not less than five years' standing on appointment as Judge, and of not less than four years' standing on appointment as Assistant Judge.

(6.) The Court shall also comprise a Magistrate, who shall be appointed by the Secretary of State. The Magistrate shall be a member of the bar of England, Scotland, or Ireland of not less than three years' standing at the date of his appointment, and shall hold office during pleasure.

(7.) Subject to any Rules of Court, the Judge shall make any such arrangements as he thinks fit for the distribution of the business of the Court.

9. During a vacancy in the office of Judge, or in case of the illness or incapacity of the Judge, or of his absence from Zanzibar, the Secretary of State may appoint a fit person to act as Judge, but unless or until such appointment is made, the Assistant Judge or Senior Assistant Judge shall act as Judge.

An Acting Judge shall, during the continuance of his appointment, have all the power and authority of the Judge.

10. During a vacancy or temporary vacancy in the office of Assistant Judge, or in case of the absence, or illness, or other incapacity of an Assistant Judge, the Judge may, by writing under his hand and the seal of the Court, appoint any fit person, approved by the Secretary of State, or by the British Agent, to act as an Assistant Judge for the time therein mentioned or during the vacancy, as the case may be; but every such appointment shall be revocable, at pleasure, by the Judge, by writing under his hand and the seal of the Court, or by the Secretary of State.

The person so appointed shall, during the continuance of his appointment, have all the power and authority of an Assistant Judge.

11. The Court shall have a seal bearing the style of the Court, and a device approved by the

Secretary of State; but the seal in use at the commencement of this Order shall continue to be used until a new seal is provided.

12. Subject to the directions of the Secretary of State, the Judge may appoint such and so many persons to be Registrars, Clerks, Bailiffs, Interpreters, and other officers of the Court as he thinks fit, and may remove from office any person so appointed.

Any Registrar of the Court, and any other officer of the Court designated in this behalf by the Judge, may administer oaths, and take affidavits, declarations, and affirmations.

13.—(1.) The Secretary of State may, if he thinks fit, appoint subordinate Courts to be held at places in Zanzibar, and may appoint a competent person to hold any such Court, under such designation, and with such remuneration as he may direct, and may assign to any such Court such jurisdiction as he may think fit, and may assign the district in and for which each such Court shall act, and may determine the description and number of the officers to be attached to any such Court and the mode of their appointment and removal, and their duties and remuneration, and any matters incident to any of the above-mentioned purposes.

(2.) Any person appointed under the provisions of this Article shall be removable by authority of the Secretary of State.

(3.) The Court for Zanzibar shall have within the district of any such subordinate Court an original jurisdiction concurrent with the jurisdiction thereof, and shall also have such appellate jurisdiction therefrom as may be assigned to it in the order of the Secretary of State.

(4.) During the absence, illness, or other incapacity of a person appointed by the Secretary of State to hold a subordinate Court the Judge may, by writing under his hand and the seal of the Court, appoint any fit person approved by the British Agent as a substitute; but every such appointment shall be revocable at pleasure by the Judge by writing under his hand and the seal of the Court or by the Secretary of State.

PART IV.—APPLICATION OF THE DECREES OF THE SULTAN OF ZANZIBAR.

14. Subject to the other provisions of this Order, and to any Treaties for the time being in force relating to Zanzibar, the Court shall apply to all persons subject to this Order the Decrees of the Sultan of Zanzibar, provided that they have been countersigned by the British Agent.

15. The enactments described in the First Schedule to "The Foreign Jurisdiction Act, 1890," shall apply to Zanzibar as if Zanzibar were a British Colony or possession, but subject to the provisions of this Order and to the exceptions, adaptations, and modifications following, that is to say:—

(i.) The British Agent is hereby substituted for the Governor of a Colony or British possession, and the Court for Zanzibar is hereby substituted for a Superior Court or Supreme Court and for a Magistrate or Justice of the Peace of a Colony or British possession.

(ii.) For the portions of the Merchant Shipping Acts, 1854 and 1867, referred to in the said Schedule, shall be substituted Part XIII of "The Merchant Shipping Act, 1894."

(iii.) In section 51 of "The Conveyancing (Scotland) Act, 1874," and any enactment for the time being in force amending the same, the Court for Zanzibar is substituted for a Court of Probate in a Colony.

(iv.) With respect to "The Fugitive Offenders Act, 1881,"—

(a.) So much of the 4th and 5th sections of the said Act as relates to sending a report of the issue of a warrant, together with the information, or a copy thereof, or to the sending of a certificate of committal and report of a case, or to the information to be given by a Magistrate to a fugitive, shall be excepted, and in lieu of such information, the person acting as the Magistrate shall inform the fugitive that in the British possession or Protectorate to which he may be conveyed he has the right to apply for a writ of *habeas corpus* or other like process.

(b.) So much of the 6th section of the said Act as requires the expiration of fifteen days before issue of a warrant shall be excepted.

(c.) The British Agent shall not be bound to return a fugitive offender to a British possession unless satisfied that the proceedings to obtain his return are taken with the consent of the Governor of that possession.

(d.) For the purposes of Part II of the said Act, Zanzibar, the East Africa and Uganda Protectorates, British India, Aden, Mauritius, and all British possessions and Protectorates in Africa south of the Equator shall be deemed to be one group of British possessions.

PART V.—CRIMINAL MATTERS.

16.—(1.) The Court for Zanzibar shall have full criminal jurisdiction over all persons subject to this Order.

(2.) The Court shall exercise criminal jurisdiction over Zanzibar subjects accused of committing an offence against any person subject to this Order, and in such cases there shall be no appeal to the High Court of Bombay.

(3.) The Court shall have such appellate jurisdiction from the Criminal Courts of the Sultan of Zanzibar as may be assigned to it by Decree of the Sultan countersigned by the British Agent.



(4.) The Magistrate shall exercise such jurisdiction over natives of Africa who are subject to this Order, and subject to such rights of appeal to or revision or confirmation by the Judge or one or more of the Assistant Judges of the Court, as may from time to time be conferred upon him by Decree of the Sultan, countersigned by the British Agent.

17. Where a person subject to this Order is accused of an offence the cognizance whereof appertains to the Court for Zanzibar, and it is expedient that the offence be inquired of, tried, determined and punished in a British possession, the accused may, under "The Foreign Jurisdiction Act, 1890," section 6, be sent for trial to Bombay.

The Court may, where it appears so expedient, by warrant under the hand of a Judge and the seal of the Court, cause the accused to be sent for trial to Bombay accordingly.

The warrant shall be sufficient authority to any person to whom it is directed to receive and detain the person therein named, and to carry him to and deliver him up at Bombay according to the warrant.

Where any person is to be so sent to Bombay, the Court before which he is accused shall take the preliminary examination, and, if it seems necessary and proper, shall bind over such of the proper witnesses as are persons subject to this Order in their own recognizances to appear and give evidence on the trial.

18.—(1.) If a person subject to this Order, having appeared as prosecutor or witness at a preliminary examination, refuses to enter into a recognizance to appear at the trial to prosecute or give evidence, the Court may send him to prison, there to remain until after the trial, unless in the meantime he enters into a recognizance.

(2.) But if afterwards, from want of sufficient evidence or other cause, the accused is discharged, the Court shall order that the person imprisoned for so refusing be also discharged.

19.—(1.) In cases of murder or culpable homicide, if either the death or the criminal act which wholly or partly caused the death happened in Zanzibar, a Court acting under this Order shall have the like jurisdiction over any person subject to this Order who is charged either as a principal offender or as an abettor, as if both the criminal act and the death had happened in Zanzibar.

(2.) In the case of any offence committed on the high seas, or within the Admiralty jurisdiction, by any person subject to this Order, who at the time of committing such offence was on board a British ship, or on board a foreign ship to which he did not belong, a Court acting under this Order shall have jurisdiction as if the offence had been committed within Zanzibar.

(3.) In cases tried under this Article no different sentence can be passed from the sentence which could be passed in England if the offence were tried there.

20. The Court may, if it thinks fit, by general order, prescribe the manner in which and the places in Zanzibar at which sentences of imprisonment are to be carried into execution.

21.—(1.) Where an offender convicted before the Court is sentenced to imprisonment, and the Court, proceeding under section 7 of "The Foreign Jurisdiction Act, 1890," authority in that behalf being hereby given to it, considers it expedient that the sentence should be carried into effect within His Majesty's dominions, the place shall be a place in some part of His Majesty's dominions out of the United Kingdom the Government whereof consents that offenders may be sent thither under this Article.

(2.) The Court may, by warrant under the hand of a Judge and the seal of the Court, cause the offender to be sent to Bombay, or other such place as aforesaid, in order that the sentence may be there carried into effect accordingly.

(3.) The warrant shall be sufficient authority to any person to whom it is directed to receive and detain the person therein named, and to carry him to and deliver him up at the place named, according to the warrant.

22.—(1.) Where it is proved that there is reasonable ground to apprehend that a person subject to this Order is about to commit a breach of the public peace—or that the acts or conduct of a person subject to this Order are, or is likely to produce or excite to, a breach of the public peace—the Court may, if it thinks fit, cause him to be brought before it, and require him to give security to the satisfaction of the Court, to keep the peace, or for his future good behaviour, as the case may require.

(2.) Where a person subject to this Order is convicted of an offence before the Court, the Court may, if it thinks fit, require him to give security to the satisfaction of the Court for his future good behaviour, and for that purpose may (if need be) cause him to be brought before the Court.

(3.) In either of the foregoing cases, if the person required to give security fails to do so, the Court may order that he be deported from Zanzibar to such place and for such period as the Court directs.

23. Where it is shown by evidence on oath, to the satisfaction of the British Agent, that any person subject to this Order is conducting himself so as to be dangerous to peace and good order in Zanzibar, or is endeavouring to excite enmity between the Sultan or people of Zanzibar and His Majesty, or is intriguing against His Majesty's power and authority in Zanzibar or against the authority of the Sultan of Zanzibar, the British Agent may, if he thinks fit, by Order order that person to be deported from the Protectorate to such place and for such period as he shall direct:

Provided that where such person is a foreigner no such order shall be made by the British Agent without the concurrence in writing of the Consul of the State to which such foreigner belongs.

24.—(1.) In any case of deportation under this Order, the place to which the person is ordered, to be deported shall be a place in some part (if any) of His Majesty's dominions to which the person belongs, or the Government of which consents to the reception of persons

deported under this Order, or a place under the Protectorate of His Majesty, or in the country out of His Majesty's dominions to which the person belongs.

(2.) An appeal shall not lie against an order of deportation made under this Order.

(3.) The person to be deported shall be detained in custody until a fit opportunity for his deportation occurs.

(4.) He shall, as soon as is practicable, and in the case of a person convicted, either after execution of the sentence or while it is in course of execution, be embarked in custody under the warrant of the British Agent or of the Court on board one of His Majesty's vessels of war, or, if there is no such vessel available, then on board any British or other fit vessel bound to the place of deportation.

(5.) The warrant shall be sufficient authority to the commander or master of the vessel to receive and detain the person therein named, and to carry him to and deliver him up at the place named according to the warrant.

(6.) If any master of a British ship, after a reasonable remuneration for the conveyance of a deported person has been tendered or paid to him, refuses or fails to carry such person to the place named, he shall be liable to a penalty not exceeding 750 rupees.

(7.) The expenses of deportation shall be defrayed in such manner as the Secretary of State, with the concurrence of the Treasury, may direct: Provided that where an order of deportation is made by the Court, the Court may order the person to be deported to pay all or any part of the expenses of his deportation.

(8.) An order of deportation made, either by the British Agent or the Court, shall be reported to the Secretary of State forthwith, together with a statement of the grounds on which it has been made; and if made by the Court, shall be reported in like manner to the British Agent.

(9.) If any person deported under this or any former Order returns to Zanzibar without permission in writing of the Secretary of State (which permission the Secretary of State may give), he shall be guilty of an offence against this Order, punishable with imprisonment for a term which may extend to two months, or with fine which may extend to 1,000 rupees, or to both; and he shall also be liable to be forthwith again deported.

25. Any person convicted of an offence against any Decree, Law, Order, or Regulation in force in Zanzibar, for the breach of which no penalty is provided, he shall be liable to imprisonment for a period not exceeding six months, or to a fine not exceeding 500 rupees, or to both.

26. When a warrant or order of arrest is issued by a competent judicial authority in the East Africa Protectorate or in the Uganda Protectorate for the apprehension of a person who is accused of crime committed in that Protectorate, and who is, or is supposed to be, within Zanzibar, and that warrant or order is produced to any Court acting under this Order, the Court may back the warrant or order, and the same, when so backed, shall be sufficient authority to any person to whom it was originally directed, and also to any constable or officer of the Court by whom it is backed, and to any person named on the back of the warrant or order, to apprehend the accused person at any place within the limits of this Order and to carry him to and deliver him up within the jurisdiction of the authority issuing the warrant or order.

PART VI.—CIVIL MATTERS.

27. The Court for Zanzibar shall have full civil jurisdiction over all persons subject to this Order.

28.—(1.) The Court for Zanzibar shall hear and determine all civil questions, claims, or disputes arising between any Zanzibar subject and any person subject to this Order, whether the former is either plaintiff or defendant.

(2.) The High Court of Bombay shall not exercise jurisdiction in any such suit.

29.—(1.) The Court shall have Admiralty jurisdiction within the limits of this Order, and over vessels and persons coming within the same.

(2.) The following enactments of "The Colonial Courts of Admiralty Act, 1890," that is to say, section 2, sub-sections (2) to (4); sections 5 and 6; section 16, sub-section (3); shall apply to the Court as if that Court were a Colonial Court of Admiralty, and as if Zanzibar were a British possession; and for the purpose of this application the expressions "judgment" and "appeal" shall in the enactments so applied have the same respective meanings as are assigned thereto in section 15 of the said Act.

(3.) The duties of the Admiralty Registrar shall, until the Judge with the approval of the Secretary of State shall otherwise order, be performed by an Assistant Judge.

30.—(1.) The Court shall endeavour to obtain, as early as may be, notice of the death of every person subject to this Order dying and leaving property to be administered, and all such information as may serve to guide the Court with respect to the securing and administration of his property.

(2.) On receiving notice of the death of such a person, the Court shall put up a Notice thereof at the Court-house, and shall keep the same there until probate or administration is granted, or, where it appears to the Court that probate or administration will not be applied for, or cannot be granted, for such time as the Court thinks fit.

(3.) The Court shall, where the circumstances of the case appear so to require, as soon as may be, take possession of the property in Zanzibar of the deceased, or put it under the seal of the



Court (in either case, if the nature of the property or other circumstances so require, making an inventory), and so keep it until it can be dealt with according to law.

(4.) All expenses incurred by the Court in so doing shall be the first charge on the property of the deceased, and the Court shall, by sale of the property or part thereof, or otherwise, provide for the discharge of these expenses.

31. When a person subject to this Order dies intestate, his property shall, until administration is granted, vest in the Judge.

32. If any person named executor in a will takes possession of, and administers or otherwise deals with, any part of the property of the deceased, and does not obtain probate within one month after the death, or after the termination of any proceeding respecting probate or administration, he shall be liable to pay double the amount of the fee chargeable on obtaining probate, and he shall also be liable to a fine not exceeding 1,000 rupees.

33. The production of a grant of probate or of letters of administration shall, in all cases, be necessary to establish the right to recover any part of the estate or effects of any deceased person, subject to this Order, situate in Zanzibar.

34. If any person other than the person named executor, or the administrator, or an officer of the Court, takes possession of and administers, or otherwise deals with, any part of the property of the deceased, he shall, as soon as practicable, notify the fact and the circumstances to the Court, and shall furnish to the Court all such information as the Court requires, and shall conform to any directions of the Court in relation to the custody, disposal, or transmission of the property, or the proceeds thereof, and, in case of any contravention of this Article, he shall be liable to pay double the amount of the fee chargeable on obtaining probate or letters of administration, and shall also be liable to a fine not exceeding 1,000 rupees.

35.—(1.) When the peculiar circumstances of the case appear to the Court so to require, for reasons recorded in its proceedings, the Court may, if it thinks fit, of its own motion, or otherwise, grant letters of administration to an officer or practitioner of the Court or to such other person as it may think fit.

(2.) The person so appointed shall act under the direction of the Court, and shall be indemnified thereby; and if he is a practitioner shall not act otherwise than as administrator in relation to the estate.

(3.) He shall publish such notices, if any, as the Court thinks fit, in Zanzibar or elsewhere.

(4.) The Court shall require and compel him to file, in the proper office of the Court, his accounts of his administration, at intervals, not exceeding three months.

(5.) The accounts shall be audited under the direction of the Court.

(6.) All expenses incurred in behalf of the Court in execution of this Article shall be the first charge on the estate of the deceased in Zanzibar; and the Court shall, by the sale of the estate, or otherwise, provide for the discharge of those expenses.

36. All real or immovable property situate in Zanzibar, and belonging at the time of his death to any person, subject to this Order, dying after the commencement of this Order, shall be deemed to be personal estate, and the devolution thereof, in case of intestacy, shall be regulated according to the law of the person's domicile for the time being relating to personal estate or movable property.

37.—(1.) Where a Court of Probate in the United Kingdom, or in any British possession to which "The Colonial Probates Act, 1892," for the time being extends, has granted probate or letters of administration or confirmation in respect of the estate of a deceased person, the probate letters or confirmation so granted may, on being produced to and a copy thereof deposited with the Court, be sealed with the seal of the Court, and thereupon shall be of the like force and effect, and have the same operation as if granted by the Court.

(2.) Provided that the Court shall, before sealing any probate letters or confirmation under this section, be satisfied either that all probate or estate duty has been paid in respect of so much of the estate situate in Zanzibar as is liable to such duty, or that security has been given in a sum sufficient to cover the property (if any) in Zanzibar, and may require such evidence (if any) as it thinks fit as to the domicile of the deceased person.

(3.) The Court may also, if it thinks fit, on the application of any creditor, require, before sealing, that adequate security be given for the payment of debts due from the estate to creditors residing in Zanzibar.

(4.) For the purposes of this Article, a duplicate of any probate letters of administration or confirmation, sealed with the seal of the Court granting the same, or a copy thereof certified as correct by or under the authority of the Court granting the same, shall have the same effect as the original.

38. Where it appears to the Court that the value of the property or estate of a deceased person does not exceed 50L., the Court may, notwithstanding anything contained in this Order, without any probate or letters of administration, or other formal proceeding, pay thereout any debts or charges, and pay, remit, or deliver any surplus to such persons, subject to such conditions (if any) as the Court thinks proper, and shall not be liable to any action, suit, or proceedings in respect of anything done under this Article. Every proceeding of the Court under this Article shall be recorded in the Minutes.

PART VII.—MISCELLANEOUS.

39.—(1.) Where it is proved that the attendance of any person subject to this Order to give evidence, or for any other purpose connected with the administration of justice, is required before a Court of the Sultan of Zanzibar, the Court for Zanzibar may, if it thinks fit, in a case and in

circumstances in which the Court for Zanzibar would require the attendance of that person before the Court, order that he do attend as required. The order may be made subject to conditions as to payment or tender of expenses or otherwise.

(2.) If the person ordered to attend, having reasonable notice of the time and place at which he is required to attend, fails to attend accordingly, and does not excuse his failure to the satisfaction of the Court for Zanzibar, or if, when so attending to give evidence, he wilfully gives false evidence, or refuses to be sworn or to give evidence, he shall, independently of any other liability, be liable to be punished with imprisonment for a term which may extend to two months, or with fine which may extend to 1,000 rupees, or with both.

40. If a person subject to this Order—

(1.) Wilfully obstructs, by act or threat, any Court of the Sultan of Zanzibar in the performance of its duty; or

(2.) Within or close to the room or place where such a Court is sitting, wilfully misbehaves in a violent, threatening, or disrespectful manner, to the disturbance of the Court or to the intimidation of suitors or others resorting to the Court; or

(3.) Wilfully insults any member or officer of such a Court in his going to, or returning from, any place of sitting or office of the Court;

He shall, on conviction before the Court for Zanzibar, be liable to be punished with imprisonment for a term which may extend to two months, or with fine which may extend to 1,000 rupees, or with both.

41.—(1.) Every agreement for reference to arbitration between a person subject to this Order, on the one hand, and a person not subject to this Order, on the other hand, may, on the application of any party, be filed for execution in the proper office of the Court.

(2.) The Court shall thereupon have authority to enforce the agreement and the Award made thereunder, and to control and regulate the proceedings before and after the Award, in such manner and on such terms as the Court may think fit.

(3.) If a person subject to this Order wilfully gives false evidence in an arbitration, he shall, on conviction before the Court for Zanzibar, be liable to the same punishment as if he were convicted of giving false evidence in a proceeding in that Court.

42.—(1.) A non-testamentary instrument to which a person subject to this Order is a party, executed after the 28th day of November, 1893, and purporting to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent to, in, or over immovable property situate in Zanzibar, shall not affect any immovable property comprised therein, or be received as evidence of any transaction affecting that property, unless—

(a.) If the instrument was executed before the commencement of this Order, it has been registered at the registration office of the Zanzibar Government, or at His Majesty's Consulate, or at some other Consulate in accordance with the rules (if any) applicable to the registration of such instruments;

(b.) If the instrument was executed after the commencement of this Order, it has been registered in accordance with the Decrees of the Sultan of Zanzibar in force for the time being.

(2.) Provided that nothing in this Article shall make any instrument inadmissible in evidence in any criminal proceeding.

43.—(1.) Notwithstanding anything in this Order, the Court for Zanzibar shall not exercise any jurisdiction in any proceeding whatsoever over the British Agent, or his official or other residences, or his official or other property.

(2.) A person attached to or being a member of His Majesty's Agency and Consulate-General shall not, in giving evidence before the Court, be counselled or allowed to answer any question or produce any document if, in the opinion of the British Agent, signified by him personally or in writing to the Court, the answering or production thereof would be injurious to His Majesty's service.

44. The Judge may make Rules of Court—

(a.) For regulating the pleading, practice, and procedure in the Courts established under this Order with respect to all matters within the jurisdiction of the respective Courts;

(b.) For regulating the practice where any party wishes to appeal;

(c.) For regulating the means by which particular facts may be proved in the said Courts;

(d.) For prescribing any forms to be used;

(e.) For prescribing or regulating the duties of the officers of the said Courts;

(f.) For prescribing scales of costs and regulating any matters in connection therewith;

(g.) For prescribing and enforcing the fees to be taken in respect of any proceedings under this Order, not exceeding, as regards any matters provided for by "The Consular Salaries and Fees Act, 1891," fees fixed and allowed from time to time by any Order in Council made under that Act;

(h.) For prescribing the allowances to be made in criminal cases to complainants, witnesses, jurors, assessors, interpreters, medical practitioners, and other persons employed in the administration of justice, and the conditions upon which an order may be made by the Court for such allowances;

(i.) For taking and transmitting depositions of witnesses for use at trials in a British possession or in the United Kingdom;



(k.) For regulating the mode in which legal practitioners are to be admitted to practice as such, and for withdrawing or suspending the right to practice on grounds of misconduct, subject to a right of appeal to the High Court at Bombay.

Where under any Act of Parliament which is applicable to Zanzibar Rules may or are required to be made in England by the Lord Chancellor or any Judicial authority, the powers of this Article shall include a power to make such Rules for the purposes of that Act so far as applicable.

Rules framed under this Article shall not have effect until approved by the Secretary of State, and, so far as they relate to fees and costs, sanctioned by the Treasury; but in case of urgency declared in any such Rules with the approval of the British Agent, the same shall have effect unless and until they are disapproved by the Secretary of State, and notification of such disapproval is recorded and published by the Judge.

Until such Rules have been made, or in relation to matters to which they do not extend, the Court may follow and employ any Rules, practice, or forms heretofore in use in the Court and in force immediately before the commencement of this Order, with any modifications or adaptations which may be necessary.

45. The Court may, in any case, if it thinks fit, on account of the poverty of a party, or for any other reason, to be recorded in the Minutes, dispense with or remit the payment of any fee in whole or in part.

46.—(1.) Payment of fees payable under any Rules to be made in pursuance of this Order, and of costs and of charges and expenses of witnesses, prosecutions, punishments, and deportations and of other charges and expenses, and of fines respectively payable under this Order, may be enforced under order of the Court by seizure and sale of goods, and, in default of sufficient goods, by imprisonment as a civil prisoner for a term not exceeding one month, but such imprisonment shall not operate as a satisfaction or extinguishment of the liability.

(2.) Any bill of sale or mortgage, or transfer of property made with a view of avoiding seizure or sale of goods or ship under any provision of this Order, shall not be effectual to defeat the provisions of this Order.

47.—(1.) The British Agent may countersign any Decrees made by the Sultan of Zanzibar in the exercise of his authority over his dominions, and such Decrees shall thereupon become binding on all persons subject to this Order.

(2.) The British Agent shall observe any general or special instructions of the Secretary of State with reference to the submission of any Decrees issued or proposed to be issued by the Sultan to the Secretary of State before so countersigning them; but nothing in this provision shall affect the validity of a Decree when countersigned by the British Agent.

(3.) The British Agent shall, at the first available opportunity, transmit to the Secretary of State an authenticated copy of any Decree of the Sultan countersigned by him.

(4.) The British Agent may at any time publish a notice that his counter-signature to any Decree published by the Sultan is revoked, and such Decree shall then cease to be binding on all persons subject to this Order accordingly.

48. Subject to the other provisions of this Order, all expenses of removal of prisoners and others, and the expenses of deportation and of the sending of any person to Bombay, or to any part of His Majesty's dominions or Protectorates, including expenses of maintenance, shall be defrayed in such manner as the Secretary of State, with the concurrence of the Treasury, directs.

49.—(1.) If an officer of the Court employed to execute an order loses, by neglect or omission, the opportunity of executing it, then, on complaint of the person aggrieved and proof of the fact alleged, the Court may, if it thinks fit, order the officer to pay the damages sustained by the person complaining, or part thereof.

(2.) The order may be enforced as an order directing payment of money.

50.—(1.) If a clerk or officer of the Court, acting under pretence of the process of authority of the Court, is charged with extortion, or with not paying over money duly levied, or with other misconduct, the Court may, if it thinks fit, inquire into the charge in a summary way, and may for that purpose summon and enforce the attendance of all necessary persons as in an action, and may make such order for the repayment of any money extorted, or for the payment over of any money levied, and for the payment of such damages and costs, as the Court thinks fit.

(2.) The Court may also, if it thinks fit, on the same inquiry, impose on the clerk or officer a fine not exceeding 50 rupees for each offence.

(3.) A clerk or officer punished under this Article shall not, without the leave of the Court, be liable to an action in respect of the same matter; and any such action, if already or afterwards begun, may be stayed by the Court in such manner and on such terms as the Court thinks fit.

(4.) Nothing in this Article shall be deemed to prevent any person from being prosecuted under any other law for any act or omission punishable under this Article, or from being liable under that other law to any higher punishment or penalty than that provided by this Article. Provided that no person shall be punished twice for the same offence.

51. Not later than the 31st March in each year the Judge shall send to the Secretary of State a Report on the operation of this Order up to the 31st December in the previous year showing, for the then last twelve months, the number and nature of the proceedings, criminal or civil, taken under this Order, and the result thereof, and the number and amount of fees received, and such other information, and being in such form as the Secretary of State from time to time directs.

PART VIII.—REPEAL AND TRANSITORY PROVISIONS.

52. On the commencement of this Order, the following Orders in Council shall be repealed, that is to say:—

- "The Zanzibar Order in Council, 1897."
- "The Zanzibar Order in Council, 1903."
- "The Zanzibar Order in Council, 1904."

Provided as follows:—

(1.) Where other provision is not made by Decree of the Sultan countersigned by the British Agent, any law practice or procedure established by or under the said repealed Orders and all Acts of any legislature in India now in force in Zanzibar shall remain in force until such other provision is made.

(2.) Every appointment of a Judge or other officer and every Court established and existing at the commencement of this Order, shall, until other provision is made, continue to be as if this Order had not been passed.

(3.) All legal proceedings begun under the said repealed Orders and pending at the commencement of this Order, shall be continued as if this Order had not been passed.

(4.) All regulations and rules made under the said repealed Orders, shall remain in force until otherwise provided by Decree of the Sultan, countersigned by the British Agent.

53.—(1.) Until other provision is made by Decree of the Sultan of Zanzibar, countersigned by the British Agent, and subject to the other provisions of this Order, the Code of Criminal Procedure and the other enactments relating to the administration of criminal justice in India, applicable to Zanzibar at the commencement of this Order, shall have effect as if Zanzibar were a district in the Presidency of Bombay; and an Assistant Judge shall be deemed to be the Magistrate of the district; the Judge shall be deemed to be the Sessions Judge; the High Court of Judicature at Bombay (hereinafter called the High Court of Bombay) shall be deemed to be the High Court; and the powers both of the Governor-General in Council and of the Local Government under those enactments shall be exercisable by the Secretary of State, or, with his previous or subsequent assent, by the Governor-General of India in Council.

(2.) Provided, however, that no sentence of death passed by the Court for Zanzibar shall require confirmation by the High Court.

54. Where a person entitled to appeal to the High Court of Bombay from any judgment or order passed in the exercise of criminal jurisdiction under this Order desires so to appeal, he shall present his Petition of appeal to the Court for Zanzibar, and the Petition shall with all practicable speed be transmitted by the Court for Zanzibar to the High Court, with certified copies of the charge (if any) and proceedings, of all documentary evidence admitted or tendered, of the depositions, of the notes of the oral testimony, and of the judgment or order, and any argument on the Petition of appeal that the appellant desires to submit to the High Court.

55. The Court for Zanzibar shall postpone the execution of the sentence pending the appeal, and shall, if necessary, commit the person convicted to prison for safe custody, or detain him in prison for safe custody, or shall admit him to bail, and may take security, by recognizance, deposit of money, or otherwise, for his payment of any fine.

56. Until other provision is made by Decree of the Sultan of Zanzibar, countersigned by the British Agent, and subject to the other provisions of this Order, the Code of Civil Procedure, "The Bombay Civil Courts Act, 1869," the Indian Succession Act, and the other enactments relating to the administration of civil justice in India applicable to Zanzibar at the commencement of this Order shall have effect as if Zanzibar were a district in the Presidency of Bombay; the Judge shall be deemed to be the District Judge, and the Assistant Judge, the Joint District Judge, of the district, and the Court for Zanzibar, the District Court or Principal-Civil Court of Original Jurisdiction in the district; the High Court of Bombay shall be deemed to be the highest Civil Court of Appeal for the district, and the Court authorized to hear appeals from and to revise the decisions of the District Court; and the Powers, both of the Governor-General in Council and the Local Government, under those enactments shall be exercisable by the Secretary of State, or, with his previous or subsequent assent, by the Governor-General of India in Council.

57. Where any person entitled to appeal to the High Court of Bombay from any Decree or Order made by the Court for Zanzibar in the exercise of civil jurisdiction under this Order desires so to appeal, he shall give security to the satisfaction of the Court, and to such amount as the Court thinks reasonable, for prosecution of the appeal, and for payment of any costs that may be ordered by the High Court of Bombay on the appeal to be paid by the appellant, and shall comply with such terms and conditions and take such steps as shall be prescribed by Rules of Court.

58. This Order shall commence and have effect as follows:—

(1.) As to the making of any warrant or appointment under this Order, immediately from and after the date of this Order.

(2.) As to the framing of Rules of Procedure or Regulations, and the approval thereof by the Secretary of State, immediately from and after the date of this Order.

(3.) As to all other matters and provisions comprised and contained in this Order, immediately from and after the expiration of one month after this Order is first exhibited in the public office



ZANZIBAR.

of the Court, for which purpose the Judge is hereby required forthwith, on receipt by him of a copy of this Order, to affix and exhibit the same conspicuously in the public office of the Court, and he is also hereby required to keep the same so affixed and exhibited during one month from the first exhibition thereof; and notice of the time of such first exhibition shall, as soon thereafter as practicable, be published in Zanzibar in such manner as the Court directs; and, notwithstanding anything in this Order, the time of the expiration of the said month shall be deemed to be the time of the commencement of this Order.

(4.) Proof shall not in any proceeding or matter be required that the provisions of this Article have been complied with, nor shall any act or proceeding be invalidated by any failure to comply with any of such provisions.

59. A copy of this Order shall be kept exhibited conspicuously in the Court at Zanzibar.

Printed copies shall be provided and sold at such reasonable price as the Court directs.

And the Right Honourable Sir Edward Grey, Baronet, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein.

J. L. W.
W. S. R.



1907

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. June 1908.

CONFIDENTIAL.

(9263.)

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1907.



LIST OF REPORTS.

(Arranged according to Countries.)

NOTE.—The Reports not addressed to the Foreign Office are marked 14A, &c.

AFRICA.

No.		Date.	SUBJECT.	Page.
1	Law Officers ..	Sept. 2, 1907	Uganda-Congo boundary. Reason why His Majesty's Government can, in their opinion, submit to arbitration question as to whether it should follow what used to be considered to be the 30th meridian. Arbitration would probably be successful. Preferable to claim Mfumbiro district against Congo State rather than Germany ..	1
2	Law Officers ..	Nov. 12, 1907	Confirmation of death sentences by Court of Appeal for East Africa is valid if signed by two Judges ..	5

BELGIUM.

3	Law Officers ..	June 10, 1907	Order in Council to carry into effect the Extradition Convention with Belgium. Approving draft of ..	6
4	Law Officers ..	Dec. 11, 1907	Belgian mail steamers being the property of the King of the Belgians are not, as a general rule, bound by Merchant Shipping Act. Protest might be made against their continued use for purposes inconsistent with their public character ..	6

CHINA.

5	Law Officers ..	Feb. 6, 1907	China and Corea and Corea (Jurisdictional) Orders in Council. Approving drafts of, as initialled ..	8
---	-----------------	--------------	---	---

CONGO FREE STATE.

6	Law Officers ..	Feb. 20, 1907	His Majesty's Government has the right, under most-favoured-nation clause of Congo Treaty with Italy, to establish Consular Courts in the Congo Free State. Reasons why Court of Arbitration might decide otherwise. Congo State can claim arbitration on question under Berlin Act of 1885 ..	10
7	Law Officers ..	Mar. 25, 1907	Obstacles to Congo Balobo Mission acquiring sites. Congo State should not adopt a land system out of harmony with Berlin Act and Anglo-Congolese Convention. The former gives full opportunities to foreigners to acquire land, and makes missionaries and their property the subject of a special protection ..	12
8	Law Officers ..	July 3, 1907	Lado Enclave in Congo Free State. Consider lease of remains in force only as long as Leopold II remains Sovereign of the Free State. Think expression "Leopold II," used in Anglo-Congolese Agreement, is merely designatory, though applicable to him only as King of the Belgians ..	16

LIST OF REPORTS.

COREA.

No.		Date.	SUBJECT.	Page.
9	Law Officers ..	Aug. 23, 1907	Mr. E. T. Bethell's newspaper articles exciting the Koreans against the Japanese. Opinion as to their constituting offences under the China and Corea Orders in Council, rendering him liable to prosecution. Scope and purport of these Orders ..	17

EGYPT.

10	Law Officers ..	Feb. 6, 1907	Consider His Majesty's Government entitled to set up Military Tribunals (in substitution of existing Special Tribunal) to deal with offences by natives against Army of Occupation. Offences against persons otherwise than in their capacity as soldiers should be dealt with by a Civil Court. British Diplomatic Agent should decide as to the proper jurisdiction in each particular case. Concur with Report of 1883 (Jurisdiction of French military authorities in Tunis) ..	21
----	-----------------	--------------	---	----

FRANCE.

11	Law Officers ..	Mar. 8, 1907	Gaston Thiriot. Trial and conviction in France not beyond terms on which his extradition was granted, as he was sentenced on an extradition crime proved by the facts on which his surrender was grounded ..	23
12	Law Officers ..	Mar. 16, 1907	Eddystone lighthouse. His Majesty's Government might properly claim sovereignty over rock on which it stands and exclusive right of fishery, but consider it impolitic to do so. Foreigners may possibly claim prescriptive rights of fishery ..	25

GENERAL.

13	Law Officers ..	Feb. 14, 1907	Status of children of W. Thom and Chinese woman legitimated by subsequent marriage. Should not be registered as British subjects. Nothing to prevent their being registered as British-protected persons. Some might be claimed as subjects by other Powers. Children similarly situated of Vincenzo Grech, a British subject of Maltese origin, can be registered as British-protected persons in the Ottoman Empire ..	27
14	Lord Chancellor	May 4, 1907	Boarding of foreign fishing vessels in Moray Firth, but outside territorial waters, is against International Law and should not be resorted to except by consent of the Government of the State affected ..	29
14A	Law Officers to Colonial Office	June 29, 1907	Imperial Extradition Acts. Approving draft Order in Council suspending their operation as long as Canadian Extradition Act remains in force ..	30
14B	Law Officers to Colonial Office	Dec. 2, 1907	Treaties concluded by Australian States previous to constitution of Commonwealth are still binding. Opinion as to mode in which adhesion to future Treaties of Commonwealth or separate Australian States should be notified ..	30

GERMANY.

14C	Law Officers to Colonial Office	Feb. 26, 1907	Rebellion in German South-West Africa. Refugees not being belligerents ordinary rules of internment do not apply. Cape Government may give them asylum but Cape territory must not be made base of hostile operations. Cannot claim expenses of internment from Germany. Cape Government entitled to prevent use of Orange River for passage of stores into German territory, but exercise of this right may be impolitic ..	32
-----	---------------------------------	---------------	--	----



1907

iv

LIST OF REPORTS.

JAPAN.

No.		Date.	SUBJECT.	Page.
15	Law Officers ..	Apr. 26, 1907	"Australia" and "Montara" condemned by Japanese Prize Court, being engaged, when captured, in a privileged Russian trade, were enemy vessels. Representations cannot properly be made on behalf of underwriters, who should not have paid on their policies if misled	35
16	Law Officers ..	Apr. 29, 1907	Pre-emption of articles <i>ancipitis usus</i> . Authorities which support opinion in their Report of 13th December, 1906. Principle should have been applied as regards food-stuffs in "Hsiping" and "Pehping." Suggesting alteration in draft despatch to Tôkiô	36
17	Law Officers ..	Apr. 29, 1907	German steam-ship "Paros" condemned by Japanese Prize Court with cargo. Representation cannot properly be made to Japanese Government on behalf of underwriters. There was deception apparently as to destination of vessel	38
18	Law Officers ..	June 29, 1907	Marriage of Mr. J. E. de Becker with Japanese lady and adoption into her family having made him a Japanese subject, he has ceased to be a British subject if his acts showed voluntary renunciation of British allegiance	42

NORWAY.

19	Law Officers ..	June 10, 1907	Supplementary Extradition Convention with Norway relative to maintenance of Treaty with Sweden of 1873 and amplifying offences thereunder. Approving Order in Council to carry into effect	45
----	-----------------	---------------	--	----

PANAMÁ.

20	Law Officers ..	July 31, 1907	Extradition Treaty with Panamá. Approving Order in Council to carry into effect	46
----	-----------------	---------------	---	----

PERSIA.

21	Law Officers ..	Mar. 16, 1907	Persian Coasts and Islands Order in Council consolidating and amending those of 1889 and 1895. Approving draft of	47
----	-----------------	---------------	---	----

PERU.

22	Law Officers ..	Mar. 16, 1907	Extradition Convention with Peru. Approving draft Order in Council to carry into effect	48
----	-----------------	---------------	---	----

SPAIN.

23	Law Officers ..	Aug. 23, 1907	Claim of Cuba Submarine Company against Spanish Government for arrears of subsidy. May be preferred diplomatically against Spanish Government. Undertaking was a measure of military necessity for the benefit of Spain, and was contracted for by Central, not by Colonial, Government. His Majesty's Government will probably be prejudiced by reason of the delay and of fact that they previously preferred claim against successors of Spain in Cuba	49
----	-----------------	---------------	---	----

LIST OF REPORTS.

v

SWEDEN.

No.		Date.	SUBJECT.	Page.
24	Law Officers ..	Aug. 9, 1907	Extradition Agreement with Norway. Approving draft Order in Council to carry into effect	51

SWITZERLAND.

24A	Law Officers to Home Office	Mar. 4, 1907	Joseph Keller, a Swiss, who has returned to England after escaping from prison during trial in Switzerland for theft committed in England. Consider he can be tried in England; his sentence <i>par contumace</i> in Switzerland would not appear to support a plea of <i>autrefois convict</i> . It does not appear to be final. Swiss Government not justified in demanding his extradition. Consider sentence <i>par contumace</i> to be sufficient for purposes of Aliens Act, and that his offence constitutes an extradition crime for purposes of that Act	51
-----	-----------------------------	--------------	---	----

UNITED STATES.

25	Law Officers ..	Feb. 7, 1907	Supplementary Extradition Convention with United States of America. Approving draft Order in Council to carry into effect	55
25A	Law Officers to Colonial Office	June 29, 1907	Newfoundland rules against fishing with purse seines. Consider His Majesty has power by Order in Council to exempt United States' citizens from application of, if such a measure is necessary for carrying Convention of 1818 into effect	55
25B	Law Officers to Colonial Office	Aug. 2, 1907	Prosecution of Canadian fishermen, Crane and Dubois, for putting herrings on American vessels contrary to Bait Act, and their conviction by Newfoundland Courts. Opinion on certain points connected with suggested appeal to Privy Council	55
25C	Law Officers to Colonial Office	Sept. 2, 1907	<i>Modus vivendi</i> with United States with reference to fishery season of 1907. Consider terms of draft Order in Council sufficient to enforce	58
26	Law Officers ..	Dec. 17, 1907	Forfeiture of Concession by Rio Grande Irrigation and Land Company ostensibly owing to delay in execution of works. Claim for compensation can properly be preferred against United States' Government, as delay was caused by action of the United States' Government in instituting unwarrantable litigation. No need to await conclusion of legal proceedings before preferring claim. Proposing reference to Hague Tribunal or Joint Commission	58



ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1907.

[The figures refer to the numbers of the pages.]

ACT—BAL.

A.

- Act. Berlin. Rights under. *See* Congo State.
 „ *See* Aliens.
 „ *See* Bait Act.
 Acts. Imperial Extradition. *See* Canada.
 Africa. *See* German South-West Africa.
 Aliens Act. Sentence *par contumace* sufficient for purposes of, 54.
 „ As to what constitutes an extradition offence under, 54.
 Allegiance. Divestment of British in extraterritorial countries. Mode of effecting, 43, 44.
 Anson. Brigadier-General, 59.
 Appeals to Privy Council from Judgments of Newfoundland Courts, 56, 57.
 Arbitration on claim of Rio Grande Irrigation Company. As to, 61, 62.
 Arbitration. Uganda-Congo boundary and claim to Mfumbiro, 1-4.
 „ on right to exercise Consular jurisdiction in Congo State, 11, 12.
 Army of Occupation. British in Egypt. Tribunal to try offences against, 21, 22.
 Arton, Emil, 23.
 Asylum. *See* Internment (of Belligerents).
 "Australia." Engaged in Russian trade when seized by Japanese as an enemy vessel, 35, 36.
 Australian Commonwealth. Effect of constitution of on Treaties, 30-32.
 „ „ Adhesion to future Treaties by, and by separate Australian States, 30-32.

B.

- Bait Act. Enforcement of in case of Newfoundland fishermen aiding Americans, 56, 57.
 „ As to whether this destroys United States' Treaty rights, 56.
 „ Trial of Crane and Dubois for violation of, 56, 57.

BEC—CLA.

- Becker, J. E. de, 42-44.
 Belgian mail-steamers. Public character of. *See* Vessels.
 Belgium. Extradition Treaty with, 6.
 Berlin Act. Rights conferred by. *See* Congo State.
 Bethell, Mr. E. T., 17-20.
 Boundary agreed upon on faulty geographical data. As to adhesion to, 1-4.
 Boyd, Dr. Nathan, 59, 60.
 British-protected person. Definition of, 27.
 „ „ Registration of illegitimate children as, in Turkey and China, 27-29.
 "British subject." As to term including "British-protected person," 27.

C.

- Canada. Suspension of Imperial Extradition Acts in, 30.
 „ Provinces of, and States of Australian Commonwealth. Difference between as regards power to adhere to Treaties, 31.
 Cape Colony. As to right to intern refugee rebels from German South-West Africa, 32-34.
 „ As to claiming cost of their internment from Germany, 33, 34.
 „ Germans making use of Orange River when fighting in South-West Africa, 34.
 Cattier, M., 14.
 China and Corea Order in Council. Draft of, 8-10.
 Claim of Cuba Submarine Telegraph Company. As to preferring against Spain or successors of in Cuba, 49, 50.
 „ of debenture holders of Rio Grande Irrigation, &c., Company against United States' Government, 59.
 „ Ditto. Ruined by vexatious proceedings against, 58-62.
 „ Ditto. Concession forfeited owing to delay of works by action of United States' Government, 58-62.
 „ Ditto. Diplomatic intervention though legal remedies not exhausted, 60, 61.
 „ Ditto. Proposed reference to Hague Tribunal or Joint Commission, 61, 62.

ALPHABETICAL INDEX.—(Names and Subjects.)

CLA—DUB.

- Claim. Seizure of vessels for contraband during Russo-Japanese War. *See* names of vessels under Vessels.
 Colony. As to its being bound by Treaties to which it had adhered previous to its joining a federation, 31.
 „ Legislation of as to fisheries. *See* Fisheries.
 Commission. *See* Joint Commission.
 Commonwealth. *See* Australia.
 Company. Cuba Telegraph Company. *See* Claim and Concession.
 „ Ruined by legal proceedings. *See* Claim also Rio Grande Irrigation Company.
 Concession system in Congo Free State practically amounts to a monopoly, 13-16.
 „ by United States' Government. Forfeiture of, owing to non-completion of work delayed by vexatious legal proceedings on part of United States, 58-62.
 „ Company prevented from carrying out, on frivolous pretexts, 60.
 Congo-Balobo Mission. Difficulties placed in way of in acquiring sites, 13-16.
 Congo State. Extra-territorial jurisdiction in, 10-12.
 „ Style, Leopold II, Sovereign of, merely designatory, 16, 17.
 „ Land system opposed to Berlin Act, 13-16.
 „ Congo-Balobo Mission refused sites for stations, 13-16.
 „ *See* Lado enclave. Duration of lease of.
 Congo-Uganda boundary. As to its following real or supposed 30th meridian, 1-4.
 Consular Courts in the Congo Free State, 10-12.
 „ Jurisdiction in cases of offensive newspaper articles, 17-21.
 Contraband of war. *See* Pre-emption; Vessels.
 Convention. *See* Treaty.
 Corea. Seditious newspaper articles in. Prosecution of in Consular Court, 17-21.
 Court. *See* Prize Court.
 „ of Appeal for East Africa. Confirmation of death sentences, 5, 6.
 „ *See* Consular Courts.
 „ to try offences against British army of occupation (Egypt), 21, 22.
 Crane and Dubois tried for aiding United States' fishermen in violation of Newfoundland Bait Act, 56, 57.
 Criminal proceedings. *See* Trial.
 Cuba Submarine Telegraph Company's claim for arrears of subsidy from Spanish Government, 49, 50.
 „ Ditto. Why to be preferred against Spain and not her successors in Cuba, 50.

D.

- Davis, J., 23.
 Death sentences in East Africa. Two Judges suffice to confirm, 5, 6.
 Debenture holders in Rio Grande Irrigation Company. Claim of against United States' Government, 58-62.
 Dubois and Crane trial. *See* Crane.

EDD—HSI.

E.

- Eddystone. Sovereignty over lighthouse. Claim justified but not politic to make, 25, 26.
 „ As to prescriptive right of foreigners to fisheries, 26.
 „ Objection to signalling station on rock, 26.
 Egypt. Offences against British army of occupation. Proposed Tribunal, 21, 22.
 Enemy vessels. "Montara" and "Australia" seized by Japanese bore character of, 36.
 Extradition. Suspension of Imperial Acts relating to in Canada, 30.
 „ for offence other than for which convicted. *See* Thiriot, Gaston.
 „ Depositions, not warrant, decide nature of offence, 24.
 „ Order in Council. *See* Order in Council.
 „ of Keller, a Swiss, escaped to England after trial in Switzerland for offence committed in England, 51-54.
 „ Offence an extradition crime for purposes of Aliens Act, 54.
 „ Question of trial in England after sentence *par contumace* in Switzerland, 54.
 Extra-territorial. *See* also Jurisdiction.
 „ countries. Divestment of British allegiance in, 43, 44.
 „ views of Sir F. Piggott, 43.

F.

- Fisheries round Eddystone. His Majesty's Government can claim exclusive, 26.
 „ Ditto. Prescriptive right of foreigners to; as to, 26.
 „ Rules (Newfoundland). *See* Fishing.
 Fishing with purse seines in Newfoundland. As to exemption of United States' citizens from rules, 55, 56.
 „ *See* Bait Act.
 „ Order in Council to suspend Colonial legislation, 56.
 „ This is Order to secure American Treaty rights, 56.
 „ Trial of Newfoundland fishermen for aiding Americans in violation of Bait Act 56, 57.

G.

- German South-West Africa. Rebellion in. Passage of stores, &c. from Cape Colony may be prevented, 34.
 Great Britain. *See* British-protected person, Nationality, British subject.
 Grech, Vincenzo, 28, 29.

H.

- Hague Tribunal. Proposed reference to of claim of Irrigation Company, owing to treatment of by United States' Government, 61, 62.
 "Hsiping." Foodstuffs *ex*. Condemned by Japanese Prize Court should have been pre-empted, 36, 37.



INT—MAR.

I.

- International (El Paso) dam project, 59.
 " law questions in connection with rebellion in German South-West Africa, 32-34.
 Internment of refugees from German South-West Africa in Cape Colony, 32-34.
 " Ditto. Duties of Cape Government, 32-34.
 " Ditto. As to recovering expenses, 33.

J.

- Japanese in Corea. Proceedings against newspapers inciting to enmity against, 17-21.
 " " Marriage with, and ceremony of adoption into family, 43, 44.
 " " Ditto. As to its involving renunciation of British allegiance, 43, 44.
 Joint Commission to adjudicate on claim of Rio Grande Irrigation Company. Proposal for, 62.
 Jurisdiction (Consular) in Congo State. Claim to establish, 10-12.
 " Maritime. See Territorial waters.
 " See Extra-territorial.
 " (Consular) over writer of offensive newspaper articles in Corea, 17-21.

K.

- Keller, Joseph, 51-54.
 " Otto, 51.

L.

- Lado Enclave in Congo Free State. Duration of lease, 16, 17.
 " Doubt caused by style of Leopold II, 16, 17.
 Land system in Congo State. Vexatious character of, 13-16.
 " " Bearing of Berlin Act, &c., on, 13-16.
 " foreigners should have reasonable chance to acquire, 15, 16.
 Law Courts. See Courts of Law.
 " suits. See Rio Grande Irrigation, &c., Company.
 Lease of Lado Enclave to King Leopold. Duration of, 16, 17.
 Legal proceedings. See Trial; Courts; Consular Courts.
 " remedies. Adoption of diplomatic intervention before exhausting of, 60, 61.
 Legitimation of children. Law of Malta, 29.
 " " by subsequent marriage of parents. See Nationality.
 Lighthouses on semi-submerged rocks. Claim to sovereignty over, 25, 26.
 " Ditto. Assertion of might render them objects of attack by enemies, 26.
 Litigation. See Rio Grande Irrigation, &c., Company.

M.

- Mail-ships. See Vessels.
 Malta. Law of relating to legitimation of children, 29.
 Maritime jurisdiction. See Territorial waters.
 " " See Moray Firth.

MAR—ORD.

- Marriage of parents. Effect on status of children born before, 27-29.
 " with Japanese. Effect on national status, 42-44.
 Meridian erroneously indicated on map annexed to Treaty. Claim to adopt as boundary, 1-4.
 Mfumbiro. Claim of His Majesty's Government to, 1-4.
 " Ditto. As to preferring against Congo State or Germany, 4.
 " Ownership of depends on true geographical position, 1-4.
 Miers, Mr. Robert, 43.
 Military operations. Use of British territory as base of. See Territory.
 " Court to try offences against army of occupation in Egypt. Proposal for, 21, 22.
 Mission, Congo-Balolo. Difficulties of in acquiring sites, 13-16.
 Missionaries, Protestant, in Congo Free State. Obstacles to which they are subjected, 13-16.
 Monopoly. Congo State land system practically amounts to, 13-16.
 " Montara," 35, 36.
 Moray Firth. Boarding of foreign vessels outside territorial waters, 29.

N.

- Nationality of children legitimated after marriage of parents in extra-territorial countries, 27-29.
 " Effect of marriage with Japanese on, 42-44.
 " Divestment of British in extra-territorial countries, 43-44.
 Neutral territory as base of hostile operations. See Rebellion in German South-West Africa; Right of passage.
 " vessels chartered by enemy for trade purposes. Seizure of, 35, 36.
 Newfoundland fisheries. See Fisheries.
 " Courts. Appeals from to Privy Council, 56, 57.
 Newspaper articles, Mr. E. T. Bethell's. Proceedings under Orders in Council against, 17-21.
 " " must be judged according to local circumstances, 20.

O.

- Orange River ferry. Use of by Germans during rebellion in German South-West Africa, 34.
 Order in Council to exempt United States' fishermen from Newfoundland rules as to use of purse seines, 55, 56.
 " may be issued, if necessary, to secure American Treaty rights, 56.
 " Approving draft of, 58.
 " Extradition Treaty with Belgium, 6.
 " Draft China and Corea, 8-10.
 " Proceedings under against writers of seditious newspaper articles, 17-21.
 " Suspension of Imperial Extradition Acts in Canada, 30.
 " Definition of British subject and of British-protected person in, 27.
 " Extradition Treaty with Norway, 45, 46.
 " Ditto with Panamá, 46.

ORD—STR.

- Order in Council. Persian coasts and islands, 47, 48.
 " " Extradition with Peru, 48, 49.
 " " Ditto with Sweden, 51.
 " " Ditto with United States, 55.
 O'Reilly v. Crane and Dubois, 56, 57.

P.

- " Paros" condemned by Japanese Prize Court. True destination of concealed, 38-42.
 " His Majesty's Government cannot support claim, 42.
 " Pehping." Foodstuffs ex condemned by Japanese Prize Courts should have been pre-empted, 36, 37.
 Persian coasts and islands. See Order in Council.
 Pigott, Sir Francis, 43.
 Piot, ex parte, 24.
 Pre-emption. Japanese should have resorted to in case of condemned foodstuffs on "Hsiping" and "Pehping," 36, 37.
 Prescriptive rights of foreigners to fisheries about Eddystone rocks. Question as to, 25, 26.
 Press, offensive articles in. See Newspaper.
 Prinsep, Mrs. Val, 51.
 Privy Council. Appeals from Colonial Courts, 56, 57.
 Prize Court. See Vessels condemned by.
 Prosecutions. See Trials; Courts.
 Protection. Definition of persons under British, 27.
 " Registration of illegitimate children as persons under British in Turkey and China, 28, 29.
 Purse seines. Fishing with forbidden in Newfoundland, 55, 56.
 " As to United States' citizens being affected thereby, 56.

R.

- Rahman's drift. See Orange River ferry.
 Rebellion (German) in South-West Africa. Questions of international law arising out of, 32-34.
 Registration of illegitimate children in Turkey and China, of British subjects in certain cases, 27-29.
 Right of passage through neutral territory, 34.
 Rio Grande Irrigation, &c., Company. Claim against United States' Government on account of vexatious legal proceedings and forfeiture of Concession, 58-62.
 Ditto. Proposed reference to Hague Tribunal or Joint Commission, 61, 62.
 Ditto. Can be supported, though legal remedies are not exhausted, 61.

S.

- Sauzat, Jean Baptiste, 23.
 Seines. See Purse seines.
 Sentence par contumace. As to its supporting plea of *autrefois convict*, 54.
 Signalling station (Admiralty) on Eddystone Lighthouse. Objection to, 26.
 Sperlich, 34.
 Strode, Mr. Chetham, 59-61.

TER—VES.

T.

- Territorial waters about the Eddystone lighthouse. Claim to can be asserted, 25, 26.
 " " Ditto. Impolitic to press, 26.
 " " Boarding of foreign vessels in Moray Firth outside 3-mile limit, 29.
 Territory, British. Passage from into German Colony during rebellion. See Orange River ferry.
 " " German use of as base during conflict with rebels, 33, 34.
 Thriot, Gaston, 23, 24.
 Thom, William, 27, 28.
 Trawling in Moray Firth by foreign vessels. See Moray Firth.
 Treaty rights of third party. Company ruined owing to alleged, 59.
 Treaty. See Order in Council (to enforce).
 " with United States of 1818 as to Fisheries (conflict with local laws, &c.). See Fisheries and Order in Council.
 Treaties, Australian. Effect of setting up of Commonwealth on validity of, 30-32.
 " Future with Commonwealth and separate Australian States, 30-32.
 " with separate Australian State. As to duration of after federation, 31.
 " As to separate States of a federation of Colonies being empowered to adhere to, 31.
 " Difference in this respect between Australia and Canada, 31.
 " relating to Uganda-Congo boundary and ownership of Mfumbiro concluded on false geographical data. Reading of, 1-4.
 " relating to Consular jurisdiction in Congo Free State, 10-12.
 " Land system in Congo Free State in conflict with Berlin Act, &c., 13-16.
 " Extradition. Accused cannot waive rights under, 23.
 Tribunal. British military in Egypt. See Army; Hague.
 Trial (Newfoundland Fishery Laws). O'Reilly v. Crane and Dubois, 56, 57.
 " As to appeal to Privy Council, 56, 57.
 " of Thriot for offence other than that for which extradited. Why justified, 24.
 " in England of Keller tried abroad for offence committed in England, 51-54.
 " Plea *autrefois convict* would fail, 54.
 " See Sentence.
 " of actions instituted against Rio Grande Irrigation Company, 59-62.

U.

- Uganda-Congo boundary. See Boundary.

V.

- Vessels. Belgian mail-boats. Their public status, 6-8.
 " Should not be permanently used for commercial purposes, 6-8.
 " Exemption from Board of Trade survey, 6.



X ALPHABETICAL INDEX.—(Names and Subjects.)

VES.	VES—WAR.
Vessels, foreign fishing. Boarding of in Moray Firth outside territorial waters, 29.	Vessels. "Paros." Properly condemned by Japanese. Articles were for war-like purposes, and true destination concealed, 42.
" British, chartered by Russians during war with Japan. Condemned by Japanese Prize Court, 35, 36.	W.
" Cargoes on should have been pre-empted, not condemned. See "Hsiping" and "Pehping."	Waltons, Johnson, and Co., 35.
" "Australia" and "Montara." Enemy vessels when seized, being engaged in Russian trade, 35, 36.	War. See Rebellion in German South-West Africa.
	" Russo-Japanese. Seizures of vessels during. See Vessels.
	" " Pre-emption of contraband. See Pre-emption.

Printed for the use of the Foreign Office. May 1908.

CONFIDENTIAL.REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1907.

AFRICA.

[17849]

No. 1.

[September 2, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, June 7, 1907.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to request that you will take into consideration the papers noted in the accompanying list respecting—

1. The Uganda-Congo boundary question; and
2. The British claim to the Mfumbiro district.

1. The boundary between the Uganda Protectorate and the Congo Free State is laid down by Article 1 (a) of the Agreement between Great Britain and the Congo Free State of the 12th May, 1894, as follows: "That the sphere of influence of the Independent Congo State shall be limited to the north of the German sphere in East Africa by a frontier following the 30th meridian east of Greenwich up to its intersection by the watershed between the Nile and the Congo, and thence following this watershed in a northerly and north-westerly direction." (Paper (A.))

No map was attached to the original signed Treaty, but the map included in the Blue Book (Paper (A)) in which the Treaty was laid before Parliament shows the position of the line which was supposed to be the 30th meridian. Later and more accurate geographical knowledge has now brought to light the fact that the real position of the 30th meridian is considerably to the east of the line shown on the above map.

A Memorandum by Mr. Wellesley (Paper (G)) contains maps and plans showing the various positions that have from time to time been assigned to this meridian.

His Majesty's Government are of course anxious to claim that the line which was believed to be the 30th meridian at the time of the conclusion of the Treaty of 1894 should be the boundary between the Congo Free State and Uganda. The Congo Government, on the other hand, maintain that the letter of the Treaty must be adhered to, and the true 30th meridian be fixed as the frontier line.

The Congo Free State may claim that this matter should form the subject of a reference to arbitration under Article 12 of the Act of Berlin, 1885 (Paper (C)), and it would therefore be of material assistance to the Secretary of State to have your opinion as to the strength of the British case before deciding what attitude to adopt.

The claim of His Majesty's Government could only be established by proving that the intention of the Treaty was that the boundary should be, not the real 30th meridian, but the line shown as such on the contemporaneous maps.

It is obvious from the map attached to the Blue Book (Paper (A)) that His Majesty's Government were at that time under the impression that the line of frontier to which they had agreed would give them access to Lake Albert Edward. And it may

[509]

Uganda-Congo boundary ownership of Mfumbiro district.

B



be observed that, as a matter of fact, the whole object of negotiating the Treaty was to secure that the proposed Cape to Cairo Railway should lie entirely within British territory.

If the true 30th meridian be adopted as the frontier, Great Britain will be deprived of access to Lake Albert Edward.

In support of the British contention His Majesty's Government can urge the fact that the strip of territory in dispute was actually occupied and administered by the Uganda Protectorate until, on the discovery that the 30th meridian lay farther to the east, a temporary Agreement was come to between the Congo State and His Majesty's Government to abstain from any act of occupation on the part of either Government until the boundary question had been definitely settled. This fact shows the intention of His Majesty's Government to occupy the country up to the line where the old 30th meridian was supposed to be.

In further evidence of such intention it might, perhaps, be possible to cite the following passage from the Earl of Kimberley's despatch to Mr. Hardinge of the 23rd May, 1894 (see Hertslet's "Map of Africa," p. 1013):—

"In order to secure access to this post, the lease has been obtained of a road passing through the Free State territory, connecting Lake Albert Edward, the eastern shore of which is in the British sphere, with the leased port."

On the other hand, Sir E. Grey is not aware of any evidence that can be produced to prove that it was also the intention of the Congo Free State to place the boundary at the supposed and not at the real position of the 30th meridian.

2. The claim to the Mfumbiro district, though distinct from the Congo-Uganda boundary dispute, may yet, for reasons which will presently appear, be conveniently dealt with at the same time. The Agreement between Great Britain and Germany of the 1st July, 1890, defining the boundary between the British and German spheres (Paper (B)), provides (Article I, Mount Mfumbiro):—

"It is, however, understood that, on the west side of the lake, the German sphere does not comprise Mount Mfumbiro; if that mountain shall prove to lie to the south of the selected parallel, the line shall be deflected so as to exclude it, but shall nevertheless return so as to terminate at the above-named point."

Again:—

"Mount Mfumbiro is included in the British sphere."

At the time when this Treaty was made the exact position of Mfumbiro was not known, but it was claimed by Great Britain and was generally assumed to lie to the south of the 1st parallel of south latitude.

It has now been definitely ascertained that the Mfumbiro district does lie to the south of the 1st parallel south latitude, but a further complication is introduced by the fact that the boundary between the Congo Free State and the German territory is also the subject of dispute, and if the German Government fail to secure the boundary they claim, Mfumbiro may be finally decided to lie within the Free State territory.

The preamble to the Agreement between Great Britain and the Congo State of the 12th May, 1894, however, contains the following words:—

"His Majesty the King of the Belgians, Sovereign of the Independent State of the Congo, having recognized the British sphere of influence as laid down in the Anglo-German Agreement of the 1st July, 1890, Great Britain undertakes to give to His Majesty a lease of territories in the western basin of the Nile," &c.

The Congo Government have stated that they are not prepared to recognize any claim on the part of His Majesty's Government to this district if found west of the true 30th meridian, as under the German-Congolese Convention of 1884 this meridian is to form the boundary between the Congo Free State and German East Africa up to 1° 20' south, and as this case may also have to be referred to arbitration, as provided for under Article 12 of the Act of Berlin, 1885, it is important to know the precise effect of this stipulation in the preamble to the Convention.

It is possible for His Majesty's Government to set up a claim to Mfumbiro either against the German Government on the strength of the 1890 Agreement or against the Congo Free State on the strength of the preamble to the 1894 Agreement, and Sir E. Grey would be glad of your opinion as to which of these courses it would be safer to adopt.

Account must be taken of the fact that, in case of negotiations between the Congo Free State and Germany for the settlement of the Congo-German East African boundary, the latter Power, knowing that if she makes good her claim to Mfumbiro she will have to hand it over to Great Britain, may be disposed to abandon this part of her claim with a view to securing concessions in other portions of the boundary.

Unless you consider, therefore, that His Majesty's Government could argue that, by the Agreement of 1890, Germany guaranteed Mfumbiro to Great Britain, and consequently is bound to obtain it from the Congo Free State, Sir E. Grey has some doubt whether there will be any advantage in putting forward the claim against her.

It will be noted that it is the recognition on the part of the Congo Free State of the British sphere, as determined by the 1890 Agreement with Germany, that forms the consideration for the lease of the Nile territories to the King of the Belgians. In the later portion of Article 1 of the 1890 Agreement with Germany, where the British sphere is defined, Mount Mfumbiro is assigned to Great Britain without any reference to the position of lines either of longitude or latitude, and both the Legal Adviser and the Assistant Legal Adviser to this Department have expressed the opinion that the action of the Congo Free State in taking the lease of the Nile territories in return for her recognition of the British sphere makes the British claim to the Mfumbiro district against the Congo Free State stronger than a claim put forward through Germany.

It is difficult to see what consideration the King of the Belgians gave for the lease of the Nile territories, if the recognition of the British sphere in the preamble of the 1894 Agreement is to be construed as limited to the recognition of the division between Great Britain and Germany of territory with which the Congo Free State was not concerned, and as falling to the ground so soon as the Congo Free State considers herself entitled to claim the territory on her own account.

The strength of the German claim to Mfumbiro is possibly also an element that you may consider should be taken into account in deciding what course to pursue. The details of the dispute between the German Government and the Congo Government as to the boundary between their territories are set out in Mr. Wellesley's Memorandum (Paper (G)), so far as they are known to His Majesty's Government.

It may be well to mention that if the German Government adopted the same arguments as to the 30th meridian that His Majesty's Government desire to put forward the actual line claimed by Germany would not be a continuation of the line claimed by Great Britain, as the German claim dates from 1885, whereas the British claim dates from 1894, and the supposed position of the 30th meridian had altered in the meantime.

You will also observe that as regards the Congo-Uganda boundary His Majesty's Government claim the old 30th meridian as being the intention of the Treaty irrespective of its actual wording, whereas with regard to Mfumbiro they claim the district under the strict letter of the Treaty, and you will no doubt give due weight to the apparent inconsistency of these contentions in advising the Secretary of State as to the course to be adopted.

Sir Edward Grey would be glad if you will be so good as to furnish him with your opinion on the following points:—

1. Whether the contention of His Majesty's Government that the boundary between the Congo Free State and Uganda should coincide with the supposed position of the 30th meridian at the time of the Treaty of 1890 is sufficiently strong to render it reasonably safe to submit the matter to a Court of Arbitration, and, if so, by what line of argument it could be most advantageously supported.

2. Whether Great Britain has a valid claim to the Mfumbiro district, and, if so, whether the claim should be made against the Congo Free State direct or against Germany.

3. Whether the claim to the Mfumbiro district, if any, is strong enough for submission to a Court of Arbitration.

4. Whether, in the event of Germany submitting her boundary dispute with the Congo State to arbitration and the Award going against her, the British claim to Mfumbiro on the strength of the recognition by the Free State of the British sphere as laid down in the Agreement of 1890 would be prejudiced thereby.

Sir Edward Grey would also be glad to receive any observations of a general character which you may be good enough to offer on the foregoing subjects.

As the question whether the British claim to Mfumbiro should be brought up at a proposed Conference on questions relating to the Aka will depend largely on the



AFRICA.

conclusion at which you may arrive, I am to request that Sir E. Grey may be favoured with your views at your early convenience in order that a reply may be sent to the German Government in regard to their proposal to refer the latter question to arbitration.

I have, &c.
(Signed) ERIC BARRINGTON.

List of Papers.

- (A.) Anglo-Congolese Treaty, May 12, 1894. "Africa, No. 4 (1894)."
- (B.) Anglo-German Treaty, July 1, 1890. "Africa, No. 6 (1890)."
- (C.) General Act of Berlin, February 26, 1885. "Africa, No. 3 (1886)."
- (D.) *Modus vivendi* of April 1904 (exchange of notes with Congolese Government), i.e., to Sir C. Phipps, No. 39, Africa, March 19, 1904; Sir C. Phipps, No. 31, Africa, April 3, 1904. In Conf. 8614.
- (E.) Memorandum, &c., by Mr. A. W. Clarke, Mr. H. Farnall, and Mr. E. A. Crowe of March 10, 1904. In Conf. 8614.
- (F.) Memorandum by Sir C. Hill of April 8, 1904. In Conf. 8614.
- (G.) Memorandum by Mr. V. Wellesley, April 8, 1907. Conf. (with 11349/07).

[29651]

Report.

(1.) We are of opinion that the contention of His Majesty's Government that the boundary between the Congo Free State and Uganda should coincide with the supposed position of the 30th meridian is strong enough for submission to a Court of Arbitration with a fairly reasonable chance of success.

It is clear that at the date of the Treaty the Government of Great Britain were mistaken as to the true position of the 30th meridian. It is certain that the King of the Belgians did not then know the true position of that meridian, and it is probable that he, like Great Britain, was mistaken in the position, if any, which he then ascribed to it. The Treaty, however, is founded on the assumption that the position of the 30th meridian was then ascertained or approximately ascertained, and arrangements were obviously made between the parties as to particular districts on that assumption. Thus it was agreed that Great Britain should have the lease of a 25 kilom. strip between Lake Tanganika and Lake Albert Edward. It must have been within the knowledge and intention of both the parties that the object of this lease was to give access as between British Central and British East Africa. This result could only be achieved if Lake Albert Edward were partly within British East Africa, and that it should be so treated was apparently the intention of both parties. It now appears that it is to the west of the 30th meridian, and if the true position of that meridian is to be taken as the boundary, the lake is outside of British territory altogether, and the connection between it and Lake Tanganika is useless.

We think, therefore, that, in selecting the 30th meridian as a boundary, both parties were acting under a mistake of fact which, now that the true position of the meridian is ascertained, gives rise to a claim either for rescission or for rectification, so that the clear purpose and consideration of the Agreement may be expressed by its words.

There would equally be a good claim for rescission or rectification if it were the fact that the Congo Free State knew that on entering into the Treaty Great Britain agreed to the boundary in question on the assumption that both parties intended such boundary to be one which would place Lake Albert Edward within or in connection with British territory.

(2 and 3.) We think Great Britain has a claim to the Mfumbiro district against either Germany or the Congo Free State sufficiently strong for submission to a Court of Arbitration. In our opinion, it would be preferable to prefer the claim against the Free State.

(4.) We think not.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
September 2, 1907.

AFRICA.

5

[25204]

No. 2.

[November 12, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 30, 1907.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you the accompanying despatch from His Majesty's Agent and Consul-General at Zanzibar,* forwarding a request from Acting Judge Murison for a definite ruling upon a point of law relating to the jurisdiction of the Judges of the Appeal Court for Eastern Africa.

Confirmation of death sentences by Zanzibar Appeal Court: as to two Judges sufficing.

You will observe that the point in question is whether a confirmation of a death sentence is valid if signed by only two Judges of the Court of Appeal, or whether it must be signed by three Judges of that Court.

Sir E. Grey is of opinion that a confirmation of a sentence of death passed by a Court of Session is valid if signed by two only of the Judges of the Court of Appeal for Eastern Africa, and that the signatures of three Judges of that Court are not essential to the validity of such confirmation.

The question appears to depend solely upon the construction of certain sections of the Bombay Criminal Procedure Code. Under section 374 a sentence of death passed by a Court of Session must be submitted for confirmation to the "High Court," which, by section 4 (j), is defined as meaning "the highest Court of Criminal Appeal or Revision for any local area," and in Zanzibar the Court of Appeal for Eastern Africa corresponds with that definition. Section 375, which enables the High Court, as so defined, to confirm a sentence of death so submitted to it, provides that no order of confirmation shall be made until the period allowed for preferring an appeal has lapsed, or, if an appeal is presented within such period, until such appeal is disposed of.

This would seem to distinguish in effect between the formal confirmation of a death sentence and an appeal in criminal cases.

Section 377 in terms provides that the confirmation of the sentence shall, when the High Court consists of two or more Judges, be made and signed by at least two of them.

For the purposes of the Bombay Criminal Procedure Code, the "High Court" in Zanzibar is represented by the Court of Appeal for East Africa. This Court "consists of two or more Judges," and it would seem to follow that, under section 377, the confirmation of a death sentence must be "made and signed by at least two of them."

In other words, jurisdiction for this purpose would seem by this section to be conferred on any two of the Judges.

"The Appeal Court Order in Council, 1902," Article 5, and the Appeal Court Rules 17 and 18 do not appear to affect the question. They obviously are applicable only to appeals in the strict sense, and not to the formal confirmation of a death sentence, the procedure as to which is expressly provided for by the sections of the Criminal Procedure Code referred to above.

I am to request that you will be so good as to take this paper into your consideration, and furnish Sir E. Grey with your opinion as to whether a confirmation of a death sentence is legally valid if signed by only two Judges of the Court of Appeal, or whether it is essential that it should be signed by three Judges.

It may be added that the practical importance of this question is due to the fact that on many occasions three Judges are not available for this purpose, one of the three frequently being absent on leave.

Sir E. Grey will also be glad to receive any general observations on the subject which you may wish to offer.

I have, &c.
(Signed) F. A. CAMPBELL.

* Mr. Cave, No. 122 June 20, 1907.



[37554]

Report.

In our opinion the confirmation of a death sentence is legally valid if signed by only two Judges of the Court of Appeal.

(Signed)

JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
November 12, 1907.

BELGIUM.

[16104]

No. 3.

[June 10, 1907.]

Foreign Office to the Law Officers of the Crown.

Order in
Council:
Supple-
mentary
Extradition
Convention
with
Belgium.

Gentlemen,

Foreign Office, May 27, 1907.

I HAVE the honour to transmit to you, by direction of Secretary Sir E. Grey, the draft of an Order in Council, carrying into effect a Supplementary Convention between the United Kingdom and Belgium, which was signed at London on the 5th March, 1907, and the ratifications of which were exchanged at London on the 17th ultimo, completing Article XIV of the Extradition Treaty of the 29th October, 1901.

The draft Order in Council has been referred to, and approved by, the various Departments of His Majesty's Government concerned, and I have now the honour to request that you will favour Sir E. Grey at your early convenience with your opinion as to whether it may, in its present form, be laid before the King in Council for His Majesty's approval.

I have, &c.

(Signed)

F. A. CAMPBELL.

[19305]

Report.

In our opinion the draft Order in Council,* as initialled by us, may be laid before the King in Council for His Majesty's approval.

(Signed)

JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
June 10, 1907.

[18943]

No. 4.

[December 11, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 20, 1907.

Belgian
mail-
steamers:
As to
exemption
from British
survey.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you the papers, noted in the accompanying list, with regard to the claim of the Belgian Government that the Belgian mail-steamers plying between Dover and Ostend are vessels belonging to a Sovereign State and consequently exempt from any survey on the part of the Board of Trade in connection with "The British Merchant Shipping

* The Order in Council dated July 6, 1907, is contained in Confidential Print No. 8996*. The Law Officers returned the draft Order unaltered.

Act, 1906." The grounds on which the Belgian Government put forward this claim are that the steamers in question represent a portion of the Belgian navy, fly the pennant, are commanded by officers commissioned by the King of the Belgians, and are under the direction of the Minister of Railways, Mails, and Telegraphs.

By section 13 of "The Merchant Shipping Act, 1906," the definition of a "passenger steamer," as laid down in section 267 of "The Merchant Shipping Act, 1894," is amended so as to include every foreign steam-ship, whether originally proceeding from a port in the United Kingdom or from a port out of the United Kingdom, which carries passengers to or from any place in the United Kingdom. It follows therefore that the Belgian mail-steamers which carry passengers between Dover and Ostend are "passenger steamers" within the meaning of the Merchant Shipping Acts, and subject to the provisions of those Acts when in the territorial waters of the United Kingdom.

In the leading case of "The Exchange," 1812, 7 Cranch 116, however, it was held by the Supreme Court of the United States that if a ship be declared by the sovereign authority by the usual means to be a ship of war, such declaration cannot be inquired into. This rule was approved by the English Court of Appeal in the case of the "Parlement Belge," in which case it was held that an unarmed packet belonging to the Belgian Sovereign, and in the hands of officers commissioned by him and employed in carrying mails, was not liable to be seized in an Admiralty suit to recover damages for a collision; nor was such immunity held to be lost by reason of merchandize or passengers having been carried for hire.

In view of these judicial decisions, His Majesty's Government feel precluded from denying that the Dover-Ostend mail-steamers, which the Belgian Government in an official note to His Majesty's Minister at Brussels have declared to be public ships, possess that character. Sir E. Grey considers, however, that he would be justified in addressing a formal protest to the Belgian Government against the continued use of these public ships for purposes inconsistent with their public character. In his opinion, it is incompatible with the character of a public ship to trade and carry merchandize or passengers for hire, and the course adopted by the Belgian Government seems to him open to grave objections.

I am to request that you will be good enough to take the above facts into your consideration, and to favour Sir E. Grey with your opinion as to the attitude which His Majesty's Government should adopt in the matter, and generally with any observations which you may have to offer on the subject; and in this connection I am to call your special attention to the copy, inclosed herewith, of the reference to the Law Officers of the 28th February, 1900, and of their Report, on a somewhat similar point.

I have, &c.

(Signed)

F. A. CAMPBELL.

List of Papers.

- | | |
|---|---------------|
| (A.) Reference to and Report of Law Officers | Mar. 9, 1900. |
| (B.) Status of mail-ships: Extracts from writers on International Law | Feb. 1900. |
| relating to (Confidential 7252) | |

[40819]

Report.

In our opinion, as the mail-steamers above mentioned are the property of a foreign Sovereign, and are used for what that Sovereign alleges to be public purposes, the Courts will not exercise over them the general jurisdiction conferred by "The Merchant Shipping Act, 1906."

The case does not appear to differ in any material respect from that of the "Parlement Belge" (5 Probate Div. 197), which is an authority in favour of the contention now raised by the King of the Belgians. In that case the trading purposes for which the vessel was used were held to be subordinate to the public purpose of carrying the mails; but the distinction between trading purposes and public purposes was not very clearly or consistently drawn, and, as the authorities now stand, is of doubtful value. The effective ground of decision in the various cases on the point appears to be that the vessel under consideration in each case was the property of a foreign Sovereign.



We are, however, of opinion that the judicial dicta laying stress on the user for public purposes of the vessels thus exempt afford good ground for a formal protest, which may properly be made against the use of such vessels for purposes of a private trading character, though, in fact, they happen to be undertaken by a Sovereign Power.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
December 11, 1907.

CHINA.

[4231]

No. 5.

[February 6, 1907.]

Foreign Office to the Law Officers of the Crown.

Draft
China and
Corea
and Corea
Orders in
Council.

Gentlemen,

Foreign Office, December 31, 1906.

I HAVE the honour to transmit to you herewith, by direction of the Secretary of State for Foreign Affairs, the drafts of a Corea Order in Council and a China and Corea Order in Council, which have been prepared in this Department.

The passing of Corea under the sway of Japan, and the withdrawal of His Majesty's Legation from that country, have rendered the provisions of the draft Corea Order in Council necessary.

The draft China and Corea Order has been framed for the purpose of introducing certain amendments which experience has shown to be desirable in "The China and Corea Order, 1904."

Article 2 deals with a question that arose before the 1904 Order was passed, but it was by an oversight omitted from that Order.

It has in practice been found convenient in some cases to station a subordinate Vice-Consul with legal qualifications within the district of another commissioned Consular officer in order that he may exercise civil and criminal jurisdiction. To enable this to be done consistently with the terms of the existing Order in Council it is necessary to resort to the somewhat cumbrous machinery of assigning to the junior officer a district which coincides and is conterminous with that of the superior officer, and there are no means of limiting the classes of cases with which he may deal.

Article 3 deals with the question of the protection of trade-marks, &c., and is to replace both "The China and Corea Patents Order, 1899," and the 69th Article of the 1904 Order in Council, which overlap, and the former of which should have been repealed in 1904.

Arrangements have been made with various foreign Powers for the mutual protection of each other's trade-marks in China, but the Japanese Government has expressed objection to the Minister's consent being required in all cases before a prosecution can be initiated. This stipulation is only contained in the 1899 Order in Council, and does not appear in that of 1904.

Article 69 of the 1904 Order, however, introduces a new element by necessitating a proof in Court that equal opportunities are given in the foreign Court concerned for punishing offences against British trade-marks. In Sir E. Grey's opinion no such proof ought to be required where His Majesty's Government have Agreements in force with foreign Powers for the reciprocal protection of trade-marks, &c.

The Orders in Council at present in force contain no provision making the institution of a civil suit by a foreigner against a British subject to recover damages for infringing a trade-mark dependent on foreign Courts providing similar facilities; the proviso being limited to criminal proceedings. Article 4 has been framed to meet this point.

The list of Acts mentioned in the clause has been slightly added to at the

suggestion of the Board of Trade, and the provision, rendering proof of the exhibition of those Acts a condition precedent to a prosecution, has been omitted in the case of Acts which are now and have been for some time exhibited in the offices of the Consulate.

Article 5. The object of the change that has been made by the wording of sub-Articles (1), (3), and (4), as compared with Article 75 of the principal Order, is to include persons stirring up disaffection against the Japanese in Corea.

Sub-Article (2) has been framed to meet the case of Companies publishing newspapers in China where none of the individuals connected with or employed by the Company is amenable to British jurisdiction, though the Company has been registered in a British possession and enjoys a British status in consequence.

Newspapers owned by such Companies registered in Hong Kong have been a source of considerable trouble in some of the Treaty ports in China. The Article is concurred in by the Secretary of State for the Colonies.

Article 84 of the 1904 Order has become a dead letter because the Government of Hong Kong refuse to receive persons deported from China; and therefore they cannot, under Article 83 (4), be sent there. On the other hand, from some of the Treaty ports in China it is extremely inconvenient to deport persons to the country to which they belong without their being transhipped at Hong Kong, and Article 6, which has been drafted by the authorities of that Colony, will enable such persons to be more easily dealt with there. The terms of the Article appear to Sir E. Grey to be warranted by section 8 of "The Foreign Jurisdiction Act, 1890."

Articles 7, 9, 10, 11, and 12 are inserted at the suggestion of Sir H. de Sausmarez, the Judge of His Majesty's Court at Shanghai, for reasons which he gives in his despatch No. 9 of the 3rd April, 1906 (Paper (D)).

Article 8 introduces a change which has been inserted in several recent Foreign Jurisdiction Orders in consequence of a case that arose in the Ottoman Empire, where the executor to a large estate, finding it cheaper to pay the fine, refused to take out probate.

Article 13 has been inserted because it has been found, in the course of a general codification of the subordinate legislation in force in China that is now being undertaken, that the penalties prescribed in Article 155 (3) of the 1904 Order are inadequate, and are less than those imposed in some cases by the Regulations in force.

Article 14 substitutes approval by the Secretary of State for approval by His Majesty the King, so as to place King's Regulations in China on the same footing as those enacted under other Foreign Jurisdiction Orders.

Article 15 has been inserted because the Judge of His Majesty's Supreme Court at Shanghai (Sir H. de Sausmarez) entertains a most lively objection to the existing Article 27 of the 1904 Order, which is inserted under the heading of "Jurisdiction of the Courts," and appears to direct the Judge of the Court, *quid* Judge, to interfere in disputes which have not been made the subject of litigation. Article 27 has therefore been repealed and re-enacted, so as to impose the duty of endeavouring to effect reconciliation on the Consular officers concerned in their Consular and not in their Judicial capacity.

The repeal of "The China and Corea (Supreme Court) Order in Council, 1900," was, so far as Sir E. Grey can ascertain, omitted from "The China and Corea Order, 1904," by mistake.

I have the honour to request that you will take the two draft Orders into your consideration, together with the papers noted in the accompanying list, and favour Sir E. Grey with your opinion as to whether their terms are fit and proper for submission to the King in Council for His Majesty's approval.

Sir E. Grey will at the same time be glad to receive any observations of a general nature which you may be good enough to offer.

I have, &c.
(Signed) ERIC BARRINGTON.

*List of Papers.*

(A.) Sir E. Satow	(No. 7)	January	6, 1906.
(B.) Ditto	(No. 37)	January	25, "
(C.) Mr. Cockburn	(No. 1, Treaty)	January	26, "
(D.) Sir H. de Sausmarez	(No. 9)	April	3, "
(E.) Colonial Office		May	30, "
(F.) Ditto		September	21, "
(G.) Sir H. de Sausmarez	(No. 20)	September	28, "
(H.) Board of Trade		November	27, "
(J.) Draft "China and Corea (Amendment) Order in Council, 1907." Revise of December 21, 1906.			
(K.) Draft "Corea Order in Council, 1907." Revise of July 3, 1906.			

Report.

In our opinion the terms of the two draft Orders, as initialled by us, are fit and proper for submission to the King in Council for His Majesty's approval.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
February 6, 1907.

[NOTE.—"The China and Corea Order in Council, 1907," is printed in Confidential 8887*. The Corea Order in Council is in Confidential 8886*.]

CONGO.

No. 6.

[537]

[February 20, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen, *Foreign Office, February 4, 1907.*

Right of
this country
to exercise
extra-terri-
torial juris-
diction in
the Congo
Free State.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to request that you will be so good as to take into your consideration the papers noted on the accompanying list relating to the right of His Majesty's Government to establish Consular Courts in the Congo Free State.

You are no doubt aware that the maladministration in the territory of the Free State has attracted a great deal of public attention in this country of recent years, and suggestions have from time to time been made both to the Marquess of Lansdowne and to Sir Edward Grey that the establishment of British Consular Courts in the Congo Free State would have a very salutary effect upon that Government.

Before committing himself in any way, however, for or against the proposal, Sir Edward Grey is anxious to obtain your opinion as to certain points connected therewith.

The foundation of any claim on the part of His Majesty's Government to the exercise of extra-territorial jurisdiction in the Free State must be the Convention between this country and the International Association of the Congo of the 16th December, 1884 (Paper A).

Part of the preamble of that document runs:—

"And whereas it is expedient to regulate and define the rights of British subjects in the territories of the said Free State, and to provide for the exercise of civil and criminal jurisdiction over them, in manner hereinafter mentioned, until sufficient pro-

vision shall have been made by the Association for the administration of justice among foreigners, &c. It is hereby agreed as follows:—"

Later, in the body of the Convention, Article V provides that: "Every British Consul or Consular officer within the said territories, who shall be thereunto duly authorized by His Britannic Majesty's Government, may hold a Consular Court for the district assigned to him, and shall exercise sole and exclusive jurisdiction, both civil and criminal, over the persons and property of British subjects within the same in accordance with British law."

By Article III Great Britain is entitled to most-favoured-nation treatment.

A despatch (Sir A. Hardinge's No. 1, Africa, of the 2nd January, 1907 (Paper B)) from His Majesty's Minister at Brussels gives a useful summary of the provisions of the various Treaties in force between the Free State and other Powers in regard to extra-territorial jurisdiction, and the full text of these documents will be found in the accompanying volume of "Hertslet's Map of Africa by Treaty." You will observe that there is no passage in the Italian Treaty, which has no preamble similar to that in the British Treaty, suggesting that the right to establish Courts is only temporary, and the question arises whether, if Italy's rights in this respect are unqualified, Great Britain is not placed by the most-favoured-nation clause in the same position.

In 1890 the Congo Government approached His Majesty's Government with a view to the surrender by the latter of their rights to extra-territorial jurisdiction. It was pointed out by the Congo Government that those rights were no longer essential to the interests of foreign residents in the Independent State, and that the Congolese Courts had then been in existence for four years, and had given satisfaction to the resident subjects of all the foreign Powers having Treaty rights with the Free State. After careful consideration of the matter His Majesty's Government decided that, in order as far as possible to meet the wishes of the Congo Government, they would abstain from establishing Consular Courts, though they would not abandon their right to do so should circumstances render that course necessary. A reply in this sense was returned to the Congolese overtures, and His Majesty's Consul at Boma was at the same time instructed not to exercise extra-territorial jurisdiction unless he should receive special instructions to that effect. No such instructions have been issued.

Considerable difficulties would be met with if His Majesty's Government endeavoured to justify the establishment of Consular Courts on the ground that "sufficient provision had not been made for the administration of justice among foreigners." The legal and judicial machinery in the Free State has been steadily developed during the twenty years of the State's existence, and is, on paper, quite as complete as those of other Central African territories, nor would it be easy for the Secretary of State to instance a series of miscarriages or denials of justice to British subjects that would enable him to say that the Courts were completely failing in the purpose for which they were created.

The only substantial point that has been made against the legal system in the Congo is that the Courts have always acted in subordination to the Executive in that the Procureur d'Etat is dependent on orders from the Governor-General as regards proceedings against foreigners, but here again Sir E. Grey can cite no case in which a British subject has suffered serious injustice in consequence of this system, and the complaint could only be made against the principle. The Commission of Inquiry recommended in their Report that the Procureur d'Etat should act independently of the Governor-General in all cases except that of an offence against the security of the State. Sir Edward Grey is not aware whether the recommendation of the Commission was adopted and enforced by Decree, but it is obvious that the exception in favour of "offences against the security of State" would lend itself to abuse.

If therefore any attempt is now to be made to set up an extra-territorial jurisdiction in the Free State it is of great importance to know how far the wording of the Preamble to the Convention of 1884 qualifies the specific provision of Article V of the Treaty, and whether the absence of any such statement in the Preamble of the Italian Convention coupled with the most-favoured-nation clause in the British Treaty improves the position of His Majesty's Government.

Another point which arises in this connection is whether the Congo Free State would be able to claim as a matter of right under Article XII of "The Act of Berlin, 1835" (to which the Congo State adhered), arbitration on the question whether His Majesty's Government were entitled to set up extra-territorial Courts.

If it can be said that the right of His Majesty's Government to set up such Courts is perfectly clear Sir Edward Grey conceives that arbitration might possibly be



avoided on the ground that the objection of the Free State Government did not amount to a "serious disagreement" within the meaning of Article XII.

It is not improbable that debates on the subject of the Congo may take place in Parliament at an early date in the forthcoming Session, and accordingly if it should be possible for you to furnish your Report before the opening of Parliament, or soon after that date, this would be of the greatest assistance to the Secretary of State.

I am therefore to request that you will be so good as to take these papers into your consideration, and furnish Sir E. Grey with your opinion—

1. Whether His Majesty's Government are entitled under the Convention of 1884 to establish at the present time Consular Courts in the Congo Free State;

2. Whether, if His Majesty's Government assert such a claim, the Congo Free State would be entitled under the Berlin Act, 1885, to demand as of right that the question should be referred to arbitration.

Sir E. Grey will also be glad to receive any further observations of a general nature which you may be good enough to offer on the papers submitted to you herewith.

I have, &c.
(Signed) ERIC BARRINGTON.

List of Papers.

(A.) Convention between His Majesty's Government and the Congo Free State...	(Africa, No. 5, 1885)	December 15, 1884.
(B.) Sir A. Hardinge [537/07]	 No. 1, Africa	January 2, 1907.
(C.) Map of Africa by Treaty (not sent).		
(D.) Minutes by Mr. Pearson and Mr. Hurst [28602/06]	.. ..	June 28, 1906.
(E.) Memorandum, A.W.C. [Confidential No. 8846]	.. ..	December 13, "
(F.) Memorandum communicated by Belgian Minister	.. ..	March 28, 1890.
(G.) To Lord Vivian	 No. 91, Africa	April 23, "

[5755]

Report.

1. In our opinion His Majesty's Government are entitled to establish at the present time Consular Courts in the Congo Free State, though having regard to the total disuse of that right on our part, and to the numerous cases in which we have acknowledged the jurisdiction of the Congolese Courts, a Court of Arbitration might erroneously, though not improbably, take a different view.

The power to establish such Courts under Article V of the Convention of 1884, is a matter of some doubt, owing to the words in the Preamble which show that the parties to the Convention only contemplated the operation of Article V until the Association had itself made sufficient provision for the administration of justice among foreigners, but we think that the operation of clause 3 (most-favoured-nation clause) gives this country all benefits conferred upon Italy by the Treaty of the 19th December, 1884. In that Treaty the right to establish Consular Courts is not qualified by words like those appearing in the Preamble of the English Treaty, and Great Britain accordingly possesses the right in question under Article III, if not under Article V. The fact that the two Treaties were negotiated together appears to indicate that the English Treaty was not to have the narrow construction which might be implied from the Preamble but which would be inconsistent with the unqualified right appearing in the Italian Treaty.

2. We think that if His Majesty's Government assert the claim in question, the Congo Free State would be entitled to demand as of right that the question be referred to arbitration under Article XII of "The Berlin Act of 1885."

(Signed) JOHN L. WALTON.
W. S. ROBSON.

*Law Officers' Department,
February 20, 1907.*

[1558]

No. 7.

[March 25, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, February 6, 1907.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you certain letters that have been received from the Congo Balolo Mission with reference to the difficulties that they have experienced with regard to the sites of their Mission stations in the Congo Free State, and also with regard to the obstacles that have been placed in their way in acquiring sites for new stations.

With the details of these various cases Sir E. Grey does not propose to trouble you; the question on which he desires to be furnished with your opinion is as to the construction and interpretation that His Majesty's Government are entitled to place on the provisions of the Berlin Act and of the Anglo-Congolese Convention of 1884, giving British subjects the right to buy and hold land in the Free State.

Article V of the Berlin Act says (as to the conventional basin of the Congo):—

"Foreigners without distinction shall enjoy the right of acquiring and transferring movable and immovable possessions."

Article II of the Convention of 1884 between His Majesty's Government and the International Association of the Congo says:—

"British subjects shall have at all times the right of sojourning and of establishing themselves within the territories which are or shall be under the government of the said Association . . . especially they shall have the right of buying or selling . . . lands and buildings . . ."

In the early days of the Independent State waste and ownerless lands were declared to be vested in the State (see Decree of the 1st July, 1885, Paper C). Similar steps have been taken in other Central African territories, including the British Protectorates of East Africa, Uganda, and British Central Africa, and as the effect is merely to give the central Power complete control over the land, no objection can be taken to such enactments. Since that time what is known as the Concession system has been introduced in the Congo Free State, and at the present time practically the entire area of the State is vested either—

- (a.) In the Sovereign personally, who works the rubber for his personal benefit; or
- (b.) In the State itself, and the rubber is worked for the benefit of the State; or
- (c.) In trading Companies who have received grants of the land which make them for a limited time proprietors; or
- (d.) Vested technically in the State, but virtually in trading Companies who have received grants of an exclusive right of "exploitation" of the forest produce.

The trading Companies referred to in both (c) and (d) are to a great extent under State control; the State holds, it is believed in all cases, a substantial portion of the share capital, and as the rights of the Companies in the land are limited both in time and in interest, it is probably the case that without State co-operation they could not grant a permanent interest in any particular piece of land for the purpose of establishing a Mission station, even if they were willing to do so. There can be no doubt, however, that the Protestant missionaries, on account of their activity, their independence, and their fearless championship of the rights of the natives, have been found an inconvenience by the Congo Government and its Sovereign, and no assistance will be forthcoming from the Congo Government for any extension of the labours of the Protestant missionaries. It may safely be assumed that this is the real reason of the difficulty the Congo Balolo Mission have experienced with regard to the sites of their existing or contemplated Mission stations.

A letter from the Baptist Missionary Society bearing on the same subject is also included in the papers, from which it will be seen that grants of land are not refused to Roman Catholic Missions in districts where they are refused to the Protestants, despite the fact that Article VI extends equal encouragement to the missionaries of all denominations.

[509]

E



The position is, therefore, briefly, that all the land in the Congo Free State is vested in the Sovereign, in the Government, or in trading Companies under effective Government control, and that the Government give the Protestant missionaries little or no facilities for securing sites for Mission stations, though they (the Government) prefer the method of offering impossible swamps to a definite refusal of any land at all for such sites.

The allegation has been made by M. Cattier, a recent Belgian writer on affairs in the Congo Free State, that it is by adopting a similar method in the so-called "Free Zone" of the Crown lands, *i.e.*, by refusing to grant any land for the erection of factories for independent traders, that the Government has succeeded in preserving the whole rubber trade there in its own hands, though the rubber trade in the district is nominally free to all.

The Congo Balolo Mission have appealed to the Secretary of State for diplomatic assistance, and it has therefore become a matter of great importance to know what is the precise effect of the Treaty provisions referred to above giving the British subjects the right to buy and hold land in the Congo Free State.

It is obvious that these provisions cannot mean that an individual land-owner can be compelled to sell his land to a would-be British purchaser against his will. It does not follow, however, that the same rule applies where the owner of the land is the State that made the Treaty, and it may reasonably be urged that a person anxious to acquire land at a particular place may look to the State to sell him that land at a reasonable price, unless the State can prove that the site in question is required for its own use.

Even, however, if this view should be, in your opinion, correct, it would not benefit the Missionary Societies in the districts where either the land or the use of the land has been granted to trading Companies, which theoretically are independent bodies, and the question arises whether any further assistance can be obtained from the Treaties.

At the time when these Treaties were made the Concession system was unknown, and in all civilized countries land was held in parcels of all sizes—great and small.

It has been, however, the custom in certain countries, *e.g.*, at one time in the United Kingdom, to exclude aliens from the ownership of land.

As owners of land are entitled, if they so desire, to sell their property, it usually happens that a foreigner anxious to buy land can, unless excluded because he is an alien, find in any European country land for sale suitable for his purpose. The primary purpose, therefore, of the Treaty provisions referred to above probably was to prevent the enactment in the Free State of laws excluding foreigners from the tenure of land, but the question arises whether they imply anything more.

Mr. Hurst, the Assistant Legal Adviser to this Department, has expressed the opinion, and Mr. Davidson, the Legal Adviser, is inclined to take the same view, that the stipulations with regard to land presuppose that the land system to be introduced would be on lines similar to those of European countries under which land is a marketable commodity, and impliedly exclude a system under which no land can be bought at all by any one.

This view has been set out in various Minutes, included in the papers herewith, to which I am to invite your attention.

If you think that this view is sound, it would be possible for Sir E. Grey to approach the Congo Government and urge that land for Mission stations should be sold to the Societies or to traders where the land is not required for other purposes.

I am to request that you will take these papers into your consideration and furnish Secretary Sir E. Grey with your opinion as to what is the true interpretation and effect of the stipulations as to the purchase of land by British subjects in the Berlin Act and the Anglo-Congolese Convention.

The Secretary of State would also be glad to receive such observations of a general nature as you may be good enough to offer.

I have, &c.
(Signed) ERIC BARRINGTON.

List of Papers.

(A.) Agreement between Great Britain and the International Association of the Congo "Africa No. 5 (1885)" [Treaty Library No. 745]	..	..	December	16, 1884.
(B.) Berlin Act, 1885 (not sent).	..	..	..	..
(C.) Decree of Congo Free State respecting unoccupied lands	..	..	July	1, 1885.
(D.) Dr. Guinness (Congo-Balolo Mission)	..	..	January	28, 1904.
(E.) Minutes on above letter.	..	..	..	..
(F.) Acting Consul Nightingale (Boma)	..	(No. 14. Africa)	March	14, 1904.
(G.) Dr. Guinness ..	..	..	December	20, 1905.
(H.) To ditto ..	..	..	March	20, 1906.
(I.) Mr. E. D. Morel (Congo Reform Association)	..	16567/06	May	12, 1906.
(J.) Sir A. Hardinge (Brussels)	..	(No. 59. Africa) 19158/06	June	1, ..
(K.) " " ..	..	(No. 61. Africa) 19382/06	June	5, ..
(L.) " " ..	..	(No. 66. Africa) 20711/06	June	15, ..
(M.) Dr. Guinness ..	..	..	June	22, ..
(N.) Mr. E. D. Morel ..	..	..	June	22, ..
(O.) Baptist Missionary Society	..	..	January	12, 1907.

[9997]

Report.

The purpose and effect of Articles V and VI of the Berlin Act and Article II of the Anglo-Congolese Convention have a much wider scope than merely to prevent aliens from being placed under a legal disability to own or occupy land in the Congo. The provisions of the Berlin Act are in our opinion intended to secure fair and equal opportunities for the acquisition of land and the carrying on of trade or mission work to the subjects of all the Signatory Powers, and under Article II of the Convention there is a further express recognition of the right of British subjects to acquire lands. From the papers before us it seems clear that such opportunities are not now accorded to British subjects in the Congo Free State, either in respect of trade or religious work.

It is difficult to maintain that the effect of the above Treaty provisions is to compel the Congo Free State to set up any particular land system of the kind existing in European countries, but we think that in adopting a land system suitable to its condition that State must not allow such a system to operate so as to interfere with the performance of its Treaty obligations. Thus the State may properly declare itself the owner of all vacant or public land, and may exact a reasonable price from any person who desires to trade or settle on such land, but it clearly may not treat the vast State domain as though it were identical in character with a merely private property over which no one but the owner has any rights. To do that would directly and completely nullify the Treaties upon the faith of which the Congolese Government was allowed to assume possession.

It is impossible to draw the precise line at which the exercise by the State of its rights of ownership may come into definite conflict with its Treaty obligations to foreigners. It is a matter of degree. The State may sell lands and grant trading Concessions, perhaps upon a very considerable scale, so long as it acts impartially as between its own subjects and those of all the Signatory Powers, and does not in effect close the country to general trade, exploitation, and settlement on the part of the subjects of those Powers.

But there appears to us to be no doubt on the facts before us that the Congo Free State have used their administrative rights, in regard to the ownership of land and the granting of Concessions, in such a way as to defeat the Treaty rights of foreigners to trade and settle in the Congo.

The case with regard to missions and missionaries appears to be even stronger than the case as to trading rights. Article VI of the Berlin Act declares that Christian missionaries and their property shall be objects of a special protection, and that their right to build edifices and organize missions shall not be limited or fettered in any way whatsoever.

Missionaries are therefore entitled to carry on their work wherever natives are to be found, and especially in or near villages or Settlements. For this purpose they are entitled to acquire a reasonable quantity of land which may not be required for the purposes of the State, and the Government ought not to grant any Concessions, or



1907

16

CONGO.

make any extensive disposition of State property, which does not preserve this Treaty right to Christian missionaries.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
March 25, 1907.

No. 8.

[18183]

[July 3, 1907.]

Foreign Office to the Law Officers of the Crown.

Lado
Enclave in
Congo Free
State:
Terms of
lease.

Gentlemen,

Foreign Office, June 3, 1907.

I HAVE the honour to transmit to you herewith, by direction of Secretary Sir Edward Grey, the accompanying question asked in Parliament by Mr. Fell on the 27th ultimo, together with the answer which he returned to it, relative to the terms on which the territory known as the Lado Enclave is leased to the Independent Congo State.

I have also the honour to inclose other papers bearing on the subject, as noted in the margin of this letter.

You will observe that, by the Agreement between Great Britain and the Independent Congo State, signed on the 12th May, 1894 (Paper B), the former grants (Article II, paragraph 1) to His Majesty Leopold II, Sovereign of the State, a lease of certain territories defined in paragraph 2 of the same Article for the period of time specified in paragraph 3, viz., "during the reign of His Majesty Leopold II, Sovereign of the Independent Congo State."

The territories so leased may be found on the inclosed map (Paper D), surrounded by a mauve line.

By paragraph 4 of the same Article it is stipulated that the above lease shall nevertheless remain in force at the expiration of His Majesty's reign as far as a certain portion of these territories is concerned. The Lado Enclave was not, however, included in this portion, and the lease of it is therefore governed by the terms of paragraph 3 of this Article, and terminates with "the reign of His Majesty Leopold II, Sovereign of the Independent Congo State."

By paragraph 5 it is provided that "this extended lease shall be continued so long as the Congo territories, as an independent State or as a Belgian Colony, remain under the sovereignty of His Majesty or His Majesty's successors," but this paragraph, as we have seen above, does not concern the Lado Enclave.

By Article I of the Agreement between the same parties, signed on the 9th May, 1906 (Paper C), the above lease is annulled as regards all the territory in question, except the Lado Enclave, which King Leopold is to "continue during his reign to occupy on the same conditions as at present," conditions, as above said, which are laid down in Article II, paragraph 3, of the former Agreement.

Before answering the question whether the transfer of the territories of the Independent Congo State to the Belgian Government will affect the lease of the Lado Enclave, it is clearly necessary to know the precise meaning to be attached to the phrase "the reign of His Majesty Leopold II, Sovereign of the Independent Congo State."

Is this expression to be taken as referring to the exercise of His Majesty's sovereignty over the territories now comprised in that State so long only as it preserves its present political status, and as excluding the exercise of that sovereignty over the same territories should they cease to form the Independent Congo State and become a Belgian Colony?

Or—in view of the fact that His Majesty is here spoken of as "Leopold II," a title which he may be held to enjoy only as King of the Belgians, since he is the first Sovereign of the Independent Congo State—is it intended that his occupation of the Lado Enclave should continue till the end of his reign over Belgium, and such dependencies as that country may possess?

If the former interpretation is correct, the lease of the Lado Enclave would appear to terminate automatically with the cessation of the existence of the Independent Congo State as a State and the transfer of its territories to the Belgian Government.

CONGO.—COREA.

17

If the latter explanation is the true one, the lease would end only with the reign of Leopold II, King of the Belgians.

The nature of the reply to the second question raised by Mr. Fell would presumably be determined by the interpretation of the doubtful phrase. If the first is adopted, that reply would be in the negative; if the second, in the affirmative.

I am to request that you will take these papers into your consideration, and that you will favour Sir E. Grey with your opinion as to what meaning should be attached to the expression in question.

I have, &c.
(Signed) LOUIS MALLET.

List of Papers.

- (A.) Mr. Fell's Question in Parliament, May 27, 1907.
(B.) Agreement of May 12, 1894. [Library No. 944.]
(C.) Agreement of May 9, 1906. [Library No. 1229.]
(D.) Map.

[22075]

Report.

The words "This lease shall remain in force during the reign of His Majesty Leopold II, Sovereign of the Independent Congo State," used in Article 2 of the Agreement of the 12th May, 1894, refer to the reign of His Majesty as Sovereign of the Independent Congo State, and the lease of the Lado Enclave will terminate automatically with the cessation of the existence of the Independent Congo State as a State and the transfer of its territories to the Belgian Government.

It is true that the words "Leopold II" are only applicable to His Majesty as King of the Belgians, but we think that the use of those words is merely designatory, and that the capacity in which His Majesty King Leopold contracts is intended to be indicated by the expression "Sovereign of the Independent Congo State."

The contingency of His Majesty ceasing to be Sovereign of the Independent Congo State was foreseen by the framers of the Agreement, and provision is made in Article 2 for the continuance of the lease over part of the area in that event, but the Lado Enclave is excluded from that provision.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
July 3, 1907.

COREA.

[21624]

No. 9.

[August 23, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 6, 1907.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you the papers noted on the accompanying list on the subject of the proposed prosecution under the provisions of "The China and Corea (Amendment) Order in Council, 1907," of Mr. E. T. Bethell, a British subject resident in Corea, for the publication of articles calculated to stir up bad feeling against the Japanese Government.

His Majesty's Government are desirous to do all in their power to meet the wishes in the matter of the Japanese Government, who have made representations on the

[509]

F

Mr. E. T.
Bethell's
seditious
newspaper
articles.



subject, and instructions were therefore issued on the 27th ultimo to Mr. Cockburn, His Majesty's Consul-General at Seoul, to take proceedings against Mr. Bethell under Article 5 of the Order in Council, provided that the published matter complained of constituted, in his opinion, an offence against that Article, and provided that the Crown Advocate at Shanghai advised that it was reasonably strong and the prosecution was likely to succeed (see telegram No. 1 to Mr. Cockburn attached, paper (D)).

I am to state that no copies of the articles already published by Mr. Bethell have been received in this Department, but that, in any case, it is only intended that proceedings shall be instituted against him after the formalities necessary to bring the Order in Council into operation have been complied with, and then only in the event of the publication of further articles of a character which, in the opinion of the Acting Crown Advocate, brings the printer, publisher, or vendor thereof within the language of Article 5 of the Order.

Article 5 (3) runs as follows:—

"Matter calculated to excite tumult or disorder, or to excite enmity between His Majesty's subjects and the Government of China or the Government of Korea, or the authorities or subjects of any Power in amity with His Majesty, being within the limits of this Order, or between the Government of China and its subjects, or the Government of Korea and its subjects, shall be deemed to be seditious matter within the meaning of this Article."

Article 5 (1) runs thus:—

"Every person subject to the criminal jurisdiction of the Court who prints, publishes, or offers for sale any printed or written newspaper or other publication containing seditious matter shall be guilty of a grave offence against the principal Order, and may, in addition to, or in lieu of, any other punishment, be ordered to give security for good behaviour, and in default thereof, or on a further conviction for the like offence, he may be ordered to be deported."

Mr. Cockburn has now drawn attention to the fact that the articles in Mr. Bethell's newspaper are published in the Korean language, are not intended for the perusal of British subjects, and have no circulation among them; and he mentions that the first clause of section 3 of Article 5 has not hitherto been considered a safe basis for proceeding. Mr. Cockburn raises the question whether a conviction could be obtained under Article 5 of the Order in Council (papers (I) and (J)); and he suggests the advisability of avoiding difficulties by passing a brief amended Order in Council, placing Japanese officials in Korea on the same footing as the Korean Government. On the other hand, the Crown Advocate in China and Korea considers that the first clause of section 3 of Article 5 of the Order in Council of 1907 is wide enough to cover the circumstances in a proper case.

The case appears to Sir E. Grey to stand as follows:—

The offence of publishing seditious matter (as defined by Article 5 (1) and (3) of the Order in Council of 1907) has been committed if the newspaper articles contain matter calculated—

- (a.) To excite tumult or disorder; or
- (b.) To excite enmity between—
 - (i.) His Majesty's subjects and the Government of China; or
 - (ii.) His Majesty's subjects and the Government of Korea; or
 - (iii.) His Majesty's subjects and the authorities or subjects of any friendly Power (which would clearly include Japan); or
 - (iv.) The Government of China and Chinese subjects; or
 - (v.) The Government of Korea and Korean subjects.

If any matter has in fact any of the tendencies above described, the language in which such matter is published (e.g., Korean, Chinese, Japanese, or English) is, in Sir E. Grey's opinion, wholly immaterial.

As stated above, this Department is not in possession of any specimens of the published matter complained of, and the question whether or not the matter published is calculated to produce any of the specified mischievous results is of course one which must be determined by the Supreme Court (see Article 5 (4) of the Order in Council).

Assuming, however, that these articles published in the Korean newspaper are of an unequivocally inflammatory or revolutionary type, and are directly aimed against the existing Japanese Administration in Korea, it would appear that Mr. Bethell has committed

offences which would justify and support a prosecution under the Order in Council of 1907, Article 5 (1) and (3), for the publication of seditious matter, since he might properly be charged with the commission of at least two distinct classes of offence, namely:—

(1.) The publication in a newspaper of matter calculated to excite tumult or disorder.

(2.) The publication in a newspaper of matter calculated to excite enmity between the Government of Korea and its subjects.

Having regard to recent political events in Korea, the result of which is that the *de facto* Government of Korea will be largely administered by Japanese officials, both as regards home or internal policy and foreign or external policy, although the nominal or titular Head of the Government continues to be the Emperor of Korea (paper (K)), it appears to Sir E. Grey that Mr. Bethell, in publishing articles tending to produce hatred and contempt of Japanese administration, and inciting Koreans against the tolerance of such administration, has clearly brought himself within the terms of the Order in Council, and has published "matter calculated to excite enmity between the Government of Korea and its subjects."

If this view be upheld, the fresh legislation suggested by Mr. Cockburn would seem unnecessary, and in any case Sir E. Grey would be reluctant to agree to such a course, as it would be obvious that the measure was taken *ad hoc* and *ex post facto*, and it might therefore be considered to have a somewhat vindictive appearance.

I am to request that you will take these papers into your consideration, and that you will be so good as to favour Sir E. Grey with your opinion whether proceedings could, with reasonable prospect of success, be taken under the Orders in Council of 1904 and 1907 in a proper case, or whether an amending Order would have to be issued as suggested by Mr. Cockburn. Sir E. Grey will be glad to be favoured at the same time with any other general observations that may occur to you as likely to assist him in dealing with the case. It will be seen from the last telegram received from Mr. Cockburn (paper (L)) on the subject that the Japanese Government are desirous to have the matter settled as soon as possible, and I am to request that the matter may therefore be treated as one of urgency, so that instructions can be telegraphed at an early date to Mr. Cockburn.

If it would, in your opinion, be likely to facilitate or expedite matters, and if you deem it advisable, Sir E. Grey will be happy to depute Mr. Kenrick, Acting Assistant Legal Adviser in this Department, to see His Majesty's Attorney-General and discuss this matter with him.

I have, &c.
(Signed) W. LANGLEY.

List of Papers.

(A.)	"China and Korea Order in Council, 1904."	[Conf. 8278*.]		
(B.)	"China and Korea (Amendment) Order in Council, 1907."	[Conf. 8887*.]		
(C.)	"Korea Order in Council, 1907."	[Conf. 8886*.]		
(D.)	Mr. Lowther	(No. 72)	May 13, 1907.	
(E.)	Ditto	(No. 21. Telegraphic)	May 22, "	
(F.)	To Mr. Lowther	(No. 120)	May 27, "	
(G.)	Mr. Cockburn	(No. 7. Telegraphic)	June 3, "	
(H.)	Ditto	(No. 23)	June 8, "	
(I.)	Ditto	(No. 10. Telegraphic)	June 22, "	
	(D) to (I) with papers and Minutes attached.)			
(J.)	Ditto	(No. 11. Telegraphic)	July 1, "	
(K.)	Japanese Ambassador		July 26, "	
	(In copy, with Minutes.)			
(L.)	Mr. Cockburn	(No. 19. Telegraphic)	July 29, "	

[26184]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 8, 1907.

WITH reference to the letter from this Department of the 6th instant regarding the proposed prosecution under the provisions of "The China and Korea (Amendment)



1907

20

COREA.

Order in Council, 1907," of Mr. E. T. Bethell, I am directed by Secretary Sir Edward Grey to transmit to you herewith for your consideration two further papers upon the subject.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

Mr. H. C. Lowther ..	..	..	..	..	(No. 147)	June 29, 1907
Mr. Cockburn ..	..	..	..	..	(No. 32)	July 4, "

[26666]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 12, 1907.

IN continuation of the letter from this Department of the 8th instant, I am directed by Secretary Sir Edward Grey to transmit to you herewith, for your consideration, four further papers with regard to the case of Mr. Bethell.

I am to state that Sir E. Grey would be grateful if you could furnish him with your opinion as soon as possible.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

Sir C. MacDonald ..	..	..	..	(No. 32. Telegraphic.)	August 8, 1907
To ditto ..	..	..	..	(No. 28. Telegraphic.)	" 11, "
Mr. Cockburn ..	..	..	..	(No. 21. Telegraphic.)	" 9, "
Ditto ..	..	..	..	(No. 22. Telegraphic.)	" 10, "

[28738]

Report.

Without any opportunity of perusing the articles in question, it is impossible to express a definite opinion as to whether or not their publication would constitute an offence under the Orders in Council of 1904 and 1907. We think, however, that the provisions of the Orders referred to make fairly clear the principles to be applied in considering whether or not Mr. Bethell's articles contravene the law.

Under Article 75 of the Order of 1904, the article must not be such as would excite tumult and disorder. Whether or not they have that character depends not merely on the sort of language used, but also on the character of the population to which it is addressed, and the general circumstances of the time. Language that might in England be quite properly employed by way of political propaganda without any danger to the public peace might have a different effect in Corea, and an Englishman editing newspapers in Corea must regulate the tone of such papers not by reference to what would be permissible in England, but to what would be safe under all the circumstances in Corea. Under the same provision (Article 75 of the Order of 1904) the articles must not be such as would be calculated to excite enmity between the Government of Corea and its subjects. This provision must be considered in the light of the Agreement between the Governments of Japan and Corea, by which the actual responsibility of executive and legislative Government rests ultimately with Japan, under whose guidance the Korean authorities must now act. Any attempt, therefore, to excite enmity among Koreans against the Japanese in relation to their policy or position in Corea may be construed as an attempt to excite enmity against the Government of Corea.

The Order appears intended to give effect to the reasonable principle that foreigners enjoying the privilege of a special jurisdiction exempting them from local laws shall not embarrass the local Government by propaganda which may be productive of discontent or disorder among the natives of the State.

The observations above made in reference to Article 75 of the Order of 1904 apply also to Article 83 of the same Order.

COREA.—EGYPT.

21

The Order of 1907 does not seem to make any substantial advance upon the Order of 1904. That Order makes it an offence to excite enmity between British subjects and the authorities, or subjects of any Power in amity with His Majesty; but a very different measure would be applied in considering articles addressed to British subjects as compared with articles addressed to Koreans. Proceedings may be taken under either Order which is in force at the time of the offence.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
August 23, 1907.

EGYPT.

[41507]

No. 10.

[February 6, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, December 11, 1906.

I HAVE the honour, by direction of Secretary Sir E. Grey, to state that a question has recently arisen in Egypt as to the method in which offences committed by natives against members of the Army of Occupation should for the future be dealt with.

Under a Khedivial Decree, dated the 25th February, 1895, it is provided that a Special Tribunal may, at the instance of the General Officer Commanding the Army of Occupation, supported by the British Agent and Consul-General, be instituted to take cognizance of crimes and offences committed by natives against soldiers and officers of the Army of Occupation or against sailors of British ships of war stationed in any Egyptian port. This Tribunal is presided over by the Egyptian Minister of Justice, and the following officials are members of it:—

1. The Judicial Adviser to the Government of Egypt;
2. An English Judge of the Native Court of Appeal;
3. The officiating Judge Advocate of the Army of Occupation at Cairo or Alexandria; and
4. The President of the Native Tribunal at Cairo or the Native Tribunal at Alexandria.

The Articles of the Khedivial Decree explain the procedure to be adopted by the Special Tribunal, and define its powers.

The last occasion on which this Special Tribunal was called into existence was in June this year, when certain British officers of the Army of Occupation were attacked whilst shooting pigeons by the inhabitants of the village of Denshawai. One officer died from the effects of the wounds he received, while several others were severely handled by the villagers, and received wounds of a more or less serious nature.

During the subsequent proceedings before the Special Tribunal certain defects in the law were brought to the notice of His Majesty's Government, and they considered it necessary to devise some new system, which could be substituted for that at present in force.

With this object in view, proposals have been put forward by His Majesty's Agent and Consul-General in Cairo in a despatch of which a copy is inclosed herewith (Inclosure (A)), and His Majesty's Government are now considering Lord Cromer's suggestions, which entail, briefly, the substitution of a Military Court for the Special Tribunal provided for under the Khedivial Decree of 1895.

In this connection, I am also to transmit to you herewith (Inclosure (B)) a copy of a private letter from Lord Cromer addressed to Sir Edward Grey.

From the Report given by His Majesty's then Law Officers on the 16th August, 1883 (Inclosure (C)), in connection with the arrest of a Maltese British subject by the

[509]

G



French military authorities at Tunis for an offence committed against an officer of the French Army of Occupation, it is gathered that they considered that the right of an Army of Occupation to try by means of a Military Tribunal, with certain exceptions, offences committed against its members was generally recognized as a principle of international law, and I am accordingly to inquire, before proceeding further with the question, whether you concur in the opinion given in 1883, and, if not, in what respects you would desire to dissent from or to modify the views expressed by your predecessors in the Report in question.

I have, &c.
(Signed) E. GORST.

List of Papers.

(A.) Lord Cromer	.. (No. 186)	October 24, 1906.
(B.) Ditto to Sir E. Grey (Private) .. .. .	.. .. .	November 19, ..
(C.) Law Officers' Opinion (Tunis) .. .. .	.. .. .	August 16, 1883.

[4217]

Report.

We concur with the Report given by our predecessors in 1883.

We observe, however, in that Opinion it is said that if the occupation of Tunis by the French amounted to a permanent Protectorate, and the army was stationed there in support of such Protectorate, and Civil Courts had been established by the French Government, it might well be contended that the army had ceased to be an Army of Occupation in a foreign country within the ordinary sense of those terms. It may be said that, except as to the establishment of Civil Courts by England, the remarks just quoted would apply to the present situation in Egypt, and that therefore the then Law Officers would not, on the principles laid down by them, be disposed to treat the English army now in Egypt as an Army of Occupation in a foreign country.

We doubt, however, whether that inference can be fairly drawn from their Opinion, and, in any event, we think that the British army in Egypt, notwithstanding the permanent character of its occupation, ought still to be treated according to the principles of international law applicable to an Army of Occupation.

Perhaps the best parallel case is that of the occupation by the French of the Papal States prior to 1870. That occupation lasted for many years, and was clearly assumed to be of a permanent character, or at least to be intended to last so long as the general political situation then existing was likely to last, but, so far as offences against French soldiers were concerned, no distinction was made between their occupation and that of an army in a hostile State.

We think therefore that, according to acknowledged principles of international law, the British Government is entitled to constitute Military Tribunals to deal with attacks or offences affecting the safety or position of British soldiers in Egypt. Having regard, however, to the undoubtedly permanent character of the British occupation, it is desirable that every practical safeguard should be adopted to prevent such Tribunals from acting in excess of their jurisdiction.

We agree with the Opinion of our predecessors, that the jurisdiction in question should not be extended to the case of an offence against an individual member of the army, which arises merely out of some quarrel, and cannot properly be regarded as directed against him in his capacity as a soldier; but we think this distinction cannot be worked in practice except by intrusting some official with the duty of deciding, according to his own discretion, whether or not the case is one proper to be tried by the Military Tribunal.

We think therefore it should be left, as Lord Cromer suggests, to the British Diplomatic Agent to say, with regard to each case, whether it is within the jurisdiction of the army or should be dealt with by a Civil Court. The sentences should also be subject to the approval of a superior military authority and of the Secretary of State, or some other high civilian authority.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
February 6, 1907.

[7779]

No. 11.

[March 8, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, December 27, 1906.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you herewith the papers noted in the accompanying list which relate to the case of a French citizen named Gaston Thiriot, who was surrendered in extradition to France in July 1905, and who it is alleged has been tried and condemned for an offence other than that in respect of which his extradition was granted.

Thiriot was committed by the Presiding Magistrate at Bow Street Police Court on the 6th July, 1905, to await his surrender on the charge of being accessory after the fact to murder ("complicité d'assassinat"), his accomplice, Jean Baptiste Sauzat, being at the same time committed on the charge of murder and robbery ("assassinat et vol").

In May last, a communication was received from Mr. J. Davis, Solicitor, acting on behalf of Thiriot, alleging that at his trial on the 28th March, 1906, the accused had been sentenced to ten years' imprisonment on the charge of receiving, a charge on which his extradition had not been granted by His Majesty's Government (Paper A).

With the concurrence of His Majesty's Secretary of State for the Home Department, His Majesty's Ambassador was instructed on the 8th June last to bring the case to the notice of the French Government, and, should the statements made by Mr. Davis prove to be well founded, to point out to them that the trial and condemnation of Thiriot upon the further charge of receiving constituted an infraction of the Extradition Treaty between the two countries.

On the 24th July last Sir F. Bertie forwarded the reply of the French Minister for Foreign Affairs (Paper C). In this reply it is contended that Thiriot was not found guilty of any crime other than that in respect of which he had been surrendered, the note adding, "il a été inculpé de complicité par recel de titres obtenus à l'aide d'un assassinat suivi de vol."

The French Government further argue that no objection to the charge was raised by the accused at the trial, and that, moreover, his counsel had stated in the course of his defence, that he had no intention of taking advantage of the terms of the Extradition Treaty.

It is, however, open to very great doubt whether the statement made by Thiriot's counsel relieves the French Government of their obligations under Article IV of the Treaty. A similar question arose in connection with the case of Emile Arton, a French citizen, who was surrendered in extradition to France in 1896. The Legal Adviser to this Department was then decidedly of opinion that Arton could not, in so far only as they concerned himself, waive the stipulations of an international arrangement, and that this could only be done by mutual agreement between the High Contracting Parties thereto. Subsequently the matter was referred to the then Law Officers of the Crown, and I am to invite your attention to a Report furnished by them to the Home Office on the 25th November of that year (Paper D), in which the opinion is expressed that, as a matter of principle, an individual cannot waive the stipulations of a Treaty.

In the present case two questions were put to the jury at the trial:—

1. Is Thiriot guilty of having knowingly received the whole or a portion of the property stolen from the murdered person?
2. Was Thiriot when he received the property aware that the crime of murder had been committed at the time when it was stolen?

To the first question the jury replied in the affirmative, to the second in the negative.

The reply of the French Government was duly communicated to Mr. Davis, but he has since urged that further representations to the French Government in the matter should be made, and traverses the arguments contained in the note above referred to (Paper E).

Gaston Thiriot. As to offence for which tried being that for which he was extradited



His Majesty's Secretary of State for the Home Department has, however, consulted Mr. Marsham, the Metropolitan Police Magistrate at Bow Street who dealt with the case, and I am to invite your especial attention to the copy of his letter inclosed in the letter from the Home Office of the 10th October last (Paper F). It will be seen that Mr. Marsham considers that Thiriot was substantially tried and sentenced for the offence proved by the facts on which his surrender was granted, and sees no sufficient grounds for further representation to the French Government. You will, however, observe that, although His Majesty's Secretary of State for the Home Department, in forwarding Mr. Marsham's letter, cites the judgment in the case *ex parte* Piot (15 Cox, C.C., 208), in which it was ruled that, with regard to the interpretation to be placed upon section 3 (2) of "The Extradition Act, 1870," it is not the warrant but the depositions which must be looked to in order to ascertain the nature of the offence or crime, yet he hesitates to take the view that Thiriot's conviction on the charge of receiving the stolen property was within the provisions of the Extradition Act and Treaty. Copies of the latter are inclosed (Papers H and I).

I am accordingly to request that you will take the inclosed papers into your consideration, and that you will favour Sir E. Grey with your opinion:—

1. Whether the trial and conviction of Thiriot upon the charge of receiving stolen property goes beyond the terms on which his surrender in extradition from this country was granted.

2. Whether there are in your opinion sufficient reasons to warrant His Majesty's Government in addressing a further representation to the French Government, and, if so, on what grounds such further representation could most advantageously be based.

3. Sir E. Grey would also be glad to be favoured with any observations of a general character which you may desire to offer upon the papers now submitted to you.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

(A.) Mr. J. Davis	..	..	..	..	May	15, 1906.
(B.) Home Office	..	..	..	..	June	1, "
(C.) Sir F. Bertie. No. 39, Treaty	..	..	..	..	July	24, "
(D.) Law Officers to Home Office (Arton case)	..	..	..	..	November	25, "
(E.) Mr. J. Davis	..	..	..	..	August	20, "
(F.) Home Office	..	..	..	..	October	10, "
(G.) D to	..	..	..	..	November	6, "
(H.) Extradition Act. [33 & 34 Vic., cap. 52]	..	..	..	..	August	9, 1870.
(I.) Extradition Treaty with France. "France No. 1 (1878)." [Library No. 619]	..	..	..	..	August	14, 1876.

Report.

1. In our opinion, the trial and conviction of Thiriot upon the charge of receiving stolen property does not go beyond the terms on which his surrender in extradition was granted. He was tried for the crime specified in the Magistrate's warrant, and, though not convicted of that crime, he was convicted of another extradition crime, proved by the facts on which his surrender was grounded, and, having regard to the provisions of section 19 of "The Extradition Act, 1870," we do not think that this country could successfully insist upon the narrow construction of Article IV of the Treaty of 1876 suggested by Thiriot's advisers.

2. In view of the above answer this question does not arise.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
March 8, 1907.

[9014]

No. 12.

[March 16, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 15, 1907.

I HAVE the honour, by the direction of Secretary Sir Edward Grey, to transmit herewith copy of a letter from the Admiralty (Paper A) respecting the arrest by the Commanding Officer of His Majesty's ship "Circe" of two French fishing-vessels found fishing for crab within 3 miles of the Eddystone Lighthouse, on the ground that they were fishing within British territorial waters.

Eddystone
Lighthouse:
as to waters
surrounding
it being
territorial

It will be seen that as a matter of fact the vessels in question were released on the recommendation of the Board of Trade, but it is considered desirable to ascertain whether the arrest was justifiable in the first instance. This must, in Sir E. Grey's opinion, depend on whether the waters surrounding the Eddystone can be regarded as part of the territorial waters of this country.

A somewhat analogous case is that of the British schooner "Admired," which was seized by an American revenue cutter within 3 miles of the rock or cay upon which the lighthouse known as the Fowey Light was erected, and was condemned by the United States' authorities at Key West. On the 5th March, 1889, the then Law Officers of the Crown, Sir Richard Webster, Attorney-General, and Sir Edward Clarke, Solicitor-General, were asked for their opinion as to whether the exclusive maritime jurisdiction of the United States within a radius of 3 miles from the Fowey Rock might safely be admitted, and on the 2nd April (Law Officers' Report, 1889, No. 59, pp. 114-116) they reported that, in the existing state of their information as to the character of the Fowey Rock, and the neighbouring rocks and reefs, they could not advise the admission that the territorial jurisdiction of the United States extends 3 miles seawards of that rock. It appeared, however, that in any case the "Admired" had been captured within 3 miles of the coast line of the Cay of Biscayne, which would bring her clearly within the jurisdiction of the United States, and they saw no ground for any further representation on behalf of the claimants. No further action was therefore taken in the matter by His Majesty's Government, and the question as to the waters round the lighthouse remained unsettled.

A copy of the Report of the Law Officers (Paper B) is annexed.

Sir Edward Grey understands that the Eddystone Lighthouse is a permanent stone structure, inhabited by the lighthouse keepers, that it is built upon a rock which is not permanently above high water, and that the rock cannot in the circumstances be regarded as being *per se* an island.

The Lords Commissioners of the Admiralty are of opinion that the waters surrounding the lighthouse are part of the territorial waters of this country. The Assistant Legal Adviser to this Department, in a Minute on the Admiralty letter of the 2nd September, 1905, expressed the same view, the grounds on which he based his conclusion being that the limits of territorial waters must be drawn from the low water mark at any particular moment, and that if low water mark advances or recedes, the limits of territorial waters move with it, and this being so it appears to be immaterial whether the cause of the change of position in the low water mark is natural or artificial, or whether the artificial creation is, as for instance in the case of a pier, annexed to the mainland or detached from it as in the case of an outlying breakwater or a lighthouse.

If this view can be upheld, it appears to Sir Edward Grey that the waters surrounding the Eddystone are territorial for all purposes.

On the other hand, it seems open to contention that the mere erection of a lighthouse on an island or rock situated outside the ordinary limits of British territorial waters is not *per se* sufficient to constitute of necessity a claim to British sovereignty and jurisdiction over such island or rock. Moreover, the primary object of the occupation may well be looked to. In the case of a lighthouse erected on a dangerous semi-submerged rock well away from land in the fairway of the great shipping routes in the British Channel, its main object is the protection of the peaceful commerce and shipping of British and other nations frequenting these routes. This end can be attained without the assertion of sovereignty or jurisdiction over the rock itself, on which, however, it is natural that Great Britain, as the nation of all others most interested, should take upon herself the erection and maintenance of the lighthouse.



The building of a fort on such a rock would, on the other hand, constitute a direct claim of sovereignty in the most definite form, which could not possibly be disputed.

It may, indeed, be contended that the theory that occupation of territory is effective where such occupation is for the purpose of a lighthouse only is not one which it is to the interest of this country to uphold, since it might lead to the abandonment of the well-established principle of the inviolability of lighthouses, and to the consequent destruction of the Eddystone Lighthouse by an enemy in time of war, and I am to transmit to you copy of a letter from the Board of Trade, drawing attention to this side of the question, and inclosing copies of correspondence which passed in 1895 and 1897 between the Board of Trade, Trinity House, and the Admiralty, on the cognate subject of the connection of the Eddystone Lighthouse with the mainland, by means of an electric cable and the use of the lighthouse as a signalling station.

Again, assuming for the moment that it is to be held that by the erection of a lighthouse sovereignty and jurisdiction over an island or rock hitherto *terra nullius* are of necessity conferred, it yet seems open to grave doubt whether the rights of fishery in the territorial waters surrounding such rock which have hitherto been uninterrupted and continuously enjoyed by the fishermen of all nations can be extinguished *ipso facto* of the erection of the lighthouse.

I am to request that you will be good enough to take the matter into consideration and favour Sir Edward Grey with your opinion as to (1) whether by the erection of a permanent lighthouse on the Eddystone Rock Great Britain obtained sovereignty and jurisdiction over that rock, to any and if so to what extent, and (2) if the answer to the previous question should be in the affirmative, whether territorial jurisdiction can be claimed over the waters within a radius of 3 miles from the Eddystone Lighthouse for all, or any, and if so, what purposes.

Sir E. Grey would at the same time be glad to receive such observations of a general nature as you may be kind enough to offer for his guidance.

I have, &c
(Signed) E. GORST.

List of Papers.

(A.) Admiralty (with inclosures)	..	..	September 2, 1905.
(B.) Report of Law Officers	..	..	April 2, 1889.
(C.) Board of Trade.	..	..	December 11, 1906.

Report.

1. We are of opinion the proper inference to be drawn from the facts relating to the erection and maintenance of the Eddystone Lighthouse is that Great Britain intended to assert sovereignty and jurisdiction over the rock, and we think that there is no principle of international law to prevent such intention from becoming effective, with the consequence that the Eddystone becomes part of the British dominions.

2. We think that if His Majesty's Government thought fit as a matter of policy to claim territorial jurisdiction over the waters within a radius of 3 miles from the Eddystone Rock, they could do so consistently with the general principles of international law, but the circumstances of the case appear to us to render it inadvisable to assert such a claim. The occupation of the rock has always been of a limited and special character, and although it involves a claim of sovereignty, this country has always been careful not to assert that claim so far as to expose the lighthouse to risk in time of war. Any advantage that might arise from the exclusive fishery seems wholly disproportionate to such a risk. It would, moreover, give rise to disputable questions founded on the uninterrupted exercise of the right of fishing by the French in the immediate neighbourhood of the rock.

The reasons which moved the Admiralty to refrain from using the rock as a signalling station appear to apply with equal force to the question of asserting unqualified sovereignty up to the 3 mile limit.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
March 16, 1907.

GENERAL.

[5070]

No. 13.

[February 14, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, December 10, 1906.

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to transmit to you herewith various papers, as noted in the accompanying list, relating to the status in countries where His Majesty exercises extra-territorial jurisdiction of persons born out of wedlock but legitimated by the subsequent marriage of their parents. Cases of this kind arise from time to time where the father has preserved a Scottish or Maltese domicile, and, in the absence of some authoritative pronouncement on the subject, prove exceedingly difficult to deal with in practice.

The first case to which your attention is directed consists of an application (Paper A) transmitted by the Consul at Foochow made by a British subject named William Thom, who is of Scottish origin and who has preserved a Scottish domicile, for the registration in the birth register of British subjects of the births of his four children by a Chinese woman with whom he cohabited and whom he subsequently married.

Sir E. Grey is advised that this application should be refused. It was decided by the House of Lords in the case of *Shedden v. Patrick* (1 Macqueen 535) that the subsequent marriage of the parents of an illegitimate child born abroad of a father who has preserved throughout his Scottish domicile of origin and his British nationality does not confer on such child the national status of a British subject, even though it render him legitimate in contemplation of Scottish law, and also in contemplation of English law for nearly every purpose.

The registration of the births of British subjects abroad is controlled by the Secretary of State under section 11 of "The Naturalization Act, 1870," and Sir E. Grey is advised that the registration there provided for cannot extend to persons who are aliens in contemplation of English law.

Subject to your concurrence, therefore, he proposes to instruct Consul Brady to refuse to register the births of Mr. Thom's children.

The further question arises, however, whether there is anything to prevent the children in question being regarded as subject to British jurisdiction in China and as entitled to British protection, and from being registered if their father desires it in the register of British subjects and protected persons—which register is of course quite separate and distinct from the birth register kept by His Majesty's Consular officers of the births of British subjects within their respective districts.

The extra-territorial rights of this country in China depend on the XVth, XVIth, and XVIIth Articles of the Treaty of Tien-tsin (Paper B), in all of which the words used are "British subjects." These Articles have never been construed as applying only to those who are British subjects in the strict and limited sense of the term, i.e., to such persons only as would, for instance, in this country be entitled to exercise the parliamentary franchise or to own a British ship. It has always been interpreted as applying to all British-protected persons; such an interpretation is in accordance with the tenour of "The China and Corea Order in Council, 1904" (Paper C), where "British subject" is defined to include British-protected person, nor has it ever been contested by the Chinese Government.

There is no exhaustive definition of the words "British-protected person"; by Statute it includes all subjects of the native States in India (53 & 54 Vict., cap. 37, sec. 15), and by usage it covers all the inhabitants of British Protectorates and other territories which are technically not part of the "British dominions," though in substance they are to be regarded as appanages of the British Empire.

In reality the term "British-protected person" covers every one who, with the sanction of the Secretary of State, enjoys British protection; and the limitations on the power of the Secretary of State to grant British protection are imposed, not by the legislative enactments of Parliament, but by international comity, and, in extra-territorial jurisdiction, by the terms of the Treaty or Capitulation under which that jurisdiction is exercised.

Status in
extra-ter-
ritorial
countries of
persons
born out of
wedlock—
Cases of
William
Thom and
Vincenzo
Grech.



Where the children of a British subject are legitimated *per subsequens matrimonium* and are not claimed as subjects of the local Sovereign, Sir E. Grey sees no reason why British protection should not be accorded to them, and their names inserted in the register, if this can legally be done.

The second case (Papers D, E, F, G) is an application transmitted through the Consul-General at Constantinople for the registration in the register of British subjects (which includes British-protected persons) of the children of the late Vincenzo Grech, a British subject of Maltese origin, who were born out of wedlock, but who were legitimated, in contemplation of the law of Malta, the parental domicile, by the subsequent marriage of the parents. They are not claimed as Ottoman subjects.

The Capitulations (Paper H) under which British jurisdiction is exercised in Turkey are dated 1675, and use only the terms "Englishman" or "the English": their language does not in any way limit the privileges conferred to those who are British subjects in the technical sense.

The question whether these persons should be registered raises the same considerations as the case of Thom above.

I have the honour to request you to take the papers into your consideration, and favour Sir E. Grey with your opinion:—

(1.) Whether the births of the children of Mr. Thom should be entered in the register of births of British subjects abroad;

(2.) Whether there is anything in the Treaty of Tien-tsin or in the municipal law of this country to prevent the Secretary of State from placing the children of Mr. Thom under British-protection and jurisdiction in China, and from causing their names to be inserted as British-protected persons in the register of British subjects;

(3.) Whether there is anything in the Capitulations or in the municipal law of this country to prevent the Secretary of State from placing the sons of the late Vincenzo Grech under British protection and jurisdiction in the Ottoman Empire, and from causing their names to be inserted as British-protected persons in the register of British subjects.

The Secretary of State would also be glad to be favoured with any observations of a general character which you may be good enough to offer.

I have, &c.

(Signed) ERIC BARRINGTON.

List of Papers.

(A.) Consul Brady, No. 6	..	..	March	26, 1906.
(B.) Treaty of Tien-tsin (Library No. 448)	..	..	June	26, 1858.
(C.) "China and Corea Order in Council, 1904." (Conf. No. 8518*)	..	..	October	24, 1904.
(D.) Sir N. O'Connor, No. 57, Consular	..	..	June	6, 1904.
(E.) Sir N. O'Connor, No. 22, Treaty	..	..	July	5, 1904.
(F.) To Sir N. O'Connor, No. 31, Treaty	..	..	September	24, 1904.
(G.) Sir N. O'Connor, No. 2, Treaty	..	..	February	26, 1906.
(H.) Turkish Capitulations (Confidential No. 86)	..	..	..	1675.

* With printed Minutes attached.

Report.

In our opinion the children of Mr. Thom (other than Jessie, who is a British subject by reason of her birth in British territory) are not British subjects, and that therefore their births should not be entered in the register of births of British subjects abroad.

(2.) We think that there is nothing in the Treaty of Tien-tsin (on the construction which it is stated in Sir Eric Barrington's letter to have received) or in the municipal law of this country to prevent the Secretary of State from placing the children of Mr. Thom (other than Jessie) under British protection and jurisdiction in China, and from causing their names to be inserted as British-protected persons in the register of British subjects. We may observe, however, that William, who was born at Macao, might be claimed as a Portuguese subject, and James Alexander and Georgina, who were born in China, might be claimed as Chinese subjects, and that the question whether such children should be treated as British-protected persons seems to be one of policy rather than of law.

3. We think that there is nothing in the Capitulations or in the municipal law of this country to prevent the Secretary of State from placing the sons of the late Vincenzo Grech under British protection and jurisdiction in the Ottoman Empire, and from causing their names to be inserted as British-protected persons in the register of British subjects. We observe, however, that it is suggested in the despatch of Mr. Consul-General Eyre, dated the 11th January, 1906, in a statement of considerable obscurity, that the marriage of the late Vincenzo Grech would not have, under the circumstances, the operation in Maltese law of legitimizing his sons. We do not advise that effect should be given to this suggestion.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
February 14, 1907.

No. 14.

[May 4, 1907.]

[14537]

Trawling in the Moray Firth.

Memorandum by the Lord Chancellor.

FROM the point of view of international law, I think it is quite clear that a British Act of Parliament cannot, as against any foreign vessel, affect the right of fishing in the high seas, though of course it is binding on British subjects. Also, British ships of war or fishery-ships have no right to board foreign vessels on the high seas for the purpose of ascertaining the names and nationality of the crews. If the Norwegian Government have agreed to this, of course it may be done without impropriety. I do not see any statement that they have so agreed, and certainly the fact that they warn their own people to refrain from trawling in the Moray Firth is a very different thing from sanctioning the boarding of their vessels by British authorities. I cannot help thinking that the entire policy of this Act was wrong, and though the Court of Session has decided that in terms it applied to foreigners, yet that it cannot in practice be applied to foreigners outside territorial waters without a grave breach of international law. The Scottish authorities have renounced prosecutions against foreigners. It seems to me, as at present advised, that they are equally bound to renounce the practice of boarding or any other interference with foreigners, unless it is done with the express consent of the foreign Government, as in the case of the Behring Sea Convention between Great Britain and the United States of America. It is by agreement alone that foreign ships can be touched on the high seas, and I think no nation has nearly so great an interest as Great Britain has in maintaining this rule inviolate. I think the same of the rule which allows fishing outside the 3-mile limit.

LOREBURN.

8, Eaton Square, London,
May 4, 1907.

List of Papers submitted to the Lord Chancellor on May 3, 1907.

Norwegian Minister	[6620]	..	..	February 27, 1907.
To ditto	[9464]	..	..	March 27, "
Scottish Office	[11501]	..	..	April 10, "
To ditto	[11501]	..	..	April 20, "
Scottish Office	[13820]	..	..	April 27, "



[In Colonial Office letter
of July 11 (23079/07).]

No. 14^A.

[June 29, 1907.]

Law Officers of the Crown to Colonial Office.

My Lord,

Royal Courts of Justice, June 29, 1907.

Draft Order
in Council
to suspend
the opera-
tion of the
Imperial
Extradition
Acts in
Canada.

WE were honoured by your Lordship's commands, signified to us by Mr. Bertram Cox in his letter of the 14th May last, stating that he was directed by your Lordship to transmit to us, for our consideration, copy of a draft Order, which it was proposed to submit to His Majesty in Council, to suspend the operation of the Imperial Extradition Acts in Canada, so long as the Extradition Act, which had now become Part I of the chapter 155 of "The Revised Statutes of Canada, 1906," should continue in force, and to inquire whether the terms of the draft were sufficient and proper for the purpose intended.

We have taken the matter into our consideration, and, in obedience to your Lordship's commands, have the honour to

Report—

That, in our opinion, the terms of the draft Order as initialled by us are sufficient and proper for the purpose intended.

We have, &c.
(Signed) JOHN L. WALTON.
W. S. ROBSON.

Annex.

Draft Order in Council.

WHEREAS, by the Extradition Acts 1870 to 1906 it is, among other things, enacted that, if by any Law or Ordinance made after the passing of the Act of 1870 by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in, or suspected of being in, such British possession, His Majesty may, by the Order in Council applying the said Acts, in the case of any foreign State, or by any subsequent Order, suspend the operation within any such British possession of the said Acts, or any part thereof, so far as it relates to such foreign State, and so long as such Law or Ordinance continues in force there, and no longer;

And whereas, by Part I of chapter 155 of "The Revised Statutes of Canada, 1906," being an Act of the Parliament of Canada intituled "An Act respecting the Extradition of Criminals," provision is made for carrying into effect within the Dominion the surrender of fugitive criminals;

Now, therefore, His Majesty, by and with the advice of His Privy Council, and in virtue of the authority committed to him by the said recited Acts, doth order, and it is hereby ordered, that the operation of the Extradition Acts, 1870 to 1906, shall be suspended within the Dominion of Canada so long as Part I of chapter 155 of "The Revised Statutes of Canada, 1906," shall continue in force, and no longer."

J. L. W.
W. S. R.

[In Colonial Office letter of
January 4, 1908 (557).]

No. 14^B.

[December 2, 1907.]

Law Officers of the Crown to Colonial Office.

My Lord,

Royal Courts of Justice, December 2, 1907.

Treaties
with Aus-
tralian
Colonies
previous to
Constitu-
tion of Com-
monwealth.

WE were honoured with your Lordship's commands, signified to us in Mr. Bertram Cox's letter of the 26th June last, stating that he was directed to request that we would be so good as to favour your Lordship with our opinion on certain points which had arisen in connection with the effect of the Constitution of the Commonwealth of Australia on Treaties to which the Australian States had adhered before confederation, and on the right of the States to adhere to future Treaties.

That our predecessors in Reports of the 11th March and the 16th April, 1902, advised that, despite the constitution of the Commonwealth, the Treaty with Japan of the 16th July, 1894, was still binding on the State of Queensland, which had adhered to it before confederation. That our predecessors had before them the fact that the Attorney-General of the Commonwealth had advised that the Treaty had been terminated by the entry of Queensland into the Commonwealth, but that the grounds on which Mr. Deakin based that opinion were not then known to the Colonial Office. That during his recent visit to this country Mr. Deakin supplied a copy of the reasons for his opinion, and also a copy of an opinion of the present Attorney-General dealing with the same matter. That it would be seen that the view held by Mr. Deakin rested on the analogy of the entrance of Sovereign States into a confederation, and that while your Lordship was advised that there was a considerable body of opinion to the effect that on the entrance of a State into a confederation all Treaties—or at least all Treaties which conflicted in any way with the confederation—*ipso facto* terminated. That your Lordship entertained considerable doubt whether this argument had any application to the case of the federation of a group of Colonies. That, as pointed out by our predecessors, Treaties were made by His Majesty on behalf of his dominions, and the mere change of the internal administration of portions of those dominions could hardly be put forward as a valid reason for holding that a Treaty entered into on behalf of part of those dominions terminated on confederation.

That at the same time there arose the question whether, when Treaties were concluded in future with foreign Powers, adherence must be made, if at all, on behalf of the Commonwealth as a whole, or whether any State might adhere separately. That our predecessors, in a Report of the 11th July, 1901, advised that the Dominion of Canada could only adhere to the Convention between the United Kingdom and the United States of America relative to the disposal of real and personal property on the terms of New Brunswick being bound by it as well as the other provinces, from which it would appear that in their view no province of the Dominion could adhere separately to a Treaty. That that Report, however, was not conclusive for the case of the Australian States, since the terms of confederation were in the case of Canada and Australia somewhat different. That in the case of Canada the Dominion Parliament was empowered by section 132 of "The British North America Act, 1867," to perform the obligations of Canada or of any province arising under Treaties, so that the provinces had clearly no right to contract Treaty obligations which were matters for the Dominion. That the Australian Constitution had no such provision although the Commonwealth Parliament had, *inter alia*, power to legislate regarding external affairs (section 51 (XXIX) of Constitution Act, 1900), but that that power was apparently merely shared with the States, though a Commonwealth law could override a State law.

That in those cases in which the Commonwealth had paramount legislative authority, whether exclusive or concurrent, your Lordship would suggest that adhesion to Treaties should be notified on behalf of the Commonwealth and on the advice of the Commonwealth Government alone. That the Commonwealth was constituted in order to enable Australia to act as one body in matters of external interest, and that your Lordship could see no reason for consulting the State Governments in any instance in which the Commonwealth Government was in a position on its own authority to make good any obligation which it undertook.

That there were, on the other hand, certain cases in which the Commonwealth had no legislative power. That His Majesty's Government, for instance, had recently entered into Conventions for the regulation of night labour of women and for the unification of the pharmacopoeial formula for potent drugs, under both of which any Colony or Possession of His Majesty's Government could adhere separately to the Conventions. That the necessary steps to carry out the terms of these Conventions would, your Lordship was advised, have to be taken by the State Governments and Parliaments, and that an adhesion on the part of the Commonwealth would involve it in obligations which, without the consent of the States, it could not perform.

That it would appear, therefore, that any adhesion to those Conventions would have to be based on the consent of the Government of the State, and should be made, in accordance with the Report of our predecessors of the 11th March, 1902, by His Majesty's Government on behalf of the Government of the Commonwealth and of the Government of the State concerned, and that the consent of both the Commonwealth and of the State Government would be requisite. That there still remained, however, the question whether all the States must adhere to such Conventions or whether one or more might adhere.



1907

32

GENERAL.—GERMANY.

That Mr. Bertram Cox was accordingly to request us to take this matter into our consideration and to report—

1. Whether Treaties to which States of the Commonwealth of Australia had adhered before confederation were still binding on the Commonwealth in respect of the State concerned, notwithstanding the confederation of the States?

2. Whether in cases of Treaties whose subject-matter fell within the legislative competence of the Commonwealth, adhesion should be notified on behalf of the Commonwealth, and on the advice of the Commonwealth Government, without reference to the State; or, if not, in what other manner?

3. Whether in cases of Treaties whose subject-matter fell within the exclusive legislative competence of the State, adhesion should be notified on behalf of the Commonwealth Government and of the States, and on the advice of both Governments; or, if not, what procedure should be adopted?

4. Whether it was possible for adhesion to be signified on behalf of one or more States only, in cases where all the States were not prepared to adhere.

We have taken the papers into our consideration, and, in obedience to your Lordship's commands, have the honour to

Report—

1. That, in our opinion, Treaties to which States of the Commonwealth adhered before confederation are still binding on the Commonwealth in respect of the State concerned.

2. In cases of Treaties whose subject-matter falls within the legislative competence of the Commonwealth, adhesion should be notified on behalf of the Commonwealth, and on the advice of the Commonwealth Government, without reference to the States.

3. In cases of Treaties whose subject-matter falls within the exclusive legislative competence of the States, adhesion should be notified on behalf of the Commonwealth Government on the advice of both Governments.

4. Yes.

We have, &c.
(Signed) JOHN L. WALTON.
W. S. ROBSON.

GERMANY.

[Colonial Office (6329).]

No. 14^c.

[February 26, 1907.]

Law Officers of the Crown to Colonial Office.

My Lord,

Law Officers' Department, February 14, 1907.

Rebellion in
German
South-West
Africa: In-
ternments
in Cape
Colony;
Orange
River Ferry.

WE were honoured by your Lordship's commands, signified to us by Mr. Just in his letter of the 15th January last, stating that he was directed by your Lordship to request us to be good enough to favour you with our opinion upon certain questions of international law which have arisen in connection with the rebellion of the Hottentot and other native inhabitants of the Protectorate of German South-West Africa.

That it would be seen from the paper marked (A) that considerable expense had been caused to the Government of Cape Colony by the numbers of rebels who had been driven over the British-German frontier between the Cape Colony and the German South-West Africa Protectorate by the German forces, and who, at the instance of the German Government, had been disarmed and "interned" at a distance from

GERMANY.

33

the frontier sufficiently remote to prevent them again troubling the Protectorate from which they had fled.

That the Cape Government had repeatedly pressed the German Government to defray the expenditure thus incurred, but that they had hitherto been unable to obtain any refund of the expenses to which they had been put, the German Government confining themselves to remarking that they would be ready to look after the refugees if these latter were sent back.

That the Cape Government, finding all their applications fruitless, were very anxious to obtain satisfaction for their claims by threatening the Germans that if their claims were not met by a certain date they would—

1. Release the refugees from the camps in which they were at present "interned"; and

2. Forbid the passage of stores, &c., across the British-German frontier.

That with regard to No. 1 he was to observe that it appeared more than doubtful whether the Cape Government had not throughout been acting *ultra vires* in interning the refugees at all.

That the process of internment was one which would appear to be appropriate and to be recognized by international law and usage only when regular hostilities were going on, and military forces of one of the belligerents were obliged to take refuge from those of the other in the territories of a neighbouring neutral, who then "interned" them until the termination of hostilities.

That the process was one, therefore, to which it would seem difficult properly in the present instance to have recourse, since there was no question but that the natives to whom it had been applied were not invested with any belligerent character; that, indeed, they partook rather of the character of political refugees who had sought asylum in British soil. That, if this view were correct, the question seemed to be not so much whether the Cape Government were justified in not releasing the refugees as whether in continuing to keep them "interned" they would not be merely prolonging an illegal situation which ought never to have been created.

That, with regard to the second step with which the Cape Government proposed to threaten the German Government in the hope of thereby compelling these latter to meet their claims, he was to remark that throughout the course of the military operations which had now been going on for some years in German South-West Africa the Cape Government had consistently refused to open to traffic more than one drift in the whole length of the frontier, which was of many hundred miles, on account of the difficulty and expense of controlling traffic at these distant points, and have always declined to permit the passage of any warlike stores even by that one drift; that their reason had been that they were not prepared to allow British territory to be used by the German authorities as a base of operations, because of the possibility of trouble being thereby created with their own natives, who were nearly connected by ties of race with the rebels in German South-West Africa. That from motives of humanity, however, they had allowed strictly limited amounts of provisions to be sent through for the use of the civil population under permits issued by the officers in command of the Cape Police at the drift. That the limitation, moreover, of these stores was not confined merely to quantity, but permission for their passage was only given from month to month.

That the German authorities accepted these restrictions without demur and applied or allowed their contractors to apply for permits on these terms. That, indeed, up to May 1905, the German Consul-General at Capetown was in the habit of certifying that all the supplies imported over the drift in question were for the use of the civil population in German South-West Africa.

That he was to request us to take the circumstances into our consideration and to favour your Lordship with our views as to—

1. Whether the action of the Cape Government in "interning" the refugees from German South-West Africa—such refugees not being belligerents—was in accordance with international law;

2. Whether, supposing the answer to this question to be in the affirmative, the Cape Government were under any obligation of *international*, as distinguished from municipal, law to "intern" the refugees, or were bound to keep them "interned" or otherwise to prevent them from returning to German South-West Africa should they wish to do so; and

3. Whether their action in the matter was legal or not, had the Cape Government

[509]

K



1907

34

GERMANY.

any legal or equitable claim to be refunded their expenses at the hands of the German Government, at whose instance and request they incurred these expenses, it being remembered that the German Government had always expressed themselves as perfectly ready to receive the refugees if asylum in British territory were denied to them and they were forcibly handed over to the German authorities?

That there was a further point on which, though not directly connected with those above set forth, your Lordship would be glad to be furnished with our opinion, viz., the continued occupation by the Germans of the drift (*i.e.*, Rahmansdrift) to which allusion has previously been made.

That the German Government admitted that the frontier between the British and German possessions in this neighbourhood was governed by section 1 of Article 3 of the Anglo-German Agreement of 1890, which provided that the line of demarcation should commence at the mouth of the Orange River and ascend the north bank of that river to the point of its intersection by the 20th degree of east longitude. That the German Government raised, indeed, questions as to the exact interpretation of the expression "north bank," but that they did not dispute that the whole bed of the river, as well also, of course, as the south bank, was British.

That all the same, however, they had given to one Sperlich a lease of the ferry at Rahmansdrift, which carried with it a landing monopoly on the northern bank of the Orange River extending 10 kilom. on either side of the Rahmansdrift landing place, and that, though constant remonstrances had been made to them on the subject, they had paid them no attention.

That in these circumstances your Lordship would be glad to be favoured with our views as to the steps which the Cape Government should take with a view to re-entering into possession of what appeared undoubtedly to be their property.

We have taken the matter into our consideration, and, in obedience to your Lordship's commands, have the honour to

Report—

That, 1 and 2, in our opinion the principles of international law relating to the duty of a neutral Power in regard to the internment of belligerent forces entering its territory do not apply in the present case. Nor is the Cape Government bound to send the refugees back, but if it gives them asylum and has ground to believe that they propose using the Cape territory as a base for hostile operations against a friendly Power they must take reasonable steps to prevent such a course being adopted. For this purpose, though not bound to intern, the Cape Government are entitled to do so if they think fit.

3. The Cape Government have no legal or equitable claim to have their expenses reimbursed by the German Government, unless they can show some express or clearly implied promise on the part of that Government to do so.

4. On the construction of Article 3 of the Anglo-German Agreement of July 1890, it would seem that the Orange River is within British territory and that no grant or reservation of the right of navigation is made to Germany. Having regard to this view, the Cape Government are entitled to forbid and, if necessary, to prevent the use of the Orange River, as well as of its south shore, by the German ferry.

We should, however, add that the assertion and exercise of such an exclusive right would involve serious questions of policy as well as of law.

We have, &c.
(Signed) JOHN L. WALTON.
W. S. ROBSON.

(35)

JAPAN.

[7291]

No. 15.

[April 26, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 13, 1907.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you the papers noted in the accompanying list, which relate to the steam-ships "Australia" and "Montara," the property of the Oceanic Steam-ship Company and the Pacific Coast Steam-ship Company respectively, which were chartered in March 1905 for a period of four months by the Kamchatka Commercial-Industrial Company, for the purpose of trading between San Francisco, the Sea of Okotsk, and Kamchatka, and their respective vicinities. The two vessels while employed in this trade were stopped and seized on the high seas by vessels of the Japanese navy, brought before Prize Courts and condemned, together with their cargoes.

The Kamchatka Company apparently hold a concession from the Russian Government, by the provisions of which the Company are bound *inter alia* to employ vessels flying the Russian flag for their trade. In time of peace this duty was performed by steamers of the Russian Volunteer fleet, but on the outbreak of war these vessels were taken up by the Russian Government for naval purposes, and within a short space of time there were no ships under the Russian flag available. The Company were in consequence compelled to charter the neutral vessels "Australia" and "Montara" to carry on the work.

By the terms of the charters it was stipulated in each case that the charterers were, at their own expense, to provide the owners with policies for fixed amounts against war risks. These policies were taken out in this country, and the underwriters, whose risks were the only English interests involved, have paid claims amounting to over 100,000*l.* in respect of the capture of the two vessels.

It will be seen from the letter addressed to the Secretary of State on the 15th ultimo by Messrs. Waltons, Johnson, and Co., who are acting on behalf of the underwriters, Paper (A), that the latter have brought these cases to the notice of the Secretary of State on the ground that this loss has been caused by a miscarriage of justice. A perusal of the judgments delivered by the Japanese Prize Courts shows that they are in the main based upon the same grounds, with this difference, that in the case of the "Australia" the judgment proceeds rather upon the assumption that the vessel had assumed an enemy character by the fact of her having been placed at the disposal of the Russian Government, and in the case of the "Montara," that the vessel had assumed an enemy character by the fact of her having been engaged in trading operations under a concession granted by the Russian Government.

I am to request that you will take these papers into your consideration, and that you will favour Sir Edward with your opinion—

1. Whether the circumstances of these cases or of either of them are such as to warrant His Majesty's Government in making representations to the Japanese Government on behalf of the underwriters.

2. If so, on what grounds such representations could most advantageously be based.

3. Sir Edward would also be glad to be favoured with any observations of a general character which you may desire to offer upon the papers now submitted for your consideration.

I have, &c.
(Signed) ERIC BARRINGTON.

List of Papers.

(A.) Messrs. Waltons, Johnson, and Co.	February 15, 1907.
(B.) Messrs. Waltons, Johnson, and Co.	March 4, "
(C.) Japanese Regulations relating to Capture at Sea [Conf. 8386]	March 7, 1904.

Russo-Japanese war.
Seizure of "Australia" and "Montara" during.



[13601]

Report.

In our opinion, the circumstances are not such as to warrant His Majesty's Government in making representations to the Japanese Government on behalf of the underwriters.

The trade in which the "Australia" and the "Montara" were engaged at the time of capture was a privileged Russian trade, *i.e.*, a trade in which ordinarily only Russian ships were permitted to engage. The Russian law or concession establishing that privilege was maintained throughout the war, and any neutral vessels which might be permitted or licensed by the Russian Government to engage in the trade were at the disposal of that Government for the gratuitous carriage of its own officials and for various other purposes.

Such vessels assumed therefore the character of enemy vessels according to the long-established rule of our Courts, and we think it would be difficult to make any substantial complaint in respect of the judgment.

It does not appear in our instructions whether the facts found by the Prize Court were duly disclosed to the underwriters before the making of their policies. If they were so disclosed, the underwriters have no claim for consideration on His Majesty's Government; if they were not so disclosed, they were not bound to pay on their policies, which they have apparently done without raising this defence.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
April 26, 1907.

No. 16.

[41977]

[April 29, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, February 12, 1907.

Cargoes of
"Hsiping"
and
"Pehping"
seized as
contraband:
doctrine of
pre-emption.

WITH reference to your Report of the 13th December, 1906, respecting the condemnation by the Japanese Prize Court of certain portions of the cargoes of the British vessels "Hsiping" and "Pehping," I have the honour, by direction of Secretary Sir E. Grey, to transmit to you the draft of a despatch which it is proposed to send to His Majesty's Chargé d'Affaires at Tokiô (Paper (A)) instructing him to address a representation to the Japanese Government in the matter.

The draft has been prepared on the lines of your Report above referred to, and I am to request that you will favour Sir E. Grey with your opinion whether, in the circumstances of the case, its terms are right and proper.

I am at the same time to explain, with regard to the question of pre-emption, that Sir E. Grey feels some hesitation as to whether it would be well to go beyond the statement that it would have been fairer on the part of the Japanese Government to subject the goods in question to pre-emption than to condemn them outright. No precedents can be discovered for representations addressed to a foreign State on the ground that goods *ancipitis usus* have not been subjected to pre-emption but have been condemned, and, although the archives of this Department have been searched, no records can be found which support a general contention that the principal foreign Maritime States advocate this practice. The Regulations respecting capture of prizes at sea issued by Denmark, Italy, Russia, the United States, and Japan make no reference to the point. I am, however, to state that if, in your opinion, it is possible to go beyond the words used in the draft, and specifically complain of the absence from the Japanese Regulations of any provisions on the subject of pre-emption, Sir E. Grey would be glad if you would make such additions thereto as may seem to you to be desirable.

A copy of your Report of the 13th December, 1906, together with the Papers therein mentioned, are also inclosed for convenience of reference (Papers (C), (D), (E), (F), (G), and (H)).

I have, &c.
(Signed) ERIC BARRINGTON.

List of Papers.

- (A.) Draft of despatch to Mr. H. Lowther.
(B.) Library Memorandum* .. January 30, 1907.
(C.) Law Officers' Report (41977) .. December 13, 1906
(D.)
(E.)
(F.) Inclosures in (C).
(G.)
(H.)

[14117]

Report.

The view taken by us in our Report of the 12th December, 1906, as to the practice of pre-emption in cases of conditional contraband is the same as that laid down by Hall (Atlay's edition, 1904, p. 665), Phillimore (III, p. 450), Oppenheim (vol. ii, p. 443), and, as regards provisions, Kent's "Commentaries" (vol. i, p. 142). See also Owen on "Declaration of War," p. 244, under the heading of "Pre-emption," where he states that certain articles of an equivocal nature, chief among which are provisions, have sometimes been placed on an exceptional footing so as to become the subject of purchase instead of confiscation.

The principle as laid down by Hall is that, in strictness, every article which is either necessarily contraband or which has become so from the special circumstances of the war is liable to confiscation, but it is usual for those nations who vary their list of contraband to subject the better class (that is, conditional contraband) to pre-emption only, which by the English practice means purchase of the merchandize at its mercantile value.

In the case of the "Hsiping" and the "Pehping" the Japanese Prize Court has not explicitly found that all the food-stuffs in question were shown to be intended for use of the belligerent forces. It appears to have acted on the belief that the circumstances afforded a strong presumption that the food-stuffs were actually so intended. The case therefore seems one in which the practice of pre-emption is peculiarly appropriate, and it is perhaps unnecessary to raise the disputed proposition that, even if the food-stuffs had been in fact shown to be consigned to the enemy's forces, the right of pre-emption would nevertheless have existed. That proposition goes somewhat beyond the necessities of the present case. We therefore suggest the following alteration in the proposed despatch:—

After the paragraph stating that the rice was only found to be suitable for consumption by Russian troops, insert:—

"In any case His Majesty's Government consider that in these circumstances it would have been fairer to subject the food-stuffs seized to pre-emption than to condemn them outright. That is the practice of this country."

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
April 29, 1907.

[41977]

Annex.

Draft of Despatch from Sir Edward Grey to Mr. Lowther.

(No. . Treaty.)
Sir,

Foreign Office, February , 1907.

HIS Majesty's Government have had under their consideration, in communication with their legal advisers, Sir C. MacDonald's despatch No. 32, Treaty, of the 11th July, 1906, inclosing translations of the decisions of the Higher Prize Court in the case of the steam-ships "Hsiping" and "Pehping," in which certain portions of their cargoes, notably various shipments of rice for Newchwang, were condemned.

I have now to observe that, in the opinion of His Majesty's Government, the decisions of the Court in these cases are in some respects at variance with the principles of international law. The Japanese Regulations relating to contraband recognize the distinction between absolute and conditional contraband, and so far they agree with the views maintained by this country, but the

* Written on Paper (C).

[509]

L



decisions of the Court deprive the distinction of any practical effect. The most important part of the judgment is that which confiscates the articles of food consigned to Newchwang, and it appears to His Majesty's Government that such confiscation, so far as it relates to food not intended for European consumption, is unjustifiable, because the facts in evidence relied upon by the captors did not show that such provisions were intended for the use of the Russian army, but rather supported the contrary inference. Particularly is this the case with the rice, as to which the Court did not even purport to find its destination, but only that it was suitable for consumption by Russian troops.

In the view of His Majesty's Government, even if the food-stuffs in question were shown to be intended for the use of the belligerent forces, it would have been fairer to subject them to pre-emption rather than to condemn them outright.

In any case, His Majesty's Government consider that, in these circumstances, it would have been fairer to subject the food-stuffs seized to pre-emption than to condemn them outright. That is the practice of this country.

The condemnation of the silver coins seems open to objection on the same grounds, namely, that their destination to the Russian army was not proved. The judgment as regards the iron wheels, iron tubes, old iron, iron ore, and timber referred to in Case No. 30 (Inclosure 2 in Sir C. MacDonald's despatch) does not find, as required by the Japanese Regulations, that such articles were intended solely for use in war, but only that they might be employed directly for warlike purposes. Such a finding appears to recognize that they are articles *ancipitis usus*, and therefore they should be treated only as conditionally contraband.

In this connexion, I have to observe that the wording, if not the substance, of the Japanese Regulations relating to conditional contraband appears to His Majesty's Government to be open to objection, inasmuch as a Prize Court may be thereby enabled to condemn without the necessity of finding definitely that articles only conditionally contraband are in fact intended for the use of enemy forces.

You should address a communication to the Japanese Government in the sense of the foregoing observations, and request that the cases of these two vessels may receive further consideration.

I am, &c.

[14118]

No. 17.

[April 29, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, February 5, 1907.

German steam-ship "Paros" seized for contraband by Japanese during war with Russia

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you the papers noted in the accompanying list relating to the seizure and condemnation by the Japanese authorities of the German steam-ship "Paros," owned by the "Aktiengesellschaft Deutsche Levante Linie" of Hamburg.

The "Paros," which had been chartered by Messrs. Kunst and Albers of Hamburg to carry a cargo of general merchandize from Hamburg to Vladivostock, sailed from the former port at the end of November 1904, was captured by the Japanese auxiliary cruiser "Hong Kong" off the Island of Hokkaido, and taken into Yokosuka for adjudication. The steamer and the whole of the cargo were condemned by the Port Prize Court, and this decision was subsequently confirmed on appeal by the Supreme Prize Court at Tôkiô.

The "Paros" and her cargo were insured against war risks by policies effected in London with British underwriters to the amount of 8,750*l.* on the steamer and 80,250*l.* on the cargo. These sums have been paid in full by the underwriters.

The main features of the case are very fully set forth in the inclosed "Statement of Facts" (Paper A) which has been prepared by Messrs. Waltons, Johnson, Bubb, and Whetton, solicitors, acting on behalf of the Indemnity Mutual Marine Assurance Company, Limited, who have also furnished copies of the report of the master of the "Paros," of the list and description of the shipments constituting her cargo, of a translation of the judgment of the Supreme Prize Court, and of two charter-parties, made respectively on the 25th and 26th October, 1904, between (1) the "Deutsche Levante Line" and Messrs. Kunst and Albers, of Hamburg, and (2) the "Deutsche Levante Line" and Messrs. G. and J. E. Pinckernelle, ship-brokers, of Hamburg (Papers B, C, D, E, and F).

It would appear from these charter-parties that (1) if on the arrival of the "Paros" off Vladivostock the port should be blockaded or the vessel warned off by the Japanese, she was to proceed to Hong Kong and there discharge

her cargo, and (2), if, on her arrival at Labuan, where she was to call for coal and orders, the charterers should consider it impossible for her to reach Vladivostock, she might be ordered to Hong Kong to unload. For fear of difficulties with the crew, and for other reasons set out in the "Statement of Facts," the first charter-party for Vladivostock, dated the 25th October, 1904, was kept secret, and the second entered into on the following day (26th October, 1904), by the terms of which the "Paros" was to proceed to Hong Kong, the bills of lading being also made out for the latter port.

These documents were found by the Japanese on board the steamer at the time of her seizure, 1,500 miles north of Hong Kong.

Both ship and cargo were condemned on the ground that part of the cargo was contraband; that the ship and the entire cargo belonged to the same parties, and that consequently the non-contraband cargo was liable to condemnation as being the property of the owner of the contraband, and the Court also relied on the circumstance that deceit was employed as to the ship's destination.

A deputation representing the British underwriters, and introduced by Mr. Rose, M.P., was received by Lord Fitzmaurice on the 21st October last, when his Lordship suggested that a "statement of facts" should be prepared by their legal advisers and forwarded to this Department, with a view to its submission to you for your consideration.

I am, therefore, to request that you will be so good as to take these papers into your consideration, and that you will favour Sir Edward Grey with your opinion—

Whether the circumstances of the case are such as to warrant His Majesty's Government in approaching the German Government with a view to ascertaining whether they would be disposed to take up the case, on behalf of the British underwriters, of this German vessel and cargo, and, in the event of their declining to do so, whether representations could properly be made by His Majesty's Government themselves to the Japanese Government, and, if so, on what grounds such representations could most advantageously be based.

Sir Edward would, at the same time, be glad to be favoured with any observations of a general character which you may desire to offer upon the papers now submitted to you.

I have, &c.
(Signed) F. A. CAMPBELL.

Statement of Facts.

THE "Paros" was a German steamer of 2,398 tons owned by the "Aktiengesellschaft Deutsche Levante Linie" of Hamburg. On the 25th October, 1904, she was chartered by Mr. Price of Kunst and Albers of Hamburg, at a lump sum freight, to carry a cargo of general merchandize from Hamburg to Vladivostock. The charter-party provided: (1) That if on arrival off Vladivostock that port should be blockaded, or the steamer warned off by enemies, she was to proceed to Hong Kong and discharge her cargo there, the freight in that case to be 9,800*l.*; (2) that if on arrival at Labuan (where she was to call for orders and coals) it should be found, or considered by the charterers, impossible for her to reach Vladivostock, the charterers might order her to Hong Kong for discharging—the freight in that case to be 5,600*l.*; (3) that if the steamer discharged at Vladivostock the freight was to be 11,200*l.* The charter-party prohibited the carriage of coals, ammunition, guns, arms, dynamite, gunpowder, and other explosives. The charter-party was made between the Deutsche Levante Line and Kunst and Albers through the intermediary of G. and J. E. Pinckernelle, ship-brokers at Hamburg.

Kunst and Albers are merchants who (as can be proved if necessary by the manifesto of steamers chartered by them in previous years) had from year to year been in the habit of sending similar mixed cargoes to Vladivostock to supply the needs of towns and villages in the country to which Vladivostock is the only port of entry; and the whole of the "Paros" cargo (consisting of upwards of eighty separate parcels of various goods) was intended for the purpose of this trade.

Japan has adhered to the Declaration of Paris, by which even enemy's goods, except contraband of war, are covered by the neutral flag, and it is submitted that no part of the "Paros" cargo came within the first class of contraband in the Japanese

The steamer and cargo were insured against war risks by policies effected in London with English underwriters to the extent of 8,750*l.* on the steamer and 80,250*l.* on the cargo.

The English underwriters have paid in full the above sums under the policies effected with them on steamer and cargo.

The intended destination of the "Paros" was Vladivostock, provided she was not prevented by blockade, &c., from getting there, but although she was not engaged for any contraband trade it was considered undesirable that her intended destination should be made known until her departure from Labuan (where she was to call for orders), one reason being that her ultimate destination was not to be definitely fixed until arrival at Labuan, and another being as the war between Russian and Japan was then pending the crew might have made difficulties about sailing to Vladivostock; therefore the intended destination and the charter-party of the 25th October, 1904, were kept secret, and another charter-party dated the 26th October, 1904, was made out by which it was purported that the "Paros" was chartered to G. and E. J. Pinckernelle (the brokers) for a voyage to Hong Kong at a lump sum freight of 2,800*l.* The bills of lading were also, for the same reason, made out to Hong Kong. It was, moreover, regarded as quite problematic whether the "Paros" would ever be able to reach Vladivostock and deliver her cargo there, having regard to the probability of a blockade of that port being declared; and if she did not, and had to discharge at Hong Kong, bills of lading for Hong Kong would have been essential, whereas if she had reached Vladivostock, delivery of the whole cargo would have been taken by KUNST and ALBER's regular representatives there, and therefore no bills of lading would have been necessary. This was an additional reason for the bills of lading being made out for Hong Kong and for a charter-party being prepared to correspond with them. Moreover, in the charter-party of the 25th October, it was stipulated that the bills of lading were to be made out by the charterers as they might think best.

From the translated judgment of the Superior Prize Court it would appear that the condemnation of the steamer and her entire cargo was based upon the following grounds:—

- As to (1) and (2), it is submitted that none of the cargo was either first class or second class contraband as declared in the Japanese Notification. Unless it be assumed, contrary to actual fact, that the cargo, or some part of it, was destined for the Russian army or navy, or that there was reason to believe it to be intended for the use of such army or navy, there was no justification whatever for treating any of it as contraband. The few bags of cement (most, or all of which had, previously to the capture, been used to stop leakage caused by ice), the twenty-five cases of linoleum, the iron plates, the iron nails, the agricultural forge or smithy, and the other goods specifically referred to in the judgment were not contraband at all. They were not for "use in war" at all, still less were they intended "solely" for that use; nor were

41

On the ground that Vladivostock, although also an important commercial port, was a Russian naval station, the Prize Court seems to have assumed (and to have largely based its judgment on the assumption) that no innocent trade to that port could be carried on during time of war, and that all goods entering the port during war must necessarily be treated as destined for or intended for the use of the Russian army or navy. Such an assumption was wholly unjustifiable; the port was not blockaded, and even if any part of the cargo could with propriety or with regard to international rules or the Japanese Notification have been condemned as either conditional or unconditional contraband, the condemnation should in any event have been confined to the contraband shipments; nor did the circumstance of the whole cargo having been shipped by Kunst and Albers justify the condemnation of the whole.

For the reasons above set forth, it is submitted that the condemnation of the "Paros" and her cargo was wholly irregular and unjustifiable, and the English underwriters, who are the sufferers, respectfully request His Majesty's Government to make diplomatic representations to the Government of His Imperial Majesty the Mikado with a view to their being indemnified by the latter Government in respect of their loss.

Copy, charter-party, the 25th October, 1904.
Copy, charter-party, the 26th October, 1904.
Copy, Judgment of the Superior Prize Court (translation).

List and description of shipments constituting the cargo.
Copy, report of Captain Niemann, the 6th December, 1906 (translation).

(A.)	{ Indemnity Mutual Marine Assurance Company January 4, 1907
	{ Inclosing—
	{ “Statement of Facts.”
(B.)	{ Report of master of “Paros.”
(C.)	{ List and description of shipments constituting cargo.
(D.)	{ Translation of Judgment of Supreme Prize Court.
(E.)	{ Charter-party dated October 25, 1904.
(F.)	{ “ ” October 26, 1904.
(G.)	{ Indemnity “Mutual Marine Assurance Company October 8, 1906.



[14118]

Report

The circumstances of the case are not, in our opinion, such as to warrant His Majesty's Government in making representations to the Japanese Government, and, although the German Government might take a different view of the case, we do not think that His Majesty's Government could, with advantage, suggest to that Government that it should take up a case the presentation of which His Majesty's Government was not prepared to support. The form of the judgment of the Supreme Prize Court appears to be in accordance with the Japanese Notification on the subject of contraband, and since most of the articles condemned as absolute contraband are, so far as we are aware of their character, materials for the construction of war-ships or the manufacture of arms or ammunition, or for the use of forces in the field, we think it would be difficult to complain of the decision in this respect, or, indeed, of the condemnation of innocent articles belonging to the same owner. As regards the condemnation of the ship, we think that there was evidence on which the Court could properly act that the owner attempted, by simulated documents, to mislead the Japanese (in the case of seizures) as to the true destination of the vessel. Their conduct was therefore such as the Japanese were entitled to treat as fraudulent, and a good ground for condemnation of the ship.

(Signed)

JOHN L. WALTON.
W. S. ROBSON.Law Officers' Department,
April 29, 1907.

[12593]

No. 18.

[June 29, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, May 11, 1907.

Mr. J. E.
de Becker's
divestment
of his
British
nationality
by marriage
with a
Japanese
subject.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you the papers noted in the accompanying list, which relate to the national status of Mr. J. E. de Becker, a solicitor, resident in Yokohama.

In 1891 Mr. de Becker, at that time a natural born British subject, contracted a marriage with a Japanese lady, the marriage being accompanied by the Japanese ceremony of adoption into his wife's family. As a consequence of this step Mr. de Becker became, in contemplation of the Japanese law of adoption on marriage, a naturalized Japanese subject.

In 1901, two years after the jurisdiction hitherto exercised by the British Courts in Japan, and all the exceptional privileges, exemptions, and immunities enjoyed by British subjects as a part of or appurtenant to such jurisdiction, had, under Article XX of the Treaty of 1894 between Great Britain and Japan (Paper A), absolutely ceased and determined, Mr. de Becker contracted a second marriage, also with a Japanese lady. This marriage was, however, not accompanied by any ceremony of adoption into his wife's family.

The case of Mr. de Becker was brought to the notice of His Majesty's Ambassador at Tôkiô (see Sir C. MacDonald's despatch No. 45 of the 20th July, 1905) (Paper B), as the result of the removal of the former's name by His Majesty's Consul at Yokohama from the register of British subjects kept at His Majesty's Consulate, on his being informed by the local authorities that Mr. de Becker had acquired the status of a Japanese subject.

It was at first assumed from Sir C. MacDonald's despatch that both marriages had been accompanied by the ceremony of adoption, and, after consultation with the Home Office, his Excellency was informed on the 4th July, 1906, that it appeared to be unnecessary, in view of Mr. de Becker's second marriage in 1901, to consider the question of the effect of his first marriage upon his national status in contemplation of English law; that assuming that the law of Japan, whereby an alien who contracts a marriage with a Japanese subject and is adopted into her family becomes a Japanese

subject by naturalization, had remained in force since the cesser in 1899 of Her Majesty's extra-territorial jurisdiction in that Empire, and was, therefore, the law at the time of Mr. de Becker's second marriage, the latter would appear not only to have become a Japanese subject in contemplation of Japanese law, but to have become voluntarily naturalized in Japan within the meaning of section 6 of "The Naturalization Act, 1870" (Paper C), and accordingly to have ceased to be, in contemplation of English law, a British subject.

On the 27th September, 1906, however, a further despatch was received from Sir C. MacDonald (Paper D), inclosing two letters from Mr. de Becker on the subject. In the first letter Mr. de Becker maintains that it was, at the time of his first marriage in 1891, impossible for him to become voluntarily naturalized in Japan, inasmuch as the mere existence of the extra-territorial jurisdiction at that time exercised by Her Majesty precluded the possibility of his divesting himself of his British nationality, nor could he be deemed to be "within any foreign State," within the meaning of section 6 of "The Naturalization Act, 1870," since he was subject only to the laws of his country of origin. This contention appears to be based upon the view expressed by Mr. (now Sir F.) Piggott in his treatise on "Exterritoriality," in which (p. 156) he suggests that a British subject is, as regards a foreign country wherein Her Majesty possesses extra-territorial jurisdiction, "under a disability" which prevents him from becoming naturalized in such a country.

This view—which, so far as is known, has not been put forward by any other writer—seems to be founded on an obvious misconception of the meaning of the word "disability," which is clearly defined in section 17 of the "Naturalization Act, 1870," which seems to have escaped the notice of the author, as meaning "the status of being an infant, lunatic, idiot, or married woman," and nothing else.

In his second letter, Mr. de Becker points out that his intention, on the occasion of his first marriage, in entering his wife's family by adoption, was simply to complete the marriage, but not to acquire naturalization, and that it was only after going through the ceremony that he became aware that he was deemed to have become a Japanese subject in contemplation of Japanese law. As regards his second marriage, Mr. de Becker also observes that the mere marriage of a British subject with a Japanese woman, without adoption into her family, does not, as a consequence, involve the naturalization of the former, whereas by the *lex loci* it does involve the loss of her Japanese status by the latter.

Sir Edward Grey has again consulted Mr. Secretary Gladstone, and it will be seen from the letter from the Home Office of the 10th April (Paper E) that Mr. Gladstone agrees with the view held by the Secretary of State that, if the facts and the law in regard to Mr. de Becker's second marriage in 1901 are now correctly stated, the question of his national status is dependent upon his first marriage in 1891; that by the latter marriage Mr. de Becker acquired Japanese nationality in contemplation of Japanese law, and that, moreover, he divested himself thereby of his British national status by virtue of section 6 of "The Naturalization Act, 1870."

I am to invite your attention to two opinions of the then Law Officers of the Crown—the first dated the 15th October, 1877 (Paper F), dealing with the case of Mr. Robert Miers, a British subject resident in the Bonin Islands (a dependency of Japan), who made a declaration renouncing British protection and adopting Japanese nationality; and the second, dated the 3rd December, 1892 (Paper G), in which the opinion is expressed that a British subject may become "voluntarily naturalized," either by taking formal steps for his naturalization, or by acting in a manner which, by the law of the foreign State, makes him a subject of that State, but that in the latter case he must have acted *with knowledge* of the consequences which his act, according to the law of the foreign State, entailed.

I am to request that you will take these papers into your consideration, and that you will be so good as to favour Sir Edward with your opinion:—

(1.) Whether it is competent for a British subject, when within the limits of a State in which His Majesty exercises extra-territorial jurisdiction, to voluntarily divest himself of his British national status within the meaning of section 6 of the Naturalization Act of 1870.

(2.) Should the reply to the above question be in the affirmative, whether Mr. de Becker, by going through the Japanese ceremony of adoption into his wife's family on the occasion of his first marriage in 1891, did so voluntarily divest himself of his British nationality, although, as he asserts, it was merely his intention to complete his marriage, and not to become a naturalized subject of the Emperor of Japan.

(3.) Sir Edward would also be glad to be favoured with any observations of a general character which you may desire to offer upon the papers now submitted to you.
I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

(A.) Treaty of Commerce and Navigation between Great Britain and Japan	(Treaty Series, No. 23, 1894)	July	16, 1894.
(B.) Sir C. MacDonald	.. (No. 45. Treaty)	July	20, 1905.
(C.) "Naturalization Act, 1870"	(33 Vict., chap. 14).		
(D.) Sir C. MacDonald	.. (No. 42. Treaty)	September	27, 1906.
(E.) Home Office	..	April	18, 1907.
(F.) Law Officers	..	October	15, 1877.
(G.) Ditto	..	December	3, 1892.
(H.) To Home Office	..	August	28, 1905.
(I.) Home Office	..	October	2, ..
(J.) Ditto	..	June	13, 1906.
(K.) To Home Office	..	July	4, ..
(L.) Home Office	..	July	14, ..
(M.) Parliamentary Paper, Miscellaneous, No. 3 (1893), see p. 193	[Library No. 3533].		
(N.) Nationality Law of Japan, 1899.			

[21864]

Report.

(1.) In our opinion it is competent for a British subject, when within the limits of a State in which His Majesty exercises extra-territorial jurisdiction, to voluntarily divest himself of his British national status within the meaning of section 6 of "The Naturalization Act, 1870."

(2.) That if at the date of Mr. de Becker's first marriage the mere fact of his adoption into his wife's family made him, according to the Japanese law, a Japanese subject, and if Mr. de Becker was, at the time he entered into this marriage, ignorant of this provision of Japanese law, he did not thereby voluntarily divest himself of his British nationality. If, however, he was aware of the effect upon his national status, according to Japanese law, of his marriage in the form adopted, or if, as Mr. Troup's letter of the 14th December seems to imply, he did other acts the sole object of which was to acquire a Japanese nationality, we think that he voluntarily divested himself of his nationality within the meaning of the Act.

In determining whether the conduct of Mr. de Becker justly leads to the inference that his action involved a voluntary renunciation of British allegiance, we think that it would be right to hold that he must be bound—

(a.) By the language of any document signed by him which expressly or by necessary inference imported such renunciation; or

(b.) By acts which to his knowledge could only be properly done by him after a surrender of his British nationality.

We think the same result should follow if the expressions were used and acts taken with indifference to the consideration whether they did or did not involve a surrender of British nationality. The motive for such conduct, whether it were to contract a Japanese marriage or not, does not in our opinion affect the application of these principles.

Upon the facts of this case there can be no hesitation in applying the rule that every man must be bound by the consequences of his acts.

(Signed)

JOHN L. WALTON.
W. S. ROBSON.Law Officers' Department,
June 29, 1907.

NORWAY.

[19304]

No. 19.

[June 10, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, May 6, 1907.

I HAVE the honour to transmit to you, by direction of Secretary Sir E. Grey, the draft of an Order in Council, carrying into effect a Supplementary Agreement between the United Kingdom and Norway, signed at London on the 18th February, 1907, providing that the Extradition Treaty of the 26th June, 1873, between the United Kingdom and the then Kingdom of Sweden and Norway, shall remain in force between the United Kingdom and Norway in so far as its provisions apply to Norway alone; and also amplifying the list of offences set out in Article II of the said Treaty.

The draft Order in Council has been referred to, and approved by, the various Departments of His Majesty's Government concerned, and I have now the honour to request that you will favour Sir E. Grey with your opinion as to whether it may, in its present form, be laid before the King in Council for His Majesty's approval.

I have, &c.

(Signed) F. A. CAMPBELL.

[19304]

Report.

In our opinion the draft Order in Council, as initialled by us, may properly be laid before the King in Council for His Majesty's approval.

JOHN L. WALTON.
W. S. ROBSON.Law Officers' Department,
June 10, 1907.

Annex.

WHEREAS by the Extradition Acts 1870 to 1906, it was amongst other things enacted that, where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, His Majesty may, by Order in Council, direct that the said Acts shall apply in the case of such foreign State; and that His Majesty may, by the same or any subsequent Order, limit the operation of the Order, and restrict the same to fugitive criminals who are in or suspected of being in the part of His Majesty's dominions specified in the Order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient;

And whereas a Treaty was concluded on the 26th day of June, 1873, between Her late Majesty Queen Victoria and His Majesty the King of Sweden and Norway, for the mutual extradition of fugitive criminals, in the case of which Treaty the Extradition Acts of 1870 and 1873 were applied by Order in Council of the 30th September, 1873;

And whereas an Agreement was concluded on the 18th day of February, 1907, between the British and Norwegian Governments, providing that the said Treaty shall remain in force between the United Kingdom of Great Britain and Ireland and the Kingdom of Norway, in so far as its provisions apply to the Kingdom of Norway alone; and also declaring that certain additions shall be made to the offences set out in Article II of the said Treaty, which Agreement is in the terms following:—

[For text, see "Treaty Series No. 19, 1907" [Cd. 3606].]

Now, therefore, His Majesty, by and with the advice of his Privy Council, and in virtue of the authority committed to him by the said Extradition Acts, 1870 to 1906, doth order, and it is hereby ordered, that from and after the * day of , 190 , the said Acts shall

* Date to be inserted by Council Office, and to be a date ten days after publication in "London Gazette."

[509]

N



1907

46

NORWAY.—PANAMA.

apply in the case of Norway under and in accordance with the said Treaty as supplemented by the said Agreement above set forth:

Provided always that the operation of the said Acts shall be and remain suspended within the Dominion of Canada so long as an Act of the Parliament of Canada, being chapter 155 of the Revised Statutes of Canada 1906, and entitled "An Act respecting the Extradition of Fugitive Criminals," shall continue in force there, and no longer.

J. L. W.
W. S. R.

PANAMA.

[21224]

No. 20.

[July 31, 1907.]

Foreign Office to the Law Officers of the Crown.

Extradition
with
Panama.
Order in
Council.

Gentlemen,

Foreign Office, July 5, 1907.

I HAVE the honour to transmit to you, by direction of Secretary Sir E. Grey, the draft of an Order in Council carrying into effect a Treaty between the United Kingdom and the Republic of Panamá, which was signed at Panamá on the 25th August, 1906, and the ratifications of which were exchanged at Panamá on the 15th April last, for the mutual surrender of fugitive criminals.*

The draft Order in Council has been referred to, and approved by, the various Departments of His Majesty's Government concerned, and I have now the honour to request that you will favour Sir E. Grey at your early convenience with your opinion as to whether it may, in its present form, be laid before the King in Council for His Majesty's approval.

I have, &c.
(Signed) F. A. CAMPBELL.

[25917]

Report.

The draft Order in Council as initialled by us may, in our opinion, properly be submitted for the approval of His Majesty in Council.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
July 31, 1907.

* The Order in Council as approved is contained in Confidential Print No. 9011*. The Law Officers did not introduce any alterations in the draft Order.

(47)

PERSIA.

[39349]

No. 21.

[March 16, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 21, 1907.

I HAVE the honour to transmit to you herewith, by direction of Secretary Sir Edward Grey, the accompanying draft Persian Coast and Islands Order in Council, together with the papers relating thereto.

The Officiating Political Resident in the Persian Gulf (who, as you are aware, is at the same time His Majesty's Consul-General at Bushire) suggested to the Government of India, in 1903, that Article 32, Part 6, of the Persian Coasts and Islands Order, 1889, should be amended so as to admit of Vice-Admiralty cases being tried, in the absence of the Consul-General, by that officer's First Assistant. The Government of India and the India Office approved this suggestion, and on the 2nd September, 1903, addressed a letter to this Department (Paper B), inviting the concurrence of the Marquess of Lansdowne to the insertion of this amendment.

In a letter dated the 17th September of the same year (Paper C), this Department replied that Lord Lansdowne had no objection to the proposal to invest the First Assistant with the necessary powers, but that, in view of the abolition of Courts of Vice-Admiralty since the date of the Order in question, he would suggest the repeal of Article 32 and the substitution for it of another Article corresponding to those inserted in recent Orders for conferring Admiralty jurisdiction, and containing the desired special provision regarding the Assistant.

The India Office, on the 23rd September, 1903, addressed a letter to this Department (Paper D), expressing their concurrence in this proposal, and in a further communication, dated the 11th May, 1904 (Paper E), suggested certain additional amendments as the result of a telegraphic correspondence with the Government of India.

In view of these suggestions, the moment appeared to this Department to be a favourable one for a general revision of the Order in such directions as the experience of the fourteen years which had elapsed since its promulgation showed to be advisable, and for the consolidation with it of the Persian Coast and Islands Order in Council, 1895, which was itself nothing but an amendment of the earlier Order.

On the 11th June, 1904, Lord Lansdowne accordingly caused a letter (Paper F) to be addressed to Mr. Albert Gray, requesting him to draft an Order in Council giving effect to the amendments proposed by the India Office, and embodying such clauses of general application, which had been introduced into various draft Orders in Council recently prepared by him, as might be of advantage in the present case.

On the 4th October, 1904, Mr. Gray submitted a first draft of such an Order, with notes in which he called attention to new and altered provisions, and raised some questions which appeared to him to require consideration by this Department and by the India Office.

This draft and the notes were subsequently revised by Mr. Gray in consultation with Mr. Hurst, Assistant Legal Adviser to this Department, and the draft Order, as amended in the light of their discussions (Paper G), was forwarded on the 25th October, 1905, to the India Office, with the suggestion that it should be submitted to the Government of India for their observations.

On the 21st November, 1906, the India Office addressed a letter (Paper H) to this Department, forwarding a copy of a despatch from the Government of India, returning the draft Order with certain further amendments, and in this form it has now been reprinted (Paper I).

I am to request that you will take the draft (Paper I) into your consideration, and that you will favour Sir E. Grey with your opinion whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

Sir E. Grey would at the same time be glad to be favoured with any observations

Persian
Coasts and
Islands
Order in
Council.



PERSIA.—PERU.

of a general nature which you may consider it desirable to offer on the papers now submitted to you.

I have, &c.
(Signed) ERIC BARRINGTON.

List of Papers.

A.) Persian Coast and Islands Order in Council [Confidential 5864*]	December 13, 1889.
(B.) India Office to Foreign Office	September 2, 1903.
(C.) Foreign Office to India Office	September 17, 1903.
(D.) India Office to Foreign Office	September 23, 1903.
(E.) India Office to Foreign Office	May 11, 1904.
(F.) Foreign Office to Mr. Albert Gray	June 11, 1904.
(G.) Persian Coast and Islands New Draft Order in Council, 1904.	
(H.) India Office to Foreign Office	November 21, 1906.
(I.) Persian Coast and Islands Amended Draft Order in Council, 1907.	

[9006]

Report.

In our opinion, the terms of the draft Persian Coast and Islands Order in Council, 1907, as initialled by us, are fit and proper for submission to the King in Council for His Majesty's approval.*

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
March 16, 1907.

PERU.

[6457]

No. 22.

[March 16, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 4, 1907.

Order in
Council re
extradition
with Peru.

I HAVE the honour to inclose the draft of an Order in Council for giving effect to a Treaty of Extradition concluded on the 26th January, 1904,† between the United Kingdom and Peru, of which the ratifications were exchanged at Lima on the 30th November last.

The various Departments of His Majesty's Government which are interested in the matter have concurred in the terms of this draft, and I am now to inquire whether, in your opinion, it may properly be submitted to the King in Council for His Majesty's approval.

I have, &c.
(Signed) ERIC BARRINGTON

* The Order in Council as approved by the Law Officers is contained in Confidential Print No. 8954*.
† The Order in Council, as approved by the Law Officers, is contained in Confidential Print No. 8952*.
The Law Officers approved the draft Orders as submitted to them.

PERU.—SPAIN.

[9032]

Report.

This draft Order in Council, which we have initialled, may, in our opinion properly be submitted for the approval of His Majesty in Council.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
March 16, 1907.

SPAIN.

No. 23.

[August 23, 1907.]

[17363]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 29, 1907.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit for your consideration the papers noted in the accompanying list relating to the claim of the Cuba Submarine Telegraph Company for the payment of the arrears of subsidy due under the terms of the Concession granted to them by the Spanish Government by Royal Decree dated the 29th September, 1895.

According to the terms of this Decree, an annual subsidy, amounting to 10,500 pesos gold (about 2,100*l.*) was to be paid to the Company in monthly instalments by the Treasury of the Island of Cuba until the expiry of the Concession in August 1910. The payments took place regularly up to the 31st December, 1898, at which date the Spanish Government, under the Treaty of Peace at the termination of the war between Spain and the United States of America, relinquished all claim to sovereignty over Cuba, and the island passed temporarily into the occupation of the United States.

The Company thereupon endeavoured to obtain payment of their subsidy from the Government of the United States, but, being unsuccessful in their efforts, they applied for the intervention of His Majesty's Government, who, in virtue of the opinion expressed by the former Law Officers in their reports dated the 2nd May, 1899, and the 30th November, 1900, urged the United States' Government to undertake the obligations entailed by the Concession. This application did not, however, lead to any result, and eventually, on the advice of His Majesty's Ambassador at Washington, it was decided that further action should be suspended until a permanent Government had been constituted in Cuba.

The Cuban Republic was established on the 20th May, 1902, shortly after which date the Company applied to the new Government, with the support of His Majesty's Minister at Havana, for the payment of their subsidy. They met, however, with a fresh refusal, based upon the fact that the payment of the subsidy was an engagement contracted by Spain, that Cuba was not a contracting party, and that the Concession was the outcome of a measure of war.

The claim was subsequently prosecuted in the Cuban Law Courts, resulting in adverse decisions in both Courts, that of the Supreme Court being given on the 11th October, 1906.

Thereupon the Company, seeing no other course open to them but to attempt to recover the money from the Spanish Government, approached Sir E. Grey in April last with the request that the claim might be presented through His Majesty's Embassy at Madrid.

Sir E. Grey recognizes that the matter presents a question of international law of considerable difficulty, but while at first sight it might be held that the obligations originally attaching to Spain in Cuba had devolved upon her successors in the sovereignty over that island, it appears to him, on a full examination of the peculiar circumstances in which the Concession was granted, that the liability of the Spanish

Claim of
Cuba
Submarine
Telegraph
Company
for arrears
of subsidy.



Government cannot properly be held to have devolved either on the United States' Government or on the present Government of Cuba.

The Concession, as stated above, was granted in the year 1895, at a period when a rebellion or insurrection was in progress in Cuba. The General in command of the Spanish forces in the island seems continually to have been impeded in his military operations through the interception by the insurgents of land telegraphic communications between various towns. He consequently made strong representations to the Government at Madrid as to the military necessity for uninterrupted communication between the ports of strategic importance in the island, especially those on the south coast between Cienfuegos and Santiago de Cuba. The result of these representations was the Concession under which the Company contracted to lay the necessary cables with great expedition and under heavy penalties for delay, the Government of Spain, in return, undertaking to pay the substantial subsidy above referred to.

These being the circumstances in which the Concession was granted, three points present themselves which appear to be of considerable weight in fixing liability, viz. :—

1. The facts are consistent with the Concession being a strategic measure for purposes of war.
2. The facts are inconsistent with its being merely a local industrial improvement.
3. The Government of Spain have had the benefit of the contract.

I am to request that you will take the above statements into your consideration together with the inclosed papers, and that you will favour Sir E. Grey with your opinion as to whether a claim for the arrears of subsidy can now be preferred by means of diplomatic representation against the Spanish Government, and, if so, upon what grounds it should be based.

I am to ask that you will be good enough to furnish Sir E. Grey with your reply at as early a date as may be convenient to you, as there are reasons making it desirable that the claim, if presented at all, should be urged with the utmost dispatch.

I have, &c.
(Signed) W. LANGLEY.

List of Papers.

Cuba Submarine Telegraph Company	April 9, 1907.
Concession and Schedule of conditions.	
Cuba Submarine Telegraph Company	May 10, 1907.
Treaty between United States and Spain (see "State Papers," vol. 90, p. 382).	Dec. 10 1898.
Minutes by Mr. Kenrick and Mr. Davidson.	
Cuba Submarine Telegraph Company	May 27, 1907.

Report.

In our opinion, a claim for the arrears of subsidy may properly be preferred by means of diplomatic representation against the Spanish Government.

The claim should be based on the grounds that the obligation was contracted by the Spanish Government personally in the name of the King, and not by the colonial Cuban authorities, and that it was undertaken as a military measure in the interests of the Spanish Government, who have had the benefit of the performance of the contract by the claimants.

It cannot be said, however, that the question is free from doubt. The contract related to a local undertaking, and payment was to be made out of the local Exchequer.

Although we think that the latter stipulation was merely a direction as to payment for the convenience of the parties, it is perhaps open to the contention that it was intended as a condition attaching to payment.

In pressing the claim, His Majesty's Government will be in some degree prejudiced by reason of the delay, and the fact that they have on previous occasions made the claim against the successors in Cuba of the Spanish Government.

(Signed) JOHN L. WALTON (per W. S. R.).
W. S. ROBSON.

Law Officers' Department,
August 23, 1907.

SWEDEN.—SWITZERLAND.

No. 24.

[25913]

[August 9, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 3, 1907.

I HAVE the honour to transmit to you, by direction of Secretary Sir E. Grey, the draft of an Order in Council carrying into effect an Agreement between the United Kingdom and Sweden, signed at London on the 2nd ultimo, providing that the Extradition Treaty between the United Kingdom and Sweden and Norway of the 26th June, 1873, shall remain in force between the United Kingdom and Sweden in so far as its provisions apply to Sweden alone. Certain additional offences are also included for which extradition may be granted.

Extradition
with
Sweden:
Order in
Council.

The draft Order in Council has been referred to and approved by the various Departments of His Majesty's Government concerned, and I have the honour to request that you will favour Sir E. Grey, at your earliest convenience, with your opinion as to whether it may, in its present shape, be laid before the King in Council for His Majesty's approval.

I have, &c.
(Signed) W. LANGLEY.

[26765]

Report.

The above-mentioned draft Order in Council* may, in our opinion, properly be submitted to the King for the approval of His Majesty in Council.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
August 9, 1907.

SWITZERLAND.

[10854]

No. 24A.

[Home Office.]

[March 4, 1907.]

The Law Officers of the Crown to Home Office.—(Communicated to Foreign Office April 5.)

THE Law Officers of the Crown are requested to advise the Secretary of State on questions which have arisen in connection with the case of one Joseph Keller, of Swiss nationality.

The facts are as follows :—

On the 14th November, 1905, property to the value of 6,000l. was stolen from the house of Mrs. Val Prinsep, at No. 1, Holland Park Road, W. Two men of Swiss nationality, Otto Keller and Joseph Keller, were shortly afterwards arrested in Zurich, Switzerland, in possession of some of the stolen property. On the 1st January, 1906,

Escape from
Switzerland
of J. Keller
during trial
for offence
committed
in England;
demand for
extradition.

* The Order in Council is contained in Confidential Print No. 9012*. The Law Officers approved the draft Order without suggesting any alterations.



the men being then in custody in Switzerland, a warrant was issued at the West London Police Court for their arrest on the charge of being concerned together in stealing the property.

The offence charged against the men is included in the list of extradition crimes in the Extradition Treaty with Switzerland (see Article II), but as Article I, paragraph 1, of the Treaty forbids the surrender by the Swiss Government of Swiss citizens "who having been charged with . . . crimes or offences enumerated in Article II, committed in the territory of the one party, shall be found within the territory of the other," it was impossible to obtain their extradition to this country. In accordance, however, with the second paragraph of the same Article, arrangements were made for the prosecution in Switzerland of the two men for the offence committed in London. The result of the prosecution was that both men were convicted and sentenced to terms of imprisonment. During the proceedings, however, Joseph Keller effected his escape, and his conviction was, in consequence, *par contumace*.

It was ascertained in September last that Joseph Keller had returned to London, and the Swiss Government applied for his extradition in accordance with Article V (a) and (c) of the Treaty. By section 26 of "The Extradition Act, 1870," under the heading "Definition of terms," the expression "accused person" includes a person convicted "for contumacy." The Secretary of State by order, under section 7 of the Extradition Act, notified the receipt of this requisition to the Magistrate at Bow Street and required him to issue a warrant for Keller's arrest, but Mr. Marsham was of opinion that as the offence was not committed "in the territory" of Switzerland, he had no power to issue a warrant. A copy of his letter is attached.

The questions then arose whether it was possible to prosecute Joseph Keller in England for being concerned in stealing property from Mrs. Val Prinsep's house, or, failing that, whether it was possible to take proceedings for his expulsion under section 3 (1), (b), (ii) of "The Aliens Act, 1905."

As regards his prosecution in England (apart from the question whether the necessary evidence is now available), there arises a doubt whether he would not be able successfully to raise the plea of "autrefois convict." The case of Hutchinson referred to in a note in 1 Leach 135 has been regarded as authority for the view that a man tried abroad for an offence committed abroad and acquitted by the foreign Court cannot be tried again for the same offence in England. A conviction abroad would presumably have the same effect as an acquittal; but it is doubtful whether Hutchinson's case, even if it decides the law as to crimes committed abroad would extend to crimes committed in England. Hutchinson had committed murder in Portugal; apparently he could not have been tried in this country except by virtue of the Statute 33 Henry VIII, cap. 33. This Statute gave the Crown power to issue special commissions for the trial of persons "vehemently suspected" of treason, misprision of treason, or murder, irrespective of the country in which the offence was committed. Under this Statute, persons, it seems, could be tried for murders committed abroad (as they can now be under section 9 of the offences against the Person Act); but this was clearly not the primary intention of the Statute. The Judges in Hutchinson's case may well have thought the power to try a man for an offence committed outside the realm was open to much doubt, and may have wished to limit it as strictly as possible. Or again, their decision may have been founded on the wording of the Statute under which it was proposed to try Hutchinson. At all events, it seems very slender authority for holding that a Court having jurisdiction by the common law to try a man for an offence committed in this country, is debarred from doing so whenever the defendant happens to have been tried and either convicted or acquitted by the Court of a foreign country. The fact that in many countries a defendant can be convicted *par contumace*, and that the Courts of this country have no guarantee that the proceedings abroad were not collusive, makes it all the more difficult to accept such a contention. The note in Leach of Hutchinson's case appears of insufficient authority to support a doctrine so markedly opposed to the ordinary principles of English law, and no other authority is cited in the text-books. In *R. v. Roche* (1 Leach 134), the defendant at first pleaded "autrefois acquit" on the ground of an acquittal by a Dutch Court, but afterwards withdrew the plea and was tried on the general issue.

Supposing a murder or other crime was committed in this country by a foreigner, who thereupon submitted himself for trial in his own country (possibly by a Court notoriously inefficient or corrupt), and either secured an acquittal or was convicted and received a nominal sentence, or was convicted *par contumace* and suffered no punishment at all, would the Courts of this country allow a plea of "autrefois acquit" or "autrefois convict" to oust their jurisdiction?

As regards his expulsion. The terms of section 3 of "The Aliens Act, 1905," are as follows:—

"3.—(1.) The Secretary of State may, if he thinks fit, make an order (in this Act referred to as an expulsion order) requiring an alien to leave the United Kingdom within a time fixed by the order, and thereafter to remain out of the United Kingdom

"(b.) If it is certified to him by a Court of Summary Jurisdiction after proceedings taken for the purpose within twelve months after the alien has last entered the United Kingdom, in accordance with rules of Court, made under section 29 of "The Summary Jurisdiction Act, 1879," that the alien

"(ii.) Has entered the United Kingdom after the passing of this Act, and has been sentenced in a foreign country with which there is an Extradition Treaty for a crime not being an offence of a political character, which is, as respects that country, an extradition crime within the meaning of "The Extradition Act, 1870."

In section 26 of the Extradition Act of 1870 "extradition crime" is defined as a "crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first Schedule to this Act. Larceny is included in that Schedule.

There is a doubt whether Keller can be held to have been convicted of an offence for a crime which is, as respects Switzerland, "an extradition crime within the meaning of "The Extradition Act, 1870," though the crime is included in the Treaty with Switzerland, if it is held (as Mr. Marsham holds) that he cannot be extradited because the crime was not committed in Swiss territory.

The Law Officers are therefore requested to advise on the following questions:—

1. Can Keller be prosecuted for larceny in England, he having already been convicted of that offence in Switzerland, or can he plead "autrefois convict?"

2. Does it make any difference that he was convicted *par contumace*, and that the term "accused person" includes a person convicted for contumacy?

3. If Keller had been acquitted in Switzerland (say from insufficient evidence), could he plead "autrefois acquit" to an indictment in England?

4. As Keller's offence in England, though not committed in Swiss territory, constituted an offence in Switzerland also, could Switzerland apply for his extradition?

5. Can Keller be said to have been "sentenced" within the meaning of that expression as used in section 3 (1) (b) (ii) of "The Aliens Act, 1905," his sentence being only a sentence *par contumace*?

6. Does Keller's offence constitute "an extradition crime within the meaning of "The Extradition Act, 1870," for the purpose of section 3 (1) (b) (ii) of "The Aliens Act, 1905?"

M. Carlin to Sir Edward Grey.

M. le Secrétaire d'État,

Londres, le 9 Octobre, 1906.

Le Conseil Fédéral me charge et j'ai l'honneur de faire appel aux extrêmes bons offices de votre Excellence à l'effet d'obtenir l'extradition du nommé Joseph Keller, de nationalité Suisse.

Cet individu a été condamné par la Cour d'Assises de Soleure (Suisse), le 20 Juin dernier, à cinq ans de travaux forcés pour vol commis à Londres. Mais pendant l'instruction il a réussi à s'évader, et on a tout lieu de croire qu'il s'est réfugié sur territoire Britannique.

Pour les antécédents de cette affaire je me réfère à la correspondance échangée entre le Gouvernement de Sa Majesté et la Légation de Grande-Bretagne à Berne.

En vue d'obtenir la délivrance d'un mandat d'arrêt provisoire contre Keller, je m'étais adressé, comme de coutume, à Bow Street Police Court. Malheureusement, vu que je n'étais pas en mesure de produire le jugement de condamnation, qui est actuellement en mains de l'autorité Britannique ("Home Office"), le Juge, Mr. Marsham, a déclaré ne pas pouvoir accéder à ma requête.

En priant votre Excellence de consentir à prendre note de la demande d'extradition de mon Gouvernement, je lui serais donc vivement obligé de vouloir bien faire faire les démarches requises pour l'obtention du mandat d'arrêt nécessaire pour l'arrestation éventuelle de Keller.

Veillez, &c.
(Signé) CARLIN.

P



1907

54

SWITZERLAND.

Mr. Marsham to Home Office.

Police Court, Bow Street, October 17, 1906.

Sir,

By the 33 and 34 Vict. cap. 52, sec. 2, when an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals Her Majesty may by Order in Council direct this Act to apply to the case of such foreign State, and may by the same or any subsequent order limit the operation of the order . . . and render its operation subject to such conditions, exceptions, and qualifications as may be deemed expedient. By section 5, when an order applying this Act in the case of any foreign State has been published in the Gazette, this Act shall, subject to the limitations, restrictions, conditions, exceptions and qualifications, if any, contained in the Order, apply in the case of such foreign State. By the definition *fugitive criminal*, means any person accused or convicted of an extradition crime committed *within the jurisdiction* of any foreign State, who is in, or suspected of being in, some part of Her Majesty's dominions.

By Article I of the Treaty with Switzerland an extradition offence must have been committed *in the territory* of the demanding State. I can find no authority for a country delivering up a person demanded by another State where the alleged offence was wholly committed within the territory of the State where the person demanded is found.

"Moore on Extradition," vol. 1, p. 812, in an article on Switzerland, lays it down that "It is an acknowledged principle that extradition can only take place for an act committed *outside* of the territory of the State on which the requisition is made."

See also 2, "Paul Bernard on Extradition," pp. 198 to 202, and 662.

I am therefore of opinion that I have no power to issue a warrant for the apprehension of Joseph Keller for the offence of larceny committed in this country, on the ground that it was not committed within the jurisdiction and within the territory of Switzerland, on the true construction of the Act combined with the Treaty.

I have, &c.

(Signed) R. H. B. MARSHAM.

Opinion.

1. In our opinion Keller can be prosecuted here for the larceny referred to in the case, notwithstanding that he has already been convicted of it in Switzerland. The question is not entirely free from difficulty, but we incline to think that notwithstanding the comity of nations the English Courts would, according to ancient doctrine, be held to be the only Courts possessed of competent jurisdiction to try persons for offences against the English Criminal Law committed in this country, and accordingly we think that a plea of "autrefois convict" would fail.

2. We do not consider that in any view a conviction *par contumace* would support a plea of "autrefois convict" as such a conviction does not appear to be final. We are not informed what is the Swiss law or that of the particular Canton in which Keller was convicted, but assuming a conviction *par contumace* to be the same as in France it is certainly not final (see *re Coppin*, L. R. 2 C. A. 47). We may point out that the terms both of the Treaty and the Extradition Act favour the foregoing view. A person convicted *par contumace* is there defined merely as an accused person.

3. We think *not* for reasons analogous to those given in our answer to the first question.

4. No, as under Article I of the Treaty Switzerland can only apply for extradition of persons who have committed offences in Swiss territory.

5. We think that a sentence *par contumace* is a sufficient sentence for the purposes of the Aliens Act, and we accordingly answer this question in the affirmative.

6. In our opinion Keller's offence does constitute for the purposes of the Aliens Act an "extradition crime" within the meaning of "The Extradition Act, 1870." We think that the section of the Aliens Act merely adopts for the purposes of that Act the crimes mentioned in the Extradition Act, and does not make it necessary that the conditions essential to extradition should exist in relation to such crimes.

(Signed) JOHN L. WALTON.

W. S. ROBSON.

Law Officers' Department,

March 4, 1907.

(55)

UNITED STATES.

[3175]

No. 25.

[February 7, 1907.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, February 1, 1907.

I HAVE the honour to inclose the draft of an Order in Council for giving effect to a Supplementary Extradition Convention concluded between Great Britain and the United States of America on the 12th April, 1905, adding bribery, and offences against bankruptcy law, to the list of extraditable offences contained in former Conventions between the two countries. A copy of the Act of Parliament ("The Extradition Act, 1906.") which was passed on the 4th August, 1906, to include bribery among extradition crimes is also inclosed for convenience of reference.

The Ratifications of this Convention were exchanged at Washington on the 21st December, 1906.

The various Departments of His Majesty's Government which are interested in the matter have concurred in the terms of the draft Order in Council, and I am to request that you will be good enough to inform Secretary Sir E. Grey at your early convenience whether, in your opinion, it may properly be submitted to the King in Council for His Majesty's approval.

I have, &c.
(Signed) F. A. CAMPBELL.

Report.

The draft Order in Council,* as initialled by us, may, in our opinion, properly be submitted for the approval of His Majesty in Council.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department,
February 7, 1907.

No. 25^A.[In Colonial Office letter of
July 5, 1907 (22279).]

[June 29, 1907.]

Law Officers of the Crown to Colonial Office.

My Lord,

Royal Courts of Justice, June 29, 1907.

WE were honoured by your Lordship's commands, signified to us by Mr. Bertram Cox in his letter of the 20th instant, stating that, with reference to our letter of the 30th November, advising as to a draft Order in Council which had been drawn up to give effect to the *modus vivendi* concluded with the United States of America on the Newfoundland fisheries question, he was directed by your Lordship to request that we would favour you with our advice on a further point which had arisen in connection with this question.

That, as we were aware, it was not considered necessary to issue the proposed Order in Council last year, but that this year it would probably be necessary to renew the *modus vivendi* with the United States, and that, in order to secure such a renewal, it was possible that His Majesty's Government might have to consent to the use by the American fishermen of purse seines.

That in our opinion referred to we pointed out that the right conferred on His Majesty in Council to make Regulations under section 1 of the Act 59 Geo. III, cap. 38, was confined to such Regulations and instructions as might be necessary for carrying

* See Confidential Print No. 8836*. The Law Officers approved the draft Order in the form submitted to them.

Order in
Council:
Supple-
mentary
Extradition
Treaty with
United
States of
America.

Applicatio
to United
States'
citizens of
Newfound-
land Rules
relative to
fishing with
purse
seines.



1907

56

UNITED STATES.

into effect the purposes of the Convention, and that it would appear to follow that the Colonial Regulation No. 20 forbidding the use of purse seines in the waters of Newfoundland could only be suspended as far as it applied to American fishermen, if it could be held that its suspension was necessary to carry out the Convention.

That your Lordship did not consider that the mere prohibition to use purse seines could be held to defeat the purposes of the Convention, but that it was necessary to take into consideration the fact that the Newfoundland Government had decided to put in force the provisions of the Bait Act against any Newfoundland fishermen aiding the Americans in their fishing. That the Supreme Court of Newfoundland had affirmed the conviction of the two fishermen to which reference was made in our Report, and that, while a reference would be made to us shortly as to the correctness of this decision, your Lordship was not prepared to dispute the claim of the Newfoundland Government to prevent the inhabitants of Newfoundland from aiding the American fishermen. But that the aid of these fishermen was essential for the use of the gill net, and that it seemed to your Lordship that by insisting on prohibiting the use of purse seines, while also prohibiting the employment of Newfoundland fishermen on American vessels, the Colonial Government was in effect impeding or destroying the American Treaty rights.

That your Lordship would accordingly be glad if we would take his letter and the papers referred to into our consideration, and advise you whether His Majesty has power by Order in Council under section 1 of the Act 59 Geo. III, cap. 38, to direct that No. 20 of the Newfoundland Fishery Rules for 1907, so far as it related to purse seines, should not apply to American fishermen exercising their Treaty rights of fishery.

We have taken the matter into our consideration, and in obedience to your Lordship's commands have the honour to

Report—

That, in our opinion, His Majesty has power by Order in Council under section 1 of the Act 59 Geo. III, cap. 38, to direct that No. 20 of the Newfoundland Fishery Rules for 1907, so far as it relates to purse seines, shall not apply to inhabitants of the United States exercising their rights of fishing under the Convention of 1818 if, as appears to be the case, such an order is deemed necessary for carrying the Convention of 1818 into effect.

We have, &c.

(Signed)

JOHN L. WALTON.
W. S. ROBSON.

[Colonial Office (20363).]

No. 25^B.

[August 2, 1907.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, June 26, 1907.

Newfound-
land
fisheries.
Appeal from
decisions in
Crane and
Dubois
cases.

I AM directed by the Earl of Elgin to request that you will be so good as to favour him with your opinion at your early convenience as to whether application should be made to the Judicial Committee of the Privy Council for leave to appeal from the decision of the Supreme Court of Newfoundland in the matter of an appeal from the decision of Mr. Levi March in the case of O'Reilly v. Crane and Dubois.

2. I am to inclose copies of the judgments delivered by the Magistrate, and on appeal by the Supreme Court of the Colony, of the Petition for leave to appeal to the Privy Council which has been addressed to the Court, and of a Memorandum by counsel for the appellant, from which the facts of the case will appear. I am also to inclose copies of Memoranda drawn up in this Department, which form the grounds on which the Memorandum of the counsel engaged rests. Copies of the documents referred to in these Memoranda are inclosed.

3. It will be observed from the correspondence with the Governor of the Colony, a copy of which is inclosed, that Lord Elgin is advised that under the Charter of Justice there is doubt whether the Supreme Court has any power to grant leave to appeal to the Privy Council, since the charge brought against Crane and Dubois appears to be essentially a criminal one, and no power is given to the Court in the Charter to grant leave to appeal in such cases. Lord Elgin is also advised that the

UNITED STATES.

57

grounds for believing that such an appeal can be allowed which were advanced on the opinion of the Attorney-General of Newfoundland are doubtful.

4. Lord Elgin would accordingly be glad to learn—

(1.) Whether, in your opinion, a decision in favour of the fishermen might reasonably be expected on appeal to the Judicial Committee if leave were granted;

(2.) Whether it is probable that the Judicial Committee would be prepared to grant special leave to appeal, in view of the importance of the issues involved;

(3.) Whether, in the event of the Supreme Court granting leave to appeal, the appeal can be prosecuted in view of leave granted by the Supreme Court in the Colony, or whether it would still be necessary to apply for special leave.

(4.) Generally.

5. I am to add that Lord Elgin is not without hope that it may be possible so to arrange matters with the Premier of Newfoundland as to render the prosecution of an appeal unnecessary, but he is anxious to obtain your advice as soon as possible as to whether an appeal would be likely to succeed.

I have, &c.

(Signed)

List of Papers.

Mr. March's judgment.				
Supreme Court's judgment.				
Petition.				
Memorandum of counsel.				
Secretary of State to Governor	..	..	..	February 16, 1907.
Ditto	..	..	..	March 21, "
Bait Acts, 1888 and 1889 (C. 6044).				
Law Reports (for return).				
Howard Holbrook case.				
Foreign Fishing-Vessels Acts, 1893, 1905, and 1906.				
Proclamation	..	..	..	March 19, 1891.
Proclamation	..	..	..	June 1, 1898.
Proclamation	..	..	..	April 14, 1905.
Marine and Fisheries Act, 1898.				

[28327]

Opinion.

(1.) In our opinion, a decision in favour of the fishermen could not reasonably be expected on appeal to the Judicial Committee, if leave were granted.

(2.) It is probable that the Judicial Committee would be prepared to grant special leave to appeal in view of the importance of the issues involved.

(3.) In the event of the Supreme Court granting leave to appeal, it would still be necessary to apply for special leave.

(Signed)

JOHN L. WALTON.
W. S. ROBSON.Law Officers' Department,
August 2, 1907.

The circumstances of the trial of Crane and Dubois are described in the Foreign Office Memorandum relative to the Newfoundland fisheries for 1907 (Confidential No. 9127).

[509]

Q



[In Colonial Office letter of
September 2, 1907 (29479).]

No. 25^c.

[September 2, 1907.]

*Proposed modus vivendi with United States of America with reference to the Fishery
Season for 1907.*

Order in
Council
secures
Treaty
rights to
United
States'
fishermen.

WHETHER terms of draft Order in Council approved by Law Officers on the 30th November, 1906, are sufficient to secure American vessels against interference whilst engaged in the exercise of the right of fishery.

Opinion of the Solicitor-General on Colonial Office Reference of August 29, 1907.

In my opinion, the terms of the draft Order in Council appended to our Report of the 30th November, 1906, are sufficient to secure American vessels against interference while engaged in the exercise of the right of fishery conferred by the Convention of 1818.

(Signed) W. S. ROBSON.

*Law Officers' Department,
September 2, 1907.*

[25850]

No. 26.

[December 17, 1907.]

Foreign Office to the Law Officers of the Crown.

Foreign Office, August 28, 1907.

Gentlemen,

Claim of
debenture
holders of
the Rio
Grande
Irrigation
and Land
Company.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you the papers noted in the accompanying list with regard to the claim of the debenture holders in the Rio Grande Irrigation and Land Company (Limited) against the United States' Government.

The issues involved in the case are comparatively simple, but have to some extent been obscured by the complications of a very protracted litigation initiated by the Government of the United States. This litigation, which in its various stages extends over several years and comprises some eight distinct judgments, most of which were favourable to the Company's case, has not yet apparently attained finality, but has resulted in entirely depleting the resources of the Company.

The history of the circumstances giving rise to the claim commences in 1893, when a Corporation called the Rio Grande Dam and Irrigation Company was formed in New Mexico according to local law. This was the parent Company of the English Company, whose debenture holders are the present claimants.

The objects of the New Mexican Corporation were to construct a storage dam, reservoir, and irrigation works at Elephant Butte, on the Rio Grande River, in New Mexico.

Powers for all these works were expressly granted by Acts of Congress, which authorized the occupation of public lands for the dam and reservoir site, and gave the right to dig across public lands for irrigation ditches.

A permit was also obtained from the Secretary of the Interior at Washington officially approving and sanctioning the scheme.

The parent Company, therefore, undoubtedly acquired certain Concessions, franchises, and privileges which the Government of the United States are legally and morally estopped from denying.

In May 1896 an English Company, the Rio Grande Irrigation and Land Company (Limited), was formed, which took over the rights and undertaking, and acquired control of the whole of the capital stock of the parent Company.

This Company, as the result of the costly litigation which consumed the whole of its paid-up capital, went into liquidation in April 1900, and the debenture bondholders obtained the appointment of a Receiver.

These debenture bondholders, who are the claimants, are represented in England by Mr. Chetham Strode, and in New Mexico by Dr. Nathan Boyd.

The cause of the ruinous and oppressive litigation is to be found in the existence of a rival irrigation scheme known as the "International (El Paso) Dam Project," promoted by Brigadier-General Anson, Commissioner for the United States, who obtained the institution of proceedings by the Federal authorities for an injunction to restrain the parent Company and the English Company from completing their irrigation works, which had already been actively commenced.

The litigation originated in 1897 by the United States' Government filing a Bill in Equity, alleging that the Rio Grande is a navigable river, and that the Company's works would be a violation of the Mexican Treaty rights, and claiming an injunction to restrain the works.

It is to be noted that, prior to the incorporation of the parent Company, an official report by Major Ernst to the Secretary of War in 1889 had declared the Rio Grande not to be navigable.

Notwithstanding this, and the Concessions which were in consequence granted by the United States' Government, the suit was instituted in May 1897 by the United States' District Attorney in New Mexico at the instance of the Legal Advisers of the United States' Government.

The course of the litigation may be summarized as follows:—

1. Trial in New Mexico Court.

The Court decided in favour of the Company, held that the Rio Grande was not a navigable river, and dissolved the injunction.

2. Appeal to Supreme Court of New Mexico.

The findings of the Trial Court on all points, which were entirely in favour of the Company, were upheld.

3. Appeal to Supreme Court of United States.

The findings of the Lower Courts in the Company's favour were affirmed.

The case was remanded to the Trial Court for inquiry on the question of fact whether the dam would destroy the existing navigability near the mouth of the river.

4. Trial Court, New Mexico (January 1900).

The Court held this inquiry, and took the evidence of thirty-three witnesses, affidavits, reports, &c. They dismissed the complaint, holding that the intended acts of Company would not substantially diminish the existing navigability.

5. Second appeal to Supreme Court of New Mexico.

The Lower Court was again upheld on all points.

6. Second appeal to Supreme Court of United States.

The Counsel for the United States' Government (apparently without any justification) alleged that the Judges of the two Lower Courts were influenced by local interests.

The Court a second time remanded the case to the Trial Court for further inquiry on the question of fact.

7. Supplemental Bill filed by the United States' Government in the Trial Court, New Mexico, claiming forfeiture of the Company's rights because their works had not been completed within the five years prescribed by law.

No notice of application for leave to file this new Bill and no notice of hearing reached the Company.

Judgment by default was entered against the Company.

8. Motion in Trial Court to vacate the decree of forfeiture.

The motion was made at the instance of Dr. Boyd, acting for the debenture bondholders.

January 1904. The Court overruled the motion, and the decree of forfeiture remains.

[509]

R



An appeal by Dr. Boyd to the Federal Supreme Court at Washington to set aside the decree of forfeiture was apparently pending in January 1907, but may have been suspended owing to want of funds.

It will be observed that the defendant Company was successful at no less than five distinct trials, in each case the Court finding in its favour on every point.

The successive appeals have been due to the action of the Attorney-General of the United States, who has thus kept the case continuously before the Courts for about six years.

The peculiarly oppressive feature of the case is that, after the Company had been successful in obtaining judgments in its favour during a litigation of several years on the original Bill, the United States' Government, without giving proper notice to the defendant Company, filed a Supplemental Bill totally inconsistent with the original one, and obtained judgment of forfeiture by default against the Company.

Dr. Boyd, the Receiver for the English debenture bondholders, on ascertaining this, in October 1903, took immediate steps to set aside this Decree, but without success.

Sir E. Grey is of opinion that the Company have been treated, not only oppressively, but with positive injustice, by the Government of the United States in the following respects:—

1. The Government, having granted a Concession to the Company under full legal sanction, subsequently litigated to restrain the Company from exercising the rights so granted on the grounds that the works authorized were illegal.

Even though the Government eventually succeeded in the Courts, the heavy expenditure incurred by the Company in consequence of the Concession would in itself raise a clear case for compensation.

2. After protracted litigation, but before the final determination of the legality of the works, the Government, *without effective notice to the Company*, applied to the Court on a *new claim* (the "Supplemental Bill") totally inconsistent with the former one, and, *without the Company being represented* before the Court, obtained judgment by default against the Company.

3. This judgment by default was a Decree of forfeiture, based solely on the non-completion of the work, which the action of the Government was alone responsible for.

The original Bill claimed that the Concession was illegal. The Supplemental Bill recognized the validity of the Concession by claiming its forfeiture in accordance with its strict terms.

4. Though the litigation is not finally determined, the Government are actually proceeding to execute the same irrigation works which they have sought to restrain the Company from doing.

In considering the steps which should now be adopted, Sir E. Grey has taken into account the well-known principle that all possible legal means of redress must have been resorted to before a claimant can seek diplomatic assistance. It is true that the Company have not exhausted all possible legal remedies, though they have exhausted all their financial resources in defending the very lengthy litigation. An appeal to the Federal Supreme Court at Washington to set aside the Decree of forfeiture, and possibly a subsequent ten years' litigation, may theoretically still be open. But, while fully recognizing that the depleted means of a claimant will not in general excuse the necessity for the prosecution of litigation to its final stage before diplomatic interference, the circumstances in this case are certainly exceptional.

In the note from the Department of State (see Inclosure in Mr. Bryce's No. 50, Commercial, of the 23rd April, 1907, Paper I) Mr. Root admits in terms that the United States' Government, owing to its Treaty obligations, is constrained to proceed with the work of construction without waiting for the judicial determination of the rights of the Company. Having thus advisedly acted as though the litigation had reached finality, the United States' Government would appear to be precluded by their conduct (in so acting on a Decree of forfeiture obtained against the Company by default and without notice) from objecting that the matter must be further contested in the Courts before steps be taken to secure its settlement diplomatically. In all the circumstances, therefore, Sir E. Grey is of opinion that His Majesty's Government would at the present stage be justified in intervening diplomatically on behalf of the Company (or on behalf of the English debenture bondholders), and that further delay will only be prejudicial to the claim.

Dr. Chetham Strode, on behalf of the English bondholders, urges that the matter

should be referred to The Hague for arbitration. Sir E. Grey is disposed to consider that, having regard to the history of the case, the United States' Government would strongly resist such a course. They would, in his opinion, more readily consent to the creation of a Joint Commission for the purpose of examining the claim, and awarding redress if any be found to be due. This would serve the purpose of the Company equally well, as it would seem that any impartial and independent Commissioners must almost inevitably come to the conclusion that the case is one for compensation.

I am to request that you will be good enough to take the facts set forth above into your consideration, and that you will favour Sir E. Grey with your opinion as to the attitude which His Majesty's Government should adopt in the case.

I am to add that the papers noted in the list are sent in original, and should be returned to the Foreign Office when finished with.

I have, &c.
(Signed) LOUIS MALLET.

List of Papers.

(A.) Dr. Chetham Strode	..	..	..	November 21, 1904.
(B.) Sir H. M. Durand	..	(No. 126.	Commercial)	11, 1905.
(C.) Dr. Chetham Strode	..	..	..	March 3, 1906.
(D.) Mr. Nathan Boyd	..	..	..	October 25, "
(E.) Dr. Chetham Strode	..	..	..	November 28, "
(F.) Dr. Chetham Strode	..	..	..	January 8, 1907.
(G.) Mr. Bryce	..	(No. 24.	Commercial)	March 7, "
(H.) Dr. Chetham Strode	..	..	..	25, "
(I.) Mr. Bryce	..	(No. 50.	Commercial)	April 23, "
(J.) Dr. Chetham Strode	..	..	..	June 17, "
(K.) Dr. Chetham Strode	..	..	..	July 31, "
(L.) Mr. George Young to Mr. Law	..	..	..	August 9, "

[33181]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, October 10, 1907.

I HAVE the honour to transmit to you, by direction of Secretary Sir E. Grey, with reference to the letter from this Office of the 28th August last, a further letter from Dr. R. Chetham Strode,* relative to the case of the Rio Grande Irrigation and Land Company (Limited).

Sir E. Grey would be obliged if you will be good enough to favour him with your opinion on the case at your early convenience.

I have, &c.
(Signed) W. LANGLEY.

[41518]

Report.

In our opinion His Majesty's Government may properly support this claim without requiring the claimants to continue the litigation of the matter. The salient facts upon which a fair and reasonable claim can be based are, that the claimants are interested in certain rights or Concessions obtained in accordance with the laws of New Mexico and of the United States, and that the Government of the United States, by instituting litigation raising a contention unfounded in fact, have so delayed the execution of the works in question that forfeiture of the rights or Concessions has been incurred under the law of the United States. That the contention that the proposed works at Elephant Butte would interfere with the navigability of the Rio Grande is unfounded appears to be shown by the fact that the United States' Government are constructing similar works at or near the same place, but if the United States' Government really dispute this question, it would be a proper subject for adjudication by the Tribunal appointed to deal with the claim. It is not clear from the papers before us whether the effect of the judgment of the Supreme Court of the United States of May 1899 was to restore the temporary injunction granted by the District Court of New Mexico, but even if the Company were not actually

* Dr. R. Chetham Strode, October 3, 1907.



1907

restrained, we do not think that their failure to proceed with the works while litigation was pending should debar them from compensation, though no doubt their case would be stronger if their works were actually restrained by injunction. We think that the United States' Government were entitled to institute the proceedings of May 1897 and to pursue them, and we doubt whether the proceedings for forfeiture in April 1903 are open to any complaint as a matter of law, though we think that, under the circumstances, it was unfair conduct on the part of the United States' Government to obtain and support a Decree made in default.

As indicated above, we do not think that the claim necessarily depends on the allegations of dishonesty made by the claimants, though no doubt the conduct of certain officials might be impugned in the course of the inquiry.

The claim could be properly referred either to The Hague or to a Joint Commission, but we think that the United States' Government would probably prefer the latter Tribunal.

(Signed)

JOHN L. WALTON.
W. S. ROBSON.

*Law Officers' Department,
December 17, 1907.*



1908

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. February 1909.

CONFIDENTIAL.

(9402.)

11
China sent.

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1908.



1908

LIST OF REPORTS.

(Arranged according to Countries.)

NOTE.—The Reports not addressed to the Foreign Office are marked 4A, &c.

CHINA.

No.		Date.	SUBJECT.	Page.
1	Law Officers ..	Apr. 1, 1908	Fees leviable by Consular Officers in China as emigration officers. Approving draft Order in Council [China Passenger-ships' Fees Order in Council]	1

GENERAL.

2	Law Officers ..	Apr. 22, 1908	Nationality of children of His Serene Highness Prince Louis of Battenberg and of Prince Henry of Battenberg. Stating which of them, in their opinion, are British subjects, and mode in which such status should be insured in the case of two of them. Form of certificate (Declaration) that might be handed in for the German Courts on the subject	2
3	Lord Chancellor	Apr. 24,	Canadian Act declaring the waters of Hudson's Bay to be territorial cannot, in his opinion, be justified. Suggests that Act be not disallowed, but that Canadian Government be told that His Majesty's Government cannot defend the position if assailed	4
4	Law Officers ..	July 15,	Foreign Jurisdiction (Probates) Order in Council. Approving draft of as initialled	5
4A	Law Officers to Colonial Office	Aug. 8,	Claim of Ceylon Government to pearl fisheries in Gulf of Manaar outside territorial limits can, in their opinion, be asserted if there is evidence of ancient user (prescription). Suggested mode of stopping infringement by foreigners	7
4B	Law Officers .. and Lord Chancellor	Nov. 2, Dec. 8,	Proclamation of neutrality. Approving proposed alteration of wording of in future	8

ITALY.

5	Law Officers ..	Mar. 20, 1908	Proposed marriage of Count N. Androuzoz and Miss Seton. Consul-General at Naples should not grant certificate of <i>nulla osté</i> , as his divorce in Greece might not be recognized by English Law Courts	12
---	-----------------	---------------	---	----

RUSSIA.

6	Law Officers ..	June 6, 1908	Mr. N. Luxenburg, naturalized British subject of German origin, imprisoned at Odessa by mistake. Compensation should not be demanded as of right, but <i>solatium</i> might be demanded, as he was not allowed to communicate with British Consul-General	14
---	-----------------	--------------	---	----

[1231]

LIST OF REPORTS.

iii

No.		Date.	SUBJECT.	Page.
7	Law Officers ..	July 15, 1908	Sinking of "Knight Commander" during Russo-Japanese war. Approving draft despatch to His Majesty's Chargé d'Affaires at St. Petersburg, rebutting reasons of Russian Government for refusing to submit question to Hague Tribunal	16

SIAM.

8	Law Officers ..	April 14, 1908	Proposed Treaty with Siam for construction of a railway by Siam in the Siamese Malay States by means of loan from Federated Malay States on the security of the loan sections of the railway as constructed inconsistent with pledge to bondholders of 1905 and 1907 loans ..	18
---	-----------------	----------------	---	----

ZANZIBAR.

9	Law Officers ..	Aug. 7, 1908	Zanzibar Order in Council altering number of Judges, &c. Approving draft of	20
---	-----------------	--------------	---	----



(iv)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1908.

[The figures refer to the numbers of the pages.]

ACT—DIV.

A.

- Act, Canadian. Jurisdiction over Hudson's Bay, 4, 5.
 " " Attitude of His Majesty's Government, 5.
 Androutzos, Count Nicholas, 12.
 " Madame, 13.
 Arbitration *re* sinking of "Knight Commander" (neutral prize). Russian Government refuse, 16-18.
 Arrest. *See* Imprisonment.

B.

- Battenberg. His Royal Highness Prince Henry (nationality of children of), 2-4.
 " His Serene Highness Prince Louis (nationality of children of), 2-4.
 Bowles, Mr. Gibson, M.P., 8.

C.

- Canadian Act. Jurisdiction over Hudson's Bay, 4, 5.
 Certificates of nationality of Battenberg children required by German Courts, 2-4.
 Ceylon pearl fisheries. Exclusive claim to, 7.
 China (Passenger Ships) Fees Order in Council, 1.
 Claim on account of N. Luxemburg, imprisoned by mistake in Russia. Cannot be put forward as of right, 16.
 " Grounds on which *solatium* might be demanded, 16.
 " Sinking of "Knight Commander" by Russians during war, 16-18.
 Consuls in China as emigration officers. Fees leviable by, 1.
 Court. *See* Law Court, Arbitration, Prize Courts.

D.

- Declaration. *See* Certificate.
 Divorce obtained abroad by Count N. Androutzos, 12, 13.
 " Need not be acted on as valid by English Courts, 12, 13. *See also* Marriage (of same).

EMI—LUX

E.

- Emigration Officers. Fees liable by Consuls as, 1.

F.

- Federated Malay States. *See* Railway Loan.
 Fisheries. *See* Pearl fisheries (Ceylon).
 Fripp, Miss Isabella, 12.

H.

- Hague Tribunal. *See* Arbitration.
 Holland, Professor, 8.
 Hudson's Bay. Canadian Act declaring waters of to be territorial, 4, 5. *See also* Act (Canadian).

I.

- Imprisonment of Mr. Luxemburg in Russia (case of mistaken identity), 14-16.
 Italy. *Nulla osta* certificates for marriage is not to be given. *See* Marriage.

J.

- Judgments, foreign, not always upheld in English Courts, 13, 14.
 " of Prize Courts not always internationally conclusive, 18.

K.

- "Knight Commander." Claim for sinking of as carrying contraband of war, 16-18.

L.

- Law Courts. Certificates of nationality of Battenberg children required by German, 2-4.
 " English. Foreign judgments not always upheld in, 13, 14.
 Loan. *See* Railway Loan.
 Luxemburg, Mr. N., 14-16.
 " Rosa, 15.

ALPHABETICAL INDEX.—(Names and Subjects.)

MAL—PRI.

M.

- Malay States. *See* Federated Malay States.
 Manaar, Gulf of. Claim to exclusive pearl fisheries in, 7.
 Maritime jurisdiction. *See* Territorial waters.
 " " in Gulf of Manaar (pearl fisheries), 7.
 " " over extended areas (Behring Sea, &c.), 4, 5, 7.
 " " *See* Hudson's Bay.
 Marriage of Count N. Androutzos. Consular Officer not to give *nulla osta* certificate, 13, 14.
 " " " Divorce from first wife might not be upheld by English Courts, 13, 14.

N.

- Nationality of children of Prince Henry and Prince Louis of Battenberg, 2-4.
 Neutral prizes, sinking of. *See* "Knight Commander."
 Neutrality. Alteration in wording of Proclamation of, 8-12.
 " Discussion in "Times" on subject of, 8.
Nulla osta. *See* Marriage.

O.

- Order in Council. China (Passenger Ships) Fees, 1.
 " " (Foreign Jurisdiction) Probates, 5, 6.
 " " Zanzibar. Change in judicial body, 20.

P.

- Pearl fisheries (Ceylon). Claim to exclusive right over, 7.
 " " Ditto. Mode of asserting, 7.
 Pemberton v. Hughes, 13.
 Pinkney, W., 18.
 Police. Illtreatment by Russian. *See* Luxemburg, N.
 Prescriptive rights to fisheries. As to, 7.
 "Princesse Marie." Non-contraband cargo of condemned by Prize Court, 18.
 Prizes (neutral), sinking of. *See* "Knight Commander."

PRI—ZAN.

- Prize Courts. Decisions not always internationally conclusive, 18.
 Probates (Foreign Jurisdiction) Order in Council, 5, 6.
 Proclamation of neutrality. Change in wording, 8-12.

R.

- Railway Loan from Federated Malay States to Siam, 18-20.
 " Terms inconsistent with pledge to holders of previous loans, 20.
 Royal Family. *See* Battenberg (nationality case).
 Russia. *See* Imprisonment.

S.

- Seton, Miss, 12.
 Siam Railway Loan. *See* Railway.

T.

- Territorial water. Canadian Act declaring Hudson's Bay to be within, 4, 5. *See also* Act (Canadian). *See also* Maritime jurisdiction.
 " Exclusive fishery rights beyond usual limits, 7.
 "Times." Discussion in on wording of Proclamation of Neutrality, 8.
 Treaty with Siam (Jurisdiction Loan for Railway, &c.), 18, 19.
 Tribunal (Hague). *See* Arbitration.

V.

- Vessel. Sinking of neutral prize during war, 16-18. *See also* "Knight Commander."
 " Condemned, including innocent cargo. *See* "Princesse Marie."

W.

- War, Russo-Japanese. Claim for sinking of "Knight Commander," 16-18.
 " " Refusal of Russia to submit question to arbitration, 16-18.

Z.

- Zanzibar Order in Council relative to judiciary, 20.

CONFIDENTIAL.REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1908.

CHINA.

[7966]

No. 1.

[May 21, 1908.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 1, 1908.

I HAVE the honour, by direction of Secretary Sir E. Grey, to inform you that the Lords Commissioners of His Majesty's Treasury have recently sanctioned the adoption of certain changes necessary to regularize the levy of fees by certain of His Majesty's Consular officers in China in discharge of their duties as emigration officers.

Order in
Council:
Fees
leviable by
Consuls in
China as
Emigration
Officers.

I am therefore to transmit herewith the accompanying draft Order in Council, under "The Consular Salaries and Fees Act, 1891," which prescribes the fees to be taken by Consuls on the issue of certificates in accordance with the Straits Settlements Immigration Ordinance, copy of which is inclosed for convenience of reference. A copy of the Consular Salaries and Fees Act is also inclosed.

Sir E. Grey will be obliged if you will take the draft Order in Council into your consideration, and will favour him with your opinion as to whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

I have, &c.

(Signed) LOUIS MALLET.

List of Papers.

Draft Order in Council.
Straits Settlements Ordinance. No. XIX of 1902.
Consular Salaries and Fees Act, 1891 [54 & 55 Vic., ch. 36].

[18126]

Report.

In our opinion the draft Order in Council, as initialled by us,* may properly be submitted to the King for the approval of His Majesty in Council.

(Signed)

W. S. ROBSON.
S. T. EVANS.

Law Officers' Department,
May 21, 1908.

* The Law Officers approved the Order in Council as submitted to them without introducing any amendments. The text of the Order is contained in the "London Gazette" of July 7, 1908 [Confidential 9265*]. It is entitled: "China (Passenger-Ships Fees) Order in Council, 1908."



(2)

GENERAL.

[5356]

No. 2.

[April 22, 1908.]

Foreign Office to the Law Officers of the Crown.

Nationality
of the
children of
Prince
Henry and
Prince
Louis of
Battenberg.

Gentlemen,

Foreign Office, March 17, 1908

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to transmit to you the accompanying papers, which relate to the question of the nationality of the children of His Royal Highness the late Prince Henry of Battenberg, and of His Serene Highness Prince Louis of Battenberg.

It will be seen (Paper A) that His Majesty's Chargé d'Affaires at Darmstadt reported on the 30th November last that, in connection with certain legal formalities initiated by His Serene Highness Prince Louis of Battenberg relative to estates held by him in the Grand Duchy of Hesse, the German Courts had requested that they might be furnished with a Declaration from a British authority that the children of His Serene Highness, and also those of the late Prince Henry of Battenberg, were British subjects.

His Majesty's Secretary of State for the Home Department, to whom the matter was referred, stated (Paper B) that as regards the children of the late Prince Henry of Battenberg there is no difficulty, inasmuch as it appears that all four children (including Princess Victoria Eugénie, who is now Queen of Spain) were born in the United Kingdom, and their nationality is determined thereby. That with regard to the children of Prince Louis of Battenberg the same considerations apply to two of the children, viz., Princess Victoria Alice (now married to Prince Andrew of Greece) and Prince Louis François, who were both born in the United Kingdom; that the other two children of Prince Louis, viz., Princess Louise and Prince George, were, however, born in Germany in 1889 and 1892 respectively, and the question of their nationality is therefore not without difficulty.

Prince Louis of Battenberg obtained in 1868 a certificate of naturalization (of which a copy is inclosed (Paper C)) under "The Naturalization Act, 1844" (Paper D). By virtue of that certificate the Prince has the rights and capacities of a British subject, except any rights or capacities of a natural born British subject out of and beyond the Dominions of the British Crown and the limits thereof. The nationality of a child born abroad of a father naturalized under the Act of 1844 does not appear to have been authoritatively decided, but the opinions of your predecessors, which are referred to in the Home Office letter, and of which copies are inclosed (Papers E and F), are to the effect that the grant of a certificate under that Act is personal, and does not confer British nationality by descent on the children born abroad. In view, however, of the fact that the opinion of the Law Officers of 1860 (Paper E) is limited by the expression "the parent being abroad," inquiry has been made of Prince Louis of Battenberg whether at the time of the birth of the children in question His Serene Highness was or was not in the British Dominions.

It now appears from His Serene Highness' letter of the 16th January (Paper G) that at the time of the births of these children he was in Germany, and was consequently abroad (i.e., not within the King's Dominions). His Serene Highness further states in this letter that, with a view of avoiding any claim on the part of the German Government upon himself or his children as German subjects, he had fulfilled the necessary formalities, renouncing for himself and his descendants the position of a subject of the Grand Duke of Hesse and of the German Empire. It would seem to follow, therefore, that if Princess Louise and Prince George are neither British subjects nor German subjects, they are technically of no nationality.

The Home Office letter (Paper H) shows the reply which His Majesty's Secretary of State for the Home Department suggests should be communicated to the German Courts in reply to their inquiry. In view, however, of the fact that the question is not wholly free from doubt, and also of the fact of His Serene Highness' near connection with the British Royal Family and his distinguished position in the public service of this country, Sir E. Grey would prefer, in the first instance, to submit the matter for your consideration.

It may be added that if it should be desired that Prince George of Battenberg

GENERAL.

3

(born the 6th November, 1892, and consequently now in his sixteenth year) and Princess Louise (born the 13th July, 1889, and consequently now in her nineteenth year) should acquire British nationality, three possible courses suggest themselves, viz. :—

1. His Serene Highness Prince Louis of Battenberg might obtain a certificate of naturalization under the last paragraph of section 7 of "The Naturalization Act, 1870," which provides that—

"An alien who has been naturalized previously to the passing of that Act may apply . . . in the United Kingdom."

In this event Prince George and Princess Louise of Battenberg might acquire British nationality under section 10 (5) of the Act.

2. Prince George and Princess Louise of Battenberg might themselves be granted certificates of naturalization under section 7 of the Act.

Sir Edward Grey understands that the Secretary of State for the Home Department is willing for special reasons in particular cases to depart from the general rule that certificates of naturalization are not granted to minors, and to grant such certificates, waiving any question as to the validity of certificates so granted.

3. Prince George and Princess Louise of Battenberg could, if necessary, be naturalized by special Act of Parliament, although it is, as a rule, undesirable that recourse should be had to this procedure in cases where naturalization can be effected under the General Act.

Sir E. Grey would accordingly be glad if you would take the papers inclosed herewith into your consideration, and favour him at your earliest convenience with your opinion—

1. Whether Prince George and Princess Louise of Battenberg, being the children born abroad of His Serene Highness Prince Louis of Battenberg, who was naturalized a British subject under the Act of 1844, are or are not to be deemed naturalized British subjects.

2. In the latter case, how best the status of British subject can be conferred upon Prince George and Princess Louise.

3. As regards the terms of the Declaration which should, in the circumstances be furnished to the German Courts.

Sir E. Grey would also be glad to be furnished with any observations of a general character which you may be good enough to offer on the papers now submitted to you.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

(A.) Mr. Harford, No. 5, Treaty	.. .. .	November 30, 1907
(B.) Home Office	.. .. .	December 24, 1907
(C.) Certificate of Naturalization of Prince Louis of Battenberg	.. .. .	September 30, 1868
(D.) "Naturalization Act," 7 and 8 Vic., cap. 64	.. .. .	August 6, 1844
(E.) Law Officers' Report	.. .. .	August 13, 1860
(F.) Law Officers' Report	.. .. .	July 14, 1875
(G.) Prince Louis of Battenberg	.. .. .	January 16, 1908
(H.) Home Office	.. .. .	February 13, 1908
(I.) "Naturalization Act," 33 and 34 Vic., cap. 14	.. .. .	May 12, 1870

[13909]

Report.

1. In our opinion Prince George and Princess Louise, having been born abroad in the circumstances stated, are not natural born British subjects.

Whether by section 10 (5) of "The Naturalization Act, 1870," they have become naturalized British subjects on their becoming resident with their father in the United Kingdom is open to argument either way.

The Attorney-General thinks that if they have so become resident they are now naturalized, as the words of section 10 (5) are quite general, and appear to apply to all certificates of naturalization, whether granted under the Act of 1844 or the Act of 1870.



The *Solicitor-General*, however, is of the opinion that section 10 (5) only applies to the children of persons who have received certificates of naturalization under the 1870 Act.

In these circumstances we think it is desirable that Prince Louis should obtain a certificate of naturalization under the Act of 1870, in order that he may become clearly entitled to the benefit of section 10 (5).

2. We think that the best method of conferring the status of British subject upon Prince George and Princess Louise, if they have resided in the United Kingdom with their father, is to proceed as indicated in the above answer.

3. If the course above suggested is adopted, before furnishing the Declaration to the German Courts, we think that the Declaration should state that, in the opinion of His Majesty's Government, the four children of Prince Henry, except Princess Victoria Eugénie, who is now Queen of Spain, and the four children of Prince Louis, except Princess Victoria Alice, who is now married to Prince Andrew of Greece, are British subjects.

The Declaration should further state that Princess Victoria Eugénie and Princess Victoria Alice were formerly British subjects, but have ceased to be so by reason of their respective marriages.

We assume that it is not necessary for the purposes of the proceedings in the German Courts to advert to any distinction between natural born and naturalized British subjects.

(Signed) W. S. ROBSON.
S. T. EVANS.

Law Officers' Department,
April 22, 1908.

[14001]

No. 3.

[April 24, 1908.]

Memorandum by the Lord Chancellor.

THERE are two questions raised in these papers:—

1. Whether or not a Canadian Act, declaring Hudson's Bay in effect to be territorial water, and imposing a license fee on all vessels whale fishing there can be successfully defended.

2. What course should be pursued as a matter of policy in view of this Canadian claim.

In regard to the first of these questions I do not believe that any impartial Arbitrator would entertain the idea of treating Hudson's Bay as a *mare clausum*.

I think it is a mistake to treat controversies of this kind as if you could found upon logical inferences finely reasoned from the vague language of Charters or of Treaties. Many of the old Charters and the old claims (alike of England, Spain, and France) to possessions in the New World were of the widest description, and each nation has protested against the generality of the other's pretensions in forgetfulness of a similar error in its own. The United States in turn has been just as inconsistent in alternately advancing and denouncing titles of this kind on its own frontiers and in South America (*e.g.*, Behring Sea, Alaskan Boundary and Venezuelan controversies, *cum quibusdam aliis*.) Municipal Acts of Parliament are obviously not binding on foreign nations and Treaties only bind the parties to them. So far as I can see here neither Charters nor Treaties nor Acts of Parliament definitely and unequivocally claim this status for Hudson's Bay. Such a claim would have been imperfectly understood in early days. But even if they did so claim in the most explicit manner it would by no means conclude a question in which the whole world has an interest. What counts is not the existence of unilateral documents, but the hard fact of user and occupation following upon a claim or the recognition of a claim by other nations because it has been preceded by user and occupation. Of this there is not a vestige in the Canadian contention. On the contrary, it is admitted that since 1861 at all events (and quite likely long before that) American whalers have uninterruptedly

Canadian
Act de-
claring
Hudson's
Bay to be
territorial
water.

and of right fished in Hudson's Bay. That fact alone would suffice to dispose of this question, in my view.

In regard to the arguments arising from the geographical configuration of this bay, there are no rules of international law and no principles of international usage which determine what are the physical requisites of a *mare clausum*. Indeed, when the infinite variety of inclosed or partially inclosed waters is considered, it is obvious that no such principles can be formulated, except in the most elastic terms. The shape and size of the waters in question, the nature and width of the approaches to them, their position as a means of access to the territory of one or more nations or of passage to waters beyond, are all ingredients and have to be considered as a whole. We are dealing with a sea 800 miles long by 600 miles in width at some parts, with seven entrances from the western end of the Straits, of which one is 29 miles and another 16 miles wide; and Hudson Strait is 460 miles long and 100 miles broad. Nothing short of an exclusive enjoyment or control, acquiesced in by nations in general, could make such a sheet of water territorial, and I do not find any instance quoted, in modern times, of any ship having been excluded or any act of sovereignty acquiesced in.

Notwithstanding the elaborate contentions of the Colonial Office, I cannot think that any weight of instructed opinion, either in Europe or America, would sustain us in arguing that the Canadian Government could treat Hudson Bay or Strait as territorial.

Upon the second point, I cannot say whether the contention of Sir Charles Lucas in his letter of 21st February, 1908 (that disallowance would not have the desired effect) is sound in law, because the Canadian Acts are not before me. If it be so, this technical point would not much signify. The important point is whether His Majesty's Government should afford any degree of sanction to an untenable claim by deliberately allowing an Act which affirmed it, when they have in their power to disclaim responsibility for that claim by public disallowance of the Act. I must observe, however, that the precedent of a Colony seeking to affirm by Colonial Statutes without the previous approval of His Majesty's Government propositions affecting the territorial rights or claims of other nations is very dangerous.

I think the "third alternative" suggested in Mr. Mallet's Minute (undated) to document 32027 has much to commend it, namely, that the Act should not be disallowed, but Canada should be formally notified that we cannot defend the position if assailed.

It seems almost the only course, now that Canada has confronted us with a peremptory choice, either to face the odious duty of disallowing the Act, or to accept some degree of responsibility towards foreign nations for a claim which is quite destitute of merit. My difficulty in accepting the "third alternative" is that it would leave the formal sanction to a claim which will not only be scouted by the United States, but will be used against us with deadly effect, unless we effectively repudiate it, in future disputes as to fisheries. And it is clearly against our interests, I should say, to encourage the enlargement of their territorial waters by other nations.

These considerations will no doubt be before the Cabinet, and at present I will say nothing further on the question of policy. It might be possible to say to Canada that the Act is not disallowed, but that, as at present advised, His Majesty's Government do not adopt its description of the status, and cannot undertake to maintain the claim as accurate or valid against other nations.

(Signed) LOREBURN.

Kingsdown, Dover, April 21, 1908.

[18100]

No. 4.

[July 15, 1908.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, June 25, 1908.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit herewith the draft of an Order in Council, to be called "The Foreign Jurisdiction (Probates) Order in Council, 1908," and certain papers connected therewith.

In all the foreign countries where extraterritorial jurisdiction is vested in His Council.

[1231]

C

Foreign
Jurisdiction
[Probates]
Order in
Council.



Majesty the British Courts have jurisdiction in matters of probate, and a provision also appears in slightly varying forms in all the Orders in Council under the Foreign Jurisdiction Act creating such Courts to the effect that jurisdiction is to be exercised in conformity with English law.

The fees to be levied on grants of probate (which in actual practice are in the nature of, and take the place of, death duties) are prescribed in Rules of Court issued under these Orders in Council.

A copy of "The China and Corea Order in Council, 1904," and the Rules thereunder is inclosed herewith as a specimen (Paper G).

Difficulties have from time to time arisen as to the extent to which the provisions of the Finance Acts and similar Acts relating to the charging of death duties in this country are to be applied in dealing with estates under administration in these British Extraterritorial Courts.

Sir E. Grey does not think it necessary to trouble you with the details of these cases, but the documents numbered 1 and 3 in the accompanying printed paper (A) will serve as examples.

After full consideration of the question, Sir E. Grey decided, in consultation with the Lords Commissioners of the Treasury, that an Order in Council under "The Foreign Jurisdiction Act, 1890," should be enacted, applying to China, Corea, Turkey, Persia, Siam, and Morocco, regulating the levying of probate fees in the Courts established by the Orders in Council relating to those countries respectively, and the draft submitted herewith has been prepared accordingly.

The draft has been concurred in by the Lords Commissioners of the Treasury. It has also been sent to the Judges of the various Courts concerned, and their observations have received careful consideration.

Article 6 of the draft is founded on section 28 (2) of "The Customs and Inland Revenue Act, 1881," as amended by section 11 of "The Customs and Inland Revenue Act, 1889." Article 7 is founded on sections 2 (2) and 3 of "The Finance Act, 1894," and Article 8 on section 7 of the same Act.

I am to request that you will take the draft Order into your consideration, and will favour Sir E. Grey with your opinion as to whether its terms are fit and proper for submission to the King in Council for His Majesty's approval. Sir E. Grey will also be glad to receive any observations of a general nature which you may be good enough to offer.

I have, &c.
(Signed) W. LANGLEY.

List of Papers.

(A.) Printed papers (Confidential No. 8798).			
(B.) Judge Cator, Constantinople [4643/07]	..	(No. 6)	February 7, 1907.
(C.) Judge Turner, Bangkok [11768/07]	..	(No. 2)	February 28, "
(D.) Judge de Saumarez, Shanghai [15697/07]	..	(No. 11)	April 5, "
(E.) Treasury [13074/08]	..	..	April 14, 1908.
(F.) Treasury [18100/08]	..	..	May 25, "
(G.) China and Corea Order in Council, and Rules thereunder (Confidential No. 8518*)	..	..	October 24, 1904

[24697]

Report.

In our opinion, the above-mentioned draft Order initialled by us may properly be submitted to the King for the approval of His Majesty in Council.*

(Signed) W. S. ROBSON.
S. T. EVANS.

Law Officers' Department,
July 15, 1908.

* The Law Officers introduced no alterations in the draft of the Order in Council submitted to them. The text of the Order is contained in the "London Gazette" of October 6 (Confidential 9306*).

[29086]

No. 4^a.

[In Colonial Office,
August 20, 1908.]

[August 8, 1908.]

The Law Officers of the Crown to Colonial Office.

My Lord,

Law Officers' Department, August 8, 1908.

WE were honoured with your Lordship's commands, signified to us in Mr. Antrobus's letter of the 25th May last, stating that he was directed by your Lordship to transmit to us three despatches from the Governor of Ceylon with regard to the claim of the Colonial Government to exclusive rights in the pearl fisheries in the Gulf of Manaar, off the West Coast of Ceylon.

Claim of the Colonial Government to exclusive rights in the pearl fisheries in the Gulf of Manaar.

That this question formed the subject of correspondence in 1891 and 1892 in connection with the Chanks Ordinance of 1890, and that in the proceedings at the Behring Sea Arbitration frequent references were made to the rights of the Ceylon Government to the pearl fisheries. That a print containing that correspondence was inclosed, together with some extracts from the Behring Sea Arbitration proceedings and some papers, including two opinions by Law Officers of the Crown, relating to the pearl fisheries off the coast of Burmah and in the Persian Gulf. That a volume containing the Ceylon enactments relating to the pearl banks was also inclosed.

That in 1906 the Ceylon Pearl Fisheries were leased by the Government for a term of twenty years to the Ceylon Company of Pearl Fishers (Limited). That a copy of the lease was inclosed, and that from Article 11 it would be observed that the Company was expected to expend considerable sums annually upon the culture of the pearl oysters and the improvement of the pearl banks within the conceded area.

That, in view of the development now reported by the Governor, your Lordship desired that you might be favoured with our advice as regarded the extent of the rights of the Ceylon Government and the manner in which any infringement of those rights which might be attempted should be dealt with.

That Mr. Antrobus was accordingly to request us to take the papers into our consideration and advise your Lordship—

(1.) As to the extent of the area over which exclusive rights of fishing for pearl oysters could properly be claimed by the Ceylon Government.

(2.) What steps should be taken to protect those rights in the event of attempts being made to infringe them; and especially how far such infringements, if made by persons who were not British subjects or who poach from foreign vessels, should be met by legal proceedings in Ceylon, and how far by diplomatic representations.

(3.) Whether the Ceylon Government would be justified in taking possession of offending vessels outside the 3-mile limit.

We have taken the matter into our consideration, and, in obedience to your Lordship's commands, have the honour to

Report—

(1.) That we think that exclusive rights of fishing for pearl oysters can properly be claimed by the Ceylon Government over those banks and parts of the bottom of the sea as to which there is evidence of ancient user on the part of successive Governments of Ceylon in the exercise of their sovereign rights. Such user appears to have existed long antecedent to the suggestion or adoption of the 3-mile limit, and is therefore, in our opinion, not restricted by that limit.

(2.) We think that infringements by persons who are not British subjects should be met by legal proceedings in Ceylon. Diplomatic action would scarcely be appropriate except in cases where His Majesty's Government consider that the Government of the offender's country is in some way responsible for his acts.

(3.) We think that the Ceylon Government would be justified in taking possession of offending vessels within the area of the pearl banks although outside the 3-mile limit, but of course it would not be advisable to resort to such seizure unless it be found that adequate protection cannot be found otherwise.

We have, &c.
(Signed) W. S. ROBSON.
S. T. EVANS.



[36621]

No. 4^B.

[Law Officers, November 2, 1908.]
[Lord Chancellor, December 8, 1908.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, October 22, 1908.

Proclama-
tions of
Neutrality:
Proposed
amendments
in wording
of future.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit herewith, for your consideration, the papers noted in the accompanying list respecting the phraseology employed for many years past in the Proclamation of Neutrality which it is customary for the Sovereign to issue on the occasion of the outbreak of hostilities between foreign States with which this country is at peace.

The last occasion on which the necessity arose for issuing such a Proclamation was in February 1904, when a state of war arose between Russia and Japan. A copy of that instrument is inclosed. It is practically identic in terms with similar Proclamations issued from time to time for the last fifty years, but its provisions evoked an animated discussion in the "Times" newspaper in the winter of 1904 between Mr. Gibson Bowles, M.P., and Professor Holland, in the course of which the learned Professor characterized some of its phraseology as "misleading rhetoric," and strongly advocated its remodelling.

Sir Edward Grey is inclined to think that in certain portions the language may advantageously be amended to bring it into closer harmony with modern requirements and usage. The changes which he is disposed to think would attain this object are indicated in red ink* on p. 933 of the copy of the "London Gazette," which contains the last Proclamation, and I am to request that you will be so good as to take them into your consideration, and to favour Sir Edward Grey with your opinion as to whether they are such as may be properly submitted to the King for His Majesty's approval, should the need arise at any future time for the Secretary of State to advise His Majesty to issue a Proclamation of Neutrality.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

Proclamation of Neutrality issued on outbreak of hostilities between Russia and Japan in 1904, with amendments suggested in red ink.*			
Mr. Gibson Bowles, M.P., to the "Times"	..	..	November 25, 1904.
Professor Holland, K.C.	..	..	" 28, "
Mr. Gibson Bowles, M.P., to the Marquess of Lansdowne..	..	..	" 28, "
" " Foreign Office ..	..	..	" 29, "
" " "Times" ..	..	..	" 29, "
The Marquess of Lansdowne to Mr. Gibson Bowles, M.P..	..	..	December 1, "
Mr. Gibson Bowles, M.P., to the Marquess of Lansdowne..	..	..	" 4, "
" " "Times" ..	..	..	" 14, "
Professor Holland, K.C., to the "Times" ..	..	..	" 14, "

[38785]

Report.

In our opinion, the changes indicated in red ink* in the copy of the last Proclamation of Neutrality laid before us and now attached hereto are such as may be properly submitted to the King for His Majesty's approval.

(Signed) W. S. ROBSON.
S. T. EVANS.

*Law Officers' Department,
November 2, 1908.*

* Printed in erased type and italics.

Annex.

Proclamation of Neutrality, with amendments.

By the King.

A PROCLAMATION.

EDWARD, R. and I.

Whereas we are happily at peace with all Sovereigns, Powers, and States:

And whereas a state of war unhappily exists between His Majesty the Emperor of All the Russias and His Majesty the Emperor of Japan, and between their respective subjects, and others inhabiting within their countries, territories, or dominions:

And whereas we are on terms of friendship and amicable intercourse with each of these Powers, and with their several subjects, and others inhabiting within their countries, territories, or dominions:

And whereas great numbers of our loyal subjects reside and carry on commerce, and possess property and establishments, and enjoy various rights and privileges, within the dominions of each of the aforesaid Powers, protected by the faith of Treaties between us and each of the aforesaid Powers:

And whereas we, being desirous of preserving to our subjects the blessings of peace, which they now happily enjoy, are firmly purposed and determined to maintain a strict and impartial neutrality in the said state of war unhappily existing between the aforesaid Powers:

We therefore have thought fit, by and with the advice of our Privy Council, to issue this our Royal Proclamation:

And we do hereby strictly charge and command all our loving subjects to govern themselves accordingly, and to observe a strict neutrality in and during the aforesaid war, and to abstain from violating or contravening either the laws and statutes of the realm in this behalf, or the law of nations in relation thereto, as they will answer to the contrary at their peril:

And whereas in and by a certain Statute made and passed in a Session of Parliament holden in the 33rd and 34th year of the reign of Her late Majesty Queen Victoria, intituled "An Act to regulate the conduct of Her Majesty's subjects during the existence of hostilities between foreign States with which Her Majesty is at peace," it is, among other things, declared and enacted as follows:—

"This Act shall extend to all the dominions of Her Majesty, including the adjacent territorial waters.

"Illegal Enlistment.

"If any person, without the licence of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with Her Majesty, and in this Act referred to as a friendly State, or whether a British subject or not, within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign State as aforesaid—

"He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

"If any person without the licence of Her Majesty, being a British subject, quits or goes on board any ship with a view to quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting Her Majesty's dominions with the like intent—

"He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

"If any person induces any other person to quit Her Majesty's dominions or to embark on any ship within Her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State—

"He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before



which the offender is convicted; and imprisonment, if awarded, may be with or without hard labour.

"If the master or owner of any ship, without the licence of Her Majesty, knowingly either takes on board, or engages to take on board, or has on board such ship within Her Majesty's dominions any of the following persons in this Act referred to as illegally enlisted persons, that is to say:—

- "(1.) Any person who, being a British subject within or without the dominions of Her Majesty, has, without the licence of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign State at war with any friendly State;
- "(2.) Any person, being a British subject, who, without the licence of Her Majesty, is about to quit Her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State;
- "(3.) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State;

"Such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue, that is to say:—

- "(1.) The offender shall be punishable by fine and imprisonment, or either of such punishments at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour; and
- "(2.) Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two Justices of the Peace, or other Magistrate or Magistrates having the authority of two Justices of the Peace; and
- "(3.) All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.

"Illegal Shipbuilding and Illegal Expeditions."

"If any person within Her Majesty's dominions, without the licence of Her Majesty, does any of the following acts, that is to say:—

- "(1.) Builds or agrees to build, or causes to be built, any ship with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or
- "(2.) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or
- "(3.) Equips any ship with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or
- "(4.) Dispatches, or causes or allows to be dispatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State;

"Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue:—

- "(1.) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour;
- "(2.) The ship in respect of which any such offence is committed and her equipment shall be forfeited to Her Majesty;

"Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following, that is to say:—

- "(1.) If forthwith, upon a Proclamation of Neutrality being issued by Her Majesty, he gives notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State;

- "(2.) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for insuring that such ship shall not be dispatched, delivered, or removed without the licence of Her Majesty until the termination of such war as aforesaid.

"Where any ship is built by order of or on behalf of any foreign State when at war with a friendly State, or is delivered to or to the order of such foreign State, or any person who to the knowledge of the person building is an agent of such foreign State, or is paid for by such foreign State or such agent, and is employed in the military or naval service of such foreign State, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign State.

"If any person within the dominions of Her Majesty, and without the licence of Her Majesty—

"By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of Her Majesty was a ship in the military or naval service of any foreign State at war with any friendly State—

"Such person shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

"If any person within the limits of Her Majesty's dominions, and without the licence of Her Majesty—

"Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue:—

- "(1.) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour;
- "(2.) All ships and their equipments, and all arms and munitions of war, used in or forming part of such expedition shall be forfeited to Her Majesty.

"Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender."

And whereas by the said Act it is further provided that ships, built, commissioned, equipped, or dispatched in contravention of the said Act may be condemned and forfeited by judgment of the Court of Admiralty; and that if the Secretary of State or Chief Executive authority is satisfied that there is a reasonable and probable cause for believing that a ship within our dominions has been or is being built, commissioned, or equipped contrary to the said Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be dispatched contrary to the Act, such Secretary of State or Chief Executive authority shall have power to issue a warrant authorizing the seizure and search of such ship and her detention until she has been either condemned or released by process of law. And whereas certain powers of seizure and detention are conferred by the said Act on certain local authorities;

Now, in order that none of our subjects may unwarily render themselves liable to the penalties imposed by the said statute, we do hereby strictly command that no person or persons whatsoever do commit any act, matter, or thing whatsoever contrary to the provisions of the said statute, upon pain of the several penalties by the said statute imposed and of our high displeasure.

And we do hereby further warn and admonish all our loving subjects, and all persons whatsoever entitled to our protection, to observe towards each of the aforesaid Powers, their subjects and territories, and towards all belligerents whatsoever with whom we are at peace, the duties of neutrality; and to respect in all and each of them the exercise of belligerent rights.

And we hereby further warn all our loving subjects, and all persons whatsoever entitled to our protection, that if any of them shall presume, in contempt of this our Royal Proclamation, and of our high displeasure, to do any acts in derogation of their duty as subjects of a neutral Power in a war between other Powers, or in violation or contravention of the law of nations in that behalf, as more especially by breaking, or endeavouring to break, any blockade lawfully and actually established by or on behalf of either of the said Powers, or by carrying officers, soldiers, despatches, arms, ammunition, military stores or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usages of nations, for the use or service of either of the said Powers that all persons so offending, together with their ships and goods, will rightfully incur and be justly liable to hostile capture, and to the penalties denounced by the such law of nations in that behalf.



And we do hereby give notice that all our subjects and persons entitled to our protection who may misconduct themselves in the premises will do so at their peril, and of their own wrong; and that they will in no wise obtain any protection from us against such capture or such penalties as aforesaid, but will, on the contrary, incur our high displeasure by such misconduct.

Given at our Court at Buckingham Palace, this 11th day of February, in the year of Our Lord 1904, and in the 4th year of our reign.

GOD SAVE THE KING!

W. S. R.
S. T. E.

[38785]

Sir Edward Grey to the Lord Chancellor.

SIR EDWARD GREY presents his compliments to the Lord Chancellor, and has the honour to transmit to his Lordship the inclosed printed reference to, and report of, His Majesty's Attorney- and Solicitor-General respecting the desirability of amending in certain particulars the phraseology which it is customary to employ in Proclamations of Neutrality issued by the Sovereign of these realms on the outbreak of hostilities between foreign States with which this country is at peace.

The Minutes contained in the annexed manuscript show the considerations which have given rise to the proposal so to amend any future Proclamation of this nature, and Sir E. Grey would be much obliged if the Lord Chancellor would be good enough to favour him with any observations which his Lordship may desire to make on the subject of the proposed changes.

Foreign Office, December 7, 1908.

[42906]

The Lord Chancellor to Sir Edward Grey.

THE Lord Chancellor presents his compliments to Sir Edward Grey, and desires to say that he agrees with the Law Officers in their Report of the 2nd November last in regard to the terms in which His Majesty's Government may be advised to issue a Proclamation of Neutrality.

8, Eaton Square, S.W., December 8, 1908.

ITALY.

[1908]

No. 5.

[March 20, 1908.]

Foreign Office to the Law Officers of the Crown.

Gentlemen, *Foreign Office, February 17, 1908.*

I HAVE the honour, by direction of the Secretary of State, to transmit to you herewith the papers noted in the accompanying list, and to lay before you the following facts connected with a request made to His Majesty's Consul-General at Naples by Count Nicholas Androutzos, a Greek subject, for a declaration that, in contemplation of English law, *nulla ostd* to his marriage in Italy by the Italian civil authorities to Miss Seton, a British subject.

The circumstances of the case are shortly as follows:—

On the 16th November, 1892, Count Androutzos was married to Miss Isabella Fripp, a British subject, according to the rites of the Greek Church, in the Cathedral of Santa Maria dei Forestieri, at Corfu.

The British Consul was present at the ceremony, and registered it as a *lex loci* marriage in his Consular Register Book. It is not disputed that this marriage was a perfectly valid marriage in contemplation both of Greek and of English law.

Proposed marriage of Count Nicholas Androutzos. Question as to validity of his divorce.

The parties subsequently lived together, chiefly in Devonshire, until 1901, when in consequence of the husband's misconduct the wife filed a petition for judicial separation in the English Courts, which was granted on the 6th February, 1902.

Subsequently Count Androutzos instituted proceedings for divorce in the Greek Court at Athens, Greece being held by that Court to be at that time the marital domicile of the parties.

A decree of divorce was pronounced against Madame Androutzos *in absentia* and without, as is believed, previous notice having been given to her, and was made absolute on the 5th July, 1906.

Although Sir E. Grey sees no ground for questioning the validity of the decree of divorce in contemplation of Greek law, he is not at present satisfied that this decree would be recognized as valid by the Tribunals of this country. He is advised that a decree pronounced by the Court of a foreign country would probably not be treated and acted upon in England as valid if the proceedings offend against English views of substantial justice, and that this view is supported by *dicta*, to be found in the judgment of the Court of Appeal in the case of *Pemberton v. Hughes* (1899), L.R. 1 Ch., p. 781.

Sir Edward is in doubt whether this might not be held to be the case in the present instance, seeing that the decree of divorce pronounced against Madame Androutzos was granted *in absentia* and without her having received any notice to appear or opportunity of laying before the Greek Court facts—with regard to the already existing decree of judicial separation or otherwise—which might have appeared material to that Court.

I have the honour to request you to favour Sir E. Grey with your opinion—

1. Whether in the circumstances of the case the Greek decree of divorce would be recognized as valid, final, and conclusive by British Tribunals;

2. If your answer should be in the affirmative, whether having regard to all the circumstances of the case, the Secretary of State is bound to instruct His Majesty's Consul-General to issue his certificate that *nulla ostd*, or whether in any event sufficient doubt does not exist to render it undesirable that the Consul should issue a certificate which would in effect guarantee to the Italian Government, and would be by them treated as officially certifying, that the Greek decree of divorce would be recognized as valid by our Tribunals; and

3. Generally for any observations which you may be good enough to make upon the case, which appears to be one of considerable complexity.

I have, &c.
(Signed) W. LANGLEY.

List of Papers.

(1.) Sir E. Egerton, No. 10, Consular	April	11, 1907.
(2.) Memorandum by Mr. Davidson	May	6, ..
(3.) Messrs. Adam Burn and Son	May	30, ..
(4.) Sir E. Elliot, No. 15, Consular	August	12, ..
(5.) Sir E. Elliot, No. 20, Consular	October	12, ..
(6.) Sir E. Elliot, No. 24, Consular	November	5, ..

[9770]

Report.

1. In our opinion the Greek Court was competent to grant the decree of divorce in question, and it is *prima facie* valid, but the British Courts would not hold themselves bound by it (at all events in proceedings initiated by Madame Androutzos), if it were proved that the Greek proceedings were not regularly conducted, and the decree were considered to be contrary to English notions of substantial justice. The question which the English Court would have to decide is one of fact, and cannot, in the circumstances of this case, be said to be free from doubt.

2. Having regard to the fact stated in the reference, that the certificate that *nulla ostd* would be treated by the Italian Government as officially certifying and guaranteeing that the Greek decree of divorce would be recognized as valid before our

[1231]

E



Tribunals, we think that the Secretary of State, in the exercise of his discretion, may properly decline to instruct His Majesty's Consul-General to issue his certificate in this case.

(Signed) W. S. ROBSON.
S. T. EVANS

Law Officers' Department,
March 20, 1908.

RUSSIA.

[18127]

No. 6.

[July 7, 1908.]

Foreign Office to the Law Officers of the Crown.

Mr. N.
Luxenburg
arrested
and badly
treated
when under
detention as
a political
suspect.

Gentlemen,

Foreign Office, June 6, 1908.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit herewith, for your consideration, the papers noted in the accompanying list, relating to the case of Mr. N. Luxenburg, a naturalized British subject of German origin, born at Warsaw, who was arrested and detained by the Russian police authorities at Odessa in March last.

The main incidents in the case may be briefly summarized as follows:—

Mr. Luxenburg was arrested on the 8th March, and Mr. Smith, His Majesty's Consul-General at Odessa, reported (see Paper A) that his arrest had been effected by order of the Department of Police at St. Petersburg, for which reason the local authorities would not permit him to visit the prisoner (Paper C), and that the charge was that of "concealed criminal organization" (Paper B), or "privity in failing to report a criminal conspiracy" (Paper A).

Sir A. Nicolson, His Majesty's Ambassador at St. Petersburg, brought the case to the notice of the Russian Minister for Foreign Affairs, and suggested on the 12th March (Paper B) that it would be a kind act to allow the Consul-General to see the prisoner. On the 20th March, Mr. Smith was permitted to see Mr. Luxenburg (Paper E). He found Mr. Luxenburg, who had not yet been interrogated or informed of the charge, suffering from insomnia, want of appetite, and palpitations, brought on by anxiety and confinement. He was then sharing a cell with a student, having previously been two days in the police station and subsequently in the prison infirmary. He begged that his case might be investigated without further delay, and that he might be released on bail, which he was willing to find (Paper F).

Mr. Smith, in reporting on his visit to the gaol, called attention to the very faulty arrangements for the first reception of arrested persons at the police station (Paper E). And there would appear to be no doubt that those conditions contributed materially to impair Mr. Luxenburg's health, the state of which, on his return to England, was reported after a medical examination (Paper G) to be seriously affected.

Sir A. Nicolson was informed on the 22nd March that Mr. Luxenburg had been released; he was not, however, actually liberated until the morning of the 23rd of that month.

A letter from Mr. Luxenburg's solicitor puts forward (Paper H) a formal claim for 10,000*l.* compensation against the Russian Government, and gives a detailed account of his client's experiences during his detention.

The official Memorandum (Paper J), furnished by the Russian Government in reply to Sir A. Nicolson's representations, states the reasons for the claimant's arrest.

It had, in September last, come to the knowledge of the Department of Police that one Luxenburg was travelling through Russia ostensibly for purposes of business, but in reality with the object of carrying on revolutionary agitation. In consequence, Mr. Luxenburg was arrested on his arrival at Odessa—a town declared to be in a state of siege—by the local police, under paragraph 1, Article 23, of the Regulations for localities in a state of siege. By the terms of that law the competent authority can subject to a preventive detention, for a period not exceeding two weeks, any person suspected on reasonable grounds of either committing crimes against the State or of having been accessory to them, or of belonging to criminal associations.

The Memorandum states, in conclusion, that the necessity of identifying Luxenburg and of discovering whether he was the person wanted by the police entailed a certain delay, but that he was released before the expiration of the term of two weeks prescribed by Article 23 of the above-mentioned Regulations.

This document would make it appear that the case was one of "mistaken identity."

It may be remarked that Mr. Luxenburg is brother of Rosa Luxenburg, the well-known anarchist, who resides in Berlin, and that he stayed three days in that town immediately before entering Russian territory.

This fact may have aroused the suspicion of the Russian police.

Sir Edward Grey thought it advisable in the circumstances to consult the Secretary of State for the Home Department as to what course would, *mutatis mutandis*, be adopted in this country with regard to a similar case of mistaken arrest and detention of a foreigner whose health was alleged to have suffered in consequence.

Mr. Secretary Gladstone replied (Papers L and M) that compensation from public funds should not be considered due merely for a mistaken arrest, and that, if nothing but a mistake be alleged, compensation should neither be paid by His Majesty's Government to a foreigner arrested by mistake in England nor claimed on behalf of a British subject similarly arrested in another country. If compensation were given or claimed, it should only be on account of ill-treatment, of detention unduly prolonged, or of some other special circumstance.

Mr. Gladstone added that, having considered Mr. Luxenburg's case, he was inclined to think that some solatium might fairly be demanded, because of the treatment which he appeared to have received while in custody, particularly at the police station at Odessa, for the condition of which the Russian Government must be held responsible. He therefore suggested, while expressly disclaiming any idea that compensation was due for a mere mistake, that a moderate claim might be put forward on Mr. Luxenburg's behalf, based on the ill-usage he received and its consequences to him. This was desirable in the interests of any British subjects who might hereafter be arrested in Russia.

I am to request that you will take into your consideration the facts of the case, and that you will favour Sir Edward Grey with your opinion as to—

1. Whether, in the circumstances, His Majesty's Government ought to put forward on Mr. Luxenburg's behalf a claim for compensation as of right in respect of the treatment to which he was subjected, and, if so, on what special grounds such claim can, in your opinion, most advantageously be supported.

2. Whether, if the answer to the preceding question should be in the negative, His Majesty's Government should yet represent the case to the benevolent consideration of the Russian Government as one involving great hardship on an undoubtedly innocent British subject, and express the hope that that Government will see their way to offering Mr. Luxenburg an expression of regret and, as an act of grace, some moderate pecuniary solatium for the sufferings which he has undergone.

I am to ask that you will be so good as to furnish Sir Edward Grey with your reply at as early a date as may be convenient to you.

I have, &c.
(Signed) LOUIS MALLET.

P.S.—Since the above was written, a further letter, which is also inclosed herein (Paper N), from Mr. Luxenburg's solicitor has been received, calling in question certain statements made in the Russian official Memorandum of the case (Paper J.)

L. M.

List of Papers.

(A.) Mr. Smith	(No. 4)	[9132]	March 12, 1908.
(B.) " "	(Telegraphic)	[8331]	" 10, "
(C.) " "		[8369]	" 10, "
(D.) Sir A. Nicolson	(No. 137)	[8952]	" 12, "
(E.) Mr. Smith	(No. 5)	[10434]	" 24, "
(F.) " "	(Telegraphic)	[9664]	" 20, "
(G.) Mr. Seal		[11410]	April 3, "
(H.) " "		[11409]	" 3, "
(J.) Mr. O'Beirne	(No. 226)	[17258]	May 16, "
(K.) Sir A. Nicolson	(No. 65. Telegraphic)	[12030]	April 7, "
(L.) Home Office		[17611]	May 22, "
(M.) " "		[18127]	" 25, "
(N.) Mr. Seal		[18935]	June 1, "



[23605]

Report.

1. In the circumstances, we think that His Majesty's Government ought not to put forward on Mr. Luxenburg's behalf a claim for compensation as of right.

2. We think that the course suggested in this question is the proper one to adopt in the event of His Majesty's Government considering the present case a desirable one in which to make representations to the Russian Government. If such representations are made, the refusal to permit communication between the British Consul-General and Mr. Luxenburg should be made a cause of complaint.

(Signed)

W. S. ROBSON.
S. T. EVANS.Law Officers' Department,
July 7, 1908.

[14262]

No. 7.

[July 15, 1908.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, June 13, 1908.

Russo-Japanese
War. Claim
on account
of sinking
of "Knight
Com-
mander."

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you the papers noted in the accompanying list which relate to the proposal made by His Majesty's Government to the Russian Government to submit the case of the "Knight Commander" to arbitration.

With the concurrence of the then Law Officers (Sir J. Lawson Walton, Attorney-General, and Sir W. S. Robson, Solicitor-General), a despatch was addressed to His Majesty's Ambassador at St. Petersburg on the 13th September, 1906 (Paper (A)), proposing that the case should be submitted to arbitration at The Hague, but it will be seen from the inclosed despatch from His Majesty's Chargé d'Affaires at St. Petersburg (Paper (B)) that the Russian Government decline to accede to this proposal on two grounds:—

1. That there is no generally recognized principle of international law which forbids the sinking of neutral prizes; and

2. That it would be derogatory to the sovereign rights of Russia to submit decisions of her Prize Courts to revision by an ulterior Tribunal.

His Majesty's Government, while recognizing that, since this refusal is couched in such definite terms, it is impossible to reiterate the request for the settlement of the question in this manner, feel that the contentions put forward by the Russian Government cannot be allowed to pass unchallenged, and I am accordingly to inclose the draft of a despatch to His Majesty's Ambassador at St. Petersburg (Paper (C)) setting forth the views of His Majesty's Government in the matter, and to request that, in taking these papers into your consideration, you will favour the Secretary of State with your opinion as to whether the terms of the draft despatch are such as can properly be addressed to the Russian Government. Sir E. Grey would at the same time be glad to be favoured with any observations of a general character which you may desire to offer upon the papers now submitted to you.

I have, &c.

(Signed)

F. A. CAMPBELL.

List of Papers.

(A.) To Sir A. Nicolson.	..	(No. 45. Treaty)	September	13, 1906.
(B.) Mr. O'Beirne	..	(No. 22. Treaty)	April	23, 1908.
(C.) Draft of despatch to Sir A. Nicolson	..	..	June	"
(D.) Judgment of Russian Prize Court at Libau referred to in above draft.	..	..	..	..
(E.) Law Officers' Reports	..	..	{ May	30, 1906.
			{ August	14 "

[24760]

Report.

As altered and initialled by us the draft despatch may, in our opinion, properly be addressed to the Russian Government.

(Signed)

W. S. ROBSON.
S. T. EVANS.Law Officers' Department,
July 15, 1908.

Annex.

Draft of Despatch from Sir Edward Grey to Mr. O'Beirne.

(No. . Treaty.)
Sir,

Foreign Office, June . 1908.

His Majesty's Government have had under their careful consideration your despatch No. 22, Treaty, of the 23rd April last, inclosing a note from the Russian Government, in which the latter decline the proposal made by His Majesty's Government that the sinking of the steamship "Knight Commander" should be referred to arbitration.

The reply of the Russian Government is based upon two main arguments:—

1. That there is no generally recognized principle of international law which forbids the sinking of neutral prizes; and

2. That it would be derogatory to the sovereign rights of Russia to submit decisions of her Prize Courts to revision by an ulterior Tribunal.

As regards the first argument, His Majesty's Government maintain the view that it is not incumbent upon them to prove that Russia, when a belligerent, is not entitled to sink neutral British prizes, but that, on the contrary, it is incumbent upon Russia, in such circumstances, to establish that she is, in fact by virtue of the generally recognized principles of international law, entitled to do so. International law is founded on the practice of nations, and it is not possible for His Majesty's Government to prove conclusively that the sinking of neutral prizes is forbidden by international law, because hitherto no nation has attempted to act on, or claimed any such right, and, consequently, there is no international practice in the matter, and hitherto no nation has claimed or has attempted to act on any suggested right of destroying neutral prizes. Consequently no practice of nations exists which can justify such an interference with the rights of neutrals. According to the practice of nations, certain acts of interference by belligerents with neutrals are acquiesced in by the latter; but if the principle were conceded that a neutral Power is compelled to submit to any hostile act on the part of a belligerent, unless it can be proved that such act is forbidden by international law, the extraordinary result would follow that any belligerent act, however outrageous, with respect to a neutral, would be legitimate by the mere fact of its being entirely novel.

In the view of His Majesty's Government, the discussion and votes taken at the recent Second Peace Conference, to which allusion is made in the Russian note, have no material bearing upon the present question. The propositions there discussed were of a legislative character—designed to lay down a law for the future—not declaring what the present state of the law is, and though speakers on both sides may have appealed to the practice, discussions and decisions of the past as arguments in favour of adopting these propositions as the law of the future, His Majesty's Government consider that the remarks made by M. Renault, one of the French Delegates, at the meeting of the Fourth Commission on the 7th August, 1907, state the correct position very clearly. They were as follows:—

"Le rôle de la Commission n'est pas de se prononcer sur le droit existant, de trancher ses controverses, ou de donner des consultations. Elle doit rechercher les règles à poser pour l'avenir."

The second argument advanced by the Russian Government is that, pending the creation of an International Prize Court of Appeal, it would be derogatory to their sovereign rights to submit the decision of their Supreme Prize Court to international review.

His Majesty's Government do not desire to contest the principle that every State has an undoubted right to determine what it deems to be consistent with its dignity and sovereign rights, but they nevertheless feel justified in observing that there are ample precedents to show that there is nothing derogatory to the dignity of a nation in the review by an International Tribunal of the decisions rendered by its highest legal Tribunals. To take but one example, no Court enjoys a higher reputation for impartiality and learning than the Supreme Court at Washington; nevertheless the United States Government consented, under Article 12 of the Treaty of Washington of 1871, to submit all British claims to an International Commission, and as a consequence a large number of claims were dealt with and settled, despite the fact that many of these cases had already been decided by the Supreme Court.

In this connection His Majesty's Government would draw attention to the following passage

[1231]



from "Moore's Digest of International Law" (vol. vii, p. 651), which is in entire harmony with their own views:—

"The principle that the decisions of Prize Courts are not internationally conclusive as to the doctrines applied, and that a claimant injured by a wrongful decision may seek indemnity through the action of his Government, is no longer open to question. The right to indemnity in such cases was demonstrated in the remarkable opinion delivered by W. Pinkney, as one of the Commissioners under the Jay Treaty, under which large amounts were paid by the British Government to citizens of the United States as indemnity for captures and condemnations under Orders in Council violative of the rights of neutral trade. Similar indemnities were obtained from France for wrongful captures and condemnations during the Napoleonic wars, as well as from Spain, Naples, and Denmark. In the case of Denmark the question of the international finality of prize sentences gave rise to a long discussion which was conducted on the part of the United States by Henry Wheaton, as Minister to Denmark."

In view of the doctrine above cited, His Majesty's Government fail to see that it would be derogatory to the dignity of Russia to pursue the same course as that followed in the past by Great Britain, France, the United States of America, Spain, Naples, and Denmark.

His Majesty's Government do not deny that the Supreme Prize Court at St. Petersburg, in deciding the appeal in the case of the "Knight Commander," correctly interpreted the Russian Naval Prize Regulations. The real point, however, which His Majesty's Government desired to submit to the impartial decision of an Arbitration Tribunal, was whether these Regulations were consistent with the principles of international law, a question which was admittedly outside the scope of the functions of the Supreme Prize Court.

For the above reasons, therefore, His Majesty's Government can only express their regret at the refusal of the Russian Government to submit the case of the "Knight Commander" to arbitration. His Majesty's Government earnestly desired to have the justice of their cause established in the manner best conforming to their anxiety to settle all controversies of this kind, more particularly with the Russian Government, in an amicable manner. But the principle of international law, for which they contend is of paramount importance to all neutral Powers, so much so that His Majesty's Government cannot in any circumstances consent to abandon it. In the vindication of that principle they have carefully refrained from all action calculated to create embarrassment, in the confident belief that the equity of their claim would ultimately be admitted as a consequence of the resort to the methods of friendly representation and judicial adjudication. But the Russian Government, in their note, refuse arbitration in such definite terms that His Majesty's Government feel that they cannot reiterate their request for a settlement of the question in this manner, and in the circumstances, as these channels are to be closed to them, they will be compelled, if in future the rights of His Majesty's subjects as neutrals should again be challenged, to rely on their own resources to insure their being respected.

His Majesty's Government take note of the statement in the concluding paragraph of M. Isvolsky's note, that it is competent for the parties interested in such portion of the cargo on board the "Knight Commander" as was unaffected by the judgment of the Supreme Court to present their claims in a Port Prize Court, and it is understood that steps are being taken with this object, which His Majesty's Government trust may be attended with satisfactory results. In this connection, however, they observe with some surprise and concern that, in a judgment recently delivered by the Prize Court at Liban in the case of the "Princesse Marie," in which important British interests are involved, the claims of the owners of all the cargo, whether innocent or contraband, have been rejected. His Majesty's Government do not desire to say more on this point at present, as they understand the finding is forming the subject of appeal to the Supreme Prize Court at St. Petersburg.

You will read this despatch to M. Isvolsky, and leave with him a copy of it.

(Initialled)

W. S. R.
S. T. E.

SIAM.

[12092]

No. 8.

[April 14, 1908.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 10, 1908.

Railway
loan to
Siam from
Malay
States.

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to transmit to you herewith the accompanying papers, which relate to the question of a loan from the Government of the Federated Malay States for the construction of a railway by the Railway Department of the Kingdom of Siam in Siamese territory in the Malay States. This railway and the loan requisite for its construction form part of negotiations which are now proceeding between His Majesty's Government and that of the King of Siam for a Treaty which contemplates, *inter alia*, a partial surrender by

Great Britain of her extra-territorial jurisdiction in return for a cession of territory and for the grant of the right, not hitherto possessed by British subjects, of holding land in Siam, and certain other minor matters.

Article IV of the draft Treaty (page 11, Paper (A)) states that "The Federated Malay States will make a loan to the Siamese Railway Department of a sum of money for the purpose of constructing a railway in the Siamese territory in the Malay Peninsula. The terms and conditions of this loan are set forth in a separate Agreement bearing even date with this Treaty."

The draft separate Agreement above referred to will be found on page 30 of the same Paper (A). Under Article VIII of that Agreement it will be observed that the Railway Department of the Kingdom of Siam pledges as security for the repayment of the principal and interest of the loan sections of the railway as they are successively constructed.

The question has now arisen (see Mr. Paget's telegram No. 10 of the 31st ultimo to Sir E. Grey, Paper (B)) as to whether a provision attached to loans raised by the Siamese Government in 1905 and 1907 is applicable to the loan projected for the railway provided for by the draft Treaty. The prospectuses of these loans are Papers (C) and (D), attached to this letter. The provision referred to is to the effect that "it is understood and agreed that if any special security should be given to any other foreign loan contracted in future by the Royal Siamese Government, such security would also be immediately applicable to and concurrent with the present loan."

His Majesty's Minister at Bangkok, Mr. Paget, states that the late Mr. Strobel, General Adviser to the Siamese Government, was of opinion that this provision would not apply to such a loan as Siam now proposes to raise from the Federated Malay States, which is a special loan raised for a special purpose, the security for which will consist in the railway to which the proceeds are to be devoted.

The Governor of the Straits Settlements, Sir J. Anderson, shares the opinion of the late Mr. Strobel, but considers that some declaration should be made on the point as public notice to those concerned, and Mr. Paget has requested to be furnished with instructions in the matter.

The Lords Commissioners of His Majesty's Treasury have been consulted on the subject, and it will be seen from their letter of the 7th instant (Paper (E)) that their Lordships find nothing in the provision of the loans of 1905 and 1907 to justify the inference that it would not apply to works which form the security for borrowed money expended upon them, and they consider that the undertaking of the Siamese Government as set out in those loan Agreements applies absolutely to any special security given for any new foreign loan.

In view of the negotiations now pending, it is very desirable to furnish Mr. Paget with instructions on the point as soon as possible, and Sir E. Grey would accordingly be glad if you would take the papers inclosed into your consideration and favour him at your earliest convenience with your opinion whether His Majesty's Government would in any way be interfering with the security of the bondholders of the Siamese Government Loans of 1905 and 1907 by appropriating part of it to the exclusive service of a subsequent loan, *i.e.*, the loan contemplated in the draft Treaty now under consideration.

Sir E. Grey would also be glad to be furnished with any observations of a general character which you may be good enough to offer on the papers now submitted to you.

I have, &c.

(Signed)

F. A. CAMPBELL.

List of Papers.

(A.) Mr. Paget (Draft Treaty)	(No. 15. Confidential.)	February 27, 1908.
(B.) Ditto	(No. 10. Telegraphic.)	March 31, "
(C.) Siamese Loan, 1905, Prospectus	(Communicated by Mr. Addis, April 9 (12392/08).)*	
(D.) Ditto 1907, Ditto		
(E.) Treasury	.. ..	April 7, 1908.

* Copies of these Prospectuses had already been received in this Office for communication to His Majesty's Treasury.



1908

[This Document is the Property of His Britannic Majesty's Government.]

20

SIAM—ZANZIBAR.

[13024]

Report.

In our opinion the proposed appropriation of the railway in question to the exclusive service of the contemplated loan is inconsistent with the pledge or undertaking given by the Siamese Government to the bondholders of the loans of 1905 and 1907.

The effect of that undertaking appears to be that if any security is given to a subsequent foreign loan, such security shall also be available for the loans of 1905 and 1907, even though it may owe its existence to a subsequent loan for which it is security. It is improbable that this was contemplated by the Siamese Government as a result of the undertaking contained in the prospectuses, but the words of the undertaking are very wide, and they must be construed in the sense in which they would naturally be read by those who are invited to act upon them.

(Signed)

W. S. ROBSON.
S. T. EVANS.

Law Officers' Department,
April 14, 1908.

ZANZIBAR.

[27329]

No. 9.

[September 28, 1908.]

Foreign Office to the Law Officers of the Crown.

Zanzibar
Order in
Council:
relative to
Judiciary.

Gentlemen,

Foreign Office, August 7, 1908.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith the accompanying draft Order in Council for Zanzibar.

In consequence of the decision of His Majesty's Government to abolish the Court of Appeal for East Africa in Zanzibar as established by "The Eastern African Protectorates (Court of Appeal) Order in Council, 1902," and to substitute a Court of Appeal on the mainland, Sir E. Grey proposes to reduce the number of the Judges in the British Court in Zanzibar to two. As the work of the British Court will in all probability entail more work than two Judges can undertake, it has been decided to appoint a second Magistrate, and at the same time to extend the jurisdiction of the Magistrate as defined by Article 16 (4) of "The Zanzibar Order in Council, 1906," so as to enable him to take cognizance not only of cases in which natives of Africa are concerned, but of all Magisterial cases, whatever may be the nationality of the accused. The draft Order in Council has therefore been designed with this object, and Sir E. Grey will be glad if you will take it into your consideration and will favour him with your opinion as to whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

Copies of "The Eastern African Protectorates (Court of Appeal) Order in Council, 1902," and "The Zanzibar Order in Council, 1906," and "The Zanzibar Order in Council, 1906 (No. 2)," are inclosed herewith for convenience of reference.

I have, &c.

(Signed)

W. LANGLEY.

[33832]

Report.

In our opinion, the terms of the draft Order in Council initialled by us are fit and proper for submission to the King for the approval of His Majesty in Council.*

(Signed)

W. S. ROBSON.
S. T. EVANS.

Law Officers' Department,
September 28, 1908.

o

* The Law Officers approved the draft Order in Council without introducing any alterations. The text is contained in the "London Gazette" of October 27, 1908 (Confidential 9316*).



1909

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. March 1910.

CONFIDENTIAL

(9638.)

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1909.



LIST OF REPORTS.

(Arranged according to Countries.)

NOTE.—The Reports not addressed to the Foreign Office are marked 4A, &c.

CHINA.

No.		Date.	SUBJECT.	Page
1	Law Officers ..	June 19, 1909	China and Corea (Consular and Marriage Fees) Amendment Order in Council. Approving	1
2	Law Officers ..	Aug. 5,	China and Corea Amendment Order in Council (Seditious Publications, &c.). Approving	1
3	Law Officers ..	Nov. 18,	Supplementary Extradition Convention with France. Approving draft Order in Council for giving effect to ..	2

GENERAL.

4	Law Officers ..	Mar. 4, 1909	Rights and duties of neutrals. Section 8 (4) of Foreign Enlistment Act relating to despatch, &c., of vessels to belligerents goes beyond requirements of Convention resulting out of Second Peace Conference at The Hague, and should be amended	3
4A	Law Officers to Treasury	Mar. 27,	Marriage in England between W. C. J. Steinmann and Gisela Reiter (<i>alias</i> Grace Roosevelt), both foreigners, was valid in English law, notwithstanding decree of Court at Cologne. Licence cannot therefore be granted for her marriage to E. E. James	5
5	Law Officers ..	Aug. 3,	Refusal of Bank of England to accept Consular certificates of death in the present form. No objection to short Act of Parliament to meet Bank's requirements. Suggestions as to its provisions	6
6	Law Officers ..	Aug. 5,	Conventions agreed to at Second Peace Conference at The Hague in 1907 relating to international tribunals, neutrality, &c. Approving Bill to give legal effect to provisions of, subject to certain alterations	8
7	Law Officers ..	Dec. 22,	Ditto. Further views as to repairing, &c., of belligerent vessels and duties of neutrals as regards use of telegraphs, &c.	14A

GERMANY.

7A	Law Officers and Mr. Rowlatt to Board of Trade	Aug. 6, 1909	Estates of German seamen dying on British ships or territory, and <i>vice versa</i> . Opinion on question of disposal of	15
----	--	--------------	--	----

NICARAGUA.

8	Law Officers ..	Aug. 11, 1909	Claim of Salvador Railway Company for damage by bands recruited by a Salvadorean in Nicaragua should be presented to Nicaragua, as Salvador was apparently not to blame. His Majesty's Government should refuse to recognize that these States were at war. Salvador might perhaps join with His Majesty's Government in matter	30
---	-----------------	---------------	---	----

LIST OF REPORTS.

iii

SIAM.

No		Date.	SUBJECT.	Page
9	Law Officers ..	June 19, 1909	Partial cesser of extra-territorial jurisdiction in Siam. Approving draft Order in Council providing for ..	31

UNITED STATES.

10	Law Officers ..	Aug. 3, 1909	William Webster's claim to land in New Zealand acquired before it became a British Colony. Opinion that it is barred by the Claims Convention of 1853	35
10A	Law Officers to Colonial Office	Dec. 22,	Claim of Canada to exclusive fisheries in Dixon Entrance and Hecate Strait. Reasons why it cannot be supported in international law or by treaty rights	37

VENEZUELA.

11	Law Officers ..	May 28, 1909	Surtax of 30 per cent. on goods imported into Venezuela from British West India Colonies. Opinion as to rights under Treaty with Columbia of 1825. Consider the Treaty terminable by either party. Position of His Majesty's Government not favourable for arbitration ..	38
----	-----------------	--------------	---	----

ZANZIBAR.

12	Law Officers ..	Aug. 5, 1909	Removal of prisoners from Zanzibar to undergo sentence elsewhere outside His Majesty's dominions. Approving draft Order in Council	44
----	-----------------	--------------	--	----



(iv)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1909.

[The figures refer to the numbers of the pages.]

ACT—CLA.

A.

- Act. *See* Foreign Enlistment.
 " Proposed relative to Consular death certificates, 6-8.
 Alfaro, Dr. Prudencio, 30.
 Arbitration as to whether a claim is barred. Proposal for, 35, 36.
 " on Venezuelan surtax on British goods from Trinidad, 44.
 " on question whether Treaty with Venezuela is terminable, 44.
 Assessor of Mixed Court at Shanghai. Fees (Order in Council), 1.

B.

- Banks. Refusal of to accept Consular certificates of death, 6-8.
 " Proposal of for legislation on subject, 6-8.
 Bethell, E. T., 1.
 Bill to give legal effect to Hague Conventions. *See* Second Peace Conference.
 Boundary line in open sea claimed as territorial demarcation, 37.

C.

- Certificates. *See* Death Certificates.
 China and Corea. *See* Order in Council.
 Claim of Salvador Railway Company damaged during raid organised in Nicaragua, 30, 31.
 " Same should be presented to Nicaragua, not Salvador, 31.
 " Cannot admit plea that state of war existed, 31.
 " Salvador, being wronged, might support His Majesty's Government in matter, 31.
 " of W. Webster for seizure of lands in New Zealand, 35, 36.
 " Same barred under Convention with United States of 1853, 36

CLA—FOR.

- Claim of W. Webster for seizure of lands in New Zealand. Question should not be submitted to arbitration, 36.
 Commerce. Treaty of. *See* Treaty.
 Consular certificates of death. *See* Death.
 Conventions (Hague Conference). *See* Second Peace Conference.
 Courts, International, constituted by Second Peace Conference (Hague). *See* Second Peace Conference.

D.

- Death. Consular certificates of. Bank of England will not accept, 6-8.
 Diplomatic Privileges. *See* Privileges.
 Dixon Entrance. Canadian claim to exclusive fisheries is unjustifiable, 37.
 Duties. Surtax imposed by Venezuela on goods from Trinidad. Treaty rights, 38-44.

E.

- Enlistment. *See* Foreign Enlistment.
 Equipment. *See* Vessel.
 Estates of deceased seamen. Negotiations with Germany, 15-29.
 Extradition Convention with France. Order in Council, 2.
 Extra-territorial jurisdiction in Siam. Order in Council determining, 31-35.

F.

- Fees (Assessor, Mixed Court at Shanghai) Order in Council, 1.
 Fisheries (exclusive) in Hecate Strait and Dixon Entrance. Canadian claim not sustainable, 37.
 Foreign Enlistment Act. Proposed amendment, 3-5, 9, 14 A, 14 B.
 " " Stricter than provisions of Hague Convention, 3-5

ALPHABETICAL INDEX.—(Names and Subjects.)

GER—RAL.

G.

- Germany. Arrangement with as to estates of deceased seamen, 15-29.

H.

- Hague Conventions. *See* Second Peace Conference.
 Hecate Strait. Canadian claim to exclusive fisheries in, not sustainable, 37.

I.

- International. *See* Tribunals.

J.

- Jurisdiction in Siam. *See* Order in Council.
 " (maritime). *See* Hecate Strait.

M.

- Maritime jurisdiction. *See* Hecate Strait.
 Marriage. Steinmann. Valid, notwithstanding foreign decree of nullity, 6.
 " Wife cannot contract another marriage in England, 6.

N.

- Neutrality. Duties of. Suggested change of Foreign Enlistment Act, 3-5, 9, 14 A.
 Neutrals. Duties of. *See* Second Peace Conference Conventions. *See* also Vessels. Telegraphs.
 Nullity. *See* Marriage.

O.

- Ogden v. Ogden, 5, 6.
 Order in Council. China and Corea Amendment, 1.
 " " China, &c. [seditious publications], 1, 2.
 " " Extradition Convention with France, 2, 3.
 " " Cesser of extra-territorial jurisdiction. Order in Council, 31, 33.
 " " (prisoners removal), Zanzibar, 44, 45.

P.

- Peace Conference. *See* Second Peace Conference.
 Philip, Leon, 5.
 Prisoners' removal. *See* Order in Council.
 Publications (Seditious) Order in Council, 1.

R.

- Railway (Salvador). Claim for injury to property, 30, 31.
 " Done by rioters from Nicaragua, 30, 31.
 " Nicaragua responsible. Cannot plead that a state of war existed, 31.

[198]

RAT—VEN.

- Ratification of Treaty postponed pending necessary legislation, 8-10.
 Reiter, Gisela, 5.
 Roosevelt, Grace, 5.

S.

- Seamen. Estates of deceased. Arrangements with Germany, 15-29.
 Second Peace Conference. Convention as to rights of neutrals less strict than Foreign Enlistment Act, 3-5. *See* also "Vessels" (neutral rights).
 " Privileges of members of tribunals set up by the, 9.
 " Convention as to neutral duties in war on land, 9, 14 A, 14 B.
 " Conventions Bill, 8-14, 14 A, 14 B.
 Siam. *See* Order in Council.
 Steinmann, W. C. J., 5, 6.

T.

- Telegraphs and Telephones. Duties of neutrals as regards use of, 9, 14 A, 14 B.
 Territorial waters. Canadians claim Hecate Strait and Dixon Entrance as within, 37, 38.
 " Claim to treat water boundary in a Treaty as a land boundary, 37, 38.
 Treaty. *See* Extradition and Order in Council.
 " *See* Neutrality. Second Peace Conference Conventions.
 " *See* Ratification.
 " Proposed arrangement with Germany. *See* Seamen's estates.
 " Claim of W. Webster in New Zealand barred under, 36.
 " Commercial, with Venezuela. Opinion that it is mainly commercial, and terminable on due notice, 44.
 " Opinion on suggested arbitration as to breach of by Venezuela. *See* Arbitration.
 Treaties. Power to denounce where no limit of duration has been assigned 42-44.
 Trial of E. Bethell for seditious writings. Reference to, 1, 2.
 Tribunals, International. *See* Second Peace Conference.
 Trinidad. Venezuelan surtax on goods from. *See* Venezuelan surtax.

V.

- Venezuelan surtax on British goods from Trinidad not warranted under Treaty, 44.
 " Foreign goods transhipped at Trinidad are in different position, 44.
 " Commercial Treaty with His Majesty's Government. *See* Treaty.

b



1909

vi

ALPHABETICAL INDEX.—(Names and Subjects.)

VES—WAR.

Vessels. Sale to belligerents. English rules more strict than necessary, 3-5.
 " Meaning of the term equipment, 4, 13.
 " Belligerent, treatment of. *See* Second Peace Conference Conventions.
 " Ditto. Repairing and revictualling in neutral ports. Hague Convention as to, 9, 14 A, 14 B.

W.

War. Damage to property wrongfully stated to be act of, 31.

WAR—ZAN.

War. Right, &c., of neutrals. Provisions of Hague Convention less strict than Foreign Jurisdiction Act, 3-5.
 " and neutrality. *See* Second Peace Conference Conventions.
 Webster, William, 35, 36.
 Williams, Sarah Helen, 5.
 Wireless Telegraphy. *See* Telegraphs.
 Witnesses. Compelling attendance outside jurisdiction, 9.

Z.

Zanzibar Order in Council (prisoners' removal), 44, 45.

Printed for the use of the Foreign Office. March 1910.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1909.

CHINA.

[23219]

No. 1.

[June 19, 1909.]

Law Officers of the Crown to Sir Edward Grey.—(Received June 21.)

Sir,

Law Officers' Department, June 19, 1909.

WE were honoured with your commands, signified to us in Mr. W. Langley's letter of the 24th ultimo,* stating that he was directed by you to transmit to us a copy of the draft of an Order in Council for the amendment of the Table of Fees fixed by the China and Corea (Consular and Marriage Fees) Order in Council, 1906, and that he was to request that we would take the draft Order in Council into our consideration and favour you with our opinion whether its terms were fit and proper for submission to the King in Council for His Majesty's approval.

We have taken the matter into our consideration, and, in obedience to your commands, have the honour to—

Report—

That in our opinion the accompanying draft Order in Council† may properly be submitted for the approval of His Majesty in Council.

We have, &c.

W. S. ROBSON.
S. T. EVANS.

[27739]

No. 2.

[August 5, 1909.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 20, 1909.

I HAVE the honour to transmit to you, by direction of Secretary Sir E. Grey, the papers noted in the accompanying list, which relate to a proposed Order in Council which has been prepared in this Department to amend "The China and Corea Order in Council, 1904," and "The China and Corea (Amendment) Order in Council, 1907."

Clause 2 of the draft Order amends the law with regard to seditious publications. During the year 1908 a British subject of the name of Bethell was tried for and

* NOTE.—The letter to the Law Officers of the 24th ultimo submitting to them the draft Order has been mislaid; but it was a mere formal letter, entering into no explanations.

† The draft Order in Council was returned by the Law Officers unaltered. The text is contained in the "London Gazette" of the 6th July, 1909 [Conf. 9490*]. It is entitled "The China and Corea (Consular Fees) Order in Council, 1909."

[198]

B

CHINA.—FRANCE.

convicted of publishing certain articles of a seditious nature in Corea, and the experiences of that trial convinced Sir E. Grey that certain amendments were required in the provisions of the Orders in Council of 1904 and 1907 relating to the trial and punishment of persons for this offence. The amendments introduced by the accompanying draft Order in Council are, firstly, that deportation may be ordered on conviction for a first offence, and not merely on failure to give security to be of good behaviour or on a further conviction; secondly, under sub-article (4), the trial only, and not the whole of the proceedings in the case, must take place before the Supreme Court; thirdly, power is given to the judge to order trial without jury.

Clause 3 of the draft Order in Council has been inserted to enable certain disciplinary powers to be conferred upon the officer in command of the Shanghai Municipal Police Force. This force is recruited from British Indian subjects and is commanded by a British subject, and experience has shown that power to administer certain minor punishments must be conferred upon him in order to enable him to maintain proper discipline.

The draft Order has been shown to and concurred in by Sir H. de Sausmarez, the Judge of the Supreme Court at Shanghai. The Secretary of State for India has also been consulted with regard to Clause 3 and concurs in its terms.

I am to request that you will take the draft Order into your consideration, and will favour Sir E. Grey with your opinion as to whether its terms are right and proper for submission to the King in Council for His Majesty's approval.

I have, &c.
F. A. CAMPBELL.

List of Papers.

"China and Corea Order in Council, 1904" [Confidential, 8278*].	
"China and Corea (Amendment) Order in Council, 1907" [Confidential, 8886*].	
Memorandum on the Bethell case, 9107 and 9348.	
Mr. Acting Judge Bourne	(No. 23) July 5, 1908.
Mr. Cockburn	(No. 52) " 13, "
Sir H. de Sausmarez	" August 15, "

[29714]

Report.

We approve the draft Order in Council as initialled by us, and think that it may properly be submitted to the King in Council for His Majesty's approval.*

We have, &c.
W. S. ROBSON.
S. T. EVANS.

Law Officers' Department,
August 5, 1909.

FRANCE.

[32696]

No. 3.

[November 18, 1909.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,
Draft Order in Council. Supplementary extradition treaty with France.

Foreign Office, September 6, 1909.

I HAVE the honour to transmit to you, by direction of Secretary Sir Edward Grey, the draft of an Order in Council carrying into effect a supplementary convention between the United Kingdom and France, which was signed at London on the 17th October, 1908, and the ratifications of which were exchanged at Paris on the 29th July last, modifying article 2 of the extradition treaty of the 14th August, 1876, between the two countries.

The draft Order in Council also gives effect to a further agreement, signed at

* The Law Officers introduced no alterations in the draft of the Order in Council submitted to them. The text is contained in the "London Gazette" of the 19th October, 1909. [Confidential, 9531*.]

FRANCE.—GENERAL.

Paris on the 29th July last, extending the provisions of the aforesaid convention to Tunis.

The draft Order in Council has been referred to and approved by the various departments of His Majesty's Government concerned, and I have now the honour to request that you will favour Sir E. Grey at your early convenience with your opinion as to whether it may, in its present form, be laid before the King in Council for his Majesty's approval.

I have, &c.
F. A. CAMPBELL.

[42416]

Report.

That the above-mentioned draft Order in Council may, in our opinion, properly be submitted to the King for the approval of His Majesty in Council.*

W. S. ROBSON.
S. T. EVANS.

GENERAL.

[880]

No. 4.

[March 4, 1909.]

Foreign Office to His Majesty's Attorney-General and Solicitor-General.

Gentlemen,

Foreign Office, January 16, 1909.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to inclose, for your consideration, the papers noted in the accompanying list respecting the duties which should be observed by this country as a neutral when hostilities are in progress between other States.

I am in the first place to invite your attention to the terms of Article 8 of a Convention signed by the British Plenipotentiaries to the recent Second Peace Conference (subject to reservations as regards Articles 19 and 23) respecting the rights and duties of neutral Powers in maritime war. The Article in question is printed on p. 119 of Paper (A).†

In the spring of last year an Inter-Departmental Committee was appointed, under the presidency of the King's Proctor, the Earl of Desart, K.C.B., to consider the various Conventions which had resulted from the labours of the Conference at The Hague in 1907, and to advise His Majesty's Government as to their acceptance, they having been with one exception—viz., the Convention which relates to the creation of an International Court of Appeal in prize matters—left open for signature down to the end of last June. The Report of that Committee on the Convention concerning the "Rights and Duties of Neutral Powers in Maritime War" is herewith inclosed (Paper (B)), and I am to draw your especial attention to paragraphs 18–22 of that Report, in which the bearing of the rule of neutrality as embodied in Article 8 of the Convention with the existing Municipal Law in the British dominions is discussed.

The Law in question is "The Foreign Enlistment Act, 1870," 33 & 34 Vict., cap. 90, of which a copy is inclosed (Paper (D)). You will observe that, in the opinion of the Inter-Departmental Committee, the provisions of section 8 (4) of this enactment go considerably beyond the requirements of the 8th Article of the Convention, and operate detrimentally to the interests of British shipping, inasmuch as they forbid the dispatch of an ordinary British merchant-vessel from British territory for employment in the service of a belligerent, while the comparative leniency of the provisions of the Municipal Laws of other nations admits in the like circumstances of the sale and dispatch unchecked to belligerents of vessels of their respective mercantile marines.

This condition of things was turned to considerable advantage by the subjects of certain neutral foreign Powers during the hostilities between Russia and Japan, when, for instance, several vessels of the Hamburg-American line were sold to the Russian Government and utilized by them as cruisers or transports.

* The Law Officers approved the Order in Council without introducing any alterations. The text is contained in the "London Gazette" of the 3rd December, 1909 [Conf. No. 9549*].
† Printed as an Annex.

Rights of neutrality
Proposed amendment
of 33 and
34 Vic.,
cap. 90, sec.
8 (4), to
safeguard.



The Committee were accordingly of opinion that it is desirable that the section in question should be amended in such a manner as to make it applicable only to vessels which have been wholly or partially adapted for warlike purposes within His Majesty's dominions.

The Inter-Departmental Committee was recently reconvened to consider a Bill which has been prepared by Parliamentary Counsel to effect the legislation which it is deemed desirable to enact before the King's ratifications of such of The Hague Conventions as necessitate fresh legislation are deposited at The Hague. None of these instruments has, as yet, been ratified. I am, in this connection, to inclose a copy of the Minutes of the proceedings of the Committee at their meeting on the 5th instant, from which you will observe that they earnestly renew their recommendation that section 8 (4) of "The Foreign Enlistment Act, 1870," should be amended in order to get rid of the discrepancy above alluded to (Paper (C)).

Sir Edward Grey presumes that if it is eventually decided to take steps in this direction the Bill for that purpose would, as in 1870, be introduced by His Majesty's Attorney-General.

I am accordingly to request that you will be good enough to take these papers into your consideration and to favour Sir Edward Grey, at your early convenience, with your opinion as to the desirability of amending section 8 (4) of "The Foreign Enlistment Act, 1870," with a view to meet the recommendations of the Inter-Departmental Committee, and at the same time to favour him with any general observations you may think well to offer on the subject.

I have, &c.
(Signed) F. A. CAMPBELL.

List of Papers.

- (A.) Blue Book "Miscellaneous, No. 6 (1908)." [Library, Parliamentary, No. 4464.]
(B.) Report of the 28th May of Inter-Departmental Committee. [Library, Confidential, No. 9325*.]
(C.) Report of the 5th January, 1909, of Inter-Departmental Committee. [Library, Confidential, No. 9323*.]
(D.) "Foreign Enlistment Act, 1870." (33 and 34 Vic., cap. 90) [Act, Library No. 58].

[8677]

Report.

WE are of opinion that section 8, sub-section 4, of "The Foreign Enlistment Act, 1870," imposes a wider obligation on British subjects than the obligation defined in Article 8 of The Hague Convention respecting the rights and duties of neutral Powers in maritime war. That Article prohibits the departure from the jurisdiction concerned of such vessels, and of such vessels only, as have been adapted wholly or partly within the jurisdiction for use in war; whereas the sub-section prohibits the dispatch of any vessels whatever with the intent or knowledge that the same may be employed in the military or naval service of a belligerent. It seems desirable that the sub-section should be amended so as to accord with the Convention.

Generally.—We observe that the Inter-Departmental Committee founded their recommendation as to the amendment of sub-section 4 of section 8 of the Foreign Enlistment Act on the desirability of enabling British shipping to share in the remunerative employment by a belligerent that is open to the mercantile marine of other nations. If full effect is to be given to this consideration, section 8 of the Foreign Enlistment Act should be repealed and recast in a form which goes no further than Article 8 of the Convention. At present sub-section 1 of the section (prohibiting the building of any ship for military or naval use by a belligerent) goes beyond the Convention, which does not deal with the case of building at all. We think also that, on a fair construction of the Article, it does not go so far as sub-section 3 of the section. That sub-section forbids the equipment of any vessel for use in the military or naval service of a belligerent; and "equipment" is defined in section 30 of the Act to include the furnishing of a ship with any stores or anything for the purpose of adapting her for sea, whereas the word "equipment" in the Convention appears to be limited to the equipment of a vessel for military purposes. There is no express definition or interpretation of the word "l'équipement" or "fitting out" in the Convention, but as the prohibition against the departure of the vessel is limited to such vessels only as have been wholly or partly adapted for use in war, we think that

the words "fitting out" must mean fitting out for use in war, or the prohibition of departure would apply to some and not all the offending vessels.
(Signed)

W. S. ROBSON.
S. T. EVANS.

Law Officers' Department,
March 4, 1909.

Annex.

ARTICLE 8.

Un Gouvernement neutre est tenu d'user des moyens dont il dispose pour empêcher dans sa juridiction l'équipement ou l'armement de tout navire qu'il a des motifs raisonnables de croire destiné à croiser ou à concourir à des opérations hostiles contre une Puissance avec laquelle il est en paix. Il est aussi tenu d'user de la même surveillance pour empêcher le départ hors de sa juridiction de tout navire destiné à croiser ou à concourir à des opérations hostiles, et qui aurait été, dans la dite juridiction, adapté en tout ou en partie à des usages de guerre.

ARTICLE 8.

A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise or engage in hostile operations which has been adapted entirely or partly within the said jurisdiction for use in war.

[16326]

No. 4^A.

[Registrar-General.]

[March 27, 1909.]

General Register Office to Treasury.*

General Register Office, Somerset House,
London, February 18, 1909.

Sir,

ON the 6th October, 1903, Walter Carl Johann Steinmann, a German subject, was married at the St. Giles' Register Office to Gisela Reiter, otherwise known as Grace Roosevelt, apparently an Austrian subject, she having been born at Vienna in 1880. A copy of the entry of the marriage is appended, from which it will be seen that the man gave his age as 21 years. It appears, however, that his true age was 18 years, and that he should therefore have obtained the consent of his parents to the marriage. On these grounds, viz., that he was only 18 years of age and that the consent of his father had not been obtained, a decree of nullity of the marriage was pronounced by the High Court at Cologne on the 26th March, 1904.

Mrs. Steinmann now wishes to remarry in England, and the question whether notice of her proposed marriage (to Mr. Ernest E. James) may be accepted by the Superintendent Registrar of Westminster has been submitted to me for decision. Such notice would be given under the Act 19 & 20 Vict., cap. 119, and would include a declaration to the effect that "there is no lawful hindrance to the said marriage."

I have caused the parties to be informed that before deciding whether I can authorize the Superintendent Registrar of Westminster district to accept a notice and grant a licence for their marriage I have considered it necessary to seek the advice of the Law Officers of the Crown.

The case has many features in common with that of *Ogden v. Ogden*, respecting which judgment was given in the Court of Appeal on the 18th November, 1907, but differs from it in one important particular. In that case Leon Philip, a French citizen by birth and domicile, had married Sarah Helen Williams at Prestwich, the marriage being without the knowledge or consent of his father. This marriage was declared by the French Court to be null and void on the ground that at the time of the marriage Leon Philip was under the age (25 years according to the French Code) at which he could lawfully marry without the consent of his parents, and that such consent had not been given. The wife then applied to the Divorce Court for a decree of divorce, but the then President dismissed the Petition on the ground that, both the parties being domiciled French people, the Court had no jurisdiction to dissolve the marriage. The wife then married William Henry Ogden, who, having later ascertained the facts as to his wife's previous marriage, petitioned for a decree of nullity on the ground that,

Validity of mixed marriages in England declared null and void by foreign Courts.

* Communicated by the Registrar-General, April 29 1909.



GENERAL.

according to English law, she was still the wife of Leon Philip. Mr. Justice Bargrave Deane held that the first marriage was valid in England, and that the Court had not to consider the effect of the French decree at all, and granted the decree of nullity accordingly. This decision was upheld by the Court of Appeal.

In the present case the woman is an Austrian by birth, whereas in the Ogden case the woman was a British subject by birth, and it nowhere appears in the judgment of the Court of Appeal (so far as I have been able to ascertain from the "Times" report) whether that decision was in any way dependent upon the original nationality of the woman. But for this difference in the circumstances I should have had no hesitation in withholding permission for the marriage to take place, on the ground that the Court of Appeal had decided that a marriage solemnized in England still holds good in England, although it has been declared null and void by the Court of the country to which one of the parties belongs.

I have therefore to request that the foregoing facts may be placed before the Law Officers of the Crown, and that I may be favoured with their Opinion whether, having regard to the fact that Mrs. Steinmann's marriage in England with Mr. Walter Carl Johann Steinmann has been declared null and void by a German Court of Law having jurisdiction in respect of the aforesaid Mrs. Steinmann—

1. Mrs. Steinmann can legally and lawfully contract another marriage in England either with a British or foreign subject; or
2. Whether the annulment of her marriage by the German Court of Law is inoperative in England, and whether she is consequently debarred from legally contracting another marriage in England.

I am, &c.
(Signed) W^m. C. DUNBAR,
Registrar-General.

The above letter having been submitted to the Law Officers, they furnished the following Opinion in reply:—

Opinion of the Law Officers of the Crown.

We are of opinion that the marriage between Steinmann and Mrs. Steinmann which took place at St. Giles' Registry Office on the 6th October, 1903, was valid according to the law of this country, and that in this country it remains valid notwithstanding the decree in the High Court at Cologne. Accordingly we think that the Registrar-General may properly decline to authorize the Superintendent Registrar of Westminster to grant a licence for the marriage of Mrs. Steinmann and Mr. James.

(Signed) W. S. ROBSON.
S. T. EVANS.

Law Officers' Department,
March 27, 1909.

[14280]

No. 5.

[August 3, 1909.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, June 12, 1909.

Consular
Certificates
of Death;
Bank of
England's
views as to.

I HAVE the honour, by direction of Secretary Sir E. Grey, to submit to you the following facts in connection with the issue of death certificates by His Majesty's Consular Officers abroad.

In July last the attention of Sir E. Grey was drawn to a case in which the London and Westminster Bank refused to accept as proof of death a certificate issued by His Majesty's Consul at Jerusalem. The Bank did, however, accept as proof a certificate issued by the clergyman who officiated at the burial of the deceased person, the signature of this gentleman being verified by the Consul.

On enquiry being made as to the reason of this refusal, the Manager of the Bank replied that their practice with regard to proving the death of a stockholder dying abroad was in accordance with the regulations of the Bank of England.

GENERAL.

In a correspondence which arose in 1902 on a similar point the Bank of England stated their position as follows:—

"Foreign certificates of death, the signature to which is authenticated by a British Consul, are accepted by the Bank. What the Bank understand by the term used in their Memorandum, 'British Consul's certificate of death,' is a certificate founded not on the ordinary official evidence of the country, but on evidence of the nature of an allegation which may reach the Consular officer."

Certificates of this nature the Bank did not feel justified in accepting.

Sir E. Grey was advised that it was desirable to reopen the matter, and a letter was accordingly addressed to the Bank of England pointing out that it appeared to be somewhat unreasonable that Consular certificates should not be accepted as evidence of death, the more so as registration of deaths by a Consular officer is carried out under the provisions of section 11 of "The Naturalisation Act, 1870," and by section 12 (4) of the same Act it is provided that "the copies of such entries shall be evidence of any matters by this Act or by any regulation of the said Secretary of State authorized to be inserted in the register."

The Bank of England replied that, after careful consideration of the matter, they considered that the only safe course open to them was that of continuing to exercise the discretionary powers vested in them by section 24 of "The National Debt Act, 1870," and maintaining their present practice of the non-acceptance of Consular certificates of death.

In view of the Bank of England's opinion that they could not accept the certificates as at present issued, it appeared to Sir E. Grey that the simplest course would be to alter the instructions issued to Consular officers so as to enable the certificates to be issued in a form which would be acceptable to the bank.

On being requested to indicate what alterations in the regulations would produce the desired effect, the Bank replied that the only alteration which would be of real value, from their point of view, would be to require the Consul to obtain documentary evidence of death or burial in accordance with the law of the country before making an entry in his register of the death of a British subject who died in his district. The certificate issued should, it was suggested, be so altered as to bear on its face a statement of the nature of the evidence of death furnished to him when registration was effected. The Bank further proposed that the authorities at Somerset House should issue sealed copies of Consular certificates of death, instead of plain copies as at present.

These proposals were referred to the Registrar-General, who expressed the opinion that, as the certificates in question are not registered under the Registration Acts, but under instructions issued by this Department, he could not legally affix the seal of his office to certified copies of such records.

The matter was next referred to certain of His Majesty's Consular officers, who were requested to suggest what alterations in the regulations would be advisable.

From the considerations put forward by these officers it became obvious that it would be necessary to make some distinction between certificates issued in civilised countries and those issued in uncivilised or partly civilised countries.

In countries of the former class, where registration of deaths before the local authority is compulsory, it would be possible for the Consular officer to require the production of documentary evidence of death or burial in accordance with the law of the country, and a column could be provided in the form of the certificate for the purpose of recording the production of such evidence. In "uncivilised" countries, where the registration of death is either not required by law or is imperfectly carried out, it was suggested that before issuing a certificate the Consular officer should require two persons known to him (but not necessarily of British nationality) to appear before him and declare that the death had taken place. A medical certificate would be added, if possible, and the declaration might, if necessary, be made on oath. This procedure, it may be noted, is that adopted by German officers in accordance with German law, which, however, does not require the declaration to be made on oath.

The Bank of England was then asked whether they would be able to accept certificates issued on the lines indicated above.

The Bank replied that certificates issued as proposed in the case of civilised would probably meet their requirements, but that in uncivilised countries it did not appear that the declaration of two persons known to the Consul would meet the Bank's requirements, even in cases where medical certificates were available.



It was, however, stated that the Bank would be prepared to accept both classes of certificates without distinction if a short Act were passed giving them protection similar to that afforded by section 78 of "The Probate Act, 1857," 20 & 21 Vic., cap. 77, in which it is provided that "all persons and corporations making or permitting to be made any payment or transfer *bond fide* upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration."

It was further suggested that in this Act a section should be inserted enabling the Registrar-General to issue copies of Consular certificates of death under seal. Unless such a section were inserted the Bank could not accept the Registrar's copies of Consular certificates of death, but they would be compelled, in all cases, to call for a copy issued by the Consul himself under seal.

The Registrar-General has been consulted on this last proposal, and has stated that he has no objection to issuing under the seal of the General Register Office copies of the Consular records which are deposited there.

In view of the extent and expense of His Majesty's Consular Service, Sir E. Grey is of opinion that Consular officers should be enabled to render as large duties as possible. At present the certificates which they are entitled to issue do not appear to enjoy the authority which it is fitting and convenient that they should possess, and I am therefore to enquire whether you see any objection from the legal point of view to the enactment of such a measure as the Bank of England suggest; and, if not, whether you consider its enactment desirable.

Sir Edward Grey would also be glad to be favoured with any observations of a general character which you may have to offer upon the matter.

I have, &c.

W. LANGLEY.

Report.

In our opinion, there is no objection, from a legal point of view, to such a measure as the Bank of England suggest, and its enactment in regard to certificates issued in civilised countries would appear to be desirable. As regards uncivilised countries, we do not think that a mere certificate by the Consul that two persons known to him have declared that the death has taken place (even if such declaration were made on oath) would be satisfactory.

We think that in regard to such certificates the Act should contain stringent provisions for the purpose of securing that the Consul shall make proper enquiry into the character and extent of the declarants' knowledge of the death, and that the certificate should record that these enquiries have been made, and that the Consul has satisfied himself that the declarations are true.

W. S. ROBSON.
S. T. EVANS.

Law Officers' Department,
August 3, 1909.

[18097]

No. 6.

[August 5, 1909.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Second
Peace
Conference
Conven-
tions Bill.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you the draft of a Bill (Paper A) which has been prepared to give full effect to the legislation which is desirable in the case of certain of the conventions agreed to at the Second Peace Conference held at The Hague in 1907, before they are ratified by the King.

The notes on the clauses of the Bill (Paper B) will explain in what respect legislation is required as regards the specific conventions therein referred to, copies of which are also enclosed (Paper C) for convenience of reference.

The draft Bill has been referred to the various departments of His Majesty's Government concerned, who have concurred in its terms, with the exception of the

Foreign Office, May 19, 1909.

Board of Trade, who have suggested a slight amendment in drafting (indicated in red ink on the copy inclosed),* in regard to which this department are in communication with the second parliamentary counsel with a view to its adoption.

I am to request that you will take the draft Bill into your consideration, and that you will be so good as to favour the Secretary of State with your opinion as to whether, in its present form, it may properly be introduced into Parliament.

Sir Edward would also be glad to be favoured with any observations of a general nature which you may desire to offer upon the draft Bill.

I have, &c.

LOUIS MALLET.

List of Papers.

- (A.) Second Peace Conference (Conventions) Bill (draft).
- (B.) Notes on clauses.
- (C.) Final Act of Second Peace Conference, with conventions, &c., annexed thereto ("Miscellaneous, No. 6 (1908)").

[29646]

Report.

We have carefully considered the draft Bill and in our opinion, subject to the following observations, it may properly be introduced into Parliament.

1. Clause 1 (1) (i) appears to suggest that a Secretary of State has power to compel the attendance of witnesses before the tribunal when sitting at a place without His Majesty's dominions, but under the clause he only has the power of the court, and no court in this country has the power to compel the attendance of witnesses out of its jurisdiction. If it is intended to give a Secretary of State such power it should be done in express language. We do not, however, suggest that it would be desirable to confer so unusual a power on the Secretary of State; and, unless it is intended to confer it, the language of the clause should be altered so as to avoid the suggestion that any such power is in fact conferred.

2. In clause 1 (2) we think that the privileges conferred on members of an international tribunal should extend only to members being in His Majesty's dominions while in the performance of their duty.

3. The convention respecting the rights and duties of neutral Powers in time of war appears to imply that belligerent war-ships should be entitled to execute repairs and to revictual, subject to the limitations imposed by articles 17 and 19. To repair or revictual a belligerent war-ship if there exists a reasonable cause to believe that the same will be employed in the military or naval service of the belligerent would be an offence against section 8 of "The Foreign Enlistment Act, 1870," and if it is intended to give full effect to the convention express enactment is necessary to enable a belligerent war-ship to repair or revictual as therein contemplated.

4. The draft Bill does not give power to His Majesty to perform the obligation imposed by the second paragraph of article 9 of the convention respecting the rights and duties of neutral Powers and persons in war on land. That paragraph provides that the neutral Power shall see that any restrictions or prohibitions which it may enact in regard to the use by belligerents of telegraph or telephone calls, or wireless telegraphy apparatus belonging to companies or to private individuals shall be impartially observed by the owners of such telegraph or telephone calls or wireless telegraphy apparatus.

W. S. ROBSON.
S. T. EVANS.

Law Officers' Department,
August 5, 1909.

Annex 1.

(A.)

Second Peace Conference (Conventions) Bill

Draft of a Bill to make such amendments in the law with respect to international tribunals, A.D. 1909, neutrality, and other matters as are necessary to enable certain conventions to be carried into effect.

WHEREAS at the Second Peace Conference held at The Hague in the year 1907 various conventions were drawn up, but it is desirable that the same should not be

* Printed in italics.

[198]

D



ratified by His Majesty the King until such amendments of the law as are in this Act contained have been made:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Provisions
as to inter-
national
tribunals.

[See 5 Edw.
VII, 7. c.]

1.—(1.) A Secretary of State, on the application of any international tribunal constituted in accordance with any treaty or convention to which His Majesty is a party for inquiring into or settling any questions of an international character, shall for the purpose of—

- (i.) Enforcing the attendance of witnesses before any such tribunal, wherever sitting, whether within or without His Majesty's dominions, or any members thereof, and the issue of a commission or request to examine witnesses elsewhere than before the tribunal; and
- (ii.) Compelling the production of documents,

have all such powers, rights, and privileges as are vested in the court, or in any judge thereof, on the occasion of any action:

Provided that an order of a Secretary of State shall be substituted for, and shall be equivalent to, any formal process capable of being issued in any action for enforcing the attendance of witnesses and compelling the production of documents, and any such order shall be enforceable by the court as though the order were an order of the court to the like effect.

(2.) A member of any such international tribunal, if not a British subject, shall enjoy all the privileges which are conferred by law or custom on Ambassadors and public Ministers of foreign States.

(3.) In this section the expression "the court" means in England and Ireland the High Court, in Scotland the Court of Session, and in any other place to which this Act extends a superior court of that place.

[See 33 &
34 Vict. c.
90, s. 26.]

(4.) The powers conferred by this section on a Secretary of State may be exercised by him in any place to which this Act extends, and those powers may also be exercised by any of the following officers within their respective jurisdictions; that is to say,—

- (i.) In Ireland, by the lord lieutenant;
- (ii.) In Jersey, by the lieutenant governor;
- (iii.) In Guernsey, Alderney, and Sark, and dependent islands, by the lieutenant governor;
- (iv.) In the Isle of Man, by the lieutenant governor;
- (v.) In India, Canada, and Australia, by the governor-general, including any person who for the time being has the powers of the governor-general;
- (vi.) In any British possession, by the governor.

Orders in
council as
to supply of
fuel and
provisions
to belli-
gerent
vessels, in-
terment of
belligerent
troops, and
the nature
and use of
signalling
apparatus.

2.—(1.) Without prejudice to any other powers exercisable by His Majesty for the purpose of enforcing the obligations of neutrality, His Majesty may by order in council—

- (a.) Make regulations for preventing, prohibiting, or restricting the supply of fuel or stores to, and the repairing or manning of, ships belonging to any foreign State at war with any other foreign State at peace with His Majesty (in this Act referred to as a friendly State);
- (b.) Authorise the arrest and detention of any persons forming part of the crew of any ship belonging to, or of the forces of, any foreign State at war with any friendly State whom His Majesty by virtue of any treaty, convention, or otherwise is under an obligation to intern;
- (c.) Prohibit the erection by or on behalf of any foreign State at war with any friendly State, of any wireless telegraphic station or any apparatus for the purpose of communicating with their forces on land or sea and the use of any such station or apparatus established by any such State for purely military purposes before the commencement of the war and not previously opened for the service of public messages;

and the order may contain such incidental, consequential, and supplemental provisions as may appear to His Majesty to be necessary or proper for the purposes of the order, and any such order may be revoked and varied by any subsequent order in council.

(2.) If any person contravenes the provisions of any such order or obstructs any officer in the execution of his duties thereunder he shall be guilty of an offence under the Foreign Enlistment Act, 1870, and shall be liable to be proceeded against and punished as if he had been guilty of increasing the warlike force of a foreign ship under section 10 of that Act.

33 & 34
Vict. c. 90.

(3.) An order in council under this section shall, if made before the outbreak of hostilities between two foreign States, come into force on the issue of a proclamation of neutrality by His Majesty in connection with such outbreak, and if made during such hostilities, come into force on the making thereof, and in either case shall, unless previously revoked, continue in force until the issue of a proclamation declaring such hostilities to be at an end, and whilst in force shall have effect as if enacted in this Act:

Provided that the issue of such last-mentioned proclamation shall not affect any legal proceeding commenced or offence committed whilst the order in council was still in force, but any such legal proceeding may be continued, and any such offence prosecuted as if the order remained in force.

3.—(1.) A British vessel other than a hospital-ship, or a boat of a hospital-ship belonging thereto, shall not be painted white outside with a broad horizontal band of red or green so as to resemble such a ship or boat, and if any such vessel is so painted the owner or master of the vessel shall be liable to a fine not exceeding 100*l.*, and on a certificate from a surveyor of ships or a Board of Trade inspector under the Merchant Shipping Act, 1894, that a vessel is so painted, the vessel may be detained until the defect has been remedied.

Prohibition
of painting
vessels to
resemble
hospital-
ships, and
displaying
the Geneva
flag.

(2.) It shall not be lawful to display on any British ship or boat, other than a hospital-ship or a boat belonging thereto, the Geneva flag, that is to say, a flag consisting of a red cross on a white ground, formed by reversing the federal colours of the Swiss Confederation, or any flag so nearly resembling the same as to be calculated to deceive, and if any such flag is displayed on any such vessel the owner or master of the vessel shall be liable to a fine not exceeding 100*l.*

[See 57 &
58 Vict., c.
60, s. 7 (5).]

(3.) For the purposes of this and the next succeeding section the expression "hospital-ship" means any ship constructed or adapted for the sole purpose of assisting the sick, wounded, or shipwrecked.

(4.) This section shall have effect and be construed as though it were part of "The Merchant Shipping Act, 1894," as amended by any subsequent enactment.

57 & 58
Vict., c. 60.

(5.) This section shall not come into operation until three months after the passing of this Act.

4.—(1.) The master of any British ship having on board any sick, wounded, or shipwrecked men, being combatants who have been rescued during or after a naval engagement in which they have taken part, shall, on demand being made in person by a commissioned officer of a war-ship of any of the belligerent States, deliver to him all such men.

Delivery up
of sick,
wounded,
and ship-
wrecked
men to a
belligerent
State.

(2.) This section shall as respects British hospital-ships extend to cases where the officer making the demand is an officer of a war-ship of a State at war with His Majesty.

(3.) In this section expressions have the same meaning as in "The Merchant Shipping Act, 1894," as amended by any subsequent enactment.

57 & 58
Vict., c. 60.

5. This Act shall extend to the whole of His Majesty's dominions.

Extent.

6. This Act may be cited as "The Second Peace Conference (Conventions) Act, 1909."

Short title.

Annex 2.

(B.)

Hague Conventions Bill.

Notes on Clauses.

SOME of the provisions contained in the various conventions drawn up at The Hague in 1907 cannot be put in force without legislative authority, and other provisions, though perhaps not absolutely necessitating legislation, are of such a nature that it seems desirable that they should receive statutory sanction.



The present Bill has been drawn in consultation with the interdepartmental committee, and is strictly confined to the provisions necessary or desirable to enable the conventions (other than the convention relative to the establishment of an international prize court) to be put in force. It does not contain the amendments of the "Foreign Enlistment Act, 1870," recommended by the interdepartmental committee in cases where the provisions of that Act are more stringent than the international obligations imposed by the conventions.

Clause 1.

The object of this clause is to enable the attendance of witnesses and the production of documents to be enforced in connection with proceedings before a commission of enquiry (see article 23 of the convention for the pacific settlement of international disputes) and before courts of arbitration (see article 76 of the same convention and article 25 of the convention relative to the creation of a judicial arbitration court). The language of the clause has also been made wide enough to cover proceedings before an international prize court should His Majesty's Government assent to the convention on that subject.

The form of subsections (1) and (2) is suggested by the provisions of the "War Stores Commission Act, 1905" (5 Edw. VII, cap. 7). But it differs from the last-mentioned Act in that that Act gives the War Stores Commission itself powers of punishing for contempt. It seems impossible to give similar powers to the Secretary of State, and, therefore, under this clause recourse has to be had to the court to enforce any order issued by the Secretary of State.

Article 20 of the convention for the pacific settlement of international disputes seems to contemplate the commission of enquiry delegating to one or more of its members the duty of taking evidence, and the language of paragraph (i) has been made wide enough to cover such a case.

The powers of the Secretary of State are made exercisable only on the application of the international tribunal. This is in order to comply with article 25 of the last-mentioned convention, which requires that the witnesses should be summoned through the Government of the State in the territory of which they are. If, therefore, the British Government wished to compel the attendance of a witness resident in England the Secretary of State would first have to apply to the international tribunal and then the international tribunal would apply to the Secretary of State to compel his attendance. It is, however, thought desirable to require that all applications should go through the international tribunal, so that the question whether the attendance of the witness is required can be decided by a legal tribunal.

No provision has been inserted making false evidence before the international tribunal perjury.

Subsection (2) gives effect to article 46 of the convention for the pacific settlement of international disputes. It is a question whether the privileges should extend only to the members of the tribunals "in the performance of their duties." The words "Ambassadors and Public Ministers of foreign States" are taken from the Act of 7 Anne, cap. 12.

Subsection (5).—This is taken from section 26 of "The Foreign Enlistment Act, 1870."

Clause 2.

This clause proposes to enable His Majesty, by order in council, to regulate various matters, so that the obligations imposed on neutrals may be enforced.

In leaving matters to be regulated by orders in council instead of providing for them expressly in the Bill, the Bill follows numerous precedents of Acts for giving effect to treaties and conventions; for instance, "The Merchant Shipping Act, 1862" (25 & 26 Vict., cap. 63), sections 58–64; "The Sea Fisheries Act, 1868" (31 & 32 Vict., cap. 45); "The International Copyright Act, 1886" (49 & 50 Vict., cap. 33). The method is a convenient one, and enables effect to be given to any modifications made by future treaties without further legislative powers.

Paragraph (a).—This paragraph is intended to enable regulations to be made to cover the obligations imposed by articles 17, 18, 19, and 20 of the convention respecting the rights and duties of neutral Powers in maritime war, which are as follows:—

"Art. 17. In neutral ports and roadsteads belligerent war-ships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay.

"Art. 18. Belligerent war-ships may not make use of neutral ports, roadsteads, or territorial waters for . . . completing their crews.

"Art. 19. Belligerent war-ships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard. Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

"If, in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the duration of their permitted stay is extended by twenty-four hours.

"Art. 20. Belligerent war-ships which have shipped fuel in a port belonging to a neutral Power may not, within the succeeding three months, replenish their supply in a port of the same Power."

At present the only legislation affecting the subject is section 8 (3) of "The Foreign Enlistment Act, 1870," which prohibits under penalty any person without a licence from His Majesty "equipping" any ship with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the naval service of a belligerent. A very wide definition is given of equipping, but the supply of fuel is not expressly mentioned in the definition, and none of the language of the provision seems appropriate to deal with the case of a belligerent war-ship calling at a neutral port.

Paragraph (b) is intended to give the necessary powers to carry out the obligation of internment foreign troops and the crews of foreign vessels (see article 11 of the convention respecting the rights and duties of neutral Powers and persons in war on land; article 15 of the convention for the adaptation of the principles of the Geneva Convention to maritime war; articles 3 and 21 of the convention respecting the rights and duties of neutral Powers in maritime war).

Apart, however, from the conventions, a neutral is by international law required to intern belligerent troops who cross the frontier, and to meet this obligation the words "or otherwise" have been inserted. The necessity for legislation on the subject was demonstrated when it was proposed to intern the Russian sailors rescued by His Majesty's ship "Talbot" at Chemulpo. It was at one time intended to intern them in Ceylon, and the Colonial Secretary was advised that, in order to prevent the Russians leaving the colony, special local legislation would probably be necessary, providing for their arrest and imprisonment if they attempted to do so, and that even if it were intended only to curtail their liberty to move about the island, legislation would also be required.

Paragraph (c) is intended to cover the provisions of article 3 of the convention respecting the rights and duties of neutral Powers and persons in war on land, and article 5 of the convention respecting the rights and duties of neutral Powers in maritime war, and closely follows the language of the first-mentioned article. As no obligation of censoring telegrams is imposed (see article 8 of the convention respecting the rights and duties of neutral Powers and persons in war on land), it is not proposed to confer any such power on the executive.

General words are added at the end of subsection (1) which will probably be wide enough to include the conferring on executive authorities of the powers of seizure and search.

Subsection (2), making the contravention of the order in council an offence under the Foreign Enlistment Act, will obviate the necessity of bringing in all such provisions as those contained in sections 16, 17, and 18 of the Act of 1870. It will, however, require the proceedings to be by indictment, and it might be advisable to enable the offence to be prosecuted summarily. If, however, it is decided to make offences under this bill punishable summarily, it would probably be well to extend the provision so as to include the offences under the Foreign Enlistment Act.

Subsection (3) defines the time during which an order in council under this clause is to remain operative. As the contravention of the provisions of the order in council whilst it is in operation will involve penal consequences, it is essential that



there should be a definite time when the order comes into operation and when it ceases to be in operation. It is suggested that (unless made during hostilities) it should be brought into operation, and its operation terminated, by proclamations.

Clause 3.

This clause is necessary in order to carry into effect the provisions of articles 6 and 21 of the convention for the adaptation of the principles of the Geneva Convention to maritime war, which prohibit the painting of ships, other than hospital-ships, with the marks characteristic of hospital-ships.

Subsection (1).—It is thought that a penalty of 100*l.*, with a liability to detention, will be sufficient to guard against breaches of this provision. If in time of war unauthorised use is made of the distinctive signs of hospital-ships by ships which are not hospital-ships, the ships which use them will, of course, not have the protection to which they would be entitled as hospital-ships.

The last paragraph of the subsection follows the form of section 7 (5) of "The Merchant Shipping Act, 1894."

The whole clause is to be read as part of the Merchant Shipping Act (see subsection (3)), and this will import the definition of vessel in section 742 of that Act as including "any ship or boat or any other description of vessel used in navigation," the general provisions of that Act with regard to the recovery of penalties (see sections 680-3, 689), and the procedure where, under that Act, a vessel may be detained (see section 692, which provides *inter alia* for the detention of the offending vessel by naval and military officers, officers of Customs, &c.).

Subsection (2).—The definition of "hospital-ship" is based on the language in article 1 of the convention. Presumably it is intended that any vessel which is constructed or adapted for use of a hospital-ship may use the characteristic marks, whether a war is or is not actually in progress.

Subsection (4).—As the painting of some existing boats may offend against the provisions of this clause, the date of the coming into operation of the clause is deferred for three months.

Clause 4.

This clause is inserted in view of the provisions of article 12 of the convention for adapting the principles of the Geneva Convention to maritime warfare.

It is perhaps questionable whether any such enactment is required to give effect to the article, but it seems desirable to have an express enactment, as without such an enactment questions as to "insult to the flag" might be raised when a foreign ship demanded and sought to enforce the rights under the convention.

The clause is limited to combatants rescued during or after an engagement in which they have taken part in order that it should not go further than the article, subject to the British reservation.

The clause is drawn so as to apply to hospital-ships, whether England is at war or not, but to other vessels only when England is a neutral.

Clause 5.

The Bill extends only to the "British dominions." This expression would not include British protectorates or Cyprus, but the provisions of the Bill could be extended to them by appropriate orders in council under the Foreign Jurisdiction Acts. It has been thought that this would probably be the most convenient method of extending the Bill to protectorates, as, not only is the expression "British protectorate" hard to define, but also the circumstances of the different protectorates vary, so that the provisions of the Bill would have to be differently adapted to suit those different circumstances.

[29646]

No. 7.

[December 22, 1909.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, November 4, 1909.

SIR EDWARD GREY duly received your report of the 5th August favouring him with your observations on the draft Bill which has been prepared to give effect to the legislation desirable in the case of certain of the conventions agreed to at the Second Peace Conference held at The Hague in 1907 before they are ratified by the King.

Sir E. Grey now desires me to submit the following observations for your consideration with reference to paragraphs 3 and 4 of your report.

In the former paragraph (para. 3) the view is expressed that, as the law now stands, the repairing and revictualling of belligerent war-ships is an offence against "The Foreign Enlistment Act, 1870;" and that, therefore, in order to enable full effect to be given to the "convention concerning the rights and duties of neutral Powers in maritime war"—in so far as repairing and revictualling of ships is allowed within certain limits—an amendment of the Foreign Enlistment Act will be required.

Sir E. Grey is informed that this point was not lost sight of by the inter-departmental committee which, under the chairmanship of the Earl of Desart, was appointed to advise on the acceptance of the conventions drawn up at the Second Peace Conference, and under whose supervision the first draft of the Bill was prepared. That committee had already advised that an amendment of section 8 (4) of the Foreign Enlistment Act was desirable, and this point was referred to you, and is dealt with in your report of the 4th March, 1909. They doubted, however, whether a further amendment on the subject of repairing and revictualling was essential.

The proceedings which are prohibited by sections 8 and 10 of the Act in question are only prohibited when done "without the licence of Her Majesty," and by section 15 a licence may be signified by an order in council, and the committee thought that if repairing or revictualling within the limits prescribed by the convention was authorised by the order in council to be enacted under the proposed Bill, such repairing or revictualling would be done with the licence of the Crown, and would not technically be an offence against section 8 of the Foreign Enlistment Act.

I am accordingly to request that you will be good enough to take this further point into your consideration, and to favour Sir E. Grey with your opinion as regards the correctness or otherwise of the view taken by the inter-departmental committee in the matter.

A Bill to amend the Foreign Enlistment Act has already been prepared by the parliamentary counsel, and Sir Edward Grey would prefer to insert in that Bill any amendments of the existing Act which you think are called for in the matter of repairing and revictualling of belligerent war-ships. The prohibition contained in sections 8 and 10 are, in the absence of a licence from the Crown, absolute, but repairing and revictualling have always been allowed in this country within certain limits, and it would seem preferable to avoid legislating upon the footing that such proceedings were absolutely prohibited under the Act, and that the necessity for legalising them flows from the Peace Conference conventions. Doubts have from time to time been expressed in this office as to whether any legislative sanction exists for the regulation of the coaling, revictualling, or repairing of belligerent war-ships in this country, but up till now the right of the customs officers to carry out the "Coaling Rules" has never been questioned. The necessity, however, of amending section 8 (4) of the Foreign Enlistment Act would give an opportunity of introducing any amendments you think desirable with regard to repairing and revictualling.

I am accordingly to ask whether you see any objection to this course.

With regard to paragraph 4 of your report, relating to article 9 (2) of the "convention respecting the rights and duties of neutral Powers and persons in war on land," which provides that a neutral Power shall see that private companies apply impartially to both belligerents restrictions as regards telegraphs, &c., imposed by the convention, I am to state that Sir E. Grey is informed that the inter-departmental committee were of opinion that it was not desirable that the draft Bill should deal with that question.

Up till now His Majesty's Government have had no difficulty in carrying out telegraph censorship rules which they have felt bound to impose, despite the fact that

[198]

E*

Second
Peace
Conference
Conven-
tions Bill:
further as
to.



they possess no statutory authority enabling them to enforce such rules. The various cable companies have always acquiesced willingly in such steps as have been deemed necessary from time to time.

The effect of the convention of 1907 is materially to lessen the responsibilities of neutral Powers with regard to censorship; they are relieved of the obligation to impose a censorship, but if, in their own interest, they consider it desirable to take such measures, it is required that the regulations should be applied impartially.

If a Power should impose such restrictions it will be with a view to protect cables or wires from being cut by the belligerent. It is therefore entirely in the interests of the British cable companies to comply with the obligations of neutrality because of the risk of their cables being cut, and it is doubtless for this reason that no difficulty in the matter has arisen in past years.

So far as concerns wireless telegraph companies His Majesty's Government are in a position to enforce compliance with such restrictions, owing to the possibility of withdrawing the licence granted to these companies.

A further argument in favour of omitting the matter from the draft Bill is the difficulty of framing any measure which would be effective. The mere subsequent imposition of penalties might not be adequate, seeing that the object is to prevent improper use by one belligerent, not to punish it subsequently for an improper use previously effected. Moreover, if for this purpose His Majesty's Government attempted to take power to control the entire use of cables in time of war, it seems probable that the cable companies would resent such action, and might indeed cease to co-operate with His Majesty's Government in carrying out the obligations imposed upon this country.

Sir E. Grey would therefore be glad if you would be good enough to take into consideration the views expressed above, and to inform him whether you still consider that it is necessary that the draft Bill should deal with this point, and, if so, to indicate for his guidance the lines upon which you consider that the clause should proceed.

For convenience of reference a printed copy of your report of the 5th August is enclosed herewith, together with the papers which accompanied my letter of the 19th May last, to which it relates.

I have, &c.

LOUIS MALLET.

List of Papers.

Law Officers' Report, August 5, 1909.
Second Peace Conference (Convention) Bill (draft), with notes of clauses.
Final Act of Second Peace Conference, with conventions, &c., annexed ("Miscellaneous No. 6, 1908").
Law Officers' Report, March 4, 1909.

Report.

In our opinion a licence from the Crown, given by an order in council made under "The Foreign Enlistment Act, 1870," to revictual, recoal, and repair belligerent war-ships in accordance with articles 17 and 19 of the convention respecting the rights and duties of neutral Powers in a maritime war would be effective for the purpose of carrying out the provisions of those articles without further amendment of section 8 of the Foreign Enlistment Act. We think that an order in council made under clause 2 (1) (A) of the draft Bill as it now stands would not be appropriate for the purpose of giving the limited privilege of revictualling, recoaling, and repairing allowed by the convention. That clause provides only for the making of regulations of a preventive or restrictive character, and revictualling, recoaling, and repairing, are already wholly prohibited unless licensed under the Act of 1870.

2. With regard to paragraph 4 of our report of the 5th August, 1909, as His Majesty's Government are of opinion that they will be able in practice to perform, without statutory powers, the obligation imposed by the second paragraph of article 9 of the convention respecting the rights and duties of neutral Powers and persons in war on land, we see no objection to omitting the subject from the draft Bill.

W. S. ROBSON.
S. T. EVANS.

Law Officers' Department,
December 22, 1909.

[32921 (F. 5090/09).]

No. 7^A.

[In Board of Trade,
August 30, 1909.]

[August 6, 1909.]

Case for the Opinion of the Law Officers of the Crown and Mr. Rowlatt.

PRIOR to 1907 the practice of the Board of Trade as regards the disposal of the estates of German seamen dying on British ships or territory was based on the arrangement between the British and North German Governments as set out in correspondence of which the following is a copy:—

*Estates of
German
seamen
dying on
British
ships, and
vice versa.*

"M. le Chargé d'Affaires,

"Foreign Office, October 19, 1869.

"With reference to my note of the 16th ultimo, I have now the honour to inform you that the Lords of the Committee of Privy Council for Trade have stated to me that it is in their power to deliver to the Consul-General in London of the North German Confederation, without the usual formalities, the money and effects of North German seamen under the value of 50*l.* received by their Lordships under the provisions of 'The Merchant Shipping Act, 1854'; and their Lordships are willing to agree to do so on the understanding that the North German Government will engage to deliver to the respective British Consuls property of British seamen on board North German vessels or on North German territory.

"I beg to assure you that it will give Her Majesty's Government much pleasure to meet the wishes of your Government in this matter, and I request that you will be so good as to ascertain whether this arrangement will be agreeable to them.

"I am, &c.

(Signed) "CLARENDON.

"M. de Katte."

"(Translation.)

"My Lord,

"Prussia House, November 1, 1869.

"I have had the honour of receiving your Excellency's courteous note of the 16th ultimo relating to the agreement to be come to between the Government of the North German Confederation and the Royal British Government respecting the delivery of the effects left by German sailors deceased in the British service and British sailors deceased in the German service, and I have made the Chancellor of the Confederation acquainted therewith. Whereupon I am now authorised to declare the acceptance of the proposition made in that note by the Lords of Trade in regard to effects under the value of 50*l.*, with an assurance of reciprocity on the part of the North German Confederation. In making that declaration hereby on behalf of the Confederation I beg leave at the same time to state, with reference to the previous negotiations, that by the expression 'the respective British Consuls,' made use of in the note of the 19th October, the Administration of the Confederation concludes that that British Consul is intended in whose district the crew of the German ship to which the deceased British seaman belonged is passed in examination. Should this acceptance not be in accordance with that of Her Britannic Majesty's Government, I beg that your Excellency will be so good as to give me further information on the subject.

"I have, &c.

(Signed) "KATTE.

"The Earl of Clarendon."

"M. le Chargé d'Affaires,

"Foreign Office, November 18, 1869.

"I lost no time in referring to the Lords of Trade the inquiry contained in your note of the 1st instant as to the signification of the words 'the respective English Consuls,' as used by that Board in reference to the proposed arrangements for the reciprocal delivery of the effects of British sailors deceased on board German vessels or



of German sailors on board British vessels; and I have now the honour to inform you that the Administration of the North German Confederation is correct in their conclusion as to the interpretation of the words in question.

"I have, &c.
(Signed) "CLARENDON.

"M. de Katte."

Under this arrangement the Board of Trade were to deliver to the Consul-General in London, of the North German Confederation, without the usual formalities, the money and effects of North German seamen under the value of 50*l.* received under the provisions of "The Merchant Shipping Act, 1854." When the arrangement was entered into 50*l.* was the limit which the Board of Trade could deal with without the production of probate or letters of administration. By section 176 of "The Merchant Shipping Act, 1894," the limit was raised to 100*l.*, no doubt in view of the fact that under then existing Inland Revenue Acts no duty is payable on estates under 100*l.* in value.

A copy of a Memorandum upon the subject prepared in the Finance Department of the Board of Trade in 1901 accompanies these papers.

On the 9th September, 1905, the German Chargé d'Affaires wrote to the Secretary of State for Foreign Affairs a letter, of which the following translation was received by the Board of Trade from the Foreign Office, with a covering letter dated the 19th September, 1905, asking what reply should be returned to Count Bernstorff's note:—

"(Translation.)

"My Lord,

"German Embassy, September 9, 1905.

"In the Agreement with the British Government of 1869 respecting the handing over of the estates of deceased seamen are included only such effects as do not exceed the value of 50*l.* This limitation is based on the regulation of section 199 of the Merchant Shipping Act of 1854. This regulation obliged the Board of Trade to make the handing over of the estates of seamen conditional on the production of a proof issued to the recipient in the manner required by English law, but empowered the Board to make an exception in the case of estates of the value of 50*l.* or less, at a rough estimate.

"The maximum value of the estates which the Board of Trade may dispose of without an official proof has meanwhile been increased by the Merchant Shipping Act of 1894 (section 176) to 100*l.*

"As experience has shown that it is both difficult and expensive for German heirs living in Germany to prove their right to succeed according to English law, equity requires that these heirs should be freed from the necessity of doing so, at least in those cases in which English law itself allows the exemption.

"From this point of view it appears to the Imperial Government desirable to amend the above-mentioned Agreement in accordance with section 176 of the Merchant Shipping Act in question in such a way that the Board of Trade may hand over to the Imperial Consulate-General here, without special formalities, all estates of German seamen of the value of 100*l.* or less.

"I have the honour, in accordance with my instructions, to propose to your Excellency an extension of the Agreement of 1869 in the above sense, and to add that I am authorized to declare that the Imperial Government would give complete reciprocity in the extended form of the Agreement.

"I have, &c.
(Signed) "J. BERNSTORFF.

"The Marquess of Lansdowne, K.G.,
" &c. &c. &c."

In reference to this, the Board of Trade sent a letter to the Foreign Office, of which the following is a copy:—

"7, Whitehall Gardens, London, S.W.,
October 10, 1905.

"Sir,

"I am instructed by the Board of Trade to acknowledge your letter of the 19th ultimo, transmitting translation of a note from the German Chargé d'Affaires at this Court, proposing that the Arrangement of 1869 respecting the handing

over of the estates of deceased seamen should be so extended as to admit of property from 50*l.* to 100*l.* in value being dealt with without the usual legal formalities.

"With reference thereto I am to direct attention to the Board's letters* F. 8441 of the 24th August, 1894, and F. 9051 of the 19th July, 1901, on similar proposals on the part of Russia, and also to a letter F. 7804 of the 18th July, 1896 (consequent on an application from the Government of the Netherlands), in which the difficulties experienced in giving effect to certain existing Agreements were fully set forth, and to state, for Lord Lansdowne's information, that, after careful consideration of the matter, the Board of Trade are of opinion that the extension of the limit to 100*l.* may be agreed to, provided that an Agreement similar to that concluded with the Government of the Netherlands in 1897, and suggested in 1898 in the correspondence with Austro-Hungary, and in 1901 in the correspondence with Russia, is entered into with the German Government in substitution for the existing Arrangement of 1869.

"A draft form of Agreement is inclosed embodying the alterations which the Board of Trade suggest in the event of a new Arrangement with the German Government being made.

"I have, &c.
(Signed) "T. W. P. BLOMEFIELD."

"The Under-Secretary of State,
"Foreign Office."

The following is a copy of the draft Agreement referred to:—

"Draft of suggested New Arrangement with the German Government.

"ARRANGEMENT for dealing with the Estates of German seamen dying on board British merchant-vessels, or on British or foreign territory which may be received by the Board of Trade under the provisions of 'The Merchant Shipping Act, 1894.'

"1. The Board of Trade will in future furnish the German Consul-General in London with copies of the accounts rendered to them in respect of the wages and effects of deceased German† seamen, subjects of the German Emperor, together with any particulars which may be in their possession likely to facilitate the identification of the deceased, and of the legal heirs.

"2. Whenever an estate does not exceed 100*l.* in value, and the Board of Trade are satisfied in any particular case that the legal heirs of the deceased seamen are resident in German territory, and that there are no persons elsewhere who have any valid claim to the wages and effects left by him, they will dispense with the customary form of claim, and will hand over the property in question to the German Consul-General in London.

"3. Before actually disposing of the estate of a German seaman in accordance with British law, the Board will give notice to the German Consul-General of their proposal to hand over such property to claimants, and will consider any representations that he may make thereon.

"4. It is understood that the estates of British seamen received by the German Government, whether dying on board German merchant-vessels, or on German or foreign territory, will similarly be handed over to His Majesty's Consular officers."

On the 2nd January, 1907, the Secretary of State for Foreign Affairs sent to the Board of Trade a copy of a note from the German Ambassador dated the 18th December, 1906, which was as follows:—

"(Translation.)

"[43364]

"Your Excellency,

"German Embassy, London, December 18, 1906.

"Lord Lansdowne was good enough to transmit to me in his note of the 19th October of last year the draft of a new Anglo-German Agreement relative to the surrender of seamen's legacies, in place of the one concluded in 1869.

* These letters are copied separately from and accompany this case.
† Alteration proposed by German Ambassador. F. 245/07.

"The German Government entirely concur in the wording of this draft in itself, but, in view of the practice which has been in existence for years in dealings with the British Board of Trade, of handing over without further formality legacies left by persons deceased whose German birth is absolutely established, though the retention of their German nationality up to the time of their death may not be so established, the German Government think it would be desirable to substitute for the words ' . . . of deceased seamen subjects of the German Emperor ' (under section No. 1 of the draft)—corresponding to the terms 'German seamen' and 'British seamen' used in the heading and in section 4 of the draft—the more general wording ' . . . of deceased German seamen.'

"I have the honour to propose to your Excellency, in accordance with instructions, an alteration in this sense of the form of section 1 of the draft, and I am to add that I have been authorised, in the event of this change of wording meeting with the approval of His Majesty's Government, to conclude the new Agreement in the same manner as the one of 1869 was concluded, that is to say, by means of an exchange of notes between the Foreign Office and myself.

"I have the honour to request your Excellency to be good enough to favour me with a communication as to the attitude of His Majesty's Government towards this proposal, and I have, &c.

(Signed) "P. METTERNICH.

"Sir F. Grey, Bart.,
" &c. &c. &c."

The Board sent a reply to the Foreign Office in the following terms:—

"7, Whitehall Gardens, London, S.W.,
January 9, 1907.

"Sir,
"I am directed by the Board of Trade to acknowledge receipt of your letter No. 43364/06 of the 2nd instant, transmitting copy of a note from the German Ambassador proposing that in Clause 1 of the new Anglo-German Agreement relative to the surrender of the property of deceased seamen the words 'deceased German seamen' should be substituted for the words 'deceased seamen subjects of the German Emperor,' and to state for Sir Edward Grey's information that they see no objection to the alteration suggested.

"I have, &c.
(Signed) "T. W. P. BLOMEFIELD.

"The Under-Secretary of State,
"Foreign Office."

On the 26th February, 1907, the Foreign Office sent to the Board of Trade for consideration a translation of a letter received from the German Embassy in the following terms:—

"(Translation.)
"[5649]

"Your Excellency, German Embassy, February 16, 1907.

"In my note of the 9th September, 1905, I proposed a modification, in accordance with paragraph 176 of 'The Merchant Shipping Act, 1894,' in the terms of the Agreement concluded with the British Government in 1869 respecting the handing over of the estates of deceased seamen, and your Excellency's predecessor was good enough to inform me on the 19th October, 1905, that the British Government agreed with the proposal to replace the existing Agreement of 1869 by another one.

"I have the honour, accordingly, with reference to the modification approved in your note of the 23rd ultimo of the draft communicated in the Foreign Office note of the 19th October, 1905, to propose, in the name of the Imperial Government, the following Agreement as to the treatment of the estates of German seamen dying on board British merchant-vessels either in British or foreign territory, which, in accordance with the provisions of 'The Merchant Shipping Act, 1904,' are sent to the British Board of Trade.

"1. The Board of Trade will in future furnish the German Consul-General in London with copies of the accounts rendered to them in respect of the wages and effects of deceased German seamen, together with any particulars which may be in

their possession likely to facilitate the identification of the deceased and of the legal heirs.

"2. Whenever an estate does not exceed 100*l.* in value, and the Board of Trade are satisfied in any particular case that the legal heirs of the deceased seamen are resident in German territory, and that there are no persons elsewhere who have any valid claim to the wages and effects left by him, they will dispense with the customary form of claim and will hand over the property in question to the German Consul-General in London.

"3. Before actually disposing of the estate of a German seaman in accordance with British law, the Board will give notice to the German Consul-General of their proposal to hand over such property to claimants, and will consider any representations that he may make thereon.

"4. It is understood that the estates of British seamen received by the German Government, whether dying on board German merchant-vessels or on German or foreign territory, will similarly be handed over to His Majesty's Consular officers.

"I have the honour to request your Excellency to state whether the British Government concur in the above Agreement, and in that case I should consider the matter settled on receiving a declaration to that effect from your Excellency.

"I have, &c.
(Signed) "P. METTERNICH."

The Board of Trade then wrote to the Foreign Office in the following terms:—

"7, Whitehall Gardens, London, S.W.,
March 2, 1907.

"Sir,
"I am directed by the Board of Trade to acknowledge receipt of your letter No. 5649 of the 26th ultimo, forwarding translation of a letter from the German Embassy as to the terms of the proposed new Anglo-German Agreement relative to the surrender of the property of deceased seamen, and to state, for the information of the Secretary of State, that they concur in the Agreement as now submitted.

"I have, &c.
(Signed) "T. W. P. BLOMEFIELD.

"The Under-Secretary of State,
"Foreign Office."

On the 28th March, 1907, the Foreign Office wrote to the Board of Trade enclosing a copy of a letter addressed to the German Ambassador, thus:—

"Sir, Foreign Office, March 28, 1907.

"With reference to your letter F. 4422 of the 2nd instant, I am directed by Secretary Sir E. Grey to transmit to you herewith copy of a note which he has addressed to the German Ambassador at this Court, accepting on behalf of His Majesty's Government the arrangements proposed in his Excellency's note of the 16th ultimo, copy of which was inclosed in my letter of the 26th ultimo, regarding the estates of deceased seamen.

"I am to inquire whether the Board consider that the notes should be published in the Treaty Series of Parliamentary publications issued by this Department.

"I am, &c.
(Signed) "ERIC BARRINGTON.

"The Secretary to the Board of Trade."

"(No. 7188/07.)

"Your Excellency,

"Foreign Office, March 21, 1907.

"I have the honour to inform you that I accept in the name of His Majesty's Government the following arrangements, as proposed in your Excellency's note of the 16th ultimo, regarding the handing over of the estates of German seamen dying on board British merchant-vessels either in British or foreign territory, which estates are in the first instance sent to the British Board of Trade in accordance with the provisions of 'The Merchant Shipping Act, 1904':—

"1. The British Board of Trade will in future furnish the Imperial German Consul-General in London with copies of the accounts rendered to them in respect of



the wages and effects of deceased German seamen, together with any particulars which may be at their disposal likely to facilitate the identification of the deceased and of the legal heirs.

"2. In every case when an estate does not exceed 100*l.* in value, and the British Board of Trade are satisfied that the legal heirs of the deceased seaman are resident in German territory, and that there are no persons elsewhere who have any valid claim to the wages and effects left by him, they will dispense with the customary form of claim, and will hand over the property in question to the Imperial German Consul-General in London.

"3. Before actually disposing of the estate of a German seaman in accordance with British law, the British Board of Trade will give notice to the Imperial German Consul-General of their intention to hand over such property to those persons having claims upon it, and will consider any representations that the Imperial German Consul-General may make thereon.

"4. It is understood that the estates of British seamen received by the Imperial German Government, whether dying on board German merchant-vessels either on German or foreign territory, will similarly be handed over to His Britannic Majesty's Consular officers.

"I have, &c.
(Signed) "E. GREY.

"His Excellency Count Metternich,
&c. &c. &c."

The Board of Trade replied thus:—

"7, Whitehall Gardens, London, S.W.,
April 17, 1907.

"Sir,
"I am directed by the Board of Trade to acknowledge receipt of your letter 7188/07 of the 28th ultimo, and of revised version of a note which has been addressed to the German Ambassador at this Court accepting, on behalf of His Majesty's Government, the arrangements proposed regarding the estates of deceased seamen, and to state that the Board have no objection to the inclusion of the notes in the Treaty Series of Parliamentary publications issued by your Department.

"I am, &c.
(Signed) "T. W. P. BLOMEFIELD.

"The Under-Secretary of State."

On the 22nd July, 1908, the Foreign Office sent to the Board of Trade a translation of a note received from the German Ambassador, which was as follows:—

"(Translation.)

"(J. No. 2252.)

"Your Excellency,

German Embassy, June 30, 1908.

"Since the extension of the Agreement of 1869 respecting the estates of deceased persons by the exchange of notes of the 16th February and 21st March, 1907, the Board of Trade have modified the practice which had hitherto been observed in connection with the handing over of the estates of deceased seamen in the following respect: Instead of handing over all such estates forthwith to the German Consul-General in London, they now merely intimate to the Consul-General that the demise has occurred, transmitting at the same time such documents and other effects as may lead to the discovery of the heirs. If such heirs are discovered, and proof of their existence given to the Board, the deceased's estate is then handed over, otherwise the Board decline to hand over the estate.

"Thus, for instance, in cases where nothing further is known about the personal affairs of the deceased than that he stated, when signing on to a British ship, that he was a German or that he came from Germany, his estate would in future not be handed over to the German Consul-General, as the existence of heirs in Germany could not be proved to the satisfaction of the Board of Trade. Even the discovery of heirs by means of advertisement or by the publication of the demise, for the costs of which the effects of the deceased act as surety, is thereby rendered more difficult, and in most cases made absolutely impossible, since, in the event of failure, there would be no means of covering the expenditure which had been incurred.

"The new procedure adopted by the Board of Trade does not appear to the German Government to be free from objection. It rests on No. 2 of the Agreement, which as it now stands, runs as follows:—

"In every case in which an estate does not exceed 100*l.* in value, and the British Board of Trade are satisfied that the legal heirs of the deceased seaman are resident in German territory . . . , they will dispense with the customary form of claim and will hand over the property in question to the Imperial German Consul-General in London."

"As, however, is shown by the negotiations which led to the conclusion of the new Agreement, the sole object aimed at was to increase the number of estates which might be handed over without any special formalities and to apply to estates of from 50*l.* to 100*l.* the benefits formerly attaching only to estates of 50*l.* and under. For this purpose the necessary basis was afforded by the modifications introduced into British legislation since 1869 (see the note from this Embassy of the 9th September, 1905).

"Any measure which tends to render more difficult the procedure for handing over the effects of deceased seamen, as must be the effect of the present action of the Board of Trade, is, in the view of the German Government, in contradiction to the object aimed at by the new Agreement. The Board of Trade can, it is true, point to the wording of No. 2. This wording was, however, put forward by the British Government without any comment and straightway accepted by the German Government, since the latter had from the first assumed that those implications ('Voraussetzungen') and conditions would alone be preserved which for a period of forty years had governed the practice of handing over without any formalities the estates of deceased seamen.

"The German Government appeared to be all the more justified in adopting this view, seeing that in section 176 of 'The Merchant Shipping Act, 1894,' on which the authority of the Board of Trade for handing over such estates without formality rests, there is no limitation of the right to the legal heirs; on the contrary the Board of Trade free themselves from the obligation incurred by assuming the inheritance if they hand over the estate to the legally constituted personal representative of the deceased. That in the absence of any special plenipotentiary the German Consul-General in London would be recognized by the British Government as such a Representative, did not appear to the German Government to be open to any doubt. Moreover, by German law the Exchequer becomes the 'legal heir' in the absence of a relative (S.1936 B.G.B.). From the German point of view, therefore, the wording of the Board of Trade draft which makes the handing over of an estate dependent on proof of the existence of legal heirs in Germany, undoubtedly implied that only the former practice would be sanctioned, under which the Board of Trade handed over the estate as soon as they were satisfied that the deceased seaman was a German.

"If, however, a seaman had stated when signing on to a British ship that he was of German nationality or came from Germany he should, in the opinion of the German Government, be considered a German until the contrary had been proved.

"The German Government hold, therefore, that the Board of Trade can assume without further inquiry that a seaman who has stated that he is a German has 'legal heirs' in Germany.

"This view is further in accordance with the principle recognized by international law that, in the absence of nearer claimants, the community to which the deceased person belonged is to be recognized as heir to the estate of such deceased person.

"On the German side a similar procedure was adopted with regard to the estates of British seamen which came into the hands of the German authorities. Thus quite recently, at the instigation of the German Government, the full estate of the British seaman George Johnson was handed over to the British Vice-Consul at Bremen, although nothing was known in Germany concerning the heirs, the information at the disposal of the German Government merely going to show that the deceased was of British nationality.

"In compliance with my instructions I have the honour to request that your Excellency will be so good as to approach the Board of Trade in the matter with a view to the retention in future of the practice which was formerly observed regarding the handing over of the estates of deceased seamen of German nationality.

"Awaiting your Excellency's reply, I have, &c.

(Signed) "P. METTERNICH."

In reference to this the Board of Trade sent to the Foreign Office a letter in the following terms:—

"7, Whitehall Gardens, London, S.W.,
October 13, 1908.

"Sir,

"I am directed by the Board of Trade to acknowledge the receipt of your letter of the 22nd July last forwarding, for their observations, copy of a note from the German Ambassador on the subject of the disposal, under the Arrangement of February-March 1907, of the estates of deceased German seamen.

"In reply, I am to remind the Secretary of State that when the German Chargé d'Affaires suggested in September 1905 that the Arrangement of 1869 should be so extended as to admit of estates from 50*l.* to 100*l.* in value being dealt with without the necessity of taking out representation the Board expressed their opinion (F. 18424 of the 10th October, 1905) that the extension might be agreed to provided that an Agreement on the model of that concluded with the Netherlands in 1897 were substituted for the existing one. At the same time they forwarded a draft indicating in exact terms the conditions to which they were prepared to agree, and which, in due course, after some slight verbal alterations, was accepted by the German Government.

"The difficulties experienced in giving effect to the earlier Arrangements with Germany and other countries, from the circumstance that in practice they were found to operate against the interests of relatives residing in the United Kingdom, and to conflict occasionally with British law, were fully set forth in the Board's letter to the Foreign Office (F. 7804 of the 18th July, 1896) with the result that when the Arrangement of 1897 with the Netherlands was entered into different conditions were introduced.

"Under the Arrangement of 1907 the wages and effects of deceased German seamen are handed over to the German Consul-General in London, when it appears that there are legal heirs resident in German territory. If the legal heirs reside elsewhere the Board of Trade deal with them direct, and when no legal heirs can be traced the property is retained and eventually appropriated in aid of the Board of Trade vote for Mercantile Marine services.

"The practical effect of this arrangement is that it enables the Board of Trade to recognise the German Consul-General in London as the official representative of relatives of deceased German seamen who are known to reside in Germany, and to make payment to him on their behalf. This is a convenient method of administration and avoids unnecessary formality and trouble.

"The real objection of the German Government to the working of the recent arrangement relates apparently to the mode in which it affects the disposal of the estates of deceased German seamen for whom no heirs are forthcoming, and it is contended by the German Ambassador that inasmuch as by German law the German Exchequer becomes the legal heir in the absence of a relative the Board of Trade can reasonably assume, without further inquiry, that a deceased seaman, who has stated that he is a German, has legal heirs in Germany.

"With reference thereto I am to state that under section 176, Merchant Shipping Act, 1894, the Board of Trade are duly empowered to hand over the estate of a deceased seaman (under 100*l.* in value) to the widow, or child, or person entitled to take out representation, and that it does not appear that the German Consul-General, except as the attorney of the heir, or next of kin, of the deceased, would be entitled to take out representation in the British Courts.

"It is further enacted by section 179 of the same Act that when no claim is substantiated the property is to fall to the Mercantile Marine Fund. The Board would, however, not plead that fact as a bar against any claim, whenever made and substantiated.

"In these circumstances, it will be seen that the Board of Trade has no power to pay over to the German authorities the property of any German seaman dying on board British merchant-ships, &c., for whom no legal heir is forthcoming, and I am to suggest for Sir Edward Grey's consideration that the German Ambassador should be informed accordingly.

"I have, &c.
(Signed) "H. LLEWELLYN SMITH.

"The Under-Secretary of State,
"Foreign Office."

On the 16th March, 1909, the Foreign Office wrote to the Board of Trade thus:—

"Sir,

"Foreign Office, March 16, 1909.

"I am directed by Secretary Sir E. Grey to state that he has had under his careful consideration your letter 17853 of the 13th October last, in which you suggested that the German Ambassador should be informed that the Board of Trade had no power to pay over to the German authorities the property of any German seamen dying on board British merchant-ships, &c., for whom no legal heirs were forthcoming. I am to offer the following observations on this subject, for the consideration of the Board of Trade.

"The contention of the German Government is, as the Board of Trade are aware, that the German Exchequer is, by German law, in the absence of other heirs, the legal heir to the estates of persons of German nationality dying intestate in any place whatever. The Board have, however, been advised that this claim would not be admitted by the Courts of this country as entitling the German Consul-General to take out representation, on behalf of his Government, under section 176 of 'The Merchant Shipping Act, 1894.'

"Sir E. Grey understands that this opinion is chiefly based on the decision in the case '*In re Barnett's Trusts*,' of which the following is the head-note given on p. 847, vol. 1, Law Reports, Chancery Division, 1902":—

"'An Austrian who was entitled to a fund in Court in this country died in Vienna, a bastard, intestate, and without heirs. By Austrian law the succession of an Austrian citizen in such a case is confiscated as heirless property by the Fiskus. The Austrian Government having claimed the fund:

"'Held, that as the right claimed was not in the nature of a succession, the maxim *Mobilia sequuntur personam* did not apply, and that the Crown, by the law of England, was entitled to the fund as *bona vacantia*.'

"I am to observe that this was a case in which the person involved died without heirs according to Austrian law, and therefore differs in the most essential point from that of a German subject, possessed of personal property, dying intestate and without any next of kin surviving him, if according to German law the German State are in the absence of other heirs to be regarded as the legal heirs of such German subject.

"In view of this fact, and in order that the German Government may be assured that the fullest consideration has been given to the question, to which they appear to attach great importance, I am to suggest that the Board should lay a case before the Law Officers of the Crown enquiring whether, in their opinion, the effects of German subjects so dying are to be considered as reverting to the British Crown as *bona vacantia* to which there are no heirs, or whether they should be considered as the property of the German Imperial Treasury, or, as the case may be, of the Federal State or States of the German Empire designated as heir by German law.

"As Sir E. Grey learnt, through private enquiry, that the Board would have no objection to taking this course, he thought it desirable, in order that the Law Officers might be enabled the more thoroughly to consider the point, to obtain the opinion of a German legal expert on the effect of German law in the matter, and he accordingly, on the 10th December last, addressed to His Majesty's Ambassador at Berlin, a despatch containing the necessary instructions. I am to transmit herewith a copy of that despatch, and of the English text of an opinion furnished in compliance therewith by the legal adviser to His Majesty's Embassy at Berlin. The latter document is forwarded in the form in which it was signed by Dr. Schneider, but alterations are shown in the margin in cases in which a comparison with the German text shows them to be required.

"It will be observed that the particular portion of the opinion which is of special value for the consideration of the present question is the first paragraph of Part II in which Dr. Schneider states that, subject to certain modifications without importance from the point of view of the question put to him 'the Treasury takes as legal heir, the general legal status of an heir, according to the circumstances of the case.' The disquisition on the 'Principles respecting Domicil and Nationality' was not invited by this department, and in the event of the whole opinion being communicated to the Law Officers, it might be well to mention this fact in order to avoid giving the impression that the divergence between the British and German views on these

matters was considered either by the Foreign Office or the Board of Trade as affecting in any way the point on which the opinion was desired.

"I am to express the hope that, as the German Government are pressing for an early answer to Count Metternich's note of the 30th June last, the matter may be dealt with as expeditiously as possible.

"I am, &c.
(Signed) "W. LANGLEY.

"The Secretary to the Board of Trade."

The despatch from the Foreign Office to His Majesty's Ambassador in Berlin was in the following terms:—

"(No. 115. Consular.)
"(35585/08.)

"Foreign Office, December 10, 1908.

"Sir,
"In the course of recent correspondence respecting the procedure adopted by the Board of Trade with regard to the disposal of the effects of German seamen dying intestate, the German Ambassador stated to me that, by German law as laid down in section 1936 of the 'Bürgerliches Gesetzbuch,' the German Exchequer is the 'legal heir' to the estates of deceased persons of German nationality when there is no spouse or relative surviving ('Nach deutschen Recht bei Nichtvorhandensein eines Verwandten oder eines Ehegatten ist der Fiskus gesetzlicher Erbe').

"I have no reason to doubt the accuracy of Count Metternich's statement, but as the point is of considerable importance in its bearing upon the general question at issue, I desire to obtain expert advice as to the interpretation of German law in the matter.

"I have accordingly to request that your Excellency will submit to the Legal Adviser to His Majesty's Embassy the following question:—

"In the event of a person of German domicile, possessed of personal property, dying in Germany intestate and without any next-of-kin him surviving, does the German State (1) become entitled to such personalty in the capacity of 'legal heir' (or, as in the case of personal property it would in this country be called 'legal personal representative') of the deceased person, or (2) does the State assume possession of such property as *bona vacantia* to which there is no heir?

"Your Excellency should explain that personalty passing to the British Exchequer in similar circumstances is regarded by English law as doing so in the manner indicated by the second of the above alternatives.

"I am, &c.
"(For the Secretary of State)
(Signed) "W. LANGLEY.

"His Excellency the Right Honourable
"Sir W. E. Goschen, G.C.V.O., K.C.M.G.,
"&c. &c. &c."

The opinion of Dr. Schneider, referred to in the letter from the Foreign Office of the 16th March, has been copied separately and accompanies this case.

The opinion of Dr. Schneider does not seem to be conclusive or convincing that the property of a German seaman dying on board a British ship or in British territory ought to be handed over to the German authorities. Even assuming that the Civil Code of the 18th August, 1896, section 1936 puts the Treasury authority in the position of taking the property by true right of succession, does that conclude the question? This brings up at once the difference between the English system in regard to succession to moveables on death and the continental system. Here the personal property of a deceased person can only be possessed under an appropriate grant from the proper authority, and only the beneficial interest in the surplus of such property is transmitted on death, whether in the case of testacy or intestacy. The property itself passes by the public grant made after death and implying no beneficial interest.

In the continental system "the moveable property is itself transmitted on death, whether in the case of testacy or intestacy, and such transmission implies a beneficial interest which is limited only by the debts and legacies to be satisfied out of it" (Westlake's "Private International Law," 4th edition, p. 102). It is submitted that the Treasury authority could not come to this country, and, without obtaining letters

of administration, sue in his own name to recover any property of the deceased. If that be so, then comes the question, could the Fiskus come here and claim successfully a grant of administration to the estate of a German seaman who had died here without a relation or surviving spouse? Apparently the Fiskus could only apply for such a grant under section 73 of 20 & 21 Vict., cap. 77. Would the Court grant letters of administration to the Fiskus in such circumstances? The section would hardly appear to have contemplated such a case. Moreover, it would seem obvious from the opinion of Dr. Schneider that it would frequently be difficult to determine who would be the right person to put forward to apply for the grant. It is not the Imperial Treasury in all circumstances. Apparently a deceased seaman may have belonged to several different Federal States, in which case the Treasury authority of each of those Federal States is entitled to an equal share in his property. Then again Dr. Schneider says: "According to the Introductory Law of the Civil Code (Article 138) this fundamental prescription leaves the prescription of the various Federal States unchanged, according to which the place of the Treasury may be taken by a Corporation or Foundation or institution, which is then considered as lawful heir." How is the Probate Division of the High Court here to deal with such a state of things?

Then again Dr. Schneider shows the difficulty in the way of reciprocity by his reference to the principle of domicile in English law and he brings himself to a "legal gap, for as an English subject does not belong to any Federal State, there is as a matter of fact no Treasury authority which can come forward as legal heir." There has, Dr. Schneider says, been no decision in regard to this legal anomaly. It may be observed in passing that according to a previous part of the opinion the German law contemplates the possibility of a German not belonging to any Federal State.

Dr. Schneider works it out that in the circumstances with which he is dealing under the No. 3, "the English Treasury would in this case not inherit as 'privileged occupier' of the inheritance as is usual, but as legal heir." But it is submitted that this is not possible according to English law.

A further difficulty in the way of giving effect to the German proposition now under consideration is to be found in that part of Dr. Schneider's opinion under the No. 4: "Establishment of the statutory right of the Treasury." It is here stated that the Treasury can only make good its right as heir when the competent Court has decided that no other heir is in existence. If the heir is not ascertained within a reasonable time the Court has to declare that the Treasury is the only heir existing. This seems to show that the so-called succession under the statute is not complete without judicial aid, and that the Treasury or the Fiskus has no right to claim property here of a deceased German or to attempt to assert any right to be recognized as the person entitled to a grant of letters of administration and become the legal personal representative of the deceased in this country at any rate until a competent Court has declared that the Treasury is the only heir existing.

It will be seen from the letter from the German Ambassador of the 30th June, 1908, that the German Government's proposition is that the Board of Trade should assume without further inquiry that a seaman who has stated that he is a German has legal heirs in Germany.

The Board of Trade are in a difficult position in dealing with this subject, and for the purposes of administration they must no doubt frequently take it for granted that a seaman is a German subject if on joining a ship he gives a German birth-place, and the question arises, what would be the position of the Board of Trade, if they handed property of a seaman of German birth-place to the German Government, and it was subsequently disclosed that the man had become naturalized, say, as an American citizen.

The possibilities in this respect are to some extent illustrated by the following case, which has not yet been disposed of. The Board received a letter of which the following is a copy:—

"360, Bullitt Building, 139, South Fourth Street,
Philadelphia, November 2, 1907.

"Dear Sir,

"On the 27th August, 1900, there died in the United States Marine Hospital Ward of St. Agnes Hospital, in this city, a certain Johann Joachim Heinrich Bruhn, late a fireman on the United States light-vessel No. 69, a naturalized citizen of the United States, born at Pohnstorf, Germany, on the 24th December, 1852. The decedent died intestate, unmarried, and without issue, father or mother, or brother or sister surviving, and stated shortly before his death that his nearest relative was



Mr. Fritz Bruhn, an only nephew, residing at Pohnstorf, Germany. The said Fritz Bruhn has since established to the satisfaction of the authorities of the United States Marine Hospital Service, that he is the sole heir of the decedent, and accordingly the effects of the latter have been surrendered to the Imperial German Consul at Philadelphia, for whom I act as attorney.

"Among the effects of the decedent so surrendered we find Pass-book No. 39,534 of the Seamen's Savings Bank under the management of the Board of Trade in the name of Bruhn, the last entry in which is a deposit on the 10th May, 1901, at Cardiff, of 8*l.*, making a total at that date of 40*l.* 7*s.* 9*d.*, with interest still to be credited for the 20th November, 1900, and the similar date in subsequent years. The decedent had property here which will require the raising of administration in this country as his domicile. But I take notice that under your regulations, where a seaman having a deposit with you dies without a will, that 'any deposit or interest that may have belonged to him will be paid over to his nearest relative or legal representative without taking out letters of administration or confirmation, if the deposits are under 50*l.*' As it appears that the deposits in this case will be under this limit, I beg to be advised whether in this case upon the production to you of satisfactory proof of the death of the depositor and that the nephew, Fritz Bruhn, is the nearest relative of the decedent, he can obtain the money on this deposit without raising administration in Great Britain, or remitting the money here to Philadelphia to the administrator to be here appointed. I will be thankful for your further advices whether the German Consulate here had best transmit the pass-book to Fritz Bruhn in Germany, or to the Imperial German Consulate in London.

"Very respectfully yours,
(Signed) "GUSTAVUS REMAK, JR.

"Assistant Secretary, Finance Department,
"Board of Trade, London, England."

To this the Board replied as follows:—

"7, Whitehall Gardens, London, S.W.,
November 14, 1907.

"Gentlemen,

"In reply to your letter of the 2nd instant I am directed by the Board of Trade to state that upon receipt of inclosed form duly completed, together with pass book, certificate of death of J. J. H. Bruhn, and such certificates or other evidence as will establish the relationship of Fritz Bruhn, as the surviving next-of-kin to the late depositor, the question of authorising payment of the balance due to deceased from the savings bank will be duly considered.

"I am, &c.
(Signed) "T. W. P. BLOMEFIELD

"To Messrs. Remak and Eichhelz,
"360, Bullitt Building, 139, South Fourth Street,
"Philadelphia, U.S.A."

Nothing more has been heard from Mr. Remak, but a letter has been received from the German Consulate-General, of which the following is a copy:—

"(J. No. 11/4175.)

"Consulate-General of the German Empire,

"Sir,

"49, Finsbury Square, London, April 26, 1909.

"I beg to inform you that I have in my possession the Seamen's Savings Bank Book No. 39,534, of the German seaman Johann Bruhn, of Pohnstorf (Germany) who, according to the inclosed certificate of death, dated the 23rd March, 1909, duly legalised by the British Consul at Philadelphia, died on the 27th August, 1907.

"As I am requested by Mr. Fritz Bruhn, at Pohnstorf, who has proved to me by producing the respective certificate of the competent Probate Court at Brevesmühlen (Germany) that he is the only heir of the deceased, I beg that, you will kindly let me know what steps are necessary for enabling me to withdraw the money in order to forward it to my applicant.

Thanking you in anticipation, I am &c.

"(For the Consul-General),
(Signed) "HUMBERG, Consul.

"The Accountant-General,

"Finance Department, Board of Trade,
"7, Whitehall Gardens, S.W."

To this the Board have replied as follows:—

"7, Whitehall Gardens, London, S.W.,

"May 5, 1909.

"Sir,

"I am directed by the Board of Trade to acknowledge the receipt of your letter of the 26th ultimo in the matter of Johann Bruhn, a deceased depositor in the Savings Bank, and in reply to request you to be good enough to forward his pass book to this Department for inspection.

"I am, &c.
(Signed) "GEO. S. FRY.

"To the German Consul-General,
"49, Finsbury Square, E.C."

So the matter stands for the moment, but it will be seen that the German Consul-General treats the case as falling under the arrangement between this country and Germany, but it is submitted that this is not so on the ground that from the point of view of the law of this country and of the United States Bruhn was not a German but an American seaman when he died, and consequently is not a person referred to in or contemplated by the arrangement under consideration. In all the circumstances of the case there may ultimately be no objection to the Board of Trade handing over the money in their hands to the German Consul-General, but if such payment is made, then, in order to avoid any future misunderstanding, it is submitted that the Board should point out that the money is not paid to him under the arrangement, but as the agent for the person entrusted, or entitled to be entrusted, with the administration by the Court of the domicile, i.e., the United States, and who as such would be recognised by the Probate Court in this country as being the person entitled to take out letters of administration here.

If Bruhn had left no next-of-kin, it is submitted that it is clear that the German Exchequer could have had no claim to the money in the hands of the Board of Trade belonging to Bruhn. The question would then be whether the United States' Government or Exchequer would have any claim either as against section 179 of the Merchant Shipping Act or as against the Crown's claim to *bona vacantia*. Incidentally this brings up the question whether the Treasury Solicitor by taking out letters of administration in any case in which property would otherwise fall to be dealt with under section 179 of "The Merchant Shipping Act, 1894," could insist upon having the money paid to him. The point is probably not of much practical importance because either way the money ultimately reaches the Exchequer.

It is submitted that in dealing with estates of not exceeding 100*l.* under the provisions of section 176 (1) (b) of "The Merchant Shipping Act, 1894," the Board of Trade, in such circumstances as those which form the subject matter for counsel's opinion, there being *ex hypothesi*, so far as the Board are aware, no widow, no child, and no will, have no alternative but to refuse to pay, except to a person entitled to take out letters of administration, although no such representation has been taken out.

Section 178 of "The Merchant Shipping Act, 1894," enables the Board to deal with claims by creditors where a claim to the property, under section 176 (1) (b), has not previously been allowed, and section 179 enacts that where no claim to the property of a deceased seaman received by the Board is substantiated within six years after the receipt thereof the Board may in their absolute discretion, if any subsequent claim is made, either allow or refuse the claim, and, subject to the allowance of any such claim, shall apply such property in manner provided by Part 12 of the Act (relating to the Mercantile Marine Fund, section 676 (c)). By "The Merchant Shipping (Mercantile Marine Fund) Act, 1898," section 1 (a), the money now finds its way into the Exchequer.

To test the position of the Board of Trade, therefore, it seems necessary first to obtain an authoritative decision or opinion upon the following proposition:—

A seaman of German nationality, and who, so far as is known, has not acquired any other domicile, dies whilst serving on board a British ship, unmarried, intestate, without next-of-kin or relations here or in Germany, leaving upwards of 100*l.*, e.g., in the Seamen's Savings Bank, which, by section 150 of "The Merchant Shipping Act, 1894," is to be paid and applied as if the money had been received by the Board of Trade under the Act. In these circumstances the Board of Trade could only pay over the amount to the legal personal representative of the deceased properly constituted, and if no legal personal representative is forthcoming the money will ultimately find



its way to the Exchequer in the manner already indicated. Then comes the question, To whom would the Probate Division of the High Court of Justice grant letters of administration? It is presumed that a grant would be made to the Treasury Solicitor in the ordinary course in the absence of any other claimant; but supposing the Fiskus representing the Imperial German Exchequer or some Federal State applied to the Court for letters of administration, would the Court make the grant? Unless the answer to this question is in the affirmative it is submitted that the Board of Trade would not be justified in acceding to the proposition put forward by the German Government, but are giving proper effect by their present practice to the existing arrangement with Germany. If the legal position is one of very great doubt it may be right that the Board should refuse to recognize the German view of it; but then the Foreign Office might at the same time be desirous of offering facilities for raising the question for decision in the Courts, and for this purpose it would probably be immaterial whether the value of the property of any particular German seaman was under or over 100*l.* The question is one of some importance, as whatever decision is arrived at in dealing with Germany must also be applied to other countries with whom the arrangements with regard to the property of deceased seamen are similar to those with Germany and their laws in this respect are similar to those of Germany.

It is rather difficult to understand how the claim of the Austrian Government was dealt with in the Chancery Division, as it was in *re* Barnett's Trusts. The Treasury Solicitor had obtained letters of administration to Louis Heller, and so long as that grant remained uncanceled it does not appear how the claim of the Austrian Government could have prevailed. Indeed, one would have thought that, strictly speaking, he had no *locus standi*.

Supposing the decision of Mr. Justice Kekewich had been in favour of the claim by the Austrian Government, in what way would effect have been given to it? Surely it would have been necessary that the grant of letters of administration to the Solicitor to the Treasury should be revoked and letters of administration granted to the Austrian Finance Minister.

Counsel are requested to advise the Board of Trade—

1. Whether the personal property in this country of a German subject, not domiciled here, dying intestate, and without leaving a widow or any next-of-kin surviving him, goes to the British Crown as *bona vacantia*, or whether such property should be considered to be property by right of succession of the German Imperial Treasury, or, as the case may be, of the Federal State or States of the German Empire designated as heir by German law, but subject to letters of administration being taken out in any of the cases?

2. Whether, in consequence, the Board of Trade, under section 176 of "The Merchant Shipping Act, 1894," ought to hand over personal property under 100*l.* of a deceased German seaman, within the meaning of the Agreement, to the German Consul as representing the German Imperial Treasury, or, as the case may be, a Federal State of the German Empire as being persons otherwise entitled to the personal property of the deceased within the meaning of section 176?

Incidentally, and in so far as it is necessary to consider the point in connection with No. 1—

3. Whether the personal property in Germany of an Englishman, not domiciled there, dying intestate, and without leaving a widow or any next-of-kin surviving him, can be claimed and received by or on behalf of the British Crown or His Majesty's Treasury as legal heir, or otherwise, and, if so, by what procedure?

4. Generally, if necessary, as to the attitude which the Board of Trade should take in the matter.

Opinion.

1. We are of opinion that if the view of Dr. Schneider is accurate, and the German Crown is legally a successor, the property would go to the Imperial or State Treasury. We cannot help thinking, however, that in all probability it would be found that the German legal theory does not differ in substance for this purpose from the Austrian, which was before Mr. Justice Kekewich in the case referred to. Letters of Administration would (as a general rule and apart from provisions like those in section 176 of "The Merchant Shipping Act, 1894,") have to be taken out by some

one, and if the German Government is entitled, letters of Administration would have to be granted to someone on their behalf.

2. In our opinion section 176 of "The Merchant Shipping Act, 1894," has no bearing upon the question whether personal property under 100*l.* of a deceased German seaman ought to be handed to the German Consul, unless the Board of Trade are satisfied that there is no widow or next of kin.

The section only authorizes payment to a claimant who is "proved to the satisfaction of the Board to be entitled under a statute of distribution or otherwise," and it is a necessary step in satisfying themselves that the German Government are entitled, to satisfy themselves to some extent, that there are no next-of-kin.

If they are satisfied of this, it seems to us that on Dr. Schneider's opinion they might further be satisfied that the German Treasury was entitled.

3. As soon as the property is brought to this country it must necessarily belong to His Majesty, because it can belong to no one else. We know of no reason why a Representative of His Majesty should not receive the property in Germany and bring it to this country, if the German Government hand it over. But so far as English legal theory is concerned there is no basis on which a title to *bona vacantia* abroad can be acquired by the British Crown. How German law regards the matter we cannot tell.

4. If compliance by the Board of Trade with any diplomatic arrangement made by His Majesty's Government involves transactions which are not protected by section 176 the result is, after all, only a small pecuniary risk, viz., that of having to account for the money again to any persons entitled thereto.

(Signed)

W. S. ROBSON.
S. T. EVANS.
S. A. T. ROWLATT.

Law Officers' Department,
August 6, 1909.

Annex.

Section 176 of "The Merchant Shipping Act, 1894."

176.—(1.) Where any property of a deceased seaman or apprentice comes into the hands of the Board of Trade, or any Agent of that Board, the Board of Trade, after deducting for expenses incurred in respect of that seaman or apprentice or of his property such sum as they think proper to allow, shall, subject to the provisions of this Act, deal with the residue as follows:—

(a.) If the property exceeds in value 100*l.*, they shall pay and deliver the residue to the legal personal representative of the deceased;

(b.) If the property do not exceed in value 100*l.*, the Board may as they think fit either pay or deliver the residue to any claimant who is proved to their satisfaction to be the widow or a child of the deceased, or to be entitled to the personalty of the deceased either under his will (if any) or any statute of distribution or otherwise, or to be a person entitled to take out representation, although no such representation has been taken out, and shall be thereby discharged from all further liability in respect of the residue so paid or delivered; or

(c.) They may, if they think fit, require representation to be taken out, and pay and deliver the residue to the legal personal representative of the deceased.

(2.) Every person to whom any such residue is so paid or delivered shall apply the same in due course of administration.

Payment
over of
property of
deceased
seamen by
Board of
Trade.



(30)

NICARAGUA.

No. 8.

[August 11, 1909.]

*Foreign Office to the Law Officers of the Crown.*Claim of the
Salvador
Railway
Company.

Gentlemen,

Foreign Office, May 19, 1909.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith the papers noted in the accompanying list respecting the claim of the Salvador Railway Company arising out of a raid by armed forces of the Nicaraguan Government into the Republic of Salvador, resulting in considerable damage to the company's property in the latter Republic and the death of one of its servants.

2. The circumstances of the case are shortly as follows:—

3. A treaty of peace between Salvador and Nicaragua was signed at Amapala on the 23rd April, 1907. It was ratified by the Legislative Assembly of Salvador on the 8th May, and by that of Nicaragua on the 15th May of the same year. As far as can be ascertained by His Majesty's Minister in Central America, the ratifications have never been exchanged (Paper A). Very shortly after the date of the Nicaraguan ratification an expeditionary force was recruited in Nicaragua by Dr. Prudencio Alfaro, a Salvadorean political refugee. This force included several citizens of Nicaragua, some of whom were in the military service of the Nicaraguan Government (Paper B). On the 11th June, 1907, the force arrived at the port of Acajutla, in Salvador, on board the Nicaraguan war-ship "Momotombo," which was at the time flying the flag of the Nicaraguan State. A steam-tug and some lighters belonging to the railway company were seized. The force then landed and took possession of two of the company's trains, in which they proceeded with their war material along the company's line to the town of Sonsonate. An attack was made upon Sonsonate, during which much damage was done to the company's property and one of their servants was killed.

4. After the attack, which lasted some hours, the troops returned to Acajutla in the company's trains and withdrew in the "Momotombo," taking with them one of the lighters. This lighter was afterwards returned to the company by a firm of shipping agents at Corinto, Nicaragua, "in the name of the Government."

5. On presenting a claim for compensation to the Nicaraguan Government, the company were informed by the Nicaraguan Minister for Foreign Affairs that "the act to which your refer was executed by a revolution headed by Salvadorean chiefs, and was supported by the Government of Nicaragua by reason of the state of war which subsisted at that time between this Republic and that of Salvador, and that it was carried out by virtue of the necessities of a military operation" (Paper C). In a subsequent message to Congress the Nicaraguan President stated that his Government had had reason to fear an attack from Salvador, which had not carried out the provisions of the Treaty of Amapala. They had therefore decided to support a revolution headed by Dr. Prudencio Alfaro (Paper A). In informing His Majesty's Government of the circumstances of the raid, the Salvadorean Minister for Foreign Affairs stated that, relying on the Treaty of Amapala, his Government had disbanded their army "since, now that our differences with Nicaragua were at an end, there was no reason to expect an attack on the sovereignty of Salvador" (Paper D).

6. It is evident from the statements of the Nicaraguan President and Minister for Foreign Affairs that the Nicaraguan Government are primarily responsible for the damage done to the railway company's property. In the abstract, however, that Government would appear to be liable not to His Majesty's Government, but to the Salvadorean Government, Salvador being the State within whose territories the damage in question accrued. The technically correct course for His Majesty's Government to pursue consequently seems to be to present the claim to the Government of Salvador.

7. Nevertheless, in dealings with the minor Republics of Central and South America departures are sometimes made from the more strict and rigid courses which would guide His Majesty's Government in controversies with the Great Powers of European civilisation. In the present case it is clear that any redress which may be obtained will, in fact, come, mediately or immediately, from the Nicaraguan Government.

8. Although, therefore, the view expressed in paragraph 6 of this letter would

NICARAGUA—SIAM.

31

appear to be theoretically the more correct, it might from the practical standpoint possibly be considered preferable, if no important principle were involved in so doing, to present the claim to the Nicaraguan Government direct in the first instance.

9. It is, however, suggested for consideration that the presentation of the claim direct to the Nicaraguan Government would involve, and might be held to operate *pro tanto* as, a recognition on the part of His Majesty's Government that Nicaragua was, at the time of the incidents out of which the claim arose, at war with Salvador.

10. I am to request that you will take the papers into your consideration, and that you will favour Sir E. Grey with your opinion as to (1) whether His Majesty's Government should officially support the claim of the Salvador Railway Company, and (2), if so, whether the claim should be presented to the Nicaraguan or to the Salvadorean Government.

I am, &c.

LOUIS MALLET.

List of Papers.

(A.) Mr. Carden (No. 20) (16592)	..	..	..	..	April	10, 1909.
(B.) Mr. Carden (No. 112) (39598)	..	..	..	..	November	7, 1907.
(C.) Salvador Railway Company (701)	..	..	..	..	January	5, 1909.
(D.) Mr. Carden (No. 63) (26983)	..	..	..	..	July	12, 1907.

Report.

1. In our opinion His Majesty's Government should officially support the claim of the Salvador Railway Company.

2. We think that the claim should be presented to the Nicaraguan Government. We have considerable difficulty in suggesting any good grounds upon which a claim against Salvador could be based, as the Government of that country might well reply that they were entirely innocent in the matter, that the injury and damage complained of arose from circumstances over which they had no control, and that it was the Nicaraguan Government that was to blame. The action of that Government cannot, in our opinion, be justified as being an act of war on the part of Nicaragua against Salvador, and, in the circumstances, we do not think that the presentation of the claim direct to Nicaragua would involve any recognition on the part of His Majesty's Government that Nicaragua was at the time in question at war with Salvador. In view, however, of the contention apparently put forward by the Nicaraguan Government, it would, we think, be well in presenting the claim to make it clear that His Majesty's Government cannot recognise that any state of war then existed between Nicaragua and Salvador, or that the acts complained of can be justified as acts of war. We do not know whether the Salvadorean Government would be prepared to join with His Majesty's Government in presenting the claim, but as the acts of the Nicaraguan Government clearly involve a wrong done to Salvador we think that this course should, if possible, be adopted.

W. S. ROBSON.
S. T. EVANS.

*Law Officers' Department,
August 11, 1909.*

SIAM.

No. 9.

[19824]

[June 19, 1909.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, May 25, 1909.

I HAVE the honour to inform you, by direction of Secretary Sir Edward Grey, that, under a treaty (paper (A)) signed at Bangkok on the 10th March last between His Majesty the King and His Majesty the King of Siam, the extra-territorial jurisdiction at present exercised by His Majesty in Siam was partially surrendered, and the States of Kelantan, Trengganu, Kedah, Perlis, and the adjacent islands were

Draft Order
in Council:
Cesser of
extra-
territorial
jurisdiction.



transferred to the Government of His Majesty. Article 5 of this treaty provided that the jurisdiction of international courts similar to that created at Chiengmai by the treaty of the 3rd September, 1883 (paper (B)), should be extended to all British subjects in Siam registered at the British consulates before the date of the recent treaty, though this system is to come to an end and the jurisdiction of the international courts is to be transferred to the ordinary Siamese courts after the promulgation and the coming into force of the Siamese codes. All other British subjects in Siam are to be subject to the jurisdiction of the ordinary Siamese courts under the conditions defined in the jurisdiction protocol which is annexed to the treaty.

I am accordingly to transmit the draft of an Order in Council (paper (G)) which has been prepared in this Department, providing that, so long as the treaty of the 10th March, 1909, is in force, "The Siam Order in Council, 1906" (paper (E)), shall not apply, except as provided for therein, and also discontinuing its operation in the transferred States, except as to judicial proceedings pending in the courts on the date when the Order in Council, now in draft form, shall come into force.

The only point in connection with the draft Order in Council to which your particular attention need be called arises with regard to the exercise of non-contentious probate jurisdiction by the British consular authorities in dealing with the estates of British subjects registered in Siam at the date of the recent treaty.

Under article 5 of the treaty British subjects so registered pass under the jurisdiction of international courts to the extent that British subjects in the Chiengmai district of Siam have been, since the treaty of the 3rd September, 1883, under the jurisdiction of the international court created by that treaty.

It was admitted by the Siamese Government in 1904, when a discussion arose as to the extent of the probate jurisdiction of the Chiengmai international court, that there was nothing in the treaty of 1883 which deprived His Majesty's consul for the Chiengmai district of the right to issue probates and letters of administration in cases where no dispute arose in the course of the proceedings (see paper (D)). This view was concurred in by Lord Lansdowne, and instructions to that effect were issued to the British representative in Siam. The effect of the first paragraph of article 5 of the new treaty must therefore be that, so long as no dispute arises, His Majesty's consular officers will still be entitled to issue probates of the wills and letters of administration of the estates of British subjects in Siam who were registered in that country on or before the 10th March, 1909.

No such exception, however, appears to apply in the case of other British subjects, and the effect of the last paragraph of article 5 appears to be to transfer to the Siamese all the jurisdiction hitherto exercised by the British courts in respect of persons not registered in Siam as British subjects on or before the 10th March, 1909. The provision in article 7, that in dealing with transferred cases the courts established under the principal Order are to apply Siamese law, has been inserted to prevent the necessity of issuing a King's regulation rendering each Siamese decree as it is enacted binding on British subjects.

I am to request that you will take the draft Order in Council into your consideration, and that you will favour Sir E. Grey with your opinion as to whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

I am also to point out that, in view of the fact that the new treaty must be ratified within four months from the date of signature, Sir E. Grey is anxious to secure the enactment of the Order in Council at as early a date as possible, and he would therefore be greatly obliged if he might receive your report at your earliest convenience.

I have, &c.

F. A. CAMPBELL.

List of Papers.

- (A.) Treaty of March 10, 1909. (Library No. 4507, Parliamentary.)
- (B.) Treaty of 1883. (Library No. 731, Treaty.)
- (C.) Treaty of 1856. (Library No. 411, Treaty.)
- (D.) Enclosure in Mr. Beckett's No. 47 of August 24, 1904, and instructions issued by Lord Lansdowne thereupon.
 - 1. To Judge Wilkinson, No. 1, July 4, 1904.
 - 2. Mr. Beckett, No. 47, August 25, 1904.
 - 3. To Mr. Beckett, No. 77, October 25, 1904.
- (E.) Siam Order in Council, 1906. (Confidential, No. 8666*.)
- (F.) Foreign Jurisdiction (Probates) Order in Council, 1908. (Confidential No. 9306*.)
- (G.) Draft Siam Order in Council, 1909. (Confidential, No. 9306*.)

Report.

The draft Order in Council, as initialled by us, may, in our opinion, properly be submitted to the King for the approval of His Majesty in Council.

W. S. ROBSON.
S. T. EVANS.

Law Officers' Department,
June 19, 1909.

Annex.

Draft Siam Order in Council, 1909.

WHEREAS by treaty, grant, usage, sufferance, and other lawful means, His Majesty the King has power and jurisdiction within the dominions of the King of Siam:

And whereas the exercise of the power and jurisdiction aforesaid is now regulated by the Siam Order in Council, 1906:

And whereas by a treaty between His Majesty the King and His Majesty the King of Siam, signed in Bangkok the 10th day of March, 1909, the States of Kelantan, Trengganu, Kedah, Perlis, and the adjacent islands were transferred to the Government of His Majesty, the frontiers of the said territories being defined in the boundary protocol annexed to the said treaty:

And whereas by article 5 of the said treaty it was agreed that the jurisdiction of the Siamese international courts, established by article 8 of the treaty of the 3rd September, 1883, between Her late Majesty Queen Victoria and His Majesty the King of Siam, should, under the conditions defined in the jurisdiction protocol annexed to the said recited treaty of the 10th March, 1909, and printed in the schedule to this Order, be extended to all British subjects in Siam registered at the British consulates before the date of the said treaty, and that this system should come to an end, and the jurisdiction of the international courts should be transferred to the ordinary Siamese courts after the promulgation and the coming into force of the Siamese codes, namely, the Penal Code, the Civil and Commercial Codes, the codes of procedure, and the law for organisation of courts, and that all other British subjects in Siam should be subject to the jurisdiction of the ordinary Siamese courts under the conditions defined in the said jurisdiction protocol:

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested, is pleased by and with the advice of his Privy Council to order, and it is hereby ordered, as follows:—

1. This Order may be cited as "The Siam Order in Council, 1909," and shall be read as one with "The Siam Order in Council, 1906," hereinafter called the "principal Order."

2. From and after the commencement of this Order the principal Order shall, except as regards any judicial matters pending in any court established by the principal Order on the day above mentioned, ceased to be in force and operation in the States of Kelantan, Trengganu, Kedah, Perlis, and the adjacent islands, being the territories transferred to the control of His Majesty's Government, the frontiers whereof are defined by the boundary protocol annexed to the said treaty.

3. With respect to any civil or criminal case arising within the limits of the principal Order, elsewhere than in the districts referred to in article 2, between British subjects who were registered at the date of the said treaty in accordance with part 8 of the principal Order or in which a British subject so registered may be a party as complainant, accused, plaintiff, or defendant, the principal Order shall not operate or have any effect so long as the said treaty of the 10th March, 1909, continues in force, unless and until such case shall have been transferred by any exercise of the right of evocation in accordance with the provisions of the jurisdiction protocol annexed to the said treaty and printed in the schedule hereto to a court established under the principal Order.

4. Notwithstanding anything contained in article 3, the courts established by the principal Order shall continue to transact all non-contentious business in relation to the probate of wills and the administration of estates of deceased British subjects who

[198]

K



were registered in accordance with part 8 of the principal Order at the date of the said treaty; but, except as to non-contentious business, the provisions of article 3 shall apply in matters of probate and administration.

5. "The Foreign Jurisdiction (Probates) Order in Council, 1908," shall not operate in Siam, except to the extent and in the cases where the provisions of the principal Order are in operation.

6. With respect to all civil or criminal cases, other than those referred to in articles 3 and 4, arising within the limits of the principal Order, elsewhere than in the districts referred to in article 2, the principal Order shall not operate or have effect so long as the said treaty continues in force.

7. Where a case is transferred from an international court to a court established by the principal Order, such court shall give such directions as seem proper for its determination, having regard to the proceedings (if any) in the international court. In determining such case the court shall apply any Siamese law, other than a law relating to procedure, which would have been applied in the international court.

In a criminal case, if the accused is handed over by the international court in custody, he may be detained in custody as if he had been arrested under a warrant on the day on which he is handed over.

8. Civil or criminal proceedings which have been instituted in any court established under the principal Order before the commencement of this Order shall not be affected by this Order.

9. Articles 139 to 153 (inclusive), 156, and 157 of the principal Order are hereby repealed, but such repeal shall not affect the past operation of such articles, or any right, title, obligation, or liability accrued, or the validity or invalidity of anything done or suffered under such articles before the commencement of this Order.

10. This Order shall commence and have effect on such date as the Minister shall appoint.

And the Right Honourable Sir Edward Grey, Baronet, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein.

W. S. R.
S. T. E.

SCHEDULE.

Protocol concerning the Jurisdiction applicable in the Kingdom of Siam to British Subjects and annexed to the Treaty dated the 10th March, 1909.

SECTION 1. International Courts shall be established at such places as may seem desirable in the interests of the good administration of Justice; the selection of these places shall form the subject of an understanding between the British Minister at Bangkok and the Siamese Minister for Foreign Affairs.

Sec. 2. The jurisdiction of the International Courts shall extend—

1. In civil matters: To all civil and commercial matters to which British subjects shall be parties.

2. In penal matters: To breaches of law of every kind whether committed by British subjects or to their injury.

Sec. 3. The right of evocation in the International Courts shall be exercised in accordance with the provisions of Article 8 of the Treaty of the 3rd September, 1883.

The right of evocation shall cease to be exercised in all matters coming within the scope of codes or laws regularly promulgated as soon as the text of such codes or laws shall have been communicated to the British Legation in Bangkok. There shall be an understanding between the Ministry for Foreign Affairs and the British Legation at Bangkok for the disposal of cases pending at the time that the said codes and laws are communicated.

Sec. 4. In all cases, whether in the International Courts or in the ordinary Siamese Courts in which a British subject is defendant or accused, a European legal adviser shall sit in the Court of First instance.

In cases in which a British-born or naturalized subject not of Asiatic descent may be a party, a European adviser shall sit as a Judge in the Court of First Instance, and where such British subject is defendant or accused the opinion of the adviser shall prevail.

A British subject who is in the position of defendant or accused in any case arising in the provinces may apply for a change of venue, and should the Court consider such change desirable the trial shall take place either at Bangkok or before the Judge in whose Court the case would be tried at Bangkok. Notice of any such application shall be given to the British Consular officer.

Sec. 5. Article 9 of the Treaty of the 3rd September, 1883, is repealed.

Appeals against the decisions of the International Courts of First Instance shall be adjudged by the Siamese Court of Appeal at Bangkok. Notice of all such appeals shall be communicated to His Britannic Majesty's Consul, who shall have the right to give a written opinion upon the case to be annexed to the record.

The judgment on appeal from either the International Courts or the ordinary Siamese Courts shall bear the signature of two European Judges.

Sec. 6. An appeal on a question of law shall lie from the Court of Appeal at Bangkok to the Supreme or Dika Court.

Sec. 7. No plea of want of jurisdiction based on the rules prescribed by the present Treaty shall be advanced in any Court after a defence on the main issue has been offered.

Sec. 8. In order to prevent difficulties which may arise in future from the transfer of jurisdiction contemplated by the present Treaty and Protocol, it is agreed—

(a.) All cases in which action shall be taken subsequently to the date of the ratification of this Treaty shall be entered and decided in the competent International or Siamese Court, whether the cause of action arose before or after the date of ratification.

(b.) All cases pending in His Britannic Majesty's Courts in Siam on the date of the ratification of this Treaty shall take their usual course in such Courts and in any Appeal Court until such cases have been finally disposed of, and the jurisdiction of His Britannic Majesty's Courts shall remain in full force for this purpose.

The execution of the judgment rendered in any such pending case shall be carried out by the International Courts.

In witness whereof the respective Plenipotentiaries have signed the present Protocol and affixed their seals.

Done at Bangkok, in duplicate, the 10th day of March, 1909.

(Signed) RALPH PAGET.
(Seal.)

(Signed) DEVAWONGSE VAROPRAKAR.
(Seal.)

UNITED STATES.

[27730]

No. 10.

[August 3, 1909.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 23, 1909.

I HAVE the honour, by direction of Secretary Sir E. Grey, to request that you will take into consideration the enclosed papers, as marked in the accompanying list, relative to the claim of the representatives of William Webster, a United States citizen, for reparation for the seizure and sale of large tracts of land in New Zealand to which he had acquired the title, and of which he was in possession before the acquisition of that colony by the British Government in 1840.

The origin and early history of the claim are fully shown in the letter from the Colonial Office of the 19th July, 1893 (Paper A), but the merits of the case itself, which formed the subject of a report by your predecessors in office on the 15th December, 1890 (Paper B), are not now in question, but rather its validity as an existing claim.

I am to explain that negotiations have for some time been in progress between His Majesty's Government and the United States for the reference to arbitration of certain specified pecuniary claims of the subjects or citizens of either country against the Government of the other. A copy of the draft convention which has been the result of those negotiations is enclosed herewith (Paper C).

Among other claims against His Majesty's Government the United States Government are anxious to refer to arbitration that of W. Webster above referred to.

To this course there are objections on several grounds, but for the purpose of this reference I need only call your attention to that created by the convention (Paper D) concluded between Her late Majesty's Government and the United States Government on the 8th February, 1853, which provided for the reference to an arbitral commission of the claims of subjects or citizens of either country against the Government of the other. Under article 5 of that convention the high contracting parties engaged to consider the result of the proceedings of the commission "as a full, perfect, and final settlement of every claim upon either Government, arising out of any transaction of a

William Webster land claims in New Zealand: As to submitting to Arbitration.



1909

date prior to the exchange of the ratifications of the present convention," and further engaged "that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission, shall, from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible."

The commission concluded their sittings in 1854, no claim on behalf of Webster having been presented.

In order to provide for the submission of Mr. Webster's claim to arbitration the United States Government introduced into article 1, paragraph 2, of the original draft of the convention at present under negotiation a clause intended to remove the bar imposed by the treaty of 1853 (see Papers E and F). This clause was subsequently abandoned, and need not therefore be now further considered (see Paper G), but the United States Government continued to press for the inclusion of the claim in some form, on the ground that if reference to it be omitted in the convention it would certainly be inserted by the Senate when the agreement comes before it for acceptance (cf. Mr. Bryce's telegram No. 30 of the 5th February, 1909, and his Excellency's despatch No. 32 of the 2nd February, 1909, Papers H and I).

His Majesty's Government, while unwilling to jeopardise the whole convention, feel unable, apart from other considerations, to include the claim, as it has hitherto been held to be barred by treaty, and the United States Government have in these circumstances suggested as a means of meeting the difficulty that the simple issue should be referred to arbitration of whether or not the claim is barred by the convention of 1853.

This proposal has been placed before the Government of New Zealand, who hesitate to assent to it, and have expressed the desire to be furnished with the views of the Law Officers of the Crown. They state that, with every desire not to embarrass His Majesty's Government or to jeopardise the proposed convention, they feel that an arbitration tribunal is not a suitable tribunal to decide a purely legal question, and that the position hitherto maintained on the main question will be much prejudiced if arbitration is agreed to on the legal point and the award decides that the claim is not barred.

In these circumstances, and in order to strengthen the hands of His Majesty's Government in discussing the question with the New Zealand Premier, who is expected to reach London next week, Sir E. Grey would be glad if you would favour him with your opinion on the question whether or not the Webster claim is barred by the convention of 1853, and as to the propriety of submitting that question to arbitration.

It is believed that the United States Government have no great confidence in obtaining a favourable award, but that on political grounds they are influenced by the desire to be enabled to give a final answer to the influential parties by whom the claim is constantly and persistently put forward.

In view of the early arrival of the New Zealand Premier, Sir E. Grey would be glad to receive a reply to this reference at your earliest convenience.

I have, &c.

LOUIS MALLET.

List of Papers.

(A.) Colonial Office	.. ..	July 19, 1893
(B.) Law Officers to Colonial Office	.. ..	December 15, 1890
(C.) Draft convention with United States for reference to arbitration of certain pecuniary claims.	.. ..	
(D.) Claims Convention with United States. (Library No. 371.)	.. ..	February 8, 1853
(E.) Mr. Bryce, No. 37 [6559/08]	.. ..	February 15, 1908
(F.) Mr. Bryce, No. 103 [10562/08]	.. ..	March 19, 1908
(G.) Mr. Bryce, No. 155 [16453/08]	.. ..	May 2, 1908
(H.) Mr. Bryce, No. 30 (Telegraphic) [4854/09]	.. ..	February 5, 1909
(I.) Mr. Bryce, No. 32 [5503/09]	.. ..	February 2, 1909

[29588]

Report.

In our opinion the Webster claim is barred by the Convention of 1853, and that it would be a bad precedent to agree to submit such a claim to arbitration.

W. S. ROBSON.
S. T. EVANS.

*Law Officers' Department,
August 3, 1909.*

[2959]

No. 10⁴

[December 22, 1909.]

[Colonial Office,
Jan. 25, 1910,
F.O. No. 2959.]

Law Officers of the Crown to Colonial Office.

My Lord,

Law Officers' Department, December 22, 1909.

WE were honoured with your Lordship's commands signified to us in Sir Francis Hopwood's letter of the 6th November last, stating that he was directed by your Lordship to transmit to us, for our consideration, a copy of a Memorandum from the United States Ambassador, in which he called attention on behalf of his Government to the question of fishery rights in Hecate Strait, together with a despatch on the subject from the Governor-General of Canada.

Claim of
Canada to
exclusive
fisheries in
Hecate
Strait.

That it would be observed that the Canadian Government contended that "the line of demarcation" mentioned in Article III of the Anglo-Russian Treaty of 1825 and determined by the Award of the Arbitration Tribunal of 1903 must be interpreted as a line of territorial demarcation, and that, as a consequence, Canada claimed exclusive jurisdiction over the whole of Hecate Strait.

That Sir Francis Hopwood was to inclose a copy of Mr. Whitelaw Reid's note of the 8th July, 1908, asking for permission on behalf of his Government to lay a cable through Hecate Strait and Dixon Entrance, to which reference was made in the Minute of the Canadian Privy Council.

That Sir Francis Hopwood was to request us take the papers into our consideration and report whether, in our opinion, the claim of the Canadian Government could properly be supported by His Majesty's Government, having regard to the special and peculiar considerations on which it was based.

We have taken the matter into our consideration, and, in obedience to your Lordship's commands, have the honour to

Report—

That we have carefully considered the claim by the Canadian Government to the exclusive right of fishing in Dixon Entrance and Hecate Strait, and, although that claim may well be supported by many cogent arguments, we are, on the whole, of opinion that it cannot be justified either by international law or by Treaty rights. We are also of opinion that, notwithstanding the admission of the claim to British jurisdiction over those waters contained in Mr. Whitelaw Reid's despatch of the 8th July, 1908, there has been nothing in the conduct of the Governments or communities concerned to prevent the United States Government from now disputing the claim. So far as the general principles of international law are concerned, we think that any International Tribunal would certainly hold that the great spaces of water intervening on the north and east between Queen Charlotte Island and the nearest land are open sea, over which neither the United States nor Great Britain or Canada can claim exclusive jurisdiction; but it is suggested in the Report of the 6th July, 1909, of the Canadian Privy Council that there are special circumstances which justify such a claim in this case. By the Treaty of 1825 between Great Britain and Russia, which settles the boundary between Canada and Alaska, it is laid down (Article I) that the respective subjects of the Contracting Parties should have free right of fishing in any part of the Pacific Ocean. By Article III of the same Treaty, together with the Award, under the Treaty of 1903 "the line of demarcation between the possessions of the High Contracting Parties upon the coast of the continent and the islands of North America to the north-west" is directed to be drawn so as to pass over sea as well as land, and it is contended in the Report to which we have referred that the effect of this demarcation was to assign the sea as well as the islands and mainland lying north and south of that line to the High Contracting Parties respectively. That is not the construction which would be given to the Treaty if due regard be had to the well-known rule of international law as to the freedom of the open sea and to Article I of the Treaty.

The line was intended to delimit the territorial possessions of England and Russia on either side, and this would include territorial waters, but it would not purport to make waters territorial which, by international law, should properly be regarded as free and open sea. If that had been the intention, it ought, and most probably would, have been explicitly stated in the Treaty, as the Contracting Parties could scarcely have failed to realize that in such a case they were acting in disregard of an inter-

[198]



national right. The line of demarcation as drawn by the Arbitration Tribunal under the Convention of 1903 is referred to in the Convention and in the Canadian Report as a "boundary-line," and an inference is thereupon sought to be drawn that whatever lies to the north or south of that line, whether land or water, would be within the territory of one or other of the Contracting Parties. This, however, is to construe the expression boundary-line in rather too literal a sense. If it were treated literally as a "boundary-line," it would have the effect of allocating to Canada part of the territorial water at the extreme points of the line where it rests upon the coasts of Alaska, and at all intermediate points where it is drawn within 3 miles of such coasts. This cannot have been intended. The Canadian Report urges with great force an argument to which a clear and positive answer is by no means easy, namely, that the claim of territoriality, say, over Clarence Strait on the north or the Straits of Georgia or San Juan de Fuca on the south, where each of the Contracting Parties admits the claim of the other, would apply with equal cogency to Hecate Strait or Dixon Entrance. We think, however, that there is a difference which, although it may be described as being one of degree, nevertheless puts Hecate Strait and Dixon Entrance in a substantially different category from any of the other named straits. The other straits are much more of the nature of inclosed waters than of open sea, although they are connected with the open sea at both ends. It must be admitted, however, that the Award of the German Emperor under the Treaties of Washington of 1846 and 1871, which has been construed practically as treating the Strait of San Juan de Fuca as divided between the territories of Great Britain and the United States, would have some weight before an International Tribunal in favour of the contention of the British Government with regard to Hecate Strait.

Next as to the admissions on the part of the United States in favour of the British contention. We attach no importance to the statement of Mr. Alexander, the United States fishery expert, in 1897. He had no sort of authority or position which could give any weight to the statements made by him in a matter of diplomacy.

Mr. Whitelaw Reid's application of July 1908 for permission to lay a cable through Hecate Strait and Dixon Entrance, together with his express recognition that those waters are British, is undoubtedly an important point in favour of Canada, but it is to be remembered that on previous occasions, in 1897 and 1905, when the present claim had been put forward on behalf of His Majesty's Government, the United States had vigorously protested, and we had taken no action even by way of reply to their protest. This circumstance gives an aspect of inadvertence to Mr. Whitelaw Reid's admission, unless, indeed, his admission was intended only to apply to waters within the 3-mile limit which might be touched by the cable in Hecate Strait. In any event, we think that such an admission does not estop the United States from raising the point now.

We have, &c.

W. S. ROBSON.
S. T. EVANS.

VENEZUELA.

[15430]

No. 11.

[May 28, 1909.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Venezuelan
surtax of
30 per cent.
on imports
from foreign
Colonies.

I HAVE the honour, by direction of Secretary Sir E. Grey, to inclose, for your consideration, the papers noted in the accompanying list respecting the surtax of 30 per cent. imposed by the Venezuelan Government in 1882 on imports from foreign Colonies.

By Article 4 of the Treaty between this country and Colombia, of which the present Republic of Venezuela was formerly an integral part, of the 18th April, 1825, "no higher duties shall be imposed on importation in the territories of Colombia of any articles of the growth, produce, or manufacture of Her Britannic Majesty's

Foreign Office, April 28, 1909.

Dominions than are or shall be payable on the like articles, being the growth, produce, or manufacture of any foreign country." A copy of this Treaty is inclosed (Paper A). The Convention between Great Britain and Venezuela of 1834, which adopted and confirmed the Treaty between Great Britain and Colombia of the 19th April, 1825, was renewed and confirmed by an exchange of notes dated the 13th February, 1903, in pursuance of Article 7 of the Protocol between Great Britain and Venezuela, signed at Washington on the same day.

A controversy arose in 1881 between the British and Venezuelan Governments owing to the imposition by the latter of 30 per cent. on the duty on all "products, goods, and effects proceeding from foreign Colonies, which may be imported through the ports of the Republic open to foreign commerce."

Copies of the Venezuelan Law of the 4th June, 1881, and of the Decree of the 12th April, 1882, for the execution of the law are inclosed (Paper B), as well as of the note from the Venezuelan Government formally announcing the imposition of the surtax (Paper C).

This 30 per cent. surtax was imposed by the Venezuelan Government admittedly as a measure of retaliation for an alleged grievance against the authorities of Trinidad, who were accused of neglecting the obligations of neutrality in regard to the proceedings of certain fugitive rebels and refugees in that island against the Government of Venezuela. This charge has been repeatedly investigated and disproved by His Majesty's Government, who have, in the meanwhile, protested against the imposition of the differential duties, and have held the Government of Venezuela responsible for the resultant injury to British trade.

On the 13th October, 1881, the then Law Officers reported that "if (as we gather will be the case), under the Law recently passed by the Government of Venezuela, articles of the growth, produce, or manufacture of Her Majesty's West Indian dominions would be charged, on importation, with higher duties than are imposed on the like articles being the growth, produce, or manufacture of other foreign countries, the enforcement of that Law will, in our opinion, be inconsistent with the provisions of Article 4 of the Treaty of 1825."

The Venezuelan Government eventually answered this argument, on its being addressed to them, as follows:—

"The Government of the Republic much regrets not being in accord with that of Her Britannic Majesty in their mode of viewing the question, and bases their (the Venezuelan) view upon the following reasons:

"The new Law, it is true, imposes a differential duty upon merchandize coming from the Antilles, but this duty is imposed on the merchandize of all nations, including Venezuela, so that even Venezuelan goods imported from those islands are subject to the additional duty. Thus the unequal treatment alleged in your observations does not exist.

"In Article 4, which is quoted, no obligation is imposed upon Venezuela except to levy no higher duties upon imports from the British dominions than those levied upon the most favoured flags, and, as the present Law levies differential duties upon all flags, including that of Venezuela, it does not appear to the Government that there results any infraction of the Treaty according to the tenor of Article 4."

The Venezuelan reply was referred to the Law Officers. The following paragraph occurs in the reference:—

"The Venezuelan Government argue that as all nations importing goods from the West Indian Islands will have to pay alike the increased duty of 30 per cent., Her Majesty's Government have no ground of complaint.

"It appears to Lord Granville, however, that such an argument is contrary to the express words of the Article, and that Her Majesty's Government are entitled to demand that articles of the growth, produce, or manufacture of the British West Indian Islands, and of any other part of Her Majesty's dominions, though sent in transit through British West Indian Islands, shall be admitted into Venezuela on the same terms as the produce, &c., of France, Germany, the United States, and other nations, which may be shipped therefrom direct to Venezuela."

The Law Officers reported (June 22, 1882):—

"That the view put forward by the Venezuelan Government is, in our opinion, contrary to the express terms of Article 4 of the Treaty. If such an argument were



admitted to be valid, it would be destructive of the provisions contained in that Article, for it would justify the imposition of differential duties in favour of France, for example, upon goods of the same description imported into Venezuela from France and from England. It might in that case also be said that all goods coming from France or England respectively were treated alike.

"Some difficulty is no doubt created by the fact that similar differential duties to those now in question were imposed without objection during the currency of the Treaty with Colombia, which contained a provision precisely similar to that embodied in Article 4 of the present Treaty with Venezuela.

"But we do not think that this affords any sufficient reason why Her Majesty's Government should not maintain their protest against the Decree, as being in violation of the terms of Article 4 of the Treaty."

An instruction was then addressed to Her Majesty's Minister at Caracas, the draft of which was submitted to and approved by the Law Officers. The following important passages occur in it:—

"Article 4 of the Treaty stipulates that 'no higher or other duties shall be imposed on the importation into the territories of Colombia (now Venezuela) of any article the growth, produce, or manufacture of Her Britannic Majesty's dominions than are or shall be payable on the like articles being the growth, produce, or manufacture of any other foreign country.'

"Her Majesty's Government therefore claim that such articles imported into Venezuela from Her Majesty's dominions in the West Indies shall be admitted on the same terms as similar articles the growth, produce, or manufacture of other countries imported into Venezuela direct from such other countries. The view put forward by the Venezuelan Government is contrary to the express terms of Article 4. If such an argument were admitted to be valid, it would be destructive of the provisions contained in that Article, as it would justify the imposition of differential duties in favour of France, for example, by a law declaring that lower duties should be paid on goods imported into Venezuela from France than on similar goods imported from England. In that case it might equally be said that all goods coming from France or from England respectively were treated alike.

"Article 4 is clear and explicit, and Her Majesty's Government are at a loss to understand how it can be contended that it refers only (as suggested by Señor Seijas) to the flag under which the goods are imported, and not to the country of their 'growth, produce, or manufacture.' As regards the fact urged by his Excellency, that Great Britain did not protest against a similar though comparatively trifling imposition of differential duties by Colombia in 1826, which was shortly afterwards removed, Her Majesty's Government cannot allow that such omission can be held to preclude them from protesting against the present grave infraction of the Treaty by Venezuela, and against the injuries thereby inflicted on British commerce."

A part of the Venezuelan argument, in reply, rested on a contention that the British Colonies were excluded from the Treaty of 1825. The only part germane to the cases under consideration is the following:—

"But the Honourable Lord Granville judges that, by Article 4 of the same Treaty, Venezuela could not impose differential duties, and, obliged as I am to justify the intention and purpose of the law bringing, for the consideration of Her Majesty's Cabinet, all that may free Venezuela from any intention opposed to the obligations prescribed by the Treaty, I trust that your Excellency and the Honourable Lord Granville will anew take into consideration that Article 4 is circumscribed to the two High Contracting Parties agreeing to the stipulation that no higher or other duties shall be imposed on the importation, in the ports of one or the other nation, of the products and manufactures of the dominions of the other Contracting Party than may be imposed upon the same articles of other nations, to which the law of Venezuela has been adjusted.

"Article 4, in the opinion of the Government and Congress of Venezuela, remained fully respected when, on imports in the ports of Venezuela from British Colonies, no other or higher duties were imposed than such as had to be paid by those of the Colonies of all foreign flags, and also of the national flag."

It is important, in considering the question of the interpretation of the most-favoured-nation Article in Commercial Treaties, to bear in mind that a Convention has recently been concluded, but not yet ratified, to regulate the commercial relations between Canada and France, of which Article 8, paragraph 1, is as follows:—

"To enjoy the benefits of the aforesaid Tariff advantages, products originating in France, Algeria, the French Colonies and possessions, and the territories of Indo-China shall be conveyed without transshipment from a port of those territories or from a port of a territory enjoying the preferential or intermediate Tariff into a sea or river port of Canada."

No objection to this stipulation was raised by His Majesty's Government because it did not appear to them that any country enjoying by Treaty most-favoured-nation treatment for its goods in Canada could claim the benefits of the advantages above mentioned if the goods were shipped from a port of some territory not falling within the category set forth in Article 8 of the Convention.

But it is conceivable that this differential treatment by Venezuela of the West Indian Colonies might have assumed the character of a reduction of duties for goods of, say, the French Colonies, provided they were shipped direct to that country under a Commercial Convention with France. The question would then have arisen as to whether it was open to the United Kingdom to claim for British goods, whether shipped direct or indirect, the benefit of the lower duties.

If such a claim be not warranted, it is difficult to see that the claim for the removal of the surtax of 30 per cent. can be justified in the case of goods originating not from the West Indian Colonies themselves, but from the United Kingdom, for example, and transhipped, for instance, at Trinidad.

The British Government have also contended that goods imported from His Britannic Majesty's Dominions in the West Indies are entitled to be admitted to Venezuela on the same terms as similar goods imported from any other country or place. To this the Venezuelan Government have rejoined that the words "Her Britannic Majesty's Dominions" in Article 4 must be held to mean Her Majesty's Dominions in Europe, and not to include Her Majesty's possessions abroad. There is no precedent, however, in support of such a construction, which would seem to be opposed to the plain meaning of the words of the Article, and the distinction between "the United Kingdom" and "Her Majesty's Dominions" in British Treaties is too well established to admit of any doubt on the point. The arguments adduced by the Venezuelan Government in support of their action and the contentions on the part of His Majesty's Government by which they have been met will be found in the Memorandum respecting the imposition of duties by the Venezuelan Government on goods imported from the British West India Islands (No. 9366), copy of which is inclosed (Paper D).

On the 21st February, 1887, relations between Great Britain and Venezuela were suspended by the Government of the latter country on account of the refusal of Her late Majesty's Government to evacuate the territory lying between the Orinoco and the Pomaroon Rivers.

In 1890 negotiations were opened, at the request of the Venezuelan Government, for the resumption of diplomatic relations, when Her Majesty's then Government stated that they were ready to do so on a satisfactory settlement being reached on the following three points:—

1. Settlement of the Anglo-Venezuelan boundary question by arbitration.
2. Repeal of the differential duties on imports from British Colonies.
3. The submission of certain claims to a Commission.

No advance was made in these negotiations, but on the 2nd February, 1897, a Treaty was concluded between the two Governments for the settlement of the boundary question, and relations were thereupon resumed without further reference to the remaining two points. It cannot, however, be held that His Majesty's Government have allowed their case, in the matter of the 30 per cent. import duties, to go by default, as negotiations on the subject have proceeded between the two Governments ever since, and this view has never been put forward by the Venezuelan Government.

It will be observed that, in the Treaty between this country and Colombia of 1825 no provision is made for the termination of that Agreement on any specified date, or for its denunciation by either of the Contracting Parties. In 1841, 1843, and again in 1897, the Venezuelan Government gave notice of their desire to terminate the Treaties



of 1825 and 1834, and on each occasion Her late Majesty's Government declined to accept the notices, and denied the right of the Venezuelan Government to terminate the Treaties on the ground that these could only be abrogated by the mutual consent of both Contracting Parties. Moreover, in the somewhat analogous case of Honduras, when, in 1877, the Provisional President of that Republic issued a Decree denouncing certain specified Treaties with foreign Powers, the British Government, whilst accepting the denunciation of certain Treaties, protested against the denunciation of the Treaty of the 28th November, 1859, relating to the Bay Islands and Mosquito land grants, whereupon the Government of Honduras declared that they would maintain that Treaty in its integrity and fulfil their obligations to the best of their power. The same principle was, moreover, admitted by the President of the United States of America in 1857 in connection with the desire of that country to abrogate the Clayton-Bulwer Treaty.

In the annex to the Protocol No. 1 of the 17th January, 1871, of the Conference which met to consider the abrogation of certain Articles of the Treaty of Paris of the 30th March, 1856 (the Treaty of Peace at the conclusion of the Crimean war), a statement will be found of the rule which Sir E. Grey understands is generally recognized in regard to the termination of Treaties to which no limit has been assigned, and I am to inclose a copy of that instrument (Paper E), the Annex to which runs as follows:—

“Les Plénipotentiaires de l'Allemagne du Nord, de l'Autriche-Hongrie, de la Grande-Bretagne, de l'Italie, de la Russie, et de la Turquie, réunis aujourd'hui en Conférence, reconnaissent que c'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties Contractantes, au moyen d'une entente amicale.

“En foi de quoi les dits Plénipotentiaires ont signé le présent Protocole.”

It seems, however, open to question how far it can be maintained that a rule which was enunciated with regard to a solemn Treaty of an obviously permanent nature, drawn up and assented to by all the great European Powers in international conclave assembled, is applicable in its integrity, and in all circumstances, to every purely Commercial Convention or Agreement.

Article 4 of the Treaty of 1825 provides for most-favoured-nation treatment in Venezuela of “articles of the growth, produce, or manufacture of Her Britannic Majesty's Dominions.” It appears, however, that of the goods imported into Venezuela from Trinidad a considerable proportion are of non-British origin, that island being to a large extent an entrepôt for goods in transit to Venezuela, and Sir E. Grey supposes that in any case His Majesty's Government would only be justified in requiring the Venezuelan Government to remove the surtax from goods of British origin so imported.

Recent political events in Venezuela having brought about a situation which seems conducive to a settlement of this long-outstanding difference, telegraphic instructions were sent on the 16th February last to His Majesty's Minister at Caracas to do all in his power to obtain the removal of the differential duty, basing the claim of His Majesty's Government on their rights under Article 4 of the Treaty of 1825. I am to inclose copy of a despatch which has been received from His Majesty's Minister, forwarding copy of the communication which he addressed to the Venezuelan Minister for Foreign Affairs on the 29th January last in pursuance of these instructions (Paper F), and also copy of a further despatch from Sir V. Corbett, in which attention is called to the view held in Venezuela that the claim of His Majesty's Government has been weakened by the fact that no mention was made of the surtax when that country was compelled, as a result of the blockade in 1902, to assent to the arbitration of all outstanding questions (Paper G). It may be observed that the reason of this omission on the part of His Majesty's Government was not, as appears to be thought in Venezuela, that Her late Majesty's Government were not confident of the validity of their Treaty rights, but that it was considered desirable by the then Secretary of State for the Colonies that the question of the 30 per cent. surtax should be treated on its own merits when a favourable opportunity occurred.

I am to transmit copies of the Protocol between Great Britain and Venezuela of the 13th February, 1903 (Paper H), as well as of the exchange of notes signed in pursuance thereof (Paper I). By the Protocol it is provided, among other things, that (7) “the British and Venezuelan Governments agree that, inasmuch as it may be contended that the establishment of a blockade has *ipso facto* created a state

of war and that any Treaty existing between has been thereby abrogated, it shall be recorded in an exchange of notes that the Convention of the 29th October, 1834, which adopted and confirmed, *mutatis mutandis*, the Treaty of the 15th April, 1825, between Great Britain and Colombia, shall be deemed to be renewed and confirmed, or provisionally renewed and confirmed, pending conclusion of a new Treaty of Amity and Commerce.” On turning, however, to the text of the notes exchanged you will see that the words underlined do not occur therein.

A telegram was received from Sir V. Corbett on the 22nd ultimo, stating that he had received an unsatisfactory reply from the Venezuelan Government to the representations which he had addressed to them. In these circumstances it seems desirable to consider the expediency of informing the Venezuelan Government that if no amicable arrangement can be reached, His Majesty's Government will be compelled to demand that the matter be referred to arbitration. Before such a step is taken, however, it would be necessary that His Majesty's Government should be advised as to whether, having regard to all the considerations which have been set forth above, the reference of the case to arbitration would have a good prospect of terminating in a decision favourable to this country.

I am accordingly to request that you will be good enough to take these papers into your consideration, and that you will favour Sir Edward Grey, at your early convenience, with your opinion as to—

1. Whether goods the produce of Trinidad are entitled under the Treaty of 1825 to enter Venezuela at the lowest rate of duty applied to any other non-Venezuelan goods and without the imposition of the surtax.

2. Whether other British goods transhipped at Trinidad are entitled to similar treatment.

3. Whether goods neither British nor Venezuelan, nor enjoying any right under Treaty between Venezuela and some other foreign State, are entitled by the mere fact of transshipment at Trinidad to similar treatment.

4. Whether a Commercial Treaty, such as that of 1825, which contains provision neither for termination nor modification can be held to be for ever binding, in spite of the expressed wish of one of the parties to denounce it or to negotiate an alteration in its terms.

5. Whether the position of His Majesty's Government under the Anglo-Colombian Treaty of 1825 in regard to the differential duties imposed by the Venezuelan Government is a sufficiently strong one to offer a good prospect, if recourse be had to arbitration, of a decision being given in their favour.

I am, at the same time, to request that you will be good enough to favour Sir Edward Grey with any general observations which you may have to offer on the subject.

I have, &c.

F. A. CAMPBELL

List of Papers.

(A.) Treaty between Great Britain and Colombia. (Library No. 214)	April	18, 1825.
(B.) Venezuelan Law, June 4, 1881, and Decree enforcing it.		
(C.) Note of Señor Duarte Level	March	15, 1882.
(D.) Foreign Office Memorandum (No. 9366).		
(E.) Annex to Protocol No. 1, January 17, 1871, of Conference on abrogation of certain Articles of Treaty, March 30, 1856.		
(F.) Sir V. Corbett's despatch No. 15, Commercial	January	27, 1909.
(G.) Sir V. Corbett's despatch No. 24, Commercial	March	6, 1909.
(H.) Protocol of Washington	February	13, 1903.
(I.) Exchange of notes between Great Britain and Venezuela	February	13, 1903.

[15666]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, April 30, 1909.

WITH reference to the letter from this Office of the 28th instant, submitting certain questions in connection with the surtax of 30 per cent. imposed on goods imported into Venezuela from the British West India Colonies, I have the honour, by the direction of Secretary Sir E. Grey, to transmit copy of a further despatch which

[198]

N



1909

44

VENEZUELA.—ZANZIBAR.

has been received from His Majesty's Minister at Caracas,* together with copy of correspondence respecting the Commercial Treaty between Great Britain and Venezuela,† which contains the note from Dr. Rojas, referred to by Sir V. Corbett (pp. 20-21), showing the repeated efforts made by the Venezuelan Government to have a period fixed for the duration of the Agreement and to replace it by another Treaty.

I have, &c.

F. A. CAMPBELL.

[20147]

Report.

1 and 2. In our opinion goods which are the produce of Trinidad, or which are of the growth, produce, or manufacture of His Britannic Majesty's dominions, ought, under the treaty of 1825, to be admitted into Venezuela at the lowest rate of duty applied to any other non-Venezuelan goods, and without the imposition of a surtax.

3. We think that similar treatment cannot be claimed in respect of the goods mentioned in this question, as the provisions of the treaty apply only to articles of the growth, produce, or manufacture of His Majesty's dominions.

4. The question is not free from difficulty, as some of the provisions of the treaty appear to be of a permanent character, while others, namely those dealing with the commercial relations of the two countries, cannot be so regarded. On the whole, we think that the main object of the treaty is commercial, and that it would be held to be temporary in character and terminable by the withdrawal of either party on reasonable notice. It appears from the papers before us, particularly from the protocol and notes of 1903, that the treaty has been regarded by both parties as being in force up to the present, and we think that the Venezuelan Government cannot be said to have withdrawn from or denounced the treaty by reason only of their contention that it is terminable, or of their expression of a desire to determine it.

5. We presume that the question which His Majesty's Government would desire to submit to arbitration would be whether the imposition and maintenance of the surtax by the Venezuelan Government amounts to an infraction of article 4 of the treaty. On this question, which depends on the construction of the treaty, we think that His Majesty's Government would probably obtain a declaration in their favour from an impartial tribunal, in spite of the imposition without protest of similar duties during the currency of the treaty with Colombia and of the subsequent conduct of this country, if, indeed, such conduct be material. But the question as to Venezuela's right to withdraw on notice would no doubt also be considered, seeing that His Majesty's Government has hitherto denied that right. As stated above, in answer to question 4, we think the contention of Venezuela on this point would be upheld, and that the tribunal would not be likely to grant substantial damages for the infraction of a treaty to which Venezuela has only been held by a mistaken contention on the part of His Majesty's Government.

On the whole, therefore, we do not think that the position of His Majesty's Government is strong enough to make it worth while to go to arbitration.

W. S. ROBSON.
S. T. EVANS.Law Officers' Department,
May 28, 1909.

ZANZIBAR.

[26350]

No. 12.

[August 5, 1909.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 21, 1909.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit herewith, for your information, the accompanying papers, together with the draft of an Order in Council which has been prepared in this department on the subject of the removal of

Draft
Zanzibar
Order in
Council
(removal of
prisoners).

* Sir V. Corbett, No. 36, Commercial, April 4, 1909 (15666).

† Parliamentary Paper, "Commercial No. 28 (1886)."

ZANZIBAR.

45

prisoners from Zanzibar, in accordance with section 7 of "The Foreign Jurisdiction Act, 1890," in order to undergo their sentences elsewhere.

A difficulty recently arose with regard to a prisoner who was sentenced to imprisonment by the British Court in Zanzibar and was ordered to be removed to Mombasa in the East Africa Protectorate for the purpose of serving his sentence. On arrival at Mombasa he was released, on the ground that the Court at Zanzibar had no power to make the order under the terms of "The Zanzibar Order in Council, 1906."

The draft of an amended Order in Council has accordingly been prepared, giving power to the Zanzibar Court to order a person who has been convicted to be removed to places which are not within the British Dominions for the purpose of undergoing his sentence. That draft has received the concurrence of the Secretary of State for the Colonies, and I am to request that you will take it into your consideration, and that you will favour Sir E. Grey with your opinion whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

A copy of "The Zanzibar Order in Council, 1906" (Paper C), is enclosed for convenience of reference.

I have, &c.

W. LANGLEY.

List of Papers.

- (A.) Colonial Office, June 4, 1909 [21000/09].
- (B.) Draft Order in Council, 1909.
- (C.) "Zanzibar Order in Council, 1906" [Confidential, 8699*].

[29701]

Report.

In our opinion, the terms of the draft Order in Council (copy of which we have initialled) are proper for submission to the King for the approval of His Majesty in Council.*

We have, &c.

W. S. ROBSON.
S. T. EVANS.Law Officers' Department,
August 5, 1909.

* The Law Officers introduced no alterations in the draft of the Order in Council submitted to them. The text is contained in the "London Gazette" of the 19th October, 1909. [Confidential 9530*.]



1910

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. May 1911.

CONFIDENTIAL.

(9830.)

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1910.



LIST OF REPORTS.

(Arranged according to Countries.)

NOTE.—The Reports not addressed to the Foreign Office are marked *1A*, &c.

AFRICA.

No.		Date.	SUBJECT.	Page
1	Law Officers ..	Jan. 19, 1910	Proposed arbitration relative to claims of Plettner Brothers, Kraeber, and Hamburg underwriters, arising out of Boer War. Opinion as to. Consider, in this connection, the Arbitration Convention with Germany retrospective in character	1

BELGIUM.

<i>1A</i>	Law Officers to Home Office	May 2, 1910	Anglo-Belgian Extradition Treaty. Concurring in proposed alteration of Article VI so as to prevent re-extradition of a person to a third Power without his having had opportunity to return to this country. Remarks on Anglo-German Treaty in this regard ..	8
-----------	-----------------------------	-------------	---	---

CHINA.

2	Law Officers ..	July 18, 1910	"China and Corea (Amendment) Order in Council, 1910" (Deportation of prisoners serving sentences in Hong Kong after trial at Shanghai, &c.). Approving draft ..	12
---	-----------------	---------------	---	----

COREA.

3	Law Officers ..	Nov. 23, 1910	"Corea Order in Council, 1910" (cesser of extraterritorial jurisdiction). Approving draft	13
---	-----------------	---------------	---	----

FRANCE.

4	Attorney-General	Aug. 19, 1910	Savarkar (British Indian) escaped from British ship in French port and recaptured. Demand of French Government for his surrender not justified, as they had promised to assist should he attempt to escape from British custody	14
5	Lord Chancellor	Sept. 10,	Savarkar. Reasons why claim for restoration of to French territory cannot be sustained	21

GENERAL.

6	Law Officers ..	Mar. 7, 1910	Draft "Foreign Jurisdiction (Admiralty) Order in Council." Approving, subject to certain remarks as to jurisdiction in matters of Prize, Slave Trade cases, &c. ..	26
7	Law Officers ..	Apr. 5,	Declaration of London arising out of Naval Conference of 1908 does not require parliamentary sanction to make it binding on Prize Courts. It appears to relate to matters within the prerogative. Position of non-signatory Powers.. .. .	28

[420]

LIST OF REPORTS.

iii

No.		Date.	SUBJECT.	Page
8	Law Officers ..	Apr. 6, 1910	"Foreign Jurisdiction (Admiralty) Order in Council." Approving as amended	31
9	Law Officers ..	May 6,	Second Peace Conference (Conventions) Bill. Revised draft as amended may be introduced into Parliament ..	33
10	Law Officers ..	May 31,	Draft Consular Fees (Order in Council) (Lascar seamen). Approving	36

JAPAN.

11	Lord Chancellor	Sept. 10, 1910	Certain marriages contracted in Japan by British subjects in churches. Opinion that legislation is necessary to validate.. .. .	37
----	-----------------	----------------	---	----

TURKEY.

12	Law Officers ..	Mar. 7, 1910	Draft Ottoman Order in Council. Approving, subject to qualifications respecting articles relating to death sentences, tenure of real property, &c. ..	39
13	Law Officers ..	Apr. 15,	Euphrates and Tigris Steam Navigation Company. Proposed amalgamation of with Turkish Company. Conditions which should be imposed before assent is conveyed to annulment of British rights	41
14	Law Officers ..	Oct. 6,	Draft Ottoman Order in Council. Approving as revised ..	43
<i>14A</i>	Law Officers to Registrar-General	Nov. 17,	Marriages of Englishwomen to foreigners of doubtful validity in country of husband. Case of Zarek Bakirgian and May Rich. Registrars cannot be instructed to refuse licence or certificate in cases of	44

UNITED STATES.

15	Law Officers ..	May 4,	Information as to mode of enforcement of claims against His Majesty's Government or Municipal Corporations. Approving revised answers as altered to questions of United States Ambassador.. .. .	46
----	-----------------	--------	--	----



(iv)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1910.

[The figures refer to the numbers of the pages.]

ACT—COL.

A.

- Acts and Bills. *See* Second Peace Conference.
 African (South) War. *See* Claims.
 Arbitration as to claims arising out of South African War. *See* Claims.
 " Agreements. As to retrospective character of. *See* Claims, South African War.
 " As to liability of conqueror for acts of conquered, 2-5.
 " As to interpretation of Arbitration Agreement itself, 4-5.
 Arrest (irregular) of person on foreign soil, and delivery for trial in his own country. *See* Savarkar.
 Asylum in French territory of person escaped from British custody. Claim to. *See* Savarkar.

B.

- Bakirgian, Zarek, 44.
 Blair, J. H., 21-22.
 Bourdiol, Polydore, 8.

C.

- Capital sentences. *See* Sentences.
 Claims against His Majesty's Government and Municipal Corporations. Mode of enforcing, 46-47.
 " Liabilities for acts of conquered State, 2-5.
 " (German) arising out of war in South Africa, 1-7.
 " Pletter-Kraeber, Hamburg underwriters, 4-6.
 " Question whether Arbitration Agreement is retrospective, 1-5.
 Colley, alias Kuhlinger, 9.

COM—HAM.

- Company merged with another Company. Position of should concession to amalgamated Company be cancelled, 41-43.
 " Right to restoration to *status quo ante*, 41-43.
 Conference. *See* Second Peace Conference.
 Conquest (States acquired by). Liabilities of, 2-5.
 Conventions. *See* Second Peace Conference.
 Corfield, Kate S., 37.
 Courts. *See* Prize Courts.

D.

- Death sentences. *See* Sentences.
 Declaration of London. Parliamentary sanction not necessary, 28-31.

E.

- Euphrates. *See* Tigris.
 Extradition of person in custody on English steamer escaped on to French territory. *See* Savarkar.
 " To third country of a person by a country to whom he had been surrendered, 8-11.
 " Treaty with Belgium. As to alteration of to accord with Act, 8-11.

G.

- Gold seized by Transvaal Government. As to liability of His Majesty's Government to compensate losers, 4-7.

H.

- Hamburgh underwriters [War Claims of], 4-7.
 Hamel, D. A., 9.

ALPHABETICAL INDEX.—(Names and Subjects.)

JAP—PLE.

J.

- Japan. Church Marriages of British subjects in. *See* Marriages.

K.

- Keyes, Captain, 17, 21, 22, 25.
 Kraeber, Herr, 4-6.
 Kuhlinger, alias Colley, 9.

L.

- Lamirande. Escaped to Canada. Irregularly restored to France, 16, 17, 21, 25.
 Legislation. Alteration of Treaty to accord with, 8-11.
 " *See also* Declaration of London.
 London. *See* Declaration of London.

M.

- Marriages of British subjects in Japan. Bill to validate those not legal under *lex loci*, 37-39.
 " Marshall-Corfield in Japan, 37-38.
 " Of English women to foreigners of doubtful validity abroad, 44-45.
 " Registrars cannot refuse licence, but may warn bride, 45.
 Marshall, Charles William, 37-38.

N.

- Navigation. *See* Tigris and Euphrates Company.

O.

- Order in Council. China-Corea [Amendment], 1910, 12-13.
 " Consular fees [Lascar seamen], 36-37.
 " Corea, 1910, 13-14.
 " Foreign jurisdiction (Admiralty), 26-28, 31-33.
 " Ottoman, 1910. Draft, 39-41, 43.
 " " Question of devolution of real property, 41.
 " Provision in as to carrying out death sentences, 40.

P.

- Parliament. As to necessity for sanction of Treaty by. *See* Declaration of London.
 Peace Conference. Second. *See* Second Peace Conference.
 Plettner Brothers, 4-6.

PRI—ZAR.

- Prize Courts. As to Declaration of London being binding on, 28-31.
 " Their origin. Laws by which they are bound, 29.
 Property in Turkey. Devolution of. Provisions of Order in Council, 41.

R.

- Real property. Devolution of in Turkey. *See* Order in Council.
 Rich, Margaret May, 44.

S.

- Savarkar in custody on "Morea." Escape of on to French territory, 14-25.
 " Question as to whether his restoration to British authorities was regular, 16.
 " Demand of French Government for his surrender, 14-25.
 Second Peace Conference [Conventions] Bill, 33-36.
 Sentences (Capital). Proposal to grant power to Supreme Court, Constantinople, to carry out, 39, 40.
 State (conquered). As to conqueror taking over liabilities, 2-5.

T.

- Territory. Alleged violation of French. *See* Savarkar.
 Tigris and Euphrates Company. Proposed amalgamation with Turkish Company, 41-43.
 " " Position of should concession to new Company be rescinded, 41-43.
 Treaty Arbitration with Germany. As to its being retrospective, 1-5.
 " " *See also* Claims arising out of South African War.
 " As to necessity for sanction of Parliament, 28-31.
 " Proposed alteration to accord with legislation. *See* Extradition.
 " *See* Second Peace Conference.
 Trial of person irregularly surrendered by foreign State. *See* Savarkar.

W.

- War in South Africa. *See* Claims.

Z.

- Zarek. *See* Bazirgian.



1910

Printed for the use of the Foreign Office. April 1911.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1910.

AFRICA.

[33247]
[File No. 1759/09.]

No. 1.

[January 19, 1910.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, September 15, 1909.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you the accompanying papers relating to three claims advanced by the German Government on behalf of certain of their subjects.

German
claims
arising out
of war in
South
Africa.

2. At intervals since the close of the South African war, the German Government have been pressing upon His Majesty's Government a large number of claims arising out of that war, and have intimated that, if His Majesty's Government are unwilling to recognize their validity, they consider that they ought to be submitted to arbitration.

3. The total number of these claims is about sixty-nine; in the great majority of cases Sir E. Grey is of opinion that sufficient reasons exist to justify him in declining altogether either to entertain the claims or to consent to their submission to arbitration.

4. With respect to the remaining claims, however, more difficult questions arise, and, as at present advised, Sir E. Grey feels that if he declines to submit the claims to arbitration he may be somewhat embarrassed to find adequate reasons for his refusal.

5. Before passing to the details of the claims, it may be well to remind you that in the year 1904 an Arbitration Agreement was concluded with Germany (Paper (A)) modelled, like many similar Agreements concluded about the same time, on that made with France in 1903. Article 1 of this Agreement provided for the reference to arbitration of differences of a legal nature, or relating to the interpretation of Treaties between the two Contracting Parties, which it may not have been possible to settle by diplomacy, with the usual proviso excluding from the scope of the Agreement differences which affect the vital interests, the independence or the honour of the parties, or which concern the interests of third parties. It is under the provisions of this Agreement that Germany maintains that these claims should be referred to arbitration.

6. Another consideration which Sir E. Grey thinks it desirable should be borne in mind is the attitude this country adopted in connection with obligatory arbitration at the Second Peace Conference at The Hague in 1907. Great Britain played a prominent part at that Conference in supporting the various schemes and propositions that were put forward for extending the scope of obligatory arbitration. On the

[420]

B



other hand, Germany took the foremost part in opposing them, and you will therefore readily understand that Sir E. Grey is reluctant to place His Majesty's Government in a position which would have the appearance of being inconsistent with the attitude they instructed the British Delegates to adopt at The Hague. For this reason he would prefer not to decline to submit these claims to arbitration unless it is quite clear that there are sufficient reasons for so doing.

7. The particular claims as to which Sir E. Grey desires your advice are three in number: That of Messrs. Plettner Brothers, that of Kraeber, and that of the Hamburg underwriters. The facts with reference to each of these claims are set out in separate Memoranda (Papers (B), (C), (D)), because as to the facts there is practically no dispute. It will be seen that each claim raises a clear legal issue, viz., whether, when Great Britain annexed the territories of the South African Republic and the Orange Free State, so that those two States ceased to exist as States, she inherited the liability of those States in respect of claims against them by individual foreigners for breach of contract or for torts committed by the officials of those Governments; and it is this question which Germany claims to refer to arbitration under the 1904 Agreement.

8. Up till now the only argument which has been used by Sir E. Grey in his correspondence with the German Government against the submission of the claims to arbitration under the 1904 Agreement is that that Agreement is not retrospective, and that therefore these claims are not within its scope. These claims must have arisen either in 1902, when the Republics were annexed, or, except as to the claim of the Hamburg underwriters, in 1903, when the mining plans which the claimants had prepared were rejected.

9. Sir E. Grey is advised, however, that it is open to question whether this argument is relevant. It will be noticed that the "differences" which are under the Agreement to be referred to arbitration are differences of a particular type, namely, "which it may not have been possible to settle by diplomacy"; and it may well be argued that it is not until diplomatic negotiations with regard to a particular question have failed to achieve a settlement that any obligation is imposed upon the parties to the 1904 Agreement to refer it to arbitration. The diplomatic negotiations with regard to the claims under consideration did not finish until after the making of the 1904 Agreement, as will be seen from the précis contained in Paper (E).

10. It is true the German Government had suggested arbitration on South African war claims generally in 1904. This proposal, however, had reference more particularly to claims which had been disallowed on the grounds that the claimants had been guilty of breaches of neutrality. Even assuming, therefore, that the Agreement of 1904 is not retrospective in character, it is not clear that His Majesty's Government would be justified thereby in maintaining that they were under no obligation to refer these claims to arbitration.

11. As to the question whether the Agreement is or is not retrospective, it will be noticed that the English text—"differences which may arise of a legal nature, or relating to the interpretation of Treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th July, 1899; provided, nevertheless, that they do not affect the vital interests, the independence, or the honour of the two Contracting States, and do not concern the interests of third Parties"—lends itself more readily to the interpretation that it is not retrospective than the German, which may be translated literally as follows: "Contentious questions of law and contentions which relate to the interpretation of Treaties existing between the two Contracting Parties shall, in so far as it may not have been possible to settle them by diplomatic means, be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th July, 1899. It is, however, at the same time to be understood that such contentions do not affect the vital interests, the independence, or the honour of the two Contracting States, and do not concern the interests of third Parties." That is, the words "which may arise" have no counterpart in the German.

12. It has also been suggested that if His Majesty's Government rely only on the argument that the Agreement of 1904 is not retrospective, the German Government may contend that the question is itself a difference of a legal nature which it would be proper to refer to arbitration under the Agreement. It seems improbable that the Agreement was meant to bind the parties to refer to arbitration differences as to the interpretation of the very instrument creating the obligation, but it is difficult to point to any words in Article 1 which specifically exclude this contention.

13. A further difficulty in relying upon the argument that these Arbitration

Agreements are not to be construed retrospectively is that, on the 4th April, 1908, an Agreement in similar terms was signed with the United States Government. Under that Agreement the Newfoundland fisheries disputes between this country and the United States, which have continued intermittently since 1818 are now being referred to arbitration; yet these disputes had certainly passed out of the category of disputes which diplomacy could settle before the making of the 1908 Agreement, as the two Powers had agreed in 1907 that the disputes should be settled by arbitration. The "compromis," however, Parliamentary Papers, United States, No. 1, 1909 (Paper (F)) is headed "Special Agreement for the submission of Questions relating to Fisheries on the North Atlantic Coast under the General Convention of Arbitration concluded between Great Britain and the United States on the 4th April, 1908," so that, in fact, His Majesty's Government have acquiesced in giving a retrospective effect to the 1908 Agreement with the United States Government.

14. On the other hand Lord Crewe has repeatedly impressed upon Sir E. Grey the grave inconvenience which would ensue from arbitration of these claims if the award were adverse.

15. The German claims raising this point number only three, but a number of other claims, both by foreigners and British subjects, some of them involving large sums, have been made at different times. The inclosed Memorandum (Paper (G)) drawn up in the Colonial Office in 1903, with opinions of Law Officers given on some of the cases, though not a complete list, will show that a number of claims have been made on the ground that His Majesty's Government, as successor to the South African Republic, has taken over its liabilities, whether arising from contract or tort, a view which His Majesty's Government and the Transvaal Government have steadily declined to recognize. In this connection I am to draw attention to the inclosed opinion of Professor Meili (Inclosure H) on the claims of the Netherlands South African Railway, in pp. 23 to 36 of which he argues against the disclaimer of obligations for contractual debts of the late Republic. His Majesty's Government, after long correspondence, succeeded in settling the claims of the Company without recognizing the concession or making any admission of liability for the obligations undertaken by the late Republic, but a decision, in which the general principles advocated, e.g., by V. Martens, quoted by Professor Meili (p. 31), were laid down, would very possibly result in reopening this and other cases.

16. It is not possible from the nature of the case to estimate the amount which would be involved in such a decision, but it would undoubtedly be very large, and the inconvenience and disturbance of settled cases which would result in South Africa, despite the fact that His Majesty's Government is prepared to take all pecuniary liability, are in Lord Crewe's opinion much to be deprecated.

17. Sir E. Grey is fully alive to the extreme inconvenience of an adverse decision, but he is disposed to doubt whether in the long run it may not be more to the interest of this country to pay these claims, if it is just that they should be paid by His Majesty's Government, rather than to be the occasion of any set back to the progress of the cause of International Arbitration.

18. Before arriving at any final conclusion, however, on this point, he is anxious to obtain your opinion as to the probability of an adverse decision if the claims are referred to arbitration.

19. To justify an award in favour of the claimants, it would be necessary for the Court to hold that a State annexing the territory of another State after conquest is bound to discharge unliquidated claims which had previously been brought against the latter. So far as Sir E. Grey is aware, there are no precedents to show that any State annexing the territory of a conquered State has ever admitted liability of this kind; to the extent to which the matter rests on international practice, therefore Sir E. Grey knows of no authority which would justify the Court in imposing liability on His Majesty's Government to pay these claims. There are, it is true, certain passages in some of the text-book writers which appear to maintain that the annexing State succeeds to all the liabilities of the former State, but he has not been able to find any precedent exactly in point showing that a nation annexing the territory of another State after conquest has regarded itself as bound by international law and apart from any special agreement to render itself liable either for the executory contracts or the torts of the extinct State.

20. A certain amount of information on the subject, together with such authorities as there are, will be found collected or referred to on pp. 303-429 of volume i of "Moore's Digest of International Law." The case most in point seems to be that of the Hawaiian claims referred to on p. 337, where the opinion of the



American Attorney-General Griggs is cited. This opinion will be found on pp. 583-8 of the accompanying volume of the "Opinions of Attorneys-General," volume xxii (Paper (I)). Further information with regard to the facts in some of the Hawaiian claims can be supplied if desired, as the claimants in many cases were British subjects.

21. It may perhaps be desirable to add that, in so far as international law does impose an obligation upon a conquering or annexing State, to take over liability for the funded debt of the annexed territory, it may be claimed that the obligation was fairly fulfilled after the annexation of the Republics. Information as to the exact action taken by His Majesty's Government (which did, however, involve some loss to the bondholders), will be found in the Colonial Office Memorandum already referred to.

22. The questions of the liability of His Majesty's Government for debts and liabilities of the Boer Republics is dealt with or touched upon in the following references to your predecessors, and copies of those references and of their reports are enclosed for convenience of reference (Paper (J)).

23. In 1905 certain British underwriters with claims very similar to those of the German claim of the Hamburg underwriters brought a petition of right against the Crown, seeking to make the Crown liable for gold seized by the Government of the South African Republic on the eve of the outbreak of the Boer War. The Divisional Court held that there was no principle of international law rendering the Crown liable in such a case. (*West Rand Central Gold Mining Company v. Rex*, L. R. 2 K. B. 391). A copy of the shorthand notes of the case can be supplied if desired.

24. Up till now the German Government have not, in their communications to Sir E. Grey, set out any arguments in favour of their contention that Great Britain has become liable for claims as successor to the South African Republic.

25. I am to ask you to take these papers into your consideration and favour Sir E. Grey with your opinion upon the following questions:—

(1.) Whether His Majesty's Government are bound by the terms of the Arbitration Agreement of 1904 with Germany to refer to arbitration a "difference" within the scope of that Agreement which arose before 1904, and as to which it was clear before 1904 that it could not be settled by diplomatic negotiation: i.e., is the Agreement retrospective in character?

(2.) Whether, assuming that the Agreement of 1904 is not retrospective in character, His Majesty's Government are bound to refer these claims to arbitration under the Agreement in view of the fact that, though they arose out of incidents that took place before 1904, the diplomatic discussion of these claims did not terminate until after 1904?

(3.) Whether, if His Majesty's Government refuse to submit the claims to arbitration under the Agreement of 1904 on the ground that it is not retrospective in character, Germany would be entitled to claim to refer that point to arbitration under the Agreement.

(4.) Whether the position adopted by Great Britain on the question of her non-liability for claims of this character against the extinct Republics is good in law?

(5.) Whether her position is strong enough to render it safe under all the circumstances for His Majesty's Government to accept arbitration upon the point?

26. I am at the same time to ask you to favour Sir E. Grey with any general observations on the subject which you may be good enough to offer.

I have, &c.

F. A. CAMPBELL.

List of Papers.

- (A.) Anglo-German Arbitration Agreement, July 14, 1904 (Treaty, No. 1170).
- (B.) Memorandum on Claim of Messrs. Plettner Brothers.
- (C.) Memorandum on Claim of Herr Kraeber.
- (D.) Memorandum on Claim of Hamburg Underwriters.
- (E.) Précis of Correspondence with German Embassy respecting Claims of Messrs. Plettner Brothers, Herr Kraeber, and Hamburg Underwriters.
- (F.) Agreement between Great Britain and the United States of America respecting the North American Fisheries Arbitration, January 27, 1909 (Parliamentary No. 4484).

(G.) Memorandum by Mr. H. Lambert, of the Colonial Office, on the Practice of His Majesty's Government and the Governments of the Transvaal and Orange River Colony with respect to accepting Liability for Obligations of the late Republics, October 27, 1903 (Confidential No. 8144).

(H.) Opinion of Professor Meili on the Claim of the Netherland South African Railway Company, January 1903.

(I.) Opinions of United States Attorneys-General, vol. xxii.

(J.) Law Officers to Colonial Office:—

November 30, 1900 (C.O., No. 39198).
December 21, 1900 (C.O., No. 41843).
January 12, 1901 (C.O., No. 1526).
March 13, 1901 (C.O., No. 9231).
November 27, 1901 (C.O., No. 41992).
February 27, 1902 (C.O., No. 8442).
March 14, 1902 (C.O., No. 10538).
May 16, 1902 (C.O., No. 19355).
February 18, 1903 (C.O., No. 7355).
February 18, 1903 (C.O., No. 7355).
February 24, 1903 (C.O., No. 7303).
May 13, 1903 (C.O., No. 17644).
May 29, 1903 (C.O., No. 19863).
June 23, 1903 (C.O., No. 23290).
July 10, 1903 (C.O., No. 25560).
March 24, 1904 (C.O., No. 10713).

[2346]

[File.]

Report.

ALTHOUGH the words "which may arise" in the English text of the Arbitration Agreement of 1904 give rise to some difficulty, we think, on the whole, that the Agreement would be held to be retrospective in character. Its object was to introduce, in cases of minor importance, a general system of arbitration between the two countries, and there seems no reason for excluding from its scope differences existing when it was made.

Apart from the language of the Agreement itself, we think that the fact that Great Britain has acquiesced in an interpretation giving a retrospective effect to a similar Agreement would afford a reason for construing the Agreement of 1904 in the same way.

2. Assuming, contrary to our view, that the Agreement is not retrospective, we do not think that a difference arising before the date of the Agreement would come under it merely because the diplomatic negotiations are not concluded at the date of the Agreement.

3. We see nothing in the language of the Agreement to support a suggestion that the interpretation of the Agreement itself is excluded from the obligation to refer and consequently, in the absence of any circumstances pointing to a contrary conclusion, we think that this question must be answered in the affirmative.

We now proceed to deal with the claims now in question.

4 and 5. The claims of Plettner Brothers, and Kraeber, arise out of ordinary commercial transactions by the late Government, and we do not think that His Majesty's Government would be able to maintain a successful defence to these claims before the Arbitration Tribunal.

We think the claim of the Hamburg Underwriters stands on a different footing, and that international law would impose on Great Britain no obligation to satisfy this claim, unless the seizure of the gold were shown to be a lawful act on the part of the Transvaal Government; and, even in that case, we think that His Majesty's Government would have a good defence if they could satisfy the Tribunal that the liability of the Transvaal Government in respect of the seizure, was incurred for the purpose of preparing for, or prosecuting, the war against Great Britain.

W S. ROBSON.
S. T. EVANS.

*Law Officers' Department,
January 19, 1910.*



Annex.

[Paper (B).]

Claim of Messrs. Plettner Brothers.

ON the 6th April, 1899, Messrs. Plettner, of Halle, received an order from the Government of the South African Republic for some model mining plans, with the object of facilitating the superintendence and control by the Government over mining operations in the Transvaal. The war broke out before they could be finished, and consequently they were not delivered to the South African authorities. After the conclusion of peace the British Mines Department at Johannesburg declined to accept the plans.

Subsequently Messrs. Plettner put in a claim for 2,565 marks (428*l.*) for the execution of the plans plus interest at 5 per cent. from the 1st April, 1900.

[Paper (C).]

Claim of Herr Kraeber.

On the 6th April, 1899, Herr Kraeber, of Nordhausen, a German surveyor of mines, was instructed by the Government of the South African Republic to give any information which might be required to the firm of Plettner Brothers, of Halle, who were engaged in printing model plans of mines for that Government, and, if desired, to proceed to Halle for a personal discussion of the subject. His expenses and fees were to be assessed at the rates prevailing in Germany for mining engineers.

Kraeber carried out his instructions up to the end of January 1900. His duties consisted in reading the proof sheets and carrying on a continual correspondence with the firm of Plettner Brothers, and he also undertook a journey from Kohlscheid, near Aix-la-Chapelle, where he was living at the time, to Halle, in order to have a personal interview with Messrs. Plettner.

In due course Kraeber forwarded his account, amounting to 480 marks (24*l.*), to the Consul-General of the South African Republic at Amsterdam. The latter acknowledged receipt of this account on the 31st January, 1900, and stated that it would be forwarded to his Government.

Kraeber, however, was unable to obtain any payment from the Government of the South African Republic; but, in reply to a reminder addressed to the Consul-General of the Republic at Amsterdam, was assured, in a letter dated the 2nd December, 1901, that the statute of limitations would not be invoked with regard to his account.

Since the incorporation of the South African Republic in the British Empire Kraeber approached the German Government with a view to their obtaining the payment of his claim, stated to be due to him by the British Government as the legal successor to the obligations of the South African Republic.

[Paper (D).]

Claim of the Association of Hamburg Underwriters.

The Association of Hamburg Underwriters took over in May 1899 on account of the Dresdner Bank under a current policy the insurance of the carriage of raw gold from South Africa. The insurance policy came into force on the 13th May, 1899, and covered all risks of carriage from the moment when the gold was taken from the coin plates.

At the beginning of 1899 the Dresdner Bank had entered into communication through their branch establishment in London with their agents, the General Mining and Finance Corporation (Limited) in Johannesburg, in regard to the purchase on behalf of the Deutsche Reichsbank of the gold produced by various mines connected with the General Mining and Finance Company. The negotiations were concluded by a written communication, dated the 22nd April, 1899, from the branch establishment of the Dresdner Bank in London and their telegram of the 12th May, 1899. The General Mining and Finance Company were instructed thereby to commence shipment of the gold as soon as possible. As far as the telegram dealt with the insurance it served to inform the General Mining and Finance Company that the policy had been taken out at the rate of 3*s.* 6*d.* per 100*l.* to cover all risks. The Dresdner Bank declared their readiness to take, if necessary, 1*s.* per 100*l.* of this themselves, while the rest of the amount to be paid as insurance was to be deducted on account of the mines in the final settlement of the purchase price.

In a letter dated the 15th May, 1899, the General Mining and Finance Company informed the branch of the Dresdner Bank in London that they would at once instruct a number of mines to ship their gold production to the head offices of the Reichsbank at Hamburg. The branch of the Dresdner Bank received this letter at the beginning of June 1899.

The General Mining and Finance Company thereupon concluded the purchase of the raw gold of the mines through their mainman [*sic*] (? President) and Managing Director, George Albu, who was at the same time Managing Director of the gold mines in question, and who arranged verbally with the Bank of Natal at Johannesburg that the latter should receive the bar gold to be sold to the Dresdner Bank from the following mines:—

Aurora West United Gold Mining Company (Limited).
Van Ryn Gold Mines Estate (Limited).
New Goet Gold Mines (Limited).
Meyer and Charlton Gold Mining Company (Limited).
Roodeport United Gold Mining Company (Limited),

and should ship it to Hamburg to the head-quarters of the Reichsbank there. The Bank of Natal were further, on delivery of the gold to them, to discount the bills drawn by the mines on the branch of the Dresdner Bank in London.

On the 2nd and 5th October, 1899, the quantities of gold quoted in Enclosures 4 to 7 according to weight, marks, and packing, were delivered from the mines specified. The Bank of Natal received the gold and furnished certificates as to its delivery, which certificates were annexed by the mines to the bills drawn by them against the gold on the branch of the Dresdner Bank in London. These bills, payable at sight, amounting in all to 35,600*l.*, were discounted by the Bank of Natal and sent to the branch of the Dresdner Bank in London, which met them on the 24th October, 1899.

The gold bars were packed in cases and dispatched by the Bank of Natal, and every case was marked with the name of the mine from which the gold it contained had been extracted.

On or about the 10th October, 1899, the Government of the then South African Republic seized the whole of the gold delivered to the Bank of Natal for the Dresdner Bank, viz.:—

1. Sixteen cases of raw gold (5,995·90 oz.) which were in the mail train at Vereeniging Station on the Netherland South African Railway Company's system.

2. Nine bars of gold (3,424 oz.) at the Bank of Natal in Johannesburg itself; or together, 9,419·90 oz. of battery and cyanide gold of a total value of 712,762 marks (35,638*l.*).

The seizure of the gold was effected on the ground of a Decree issued on the 27th September, 1899, by the Administrative Council of the South African Republic to the effect that gold extracted by mine owners in time of war must be deposited for keeping with the Government of the South African Republic. At the close of the war the gold, or its value, would be returned to the rightful owners after certain deductions to be fixed by law.

A further Decree of the Administrative Council, dated the 12th October, 1899, laid down that during the war all raw gold found or extracted in the South African Republic must pass through the hands of the head of the Mines Department, who would furnish an official acknowledgment of the receipt of the goods.

In execution of this latter Decree, receipts were furnished by the head of the Mines Department on the 5th and 20th November, 1899.

A further notification on the part of the Government of the South African Republic that they would return or refund the value of gold which had been seized is contained in a letter dated the 12th October, 1899, from Secretary of State Reitz to the then Imperial German Consul at Pretoria, who had, on the 6th October, 1899, already protested verbally and in writing against the seizure. In this letter Secretary of State Reitz stated that the gold could not be released, the intention being to retain it till after the war and then to return it to its legal owners.

The losses, amounting to 712,762 marks, incurred by the Dresdner Bank through the seizure of the gold bars, were refunded to them on the 24th October, 1900, by the insurers—the Association of Hamburg Underwriters.

Of the seized gold bars, one and a-half bars, which were found after the close of the British South African war in the mint at Pretoria, were handed over to the branch of the Dresdner Bank in London by the British Government. The value of this gold amounted to 72,844·35 marks (3,642*l.*), and this sum was refunded to the Association of Hamburg Underwriters. The actual losses, therefore, amount to 712,762 less 72,844·35 marks=639,917·65 marks (31,995*l.*).

The claim of the Dresdner Bank against the South African Republic for a refund is, in consequence of the payment made by the insurers—the Association of Hamburg Underwriters—transferred to the latter by legal cession.



(8)

BELGIUM.

No. 1^A.[In Home Office,
May 19, 1910.]

[File No. 18400/10.]

[May 2, 1910.]

*Case for the Opinion of the Law Officers of the Crown.*Anglo-
Belgian
Extradition
Treaty:
as to
alteration of
article 6.

THE Secretary of State desires to have the opinion of the Law Officers of the Crown on the question whether article 6 of the Extradition Treaty between Great Britain and Belgium and article 7 of the treaty between Great Britain and Germany give proper effect to the requirements of "The Extradition Act, 1870."

To understand the question which has arisen it is necessary to refer to two previous occasions upon which the Law Officers have been consulted.

In 1874 one Bourdiol was extradited from England to Belgium, and in the following year the French Government requested the Belgian Government to re-extradite him to France at the expiration of the sentence which he was then serving in Belgium.

The Law Officers were asked whether such re-extradition would constitute a violation of the Anglo-Belgian Treaty of 1872, and they advised that, though there was nothing in that treaty to prevent Bourdiol's surrender to France, the treaty must be governed by the Extradition Act of 1870, of which section 3, sub-section (2) would prevent his surrender.

The point was then referred to the Lord Chancellor (Lord Cairns), who advised that, as Bourdiol had been surrendered to and was under the control of Belgium, Her late Majesty's Government could not exact from her more than was stipulated by the treaty of 1872. He held, however, that the treaty, by departing from the words of the Act of 1870, had left a loophole by which the obvious purpose of the Act was frustrated.

In accordance with the Lord Chancellor's opinion, no objection was offered by Her late Majesty's Government to the re-extradition of Bourdiol by Belgium to France.

Section 3 (2) of the Extradition Act of 1870 is as follows:—

"3 (2).—A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded."

Article 6 of the Anglo-Belgian Treaty of 1872, and of the subsisting Anglo-Belgian Treaty of 1901, is as follows:—

"Where any person shall have been surrendered by either of the high contracting parties to the other, such person shall not, until he has been restored, or had an opportunity of returning to the country from whence he was surrendered, be triable or tried for any offence committed in the other country prior to the surrender, other than the particular offence on account of which he was surrendered."

It will be observed that the words "in that foreign State" in the Act apply to the words "detained or tried," and there is no limitation as to the place where the offence may have been committed, whereas in the treaty the words "in the other country" apply to the words "offence committed." Also in the treaty the word "triable" is substituted for the word "detained" in the Act.

In the year 1882 the question again came up for consideration in connection with the similar case of one Hamel, who had been extradited from England to Germany, and whose re-extradition from Germany was requested by the French Government.

Article 7 of the Anglo-German Treaty is as follows:—

"A person surrendered can in no case be kept in prison or be brought to trial in the State to which the surrender has been made for any other crime or on account of any other matters than those for which the extradition shall have taken place."

"This stipulation does not apply to crimes committed after the extradition."

BELGIUM.

9

It will be observed that the wording of this article more nearly provides the "arrangement" required by section 3 (2) of the Act of 1870 than does the corresponding article 6 of the Belgian Treaty. The prohibition against prosecution for any crime other than that for which extradition has been granted is absolute, and is not limited to crimes committed in Germany. The words "kept in prison or be brought to trial" are, however, substituted for the words "detained or tried" in the Act.

The Law Officers were asked to advise whether, in view of section 3 (2) of the Act of 1870 and article 7 of the Anglo-German Treaty, the Secretary of State would be justified in consenting to the proposed surrender of Hamel by Germany to France.

The Law Officers' opinion was as follows:—

"We answer the question 'whether the Secretary of State would be justified in consenting to the proposed surrender of Hamel to France' by saying that we are of opinion that the German authorities will be justified in surrendering Hamel to France, and that the consent of the Secretary of State is not necessary to justify that surrender. The power to surrender an extradited criminal (under the circumstances mentioned) to a third country appears to us to exist, and whilst the consent of the Secretary of State cannot confer that power if it does not exist, neither can the refusal of such consent interfere with the power if it does exist."

"Circumstances may occur, such as the obtaining of the extradition of a prisoner in order to deliver him over to a third country to be tried for a political offence which might give this country a right to complain, but no such question arises in this case."

The case submitted to the Law Officers and their opinion as attached hereto.

The German Government were accordingly informed that, in the opinion of His Majesty's Government, there was no objection to the further extradition to France of the man Hamel, and that the consent of His Majesty's Government to such a step was not necessary.

Another case has now occurred under the Anglo-Belgian Treaty.

In September 1907 one Colley *alias* Kuhliger was extradited from this country to Belgium to take his trial on charges of fraud, and was sentenced in Belgium on the 18th December, 1907, to a term of two years' imprisonment. In October 1908 the German Government applied to Belgium for this man's surrender to them on a charge of counterfeiting documents.

The Belgian Government replied that, having regard to the provisions of article 6 of the Anglo-Belgian Extradition Treaty, they could not authorise Kuhliger's extradition from Belgium to Germany.

The German Government then approached the Government of this country, referring to the case of Hamel (see above), and asked them to act on the view then expressed, and to inform the Belgian Government that they had no objection to the man's extradition from Belgium to Germany.

His Majesty's Government, following the precedents afforded by the cases of Bourdiol and Hamel, informed the Belgian authorities that they were not precluded by the terms of article 6 of the treaty from re-extraditing Kuhliger to Germany, and that the British Government had no objection to their doing so.

The Belgian Government, however, strongly protest against the view taken by His Majesty's Government. Their contention is as follows:—

If, as the British Government hold, article 6 of the treaty does not preclude the man's surrender from Belgium to Germany, because "any other offence" in that article (see above) only applies to offences committed in the United Kingdom or Belgium, it will follow that it does not prevent his trial in Belgium for the offence committed in Germany. Thus, although the Belgian Government could not prosecute an *extradé* for another offence of an extraditable character committed in Belgium, they could prosecute him for a non-extraditable offence committed in Germany. They are strongly of opinion that the prohibition against prosecution for any offence other than that in respect of which a person has been extradited extends to preclude his re-extradition to a third Power; but, if the contrary view taken by His Majesty's Government is to be maintained, they propose that the treaty may be amended so as to make this view clear. They also propose to insert in the new treaty various other provisions which would be obviously inconsistent with section 3 (2) of the Act.

[420]

D



In view of the attitude adopted by the Belgian Government, it has become necessary to decide what arrangement is required by section 3 (2) of the Act of 1870, and whether the treaties concluded with Belgium and Germany comply with the terms of that section.

Article 7 of the German Treaty does not follow the wording of the Act exactly, but, so far as the right of re-extradition is concerned, there is a close correspondence between the two, and the Law Officers' opinion of 1882, that "power to surrender an extradited criminal to a third country exists," may perhaps be taken to mean that under the Extradition Act there is no obligation on His Majesty's Government to provide against the surrender to a third State of a person surrendered from this country. If this is the correct view of section 3 (2) of the Act, article 6 of the Belgian Treaty, though it does not follow the words of the Act, sufficiently carries out the intention of it in this respect.

It is submitted, however, that the opinions of the Law Officers of 1874 and of Lord Cairns are the more correct, and that re-extradition to a third Power is precluded by the terms of section 3 (2) of the Act of 1870, and ought to be precluded by treaties intended to embody the arrangement prescribed by that section.

Parliament in 1870 put many restrictions on the extradition of accused persons, and limited somewhat narrowly the offences for which they could be surrendered. Could it be intended that if a fugitive in the United Kingdom has committed offences in two foreign countries, A and B, and for the offences in B extradition cannot be granted, either because they are not covered by the Act or because they are of a political character, there should be power to surrender him to A with no stipulation against his surrender to B? If A must be debarred from trying him for any offence for which extradition cannot be granted, does it not follow that A should also be debarred from surrendering him to B for trial? It seems to the Secretary of State that this is the most natural construction of the words in section 3 (2) of the Act, "detained or tried in that foreign State for any offence committed prior to his surrender," and that the insertion of the words "in the other country" after "committed" is a gloss that does not afford the "arrangement" mentioned in section 3 (2) of the Act. A man who is to be extradited from A to B is not tried in A, but must certainly be detained there.

If re-extradition to a third Power is not permissible, the Secretary of State does not anticipate that any great difficulties would arise. The prisoner could be restored to the United Kingdom and a provisional warrant for his arrest obtained at the instance of the third Power, which would then take the usual steps for procuring his extradition in accordance with the treaty subsisting between the United Kingdom and that third Power.

Though, therefore, the present Belgian Treaty does not appear to give His Majesty's Government any right of protesting against the surrender of Kuhliger by Belgium to Germany, English law seems to require that Kuhliger should not have been extradited to Belgium unless the Anglo-Belgian Treaty precluded the possibility of his re-extradition to another Power without his first having been restored or having been given an opportunity of returning to this country. In fact, it would appear to be possible for any person successfully to resist extradition from the United Kingdom to Belgium upon the ground that the treaty does not afford the arrangement prescribed by section 3 (2) of the Act, and there is no provision made by Belgian law such as is mentioned in that section.

Article 6 of the Anglo-Belgian Treaty is, moreover, faulty in only providing that the surrendered person shall not be "triable or tried." Under the Act he ought not to be "detained." Under the treaty it would appear to be open to the Belgian authorities to keep a man in prison on a charge other than that for which he had been surrendered for a long period pending trial, or to punish him for any offence of which he had been convicted prior to his surrender. This is clearly not the intention of the Act.

The Secretary of State thinks that it is reasonable, even if it be not by law obligatory, to provide against a fugitive who has been extradited to a foreign country being sent afterwards to a third country for trial on a charge that may be of a political character, and if extradition treaties permit re-extradition for offences that are not political, what effective protest can be made against re-extradition for political offences?

Attention may be called to section 4 of "The Extradition Act, 1870," which enacts:—

"An Order in Council for applying this Act in the case of any foreign State shall not be made unless the arrangement . . . is in conformity with the provisions of this Act, and in particular with the restrictions on the surrender of fugitive criminals contained in this Act."

There are nine other treaties containing an article similar in terms to article 6 of the Belgian Treaty, and there might be considerable difficulty in obtaining a revision of all of them.

The Law Officers are requested to advise:—

1. Whether arrangements made with foreign countries in pursuance of section 3, subsection (2) of the Extradition Act of 1870 should prohibit the re-extradition to a third Power of a person extradited from the United Kingdom without his having had an opportunity of returning to His Majesty's dominions.
2. Does article 6 of the Anglo-Belgian Treaty prohibit such re-extradition?
3. Does article 7 of the Anglo-German Treaty prohibit such re-extradition?

Extradition Act, 1870.

Extradition Treaty with Belgium, article 6. (October 29, 1901.)

Extradition Treaty with Germany, article 7. (May 14, 1872.)

Whether these articles give proper effect to the requirements of the Act.

Opinion of the Law Officers of the Crown.

We answer the questions put to us as follows:—

1. Arrangements made with foreign countries, in pursuance of section 3, subsection (2) of "The Extradition Act, 1870," should prohibit the re-extradition to a third Power of a person extradited from the United Kingdom without his having had an opportunity of returning to His Majesty's dominions.

The Extradition Act, except as regards the extradition crime, contemplates only two methods of dealing with a person extradited, viz., his restoration to His Majesty's dominions or his release to give him an opportunity of returning there. Re-extradition, moreover, must involve "detention" in the foreign country for the purpose of re-extradition, and detention, except for the extradition crime, is forbidden by the arrangement contemplated by the Act.

2. Article 6 of the Anglo-Belgian Treaty, by confining the offences for which the person extradited is not to be triable or tried to offences committed in the other country, leaves it open for the other country to detain or try him, and consequently to re-extradite him for offences committed elsewhere without infringing the treaty. It is, therefore, not such an arrangement as is contemplated by the Extradition Act of 1870.

3. In the case of the German Treaty, the answer to the question depends upon the meaning given to the words "kept in prison" in article 7. We think that these words need not be read in the narrow sense, that is, as applying only to confinement in gaol, but should be read in the wider sense, as the word imprisonment is used in connection with the action for false imprisonment known to our courts, that is, as expressing any forcible detention or restraint upon personal liberty, a view which is, we think, in accordance with the German text. The treaty does therefore prohibit re-extradition, and is consequently in accordance with the Extradition Act of 1870. The request for extradition by a third country, if considered, would involve the imprisonment or detention of the person to be extradited, and that would be contrary to the provisions of the treaty.

W. S. ROBSON.
RUFUS ISAACS.

Law Officers' Department,
May 2, 1910.



1910

(12)

CHINA.

No. 2.

[July 18, 1910.]

Foreign Office to the Law Officers of the Crown.[26196]
[File No. 1218/10.]

Gentlemen,

Foreign Office, July 8, 1910.

"The China and Corea (Amendment) Order in Council, 1910."

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith the draft of an Order in Council, to be entitled "The China and Corea (Amendment) Order in Council, 1910," dealing with the disposal of persons who have been imprisoned at Hong Kong, after sentence at Shanghai (Articles 2 and 3), and with the jurisdiction over the municipal police at Shanghai of the Captain Superintendent of that force (Articles 4 and 5).

With regard to Articles 2 and 3, I am to explain that under Section 7 of "The Foreign Jurisdiction Act, 1890," and Article 66 of the China and Corea Order in Council of 1904, a person sentenced to hard labour by a Consular Court in China may be sent to serve his sentence in Hong Kong, and in practice all persons sentenced by His Majesty's Supreme Court at Shanghai to hard labour for a term of nine months or more imprisonment are so sent to Hong Kong. On the scale of punishment which prevails at Shanghai all persons receiving such sentences are deemed to have been convicted of serious crimes, and it is felt to be very undesirable that such persons, in the event of their not being natives of Shanghai, should be at liberty to return to that port at the termination of their sentence. The same considerations apply to the remaining Treaty ports.

With a view to obviating these inconveniences of the present system, Articles 2 and 3 of the draft Order have been prepared, after consultation with the Secretary of State for the Colonies. Under these Articles the Courts in China are empowered, when sentencing a prisoner to a term of imprisonment of not less than six months, to order, as part of the sentence, that such prisoner be deported. The deportation will then be carried out by the Governor of Hong Kong, if empowered by legislation at Hong Kong to do so. If the Governor is not so empowered, the prisoner will be returned to Shanghai, and the deportation will be effected thence.

Articles 4 and 5 of the draft Order have been inserted for the purpose of further regulating the disciplinary powers conferred upon the officer in command of the Shanghai Municipal Police Force, and include certain modifications in "The China and Corea (Amendment) Order in Council, 1909," which experience has shown to be desirable. Article 5 of the draft Order also provides for sentences of detention, as differentiated from imprisonment in "The Army Act, 1907," Schedule 3. The object of this provision is that the self-respect of the men punished, who remain in the police force, may be preserved.

I am to request that you will take the draft Order into your consideration, and that you will favour Sir E. Grey with your opinion as to whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

I have, &c.

W. LANGLEY.

Report.

The draft Order as initialled by us may, in our opinion, properly be submitted for the approval of His Majesty in Council.

W. S. ROBSON.
RUFUS D. ISAACS.*Law Officers' Department,
July 18, 1910.*

CHINA.—COREA.

13

Annex.

China and Corea (Amendment) Order in Council, 1910.

WHEREAS by treaty, grant, usage, sufferance, or other lawful means, His Majesty the King has jurisdiction within the dominions of the Emperor of China and of the Emperor of Corea:

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested, is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as "The China and Corea (Amendment) Order in Council, 1910," and shall be read as one with "The China and Corea Order in Council, 1904," hereinafter referred to as the "Principal Order," and the Principal Order, "The China and Corea (Amendment) Order in Council, 1907," "The China and Corea (Amendment) Order in Council, 1909," and this Order may be cited together as "The China and Corea Orders in Council, 1904 to 1910."

2.—(1.) Where a British subject is sentenced to imprisonment for a term of not less than six months, the Court may, as part of the sentence, order that he be deported.

(2.) Article 83, sub-Articles 4 to 11, of the Principal Order, and Article 6 of "The China and Corea (Amendment) Order in Council, 1907," shall apply to deportations under this Article.

3. Where a person not belonging to Hong Kong is sentenced to imprisonment and deportation under Article 2, and is sent for imprisonment to Hong Kong, the Governor of Hong Kong shall, if lawfully empowered thereto, deport such person to the place to which he was ordered by the Court to be deported; and if not so empowered, the Governor shall cause such person to be sent back to Shanghai.

4.—(1.) Where a warrant is issued by the Minister to the person for the time being in command of a police force in any foreign concession or settlement in China, as provided in Article 3, sub-Article 3, of "The China and Corea (Amendment) Order in Council, 1909," the jurisdiction authorised by the said warrant shall be exercised in conformity with, and shall be subject to, such Rules as the Judge of the Supreme Court, with the approval of the Secretary of State, may make, and pending the issue of such Rules, such of "The China and Corea Rules of Court, 1905," as the Judge may direct.

(2.) A monthly return of all summary punishments inflicted by the person holding such warrant shall be sent to the Judge of the Supreme Court.

5.—(1.) A warrant issued by the Minister under Article 3, sub-Article 3, of "The China and Corea (Amendment) Order in Council, 1909," to the person for the time being in command of a police force in any foreign concession or settlement in China may empower such person while in command of the force to inflict summary punishment upon members of the force by detention for a period not exceeding fifteen days in such place as may be provided as a detention barrack by the authority by whom the force is paid.

(2.) Any warrant or King's Regulation issued under Article 3 of "The China and Corea (Amendment) Order in Council, 1909," in force at the date of this Order, authorising a sentence of imprisonment shall be deemed to authorise a sentence either of imprisonment or of detention.

(3.) For the purposes of this article, "detention" and "detention barrack" shall have the same meaning as in the Army Act.

And the Right Honourable Sir Edward Grey, Baronet, one of His Majesty's Principal Secretaries of State, is to give the necessary directions hereinafter.

(Initialled) W. S. R.
R. D. I.

COREA.

No. 3.

[42800]
[File No. 33364/10.]

[November 23, 1910.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, October 26, 1910.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith the accompanying draft of an Order in Council to be entitled "The Corea Order in Council, 1910."

This Order has been prepared, in view of the annexation of Corea to Japan in August last, in order to terminate the jurisdiction exercised in Corea by the British

[420]

E



1910

14

COREA.—FRANCE.

Courts established in that country, under the China and Corea Orders in Council, 1904-10.

Sir E. Grey will be glad if you will take the draft Order into your consideration and will favour him with your opinion as to whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

I am, &c.
W. LANGLEY.

Report.

In our opinion the draft Order in Council, as initialled by us, may properly be submitted to the King for the approval of His Majesty in Council.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
November 23, 1910.

Annex.

Corea Order in Council, 1910.

WHEREAS by a Treaty dated the 26th November, 1883, between Her late Majesty Queen Victoria and the King of Corea, jurisdiction over the persons and property of British subjects in Corea was conferred upon Her Majesty; and

Whereas by a Treaty dated the 22nd August, 1910, between the Emperor of Japan and the Emperor of Corea it was provided that Corea should be annexed to Japan; and

Whereas it is desirable that the jurisdiction of the Courts established under the China and Corea Orders in Council, 1904 to 1910, should no longer be exercised in Corea:

Now, therefore, His Majesty, by virtue and in exercise of the powers in that behalf by "The Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested, is pleased by and with the advice of his Privy Council to order, and it is hereby ordered, as follows:—

1. This Order may be cited as "The Corea Order in Council, 1910."
2. As regards all such matters and cases as come within the jurisdiction of the Courts established by or under the control of the Japanese Government in Corea, the provisions of the China and Corea Orders in Council, 1904 to 1910, regulating the exercise of His Majesty's consular jurisdiction in Corea shall cease to be in force and operation in Corea as from the date of the annexation of Corea by Japan, except as regards any judicial matters pending in any of the Courts established by such Orders at the date of the commencement of this Order.

3.—(1.) The China and Corea Orders in Council, 1904 to 1910, may be cited as "The China Orders in Council, 1904 to 1910," and the words "and Corea" shall be omitted from the short title of each of the Orders therein comprised, and from all Rules of Court made thereunder.

(2.) The words "and Corea" shall be omitted from the title of His Britannic Majesty's Supreme Court for China and Corea.

And the Right Honourable Sir E. Grey, Bart., one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein.

R. D. I.
J. A. S.

FRANCE.

[File No. 26214/10.]

No. 4.

[August 19, 1910.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 12, 1910.

Savarkar
escaped
from British
steamer:

I HAVE the honour, by direction of Secretary Sir E. Grey, to enclose, for your consideration, the papers noted in the accompanying list relating to a demand made by the French Government for the surrender to them of an Indian subject of the name of Savarkar.

FRANCE.

15

The facts of the case are as follows: A warrant for the arrest of Savarkar was issued by a duly constituted Court in British India. Upon this warrant Savarkar was arrested in England, and ordered to be removed to India under "The Fugitive Offenders Act, 1881." He was accordingly placed on board the P. and O. Company's steam-ship "Morea" in the custody of two Indian policemen.

The crimes of which Savarkar is accused included the abetment of the murder of Mr. Jackson, and were the following:—

1. Waging and abetting the waging of war against the King;
2. Conspiring to wage war against the King;
3. Collecting arms with intent to wage war against the King;
4. Sedition;
5. Abetment of murder;

and it may be mentioned that Savarkar is believed to be a prominent member of the organisation which is responsible to a large extent for the unrest which is at present prevailing in India.

In order to avoid any possibility of an attempt on the part of Indian extremists to rescue Savarkar or to provoke demonstrations during the period the "Morea" was at Marseilles, the Chief Commissioner of Police in London warned the French police of the day when the "Morea" would probably reach Marseilles and of the presence of Savarkar on board, and asked that all due precautions might be taken. Copies of this letter and of the French reply are enclosed (Papers (A) and (B)).

While the "Morea" was at Marseilles Savarkar succeeded in escaping by jumping through a port-hole and swimming ashore. He was rearrested by a French gendarme and brought back on board the "Morea."

The actual facts of this incident are in all probability correctly given in M. Cambon's third note, which states them as follows:—

"Or, il est aujourd'hui avéré qu'au moment de l'évasion de Savarkar, les agents anglais de la 'Morea' ont appelé par leurs cris l'attention des gendarmes français sur cette évasion, que trois de ces agents ont débarqué du paquebot britannique, qu'ils ont pris part à l'arrestation du fugitif, et qu'ils l'ont eux-mêmes ramené de force à bord de la 'Morea' de concert avec le Brigadier de Gendarmerie Pesquié.

"Voici ce que ce dernier a déclaré au Commissaire spécial de Police de Marseilles, M. A. Borelli, chargé de procéder à une enquête sur cette affaire:

"Le vendredi, 8 juillet courant, j'étais de service au paquebot "Morea," de la Compagnie Peninsular, lorsque, vers 7 heures du matin, je vis un homme presque nu sortir par un hublot de ce vapeur, se jeter à la mer et gagner le quai à la nage. Au même instant, des personnes du bord se sont précipitées, en criant et en gesticulant, sur la passerelle conduisant à terre pour se mettre à la poursuite de cet homme. Ne connaissant pas la langue anglaise, je n'ai pas saisi exactement quels cris poussaient ces personnes, mais il ne pouvait y avoir aucun doute pour moi: ces personnes étaient à la poursuite de l'homme qui se sauvait; leurs gestes signifiaient: "Arrêtez-le!"

"D'autre part, les nombreuses personnes se trouvant sur le quai, dans les parages du navire, ouvriers des quais, pisteurs, marchands, &c., dont l'attention put être attirée par les cris et les gestes des personnes qui descendaient précipitamment du navire, se mirent à crier: "Arrêtez-le! Arrêtez-le!"

"Je m'élançais aussitôt à la poursuite du fugitif et le rejoignis, après un parcours de 500 mètres environ, à l'extrémité du bassin du radoub; lorsque je mis la main sur lui, il me posa à deux reprises la question suivante: "Vous policeman français?" Je répondis, Oui. Je le pris par un bras pour le ramener vers le navire et il me suivit docilement.

"J'avais fait environ 10 mètres, lorsque trois des personnes qui étaient descendues précipitamment du navire, arrivèrent en courant, saisirent l'individu par le bras droit, alors que je le tenais par le bras gauche, et nous arrivâmes ainsi à bord du navire sans échanger aucune parole."

Inspector Parker's report and a more recent telegram from India (Papers (C) and (D)) are annexed, but the latter is stated by Viscount Morley's advisers to bear some trace of a desire on the part of the Indian policemen to magnify their own share in the recovery of Savarkar.

Taking the facts as stated by M. Daeschner, the complaints by the French Government against the conduct of the Indian policemen appear to be based on two grounds—the pursuit of Savarkar on shore, and the taking hold of his arm when he



had been arrested by the gendarme. Both actions are consistent with a mere desire to assist the French police in the discharge of their duty; there is nothing to show that they intended to oust the French police from the discharge of their functions and take such duties upon themselves; it does not appear that when the Indian policemen took hold of Savarkar's arm they either intended or desired to substitute themselves for the gendarme as custodians of Savarkar; the latter had been arrested by the gendarme, and remained in his custody until he was on board the "Morea."

The "Morea" in due course sailed from Marseilles on the 9th July with Savarkar on board. The fact, however, that Savarkar had escaped and had reached French soil became known to the French newspapers, and the question was taken up by the leader of the Socialist group in the French Chamber. The French Minister for Foreign Affairs accordingly spoke to the British Ambassador on the 18th July on the subject, and the French Ambassador in London handed a note to Sir E. Grey on the same day, asking that, pending a decision of the questions raised by the incident, no proceedings should be taken against Savarkar (Papers (E) and (F)). At the time when Sir E. Grey received this note Savarkar was still on the high seas, as the "Morea" did not reach Bombay till the 22nd July;* but it may be remarked that, in this note, the Ambassador did not ask for the rendition of Savarkar, a request which was only made when the man was within the jurisdiction of the Indian Courts, i.e., in the note of the 25th July.

On the 25th July another note from the French Embassy reached Sir E. Grey demanding that, as Savarkar had reached French territory and had been handed over irregularly by the French policeman without any legal or other process for his extradition or expulsion having been taken, he should be reconducted to French territory (Paper (G)).

On the 3rd August a third note (Paper (H)) was received, giving a slightly different account of the facts of the incident at Marseilles from those previously set out in M. Cambon's notes, and alleging that the acts of the Indian policemen constitute a violation of French territory requiring an apology as well as the surrender of Savarkar. It is from this note that the facts, as stated in an earlier paragraph of this reference, have been taken.

After the arrival of Savarkar in India he passed into the custody of the Indian authorities, and the proceedings against him in the Court at Nasik have commenced. The Court, however, has granted a short adjournment of his trial, which will admit of the questions of international law that have arisen being discussed between the Governments concerned.

The only answer which has, up till now, been returned to M. Cambon is a note stating that the question is engaging the serious attention of His Majesty's Government, and that Savarkar is now at Nasik, within the jurisdiction of the British Indian Courts of Justice, as, before deciding what further answer to return, Sir E. Grey is anxious to receive your opinion upon the legal questions involved.

Sir E. Grey is advised that there can be no doubt but that, as Savarkar had reached French soil, the French policeman acted wrongly in handing him back to the custody of the Indian police officers without the machinery for the extradition of criminals having been set in motion, but, assuming that this action was a mistake on the part of the French policeman, it by no means follows that an obligation to set the mistake right falls on the British authorities, as no blame can attach to the Indian policemen for keeping Savarkar in their custody after he had been rearrested and handed over to them by the French gendarme.

Instances are not wanting of persons accused of crimes being handed over to the authorities of one country by the mistake of an official of another country.

The case most nearly in point appears to be that of a Frenchman named Lamirande, who fled to Canada after having committed a crime in France. Proceedings were initiated for his extradition, and he was arrested; but while under arrest in Canada, the case was brought before the law courts upon an application for a *habeas corpus*, as he claimed to be entitled to be released upon various grounds. Before his application had been finally dealt with application was made to the Governor-General, who, in ignorance that any legal proceedings were pending, signed an instrument under which the sheriff issued an order, and the accused was handed over to the French police.

Details of this case will be found in the accompanying printed Foreign Office Paper No. 1491 (Paper (I)) and the accompanying Reports of the Law Officers. A

* Since this reference was drafted, it has been ascertained that the "Morea" reached Aden on July 17, where mails and passengers for Bombay were transferred to the steam-ship "Salsette," which arrived at Bombay on July 22.—W. M.

copy of the Judgment of the Canadian Court delivered subsequently to the removal of the accused in French custody will be found in the Appendix to "Clarke upon Extradition," 4th edition, page cccxcv.

The case is one of an accused person handed over by the mistake of an official, and received into the custody of the officials of another country to whom no blame attached. The only difference between that case and the case of Savarkar is, that in the former an extradition order was issued when it ought not to have been, and in the latter no such order was issued at all.

Her Majesty's Government claimed the re-surrender of Lamirande to them not as a matter of right, but of comity, but the French Government declined to accede to the request. The discussion ultimately terminated by the desire of Lamirande. The Law Officers advised that Her Majesty's Government were not entitled to claim the surrender of Lamirande as a matter of right, and your particular attention is drawn to the fifth paragraph of their Report of the 15th November, 1866, giving their opinion as to what would happen in a case the converse of that of Lamirande, i.e., in the exact circumstances of this case.

Another case is that of the murderers of Captain Keyes in 1901. These men were French deserters who crossed from French territory into Nigeria, and there murdered Captain Keyes; they then escaped back into French territory, where they were apprehended. They were subsequently surrendered by a French official to the British authorities without any request for their extradition having been made. They were tried and condemned by the British Courts, but before their execution the French Government demanded their surrender. The men were ultimately handed over for that purpose to the French authorities after an undertaking had been obtained that they should be put on trial for the murder before the French Courts. No application could have been made by the Nigerian officials for their extradition, as the men were of French nationality. The facts are fully set out in the Minute by Sir E. Davidson, annexed to the Report of the Law Officers, dated the 29th November, 1901 (Paper (J)). The Law Officers held that the question of the surrender of the men to the French Government was not a question of law, but that as a matter of policy it would be proper to comply with the request of the French Government, as the men had been handed over to the British authorities under a misapprehension. Sir E. Grey infers from this opinion that the surrender of the murderers of Captain Keyes could not have been demanded by the French Government as a matter of right.

There are also certain cases in which the question has arisen whether the Court before which a man is tried can take cognizance of a contention by him that he was brought within the jurisdiction of the Court by improper means, and ought on that ground not to be tried. This point was raised in "*ex parte Scott*" (9 Barnwell and Cresswell 446 (1829)), where it was held that if a person charged with a crime is found within the jurisdiction, the Court has nothing to do with the circumstances under which he came there.

Another case is that of J. H. Blair, whose removal from the United States of America to this country was obtained in 1876, not by extradition proceedings, but by a grossly improper misapplication of the machinery existing in the United States of America for the removal of accused persons from one place to another. Blair had become bankrupt and fled to the United States of America after committing an offence which was not within the Extradition Treaty; but his creditors sent a detective after him, who obtained a warrant in pretended good faith from the Governor of Nebraska to remove him to Chicago on a charge of perjury in connection with the declaration of his baggage. He was then surreptitiously taken to New York, placed on board a British ship, brought to England and tried and condemned at the Assizes. The Court held that it could not go into the question of international law as to the regularity of his removal to this country, and he was sentenced to eighteen months' imprisonment. Representations were made by the United States' Government, and the matter was referred to the Law Officers (Paper (K)).

It should be observed that the present case differs materially from that of Blair, in that Savarkar was put off French soil by a French official acting in the reasonable discharge of his duty, and under the orders of his superior officers, whereas Blair was kidnapped on American soil by the ruse of a British detective, acting on behalf of a private prosecutor in England.

Various cases are also cited in Sir E. Clarke's book upon extradition, which show that, in the opinion of the French authorities, the Courts are not to consider the circumstances under which the power of surrender has been exercised so as to bring within their jurisdiction a man who is accused of an offence; the mere fact that the



man has been surrendered invests the Court with the power to take cognizance of the case in respect of which he has been surrendered. Reference may be made to the cases of Renneçon, Clarke (4th edition), page 220, and Cyvoct, page 225.

These latter cases appear to establish the proposition that, as Savarkar is now within the jurisdiction of the Court at Nasik accused of an offence of which that Court can take cognizance, the Court must deal with the case, and cannot entertain any contentions raised by Savarkar as to the regularity of his rearrest and redelivery to the custody of the Indian policemen at Marseilles; that matter must be dealt with between the two Governments.

Sir E. Grey is informed that, under the laws in force in India, no power is given to the Executive Government to interfere with or to defer the trial of a person who is in the custody of a Court accused of an offence; the Court has, of course, power to adjourn the trial of a case, but the Government has no means of compelling the Court to do so.

Unless you consider that the fact that, at the moment when the French Government put forward their demand, Savarkar was still upon the high seas renders these cases inapplicable, Sir Edward Grey is inclined to think that these latter cases afford an adequate answer to the demand made in the first note from the French Ambassador, that no steps should be taken to bring Savarkar to justice until the questions raised by his surrender had been settled.

I am to ask you to take the papers into your consideration, and favour Sir E. Grey with your opinion—

1. Whether, as a matter of strict law, and apart from all questions of policy, His Majesty's Government are bound, because of the escape of Savarkar to French soil, and his restoration by a French gendarme to British custody, to restore Savarkar to French territory.

If your answer to the above question is in the negative, there will remain for consideration the question of policy, whether it would be desirable to undertake to surrender Savarkar after the conclusion of his trial. Viscount Morley attaches great importance to the trial of Savarkar being allowed to pursue its course, as there are a considerable number of other prisoners connected with the same organisation awaiting trial, and the admissibility of important evidence may depend upon the inclusion of Savarkar in the common charge.

If your answer to question (1) is in the affirmative, Sir E. Grey would be glad if you would also state (2) whether, in your opinion, he would be justified in saying that, as Savarkar is in the custody of the Court and the Executive Government have no power to interfere, it is impossible to take any steps to comply with the French request before the conclusion of the trial, but that, in the event of his conviction, his surrender shall be made so soon as the trial is concluded.

I am to request that, in view of the urgency of returning an answer to the French notes, you will favour Sir E. Grey with your Report with as little delay as possible.

Sir E. Grey will also be glad of any observations of a general nature which you may be good enough to offer upon the papers now submitted to you.

I have, &c.

F. A. CAMPBELL.

P.S.—I am further to request that, as the Solicitor-General is understood to be abroad, the case may be dealt with by the Attorney-General alone.

A further note received from the French Embassy, dated the 9th August, is also enclosed (Paper (M)).

List of Papers.

(A.) Commissioner of Police to French Police	June	29, 1910.
(B.) Reply of latter	July	9, 1910.
(C.) Inspector Parker's Report	July	8, 1910.
(D.) Telegram from Governor of Bombay	August	5, 1910.
(E.) Sir F. Bertie, No. 280	July	18, 1910.
(F.) M. Cambon	July	18, 1910.
(G.) M. Cambon	July	23, 1910.
(H.) M. Daeschner	August	2, 1910.
(I.) Extradition of Lamirande, 1866-7 (printed correspondence with Law Officers' opinions attached).		
(J.) Law Officers' Report	November 29,	1901.
(K.) Case of J. H. Blair, 1876.		
(L.) To M. Daeschner	August	6, 1910.
(M.) M. Daeschner	August	7, 1910.

Opinion of Attorney-General.

His Majesty's Government are not bound to restore Savarkar to French territory. The following circumstances are disclosed in the accompanying papers:—

1. That before Savarkar was taken by the British authorities into French territory, the assent of the French Government was duly obtained to his being kept in custody there by those authorities;

2. That an agreement was thereupon arrived at between Great Britain and France that the French authorities should assist the British authorities to prevent the escape of Savarkar from British custody;

3. That in the circumstances, this agreement amounted to a stipulation that Savarkar should not be entitled to any rights of asylum on French soil; and

4. That in giving him up the French police properly acted in accordance with the instructions given to them under the above agreement.

So far as Great Britain is concerned this agreement was within the competence of the French Government, and was valid and binding as between the two States. If it should happen to conflict with the French law of extradition (as to which I have no information) that is a matter which concerns the French authorities alone, and does not disentitle the Government of Great Britain from retaining any advantage it may have already acquired in good faith under such agreement. I do not think, however, that the agreement is likely to be in conflict with the substance or spirit of any French extradition law.

It is, perhaps, desirable that I should state somewhat fully the grounds upon which I have arrived at the above conclusions.

On the 29th June, 1910, Sir Edward Henry, acting for the British police, gave notice that the "Morea" would call at Marseilles with Savarkar on the 7th or 8th July. He at the same time indicated that there might be some demonstration or attempted interference with the escort at Marseilles, and asked the French police to take such steps as they might consider necessary to ensure the safety (*i.e.*, the security or custody) of the prisoner while at Marseilles. M. Hennion replied by letter, dated the 9th July, 1910, saying that he had given the necessary instructions ("les instructions nécessaires en vue d'éviter tout incident à l'occasion du passage à Marseilles du nommé Savarkar embarqué à bord du vapeur 'Morea'").

In the meantime M. Hennion had communicated with the Préfet des Bouches du Rhône, and had given him instructions to the effect that the escape of the prisoner should be prevented. The local police at the same time received orders not to allow any Hindu to go on board the "Morea" without a ticket (see memorandum from the French Embassy of the 18th July, 1910). The "Morea" arrived at Marseilles on the 7th July, 1910, and on its arrival the commissaire spécial of the port called and informed those in charge of the "Morea" that he had received instructions to render every possible assistance. He further introduced to them the police officers on the quay, and promised to render all the assistance that they (the British authorities) might require (see report of Inspector Parker of the 8th July, 1910).

At this time M. Hennion's letter of the 9th July had not been received. It was apparently sent off after the prisoner's escape and without information of that circumstance, but the understanding between the two sets of police authorities, respectively representing Great Britain and France, was obviously complete on the 7th July, and Savarkar's escape did not take place until the next day.

It follows, therefore, that when that escape took place Savarkar was already in French territory, and by the agreement of the two Governments he was being held in custody there under their joint co-operation and control, the right of the British authorities being to keep him on board the ship, and the duty of the French authorities being to prevent him from reaching the land, or, if by any mischance he should reach the land, then the duty of the French authorities was to hand him back to the British authorities in whose custody it was agreed that he should remain.

That this was the true intent and purport of the agreement is shown by the passage I have above cited from M. Cambon's memorandum of the 18th July, 1910. Every sovereign State possesses the right to refuse hospitality to an alien, or to prescribe, according to its own uncontrolled discretion, the terms on which any alien shall be allowed to enter its territory. Those terms, in the case of Savarkar, were that he should remain in the custody of his own Government while within the territorial waters of France or the Harbour of Marseilles. This consideration disposes of the



ground on which M. Cambon bases his demand for the rendition of the prisoner, namely, that he had acquired a right of residence and asylum on French soil. So far from that being the fact, he was only taken by Great Britain through French territory on the express stipulation by France that he should not be allowed to acquire any such right.

The agreement thus constituted was duly acted on by the French authorities. As soon as Savarkar reached the land a French gendarme started in pursuit. The policemen from the "Morea" also started in pursuit, but appeared to have been behind the Frenchman, who was the first to arrive at the prisoner and arrest him. (See M. Cambon's memorandum of the 18th July, "il fut rattrapé par un brigadier de gendarmerie, qui le ramena à bord de la 'Morea.'") The British police came up with the prisoner when he was already in the custody of Brigadier Pesquié, and no doubt walked with him, and assisted to hold him, on his way back to the ship. This does not alter the fact that Savarkar had already surrendered himself to the French policeman and was then in his custody. Brigadier Pesquié had walked back towards the ship about 10 metres before the British police came up. He accompanied him to the ship and duly surrendered him. It may perhaps be contended that the action of the British police in pursuing their prisoner on land was irregular, but in the events that happened it was unimportant, and did not make any difference to the recapture or delivery up of the prisoner. Their action undoubtedly introduces an element of difficulty, but, on a consideration of all the circumstances, I do not think it can fairly be said that it constituted any violation of French territory or sovereignty. At the same time, it must be admitted that the agreement between the police of the two countries did not, in express terms, provide for the exercise by the British police of any authority on land.

It was no doubt expected that so far as the land was concerned the French police would be sufficient (as in fact they were) for all the purposes of the agreement. The action of the British police was, therefore, unnecessary and was not expressly authorized, but it was obviously intended to be in aid of the French police in the maintenance of a joint custody.

It was certainly not an act which was then or could be now treated by the French authorities as one relieving them of their obligations under the agreement, or as depriving the British authorities of its advantages. There is no rule of international law which prevents a foreigner in a foreign country from assisting a police officer in the performance of a lawful act of seizure. The act which replaced Savarkar on board the "Morea" was not an act of which the French Government can rightfully complain, for it was an act which emanated from themselves by virtue of the instructions given to their gendarme by their authority.

It is to be observed that no point is made by the French authorities on the action of the British police. M. Cambon's objection (see his formal demand of the 23rd July, 1910) is, that the prisoner was delivered up to the British authorities by a subordinate agent who was acting irregularly in depriving Savarkar of his supposed right to remain on French soil.

In my view, for the reasons above stated, Savarkar had no such right; the French authorities were bound to prevent him from acquiring any such right, and the action of their policeman was in accordance with his instructions and the terms of the agreement between the two countries.

The case, therefore, is not of a criminal who has been handed over in violation of the conditions of an extradition treaty, but of an alien who has been excluded from French soil which he had no right to enter. Extradition questions only arise when a fugitive criminal has been admitted into foreign territory, but in this case Savarkar never was admitted into French territory except on the terms that he should remain a prisoner on the "Morea."

2. I do not think Sir Edward Grey would be justified in promising that Savarkar should be surrendered so soon as his trial is concluded, nor do I think that the executive Government have power under the circumstances to insist upon the trial being delayed.

W. S. ROBSON.

5, Paper Buildings, Temple,
August 19, 1910.

Annex.

IN this connection attention may be called to the case of J. H. Blair, who was removed from the United States to this country without Treaty obligation, though not with the consent of the United States Government. The facts are as follows:—

Blair, a Sheffield tradesman, having failed, packed up some of his most valuable effects and fled to the United States of America. The Extradition Treaty not including the offence of which he had been guilty, the creditors sent a detective after him to contrive his capture. Under a warrant obtained in pretended good faith from the Governor of Nebraska to remove him from Lincoln City, in the State of Nebraska, to Chicago, in the State of Illinois, on a charge of perjury in connection with his declaration of baggage, he was surreptitiously taken to New York and placed, handcuffed, on board a British ship, landed at Queenstown, handed over to an arresting officer, and committed for trial by the stipendiary Magistrate at Liverpool. The case was heard before Mr. Justice Mellor, who, notwithstanding the prisoner's protest of having been irregularly taken in America and brought to England without proper warrant, refused to go into any question of international law, and tried him in the usual way, sentencing him to eighteen months' imprisonment. On the representations of the United States Government that there had been a breach of international comity, the opinion of the Law Officers was taken.

In reporting on the legal aspect of the question they were of the opinion that no wrong had been done by His Majesty's Government; that they saw no reason for setting Blair at liberty; that supposing he were set at liberty, His Majesty's Government had no power to restore him to the jurisdiction from which he was taken; that the act of the abductors (some of whom were United States citizens) was one for which His Majesty's Government could not properly indemnify him; that he could bring his action for assault, &c., and so recover damages; and that the parties who brought him over should be indicted. At the same time, they thought that a gross outrage had been committed, and that, as a matter of policy, Blair should be pardoned, and that, if the pardon were on condition that he returned to the United States of America, the object of the Government might possibly be attained.

Sir Thomas Henry thought that the English Government ought not to give effect to a sentence which was obtained by fraud, and that they could not resist the application to discharge Blair from custody.

It was finally arranged that Blair should be pardoned on condition that he sailed to the United States of America and did not return to this country during the term of his sentence. His expenses were paid to Chicago.

[34948]
[File No. 26214/10.]

No. 5.

[September 10, 1910.]

Memorandum by the Lord Chancellor as to Savarkar's Case.

I ENTERTAIN no doubt that the claim of the French Government for the restoration of Savarkar to French territory is, under international law and usage, wholly inadmissible, considerations of pure policy apart.

To begin with, no claim can be sustained on the footing of a supposed right of asylum residing in Savarkar himself. He had no such right, as the Attorney-General points out, and, if he had, the French Government are not the people to assert it, for he is not a French subject. They can only claim on the footing of a wrong done to France. This is not a case of a Government demanding the restoration of their own national, whom they are bound to protect, or of some one who has committed a crime in their territory, whom they are entitled to punish. It is a claim to have restored to them a British subject charged with committing a crime in British territory, and at this moment within British jurisdiction, by reason of the action of the French police, in accordance with arrangements made between the police of the two countries. Such a claim can be supported only on the ground of comity, which means that, as good neighbours, we ought to give the man back, though we are not bound to do so. If there has really been an outrage of French sovereignty, it may well be that we ought to do so. Surely not otherwise.

I will not restate the precedents of Lamirande, Blair, and Keyes. In no one of them did the Law Officers of the Crown assert or admit any right to have the prisoner resurrendered. In each case the British Government treated it as a matter of comity or of policy, which is very much the same thing. And in the Lamirande case, when the French Government were the parties asked to resurrender, they would not do it, even as a matter of comity, though they had obtained their prisoner by an error on the part of the British Governor, who was manifestly deceived. In the Blair

[420]

G

Demand of
French
Government
for sur-
render of
Savarkar.



case there had been a gross fraud and outrage on the American Government. In the Keyes' case the murderers, who were resurrendered to France, were French subjects, and, as extradition could not have been obtained, the form of their trial was, at least arguably, French. Yet in both these cases the resurrender was only on the ground of policy, wise or unwise.

It is not because a State has delivered up a prisoner by error, if there has been error, that resurrender has taken place, but because the State which surrenders him or its subjects have affronted the rights and dignity of another State in such a way as to owe a signal moral reparation, as in Blair's case, or because it is thought politic to do so, as in Keyes' case.

Next comes the question: Has there been in the case of Savarkar any such conduct toward the French Government as should lead us, in point of comity, to release a man who is alleged to be a dangerous criminal of the worst type actually concerned in the assassination of a British official? There must, in matters of comity, be some proportion between the conduct complained of and the reparation or atonement to be made in respect of it, if any is to be made at all.

From this point of view the opinion of the Attorney-General, dated the 19th August, 1910, appears to me quite unanswerable. It does not matter whether what passed amounted to an agreement or not, though it was, in fact, an explicit promise by the French police that the prisoner to be sent via Marseilles should be prevented from escaping, and was so understood by the English police. In private litigation it would be absurd for principals to deny responsibility for the conduct of their agents acting within their ostensible authority, on which other persons reasonably relied. That, however, is not the main significance of what passed. Its main significance lies in this: that it excludes absolutely the idea of any disrespect or deception or outrage toward France, such as might furnish material for a claim to resurrender on the ground of comity.

It must be common for ships carrying prisoners for trial to put in at foreign ports. In law a foreign port, *intra fauces portus*, is as much a part of the foreign country as is its capital city. It cannot surely be said that if a German vessel calls at Southampton or a French vessel at Aden, carrying a prisoner for trial, a wrong has been committed against the British Government, who could on that account require his restoration to British soil. Even if a technical wrong had been committed, no one would think that restoration was an appropriate atonement. In fact this kind of thing is allowed by all States because it is convenient to all. I do not, however, find that the French Government asks for Savarkar's resurrender on the ground that he was unlawfully detained on the "Morea" while in the port of Marseilles.

It must be, then, on the ground of the escape for a few minutes and the recapture, and that this was a violation of French sovereignty in a degree quite different from the venial detention within the port of Marseilles on board ship. This recapture was effected by a French gendarme. If he was acting against his duty, he may justly be reprehended by his employers. In fact he was acting upon instructions from his superiors to help in preventing this man's escape. In any case the error, if error there was, of the French gendarme and his superiors, cannot be tortured into a disrespect by the British Government or by British subjects.

In regard to the co-operation of the two British police agents, what they did was to make a clamour so as to procure the arrest, and then to take hold of the prisoner on the one side, while the French gendarme who had arrested him held him on the other. They did not usurp the right of arrest or oppose or supplant the French gendarme, but simply assisted him. It is one thing to say that to assist the French police was technically a violation of French sovereignty. If so it was a trifle, without intended offence, of which no Government can make a real grievance. It is quite a different thing to say that such an incident carries with it a duty to restore Savarkar. At most, it involves a disavowal and expression of regret. This might be given if it is desired to soothe any feeling of irritation, and would suffice for any reasonable person. To claim that in this respect anything had been done involving so serious an interference with the course of justice as the release of this man seems to me quite extravagant.

The truth evidently is that, so far from there being any outrage on the French Government, everything was done in complete good faith and (except for the assistance of the British police officers, which had no effect on the result) exactly as had been arranged by the police of both countries should be done if the man tried to escape. It seems to me that the British Government would have cause to complain if, after they had been led to send Savarkar by a ship calling at Marseilles on the assurance of support from the French police, that assurance was afterwards repudiated.

It appears from the French communications that they regard as an ingredient in this case the supposed fact that Savarkar's crime was "political." In my opinion the assassination of Mr. Jackson was not a "political" crime. How it may be regarded in France I do not, of course, know. Nor do I see how its being a "political" crime, if it were so, makes any difference. It would be an important fact in any proceedings for extradition. There are none here, and the imaginary affront to France is not either greater or less by reason of the nature of the offence with which the prisoner is charged.

I think the request of the French Government may properly be refused upon the ground that he is a British subject charged with being a party to murder in British territory, and that no disrespect was intended or showed toward French sovereignty; that Savarkar was arrested and handed over by the French police acting under directions from head-quarters, and that if His Majesty's Government had not been assured beforehand of the co-operation of the French police at Marseilles he would not have been sent by a vessel touching at that port.

The true explanation of what happened, and the justification of a refusal to resurrender Savarkar, is the arrangement made between our police and the French. This is vital to show that there has been no affront against French sovereignty and no duty to resurrender. No doubt the disclosure may be politically inconvenient to the present French Ministry. Of that I am not able to judge. But I am sure it is only fair to the British Government that it should be known.

LOREBURN.

September 10, 1910.

Note by Mr. Maycock.

I HAVE endeavoured in this draft to embody the salient points of the Lord Chancellor's Memorandum, but I don't think we can say "that if His Majesty's Government had not been assured beforehand of the co-operation of the French police at Marseilles he would not have been sent by a vessel touching at that port."

Sir E. Henry wrote to M. Hennion on the 29th June.

The "Morea" sailed from Gravesend on the 1st July.

M. Hennion's reply was dated the 9th July, the day after the escape.

Savarkar's passage must have been taken even before Sir E. Henry wrote to M. Hennion at all.

W. M.

September 14, 1910.

Note by the Lord Chancellor respecting the Savarkar Case.

IN regard to the proposed draft of despatch to French Government:—

1. It would of course be wrong to say that Savarkar would not have been sent by a vessel touching at a French port if His Majesty's Government had not been assured beforehand of the co-operation of French police—unless the statement is true. I assumed it to be true because of what Sir E. Grey says in his Minute on No. 27 (at p. 30) of the printed documents sent me.

If it is not strictly accurate, would it not be accurate to say that His Majesty's Government would not have sent him by a vessel touching at Marseilles but for their belief that the French authorities would be instructed, as in fact they were instructed, "à l'effet d'empêcher l'évasion du prisonnier"? (See M. Cambon's letter of the 18th July, No. 4 in the printed documents.) Is it not desirable to say this?

2. Might it not be well to state a little more of what passed at Marseilles? The commissaire when on board the "Morea" told the officer of gendarmes to give the English police "any assistance he might require" in regard to the Indian prisoner. (Enclosure 3 of No. 28 of printed documents.)

3. Would it not be well to add that in Lamirande's case the British Government



only asked his restoration on the ground of comity, not of right? (See Mr. Hurst's Minute of the 29th July, No. 16, on p. 11 of printed documents.)

I have no other comments to offer.

LOREBURN.

September 22, 1910.

[Additions made to draft in accordance with above.—W. M.]

Foreign Office, September 23, 1910.

Sir Edward Grey to M. Daeschner.*

Sir,

Foreign Office, September 24, 1910.

WITH reference to the concluding paragraph of my note of the 1st instant, I have now the honour to state that His Majesty's Government have further and fully considered the request of the French Government, conveyed in M. Cambon's note of the 23rd July last, that the fugitive criminal Damodar Savarkar, who escaped from the steam-ship "Morea" at Marseilles on the 8th July last, should be restored to French territory ("soit reconduit sur le territoire Français").

It may be convenient that I should briefly recapitulate the facts in connection with this case, which happily are not in dispute.

On the 29th June last Sir E. Henry, the Chief Commissioner of the Metropolitan Police, addressed a letter to M. Hennion, the Director of the Sûreté Générale in Paris, advising him that Savarkar was being sent to India to take his trial for abetment of murder, and asking, as there were some Indian Extremists who might make a demonstration at Marseilles or interfere with the escort, that M. Hennion would be so good as to take such steps as he considered necessary to ensure the safety of the prisoner while in that port.

M. Hennion replied, in a note dated the 9th July, to the effect that he had issued the necessary instructions to prevent any incident occurring at Marseilles.

The "Morea" arrived at Marseilles with Savarkar on board about noon on the 7th July, and directly afterwards the Commissaire Spécial of the port came on board, showed an English police officer, Mr. Parker, a letter (presumably that from Sir E. Henry to M. Hennion) from Scotland Yard, saw Savarkar in the cabin, and then took Mr. Parker ashore and introduced him to the officer in charge of the police on the quay. *There were four or five gendarmes in uniform. The commissaire addressing their officer said, "Let me introduce to you the English police officer who has an Indian prisoner on board. You must give him any assistance he may require and prevent any strange Indians from assembling on the quay or going on board."*

Between 6 and 7 on the following morning Savarkar succeeded in getting through a porthole of the "Morea" and swam ashore, where he was arrested and conducted back to the "Morea" by a French gendarme. This officer never relaxed hold of Savarkar from the moment he arrested him till he was delivered on board the "Morea." The action of the ship's steward and two Indian constables who, on hearing of the escape of Savarkar, had landed and taken part in the pursuit seems, as a result of the fullest investigation, to have been wholly confined to assisting the French police officer to escort Savarkar back to the "Morea," and it can hardly be contended that there was anything unlawful or irregular in this proceeding. It is a common occurrence in every country for independent individuals to assist police officers, if they think they need it, in the execution of their duties. In any circumstances the action of these persons on this occasion in no way affected the final issue, and being, as it was, co-operation with a French official willingly accepted by him at the time, it cannot be regarded as derogatory to French authority either in fact or intention.

His Majesty's Government understand from the tenor of M. Cambon's note that the French Government base their claim for the restoration of Savarkar on the ground that he had acquired a right of residence and asylum on French soil. If that is the proposition advanced by the French Government, it is negatived by the action taken by

* The additions suggested by the Lord Chancellor are printed in *italics*.

the authorities at Paris and Marseilles with the specific object of precluding Savarkar from acquiring any such right. The claim cannot, moreover, be sustained on a supposed right of asylum residing in Savarkar himself, since he is not a French citizen.

In the opinion of His Majesty's Government, a claim for the restoration of Savarkar could only be based on some action on the part of the British authorities which constituted an affront to the sovereign rights of France; but the facts cited clearly establish, in the opinion of His Majesty's Government, that no such affront was either offered or contemplated. I need hardly add that nothing could have been further from the mind of the British authorities concerned. A British subject charged with the grave offence of abetment to murder in British territory was simply being conveyed in a British ship to take his trial for the offence alleged against him.

There was no concealment; the fact was notified by the Chief Commissioner of Metropolitan Police to the official occupying a corresponding position in Paris, who in turn issued such directions as he thought right and proper to prevent the escape of the prisoner at Marseilles. As a result of these instructions Savarkar was in fact arrested by a French police officer, and by him replaced on the vessel from which he had escaped. *Savarkar would not have been sent to India by a vessel putting in at a French port had not the British police authorities had ground for believing that the French police would be instructed, as in fact they were instructed, "à l'effet d'empêcher l'évasion du prisonnier."*

Various authorities and precedents have been searched without discovering any case precisely analogous to that under discussion.

The French Government may possibly have had in mind the case of the men who killed Captain Keyes in Nigeria in 1901. On that occasion it is true that His Majesty's Government restored those men who, through inadvertence, had been handed over by a French officer to be dealt with by the authorities of the British Protectorate. It will be remembered, however, that those men were only restored to the French authorities on a distinct assurance that they would be tried for murder. It was an act of comity solely on the part of His Majesty's Government, who were, moreover, largely influenced by the fact that the men were French citizens, and by the knowledge that they would not escape justice. On that occasion, however, His Majesty's Government never admitted that they were under any obligation to restore them. The circumstances were, in short, wholly dissimilar to those of Savarkar.

A closer analogy is, however, to be found in the attitude of the French Government in the Lamirande case in 1866. A French fugitive criminal escaped to Canada, whence his surrender in extradition was demanded by the French Government. He was handed over through inadvertence to the French Consul, and shipped for France before certain legal formalities had been completed. The request of His Majesty's Government that he might be restored as an act of comity, and not of right, to British jurisdiction was not accorded by the French Government.

His Majesty's Government are therefore unable to admit that they are under any obligation to restore Savarkar to French territory, and they sincerely trust that the French Government will, upon further consideration, view the matter in the same light. Should this, however, unfortunately not be the case, His Majesty's Government would be willing, in the special circumstances of the case, and as a mark of their consideration for the wishes of the French Government in the matter, to submit to arbitration the question whether, in accordance with international law, any obligation to surrender Savarkar to French jurisdiction can be held to devolve upon them.

I am, &c.
E. GREY.



(26)

GENERAL.

[32840]
[File No. 9450/09.]

No. 6.

[March 7, 1910.]

*Foreign Office to the Law Officers of the Crown.*Draft
Foreign
Jurisdiction
[Admiralty]
Order in
Council:
submitting.

Gentlemen,

Foreign Office, November 23, 1909.

I HAVE the honour, by direction of Secretary Sir E. Grey, to submit to you herewith the accompanying draft of an order in council, entitled "The Foreign Jurisdiction (Admiralty) Order in Council, 1910."

I am to state that His Majesty's Supreme Court at Shanghai has a considerable amount of Admiralty business, and that up to the present time such work has been dealt with under the powers conferred upon the court by article 100 of "The China and Corea Order in Council, 1904," which applies certain sections of "The Colonial Courts of Admiralty Act, 1890," to the Supreme Court at Shanghai, by virtue of the power given by section 12 of that Act. It has, however, been found that this manner of applying the sections of the Act in question is not a convenient method of procedure, particularly with regard to the question of fees and rules of court, and Sir Havilland de Sausmarez, the judge of His Majesty's Supreme Court for China and Corea, has therefore prepared a draft order in council, re-enacting in the form of an order in council under "The Foreign Jurisdiction Act, 1890," and in terms more directly consonant with local requirements, the applied sections, together with such other additional sections as experience had shown would be useful. This draft order applies not only to China, but to all the foreign jurisdiction courts which are under the supervision of this Office.

The draft has been carefully considered in this department, in consultation with Sir H. de Sausmarez and Judge Cator (the judge of His Majesty's Supreme Consular Court for the dominions of the Ottoman Porte), when they were in this country on leave of absence, and various amendments have been introduced.

Sir E. Grey is of opinion that the order will, in its present form, be a useful enactment, and will render the powers of the courts concerned in Admiralty matters clearer and simpler.

I am to request that you will take the draft order in council into your consideration, and that you will favour Sir E. Grey with your opinion as to whether its terms are fit and proper for submission to the King in council for His Majesty's approval.

Sir E. Grey would at the same time be glad to be favoured with any observations of a general nature which you may desire to offer on the papers now submitted to you.

I have, &c.

W. LANGLEY.

[File No. 8240/10.]

Report—

We have considered the draft order in council submitted to us and that, in our opinion, its terms are fit and proper for submission to the King in council for His Majesty's approval, subject to the following observations:—

It appears from the letter of reference that it was intended to re-enact in the proposed order in council those sections of "The Colonial Courts of Admiralty Act, 1890," which are applied by the existing order in council in each case together with certain additions. We observe that several provisions of the applied sections have been omitted, and we are not informed of the reasons which led to this omission. In particular, with reference to section 2 (3) (b), we think that it is at least open to doubt whether the order as drafted does not confer on the courts in question jurisdiction in matters of prize and in matters arising under the Slave Trade Acts. If it is intended to confer such jurisdiction, we think that it would be advisable to define its extent, as has been done in the past by the application of section 2 (3) (b) of 53 and 54 Vict., cap. 27.

GENERAL.

27

If such is not the intention, we think that some express provision should be inserted, as was done in "The County Courts Admiralty Jurisdiction Act, 1868," in order to put the matter beyond any doubt.

W. S. ROBSON.
S. T. EVANS.*Law Officers' Department,*
March 7, 1910.

Annex.

Draft Admiralty Order in Council.

WHEREAS by Treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty the King has jurisdiction within the places referred to in this Order;

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested, is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as "The Foreign Jurisdiction (Admiralty) Order in Council, 1910."

2.—(1.) This Order extends to all persons and to all property subject to any of the following Orders:—

"The Ottoman Order in Council, 1899."

"The China and Corea Order in Council, 1904."

"The Zanzibar Order in Council, 1906."

"The Siam Order in Council, 1906."

"The Persian Coast and Islands Order in Council, 1907."

or any Orders in Council substituted therefor.

(2.) This Order shall take effect on such day, not less than one month nor more than three months after it is first exhibited in the public office of the highest of His Majesty's Courts established by each of the said Orders in Council, as His Majesty's Representative shall by public notification appoint.

3. In this Order, and in Rules of Court made under it, the following terms shall, unless the context otherwise require, have the respective meanings hereinafter assigned to them, that is to say:—

"The Court" means the Court exercising Admiralty jurisdiction in accordance with this Order.

"Principal Order" means the Order in Council under which the Court is established, including therein any subsequent or amending Order affecting such jurisdiction.

"Provincial Court" includes, in the case of Siam, a district court, but in the case of Zanzibar does not include a subordinate court.

"His Majesty's Representative" means, in the Ottoman Empire, except Egypt, His Majesty's Ambassador; in Egypt and Zanzibar, His Majesty's Agent and Consul-General; in Siam, China, and Persia, His Majesty's Minister.

"Registrar" means, in the Ottoman Empire, the Registrar of the Supreme Court, and includes, in Egypt, the Registrar of His Majesty's Consular Court of Alexandria; in China and Corea, the Registrar of the Supreme Court; in Siam, the Registrar of the Court for Siam; in Zanzibar, the Assistant Judge, until the Judge, with the approval of the Secretary of State, shall otherwise order; in Persia, the person whom the Consul-General, with the approval of the Secretary of State, may appoint as Registrar.

"Marshal" means the Marshal of the Court, or the person who for the time being is performing the duties of Marshal.

"Judgment" includes a decree, order, and sentence.

"Appeal" means any appeal, rehearing, or review.

Expressions defined in the principal Order shall have the same meanings as are therein respectively assigned to them, unless the context or this Order otherwise require.

4.—(1.) The following Courts shall have Admiralty jurisdiction in civil matters for and within the limits of the principal Orders respectively, and over vessels and persons coming within the same: in the Ottoman dominions the Supreme Court, and during the absence from Egypt of a Judge of the Supreme Court, and subject to any rules of Court, the Provincial Court at Alexandria; in China and Corea, the Supreme Court; in Zanzibar, the Court for Zanzibar; in Siam, the Court for Siam; in Persia, the Court of the Consul-General for Fars and the coasts and islands of the Persian Gulf, whether held by the Consul-General or by the Judicial Assistant.

(2.) Such jurisdiction shall be exercised in accordance with the provisions of this Order, and of the principal Orders and of any rules of Court made under this Order.

(3.) Such jurisdiction shall, subject to the provisions of this Order, be over the like places, persons, matters, and things, when within the limits of the principal Order, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Court may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

5. Any reference to a Vice-Admiralty Court which is contained in any Act of the Imperial Parliament, or in any law of a British possession applicable within the limits of the principal Order, shall be construed as a reference to the Court or Courts upon which Admiralty jurisdiction is conferred by the principal Order, and such Court shall have jurisdiction accordingly.



Provided that the Court shall not have any greater jurisdiction in relation to the laws and regulations relating to His Majesty's navy at sea, or under any Act providing for the discipline of His Majesty's navy, than may be from time to time conferred on such Court by Order in Council.

6. An action under this Order shall be tried by a Judge sitting alone or with assessors appointed in the prescribed manner.

7.—(1.) Where Provincial Courts have been established by the principal Order, the Judge may, by writing under his hand and the seal of the Court, order that the Registry of a Provincial Court within the jurisdiction of the Court be a District Registry of the Court for the purposes of this Order, and the Registrar and Marshal of the Provincial Court shall, within the jurisdiction of such Provincial Court, be the District Registrar and District Marshal of the Court, and may exercise within such jurisdiction all the prescribed functions and perform all the prescribed duties of the Registrar and Marshal of the Court.

(2.) Where an action has been commenced in a District Registry the Judge may order that such action shall be tried in the Provincial Court; but the making of any such Order shall not affect the power of the Judge to remove the said action at any time to the Supreme Court.

8. In places where there is no District Registry, the Judge may direct that for the purposes of any particular matter or action "the powers of a District Registrar and Marshal may be exercised by the Provincial Court."

9. The territorial waters adjacent to the district of a Provincial Court shall for the purposes of this Order be deemed to be within the jurisdiction of such Provincial Court.

10. An appeal from any judgment of the Court, or of a Provincial Court, under this Order shall be subject to the provisions of the principal Order governing appeals in civil cases, and the Court having cognizance of such appeal shall, for the purpose thereof, possess all the jurisdiction conferred upon the Court by the principal Order or by this Order.

11. "The Colonial Courts of Admiralty Act, 1890," section 6, shall apply to appeals from the Court to His Majesty in Council as if the Court were a Colonial Court of Admiralty.

12. Rules of Court for the purposes of this Order shall be made by the same authority, and in the same manner and subject to the same approval, as Rules of Court made in virtue of the powers conferred by the principal Order.

13. The following Articles are hereby repealed:—

Article 106 of "The Ottoman Order in Council, 1899."

Article 100 of "The China and Corea Order in Council, 1904."

Article 29 of "The Zanzibar Order in Council, 1906."

Article 90 of "The Siam Order in Council, 1906."

Article 29 of "The Persian Coast and Islands Order in Council, 1907."

Provided that—

(1.) Proceedings begun under any of the Articles repealed by this Order, and pending at the time when this Order comes into operation, shall from and after that time, be regulated by the provisions of this Order, as far as the nature and circumstances of each case admit.

(2.) The Rules of Court and Table of Fees and Costs in force under the repealed Articles shall continue in force until rules are made and have come into force under the provisions of this Order.

14. Nothing in this Order shall affect the criminal jurisdiction of any Court established by the principal Order.

15. This Order shall not operate in Siam except to the extent and in the cases where the provisions of the principal Order are in operation.

And the Right Honourable Sir Edward Grey, Baronet, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein.

No. 7.

[April 5, 1910.]

[25720]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 14, 1909.

Declaration
of London:
As to
necessity
for Par-
liamentary
sanction.

I HAVE the honour, by the direction of Secretary Sir E. Grey, to transmit to you the accompanying papers relating to the Convention, known as the Declaration of London, which was drawn up by the International Naval Conference held in London during the preceding winter, and to request that he may be furnished with your opinion on the question whether it is necessary that this Declaration, in order to render it binding on the Prize Courts and other Tribunals of this country, should be embodied in or sanctioned by an Act of Parliament.

By Article 66 of the Declaration (see p. 34 of "Blue Book, No. 4, Miscellaneous (1909)") the Signatory Powers undertake to issue the necessary instructions, and to take such measures as may be required in order to ensure that it will be applied by their courts, and more particularly by their prize courts.

The question has on one occasion been mentioned in Parliament, and views have from time to time been expressed that Parliamentary sanction is required for this instrument, but Sir Edward Grey is advised that this is not so, and that the Declaration of London will be binding upon British Prize Courts so soon as it has been ratified.

The theoretical basis upon which prize courts exist, whether they are to be looked upon as courts of the law of nations (see "Blackstone's Commentaries," 4th ed., 1876, vol. iii, p. 56) or municipal courts (see Sir Henry Maine's "International Law," p. 96), is somewhat obscure, but the position adopted by Lord Stowell in several cases shows that he regarded himself when sitting in a prize court as bound to enforce, primarily, the law of nations (see, for instance, "The Walsingham Packet," 2 C. Rob. 77 (1 E. P. C. 189)), though bound to take notice of the provisions of an Act of Parliament (*ibidem*), but apparently only doing so in connection with property claimed on behalf of British subjects.

The question what attitude should be adopted by the Court where a British enactment with a direct bearing on the point at issue was alleged to be contrary to the law of nations, was considered by Lord Stowell in the case of the "Fox and Others" (Edwards 311, 2 E. P. C. 61). The question is discussed at some length on pp. 312 *et seq.*, but no definite answer is given, because Lord Stowell held that the British Orders in Council there referred to, being merely retaliatory measures, were not contrary to the law of nations; and also that the King's Orders and Instructions are presumed to conform themselves to that unwritten law.

It seems to follow from the above cases that Lord Stowell would have regarded the law of nations as binding on the Court *per se*, and would only have enforced Acts of Parliament, Orders in Council, or other municipal enactments in so far as they were in conformity with that law. The decisions appear to be quite inconsistent with the opinion that municipal legislation is required to justify the Court in applying what it believes to be the law of nations.

Section 55 (5) of the Naval Prize Act, 1864 (27 & 28 Vict., cap. 25), provides that nothing in that Act shall take away, abridge, contract, further, or otherwise than as expressly provided by the Act, the jurisdiction or authority of a prize court to take cognizance of and judicially proceed upon any capture, seizure, prize, or reprisal of any ships or goods, and to hear and determine the same, and according to the course of Admiralty and the law of nations to adjudge and condemn any ship or goods, or any other jurisdiction or authority of or exercisable by a prize court. The law, therefore, still remains the same to-day as it was in the days of Lord Stowell.

The real purpose of the institution of prize courts is to judge between the Sovereign and the foreign subject as to the validity of captures made by the Sovereign's forces in war, the foreign subject being the previous owner of the goods. It was not intended to judge between the Sovereign and his own subjects, or between those subjects and the foreign subjects as, in principle, all booty or prize in war goes to the Crown, the subject only taking an interest by virtue of the grant from the Crown, which is in theory a matter of grace and not of right.

As the direction of all matters relating to the conduct of war falls within the prerogative of the Crown, there seems on principle no reason why an Agreement between the Sovereign and other States, laying down rules as to what are or are not valid captures, should require parliamentary sanction before the Prize Court can enforce it when judging between the Crown and the subjects or citizens of those foreign Powers.

The Prize Courts in which the application of the rules contained in the recent Declaration will affect British subjects will be the foreign Courts, and not the British Courts, but it can scarcely be urged that the right of a foreign Prize Court to apply the Declaration to the property of a British subject could depend on an English Act of Parliament.

Cases will be found in the Prize Reports in which the provisions of treaties have been treated by the Prize Courts as binding upon them, especially with regard to contraband. The following cases may be cited:—

"Vryheid" (No. 1). Hay and Marriott, 188, 1 E.P.C. 13.

"Endraught." 1 C. Rob. 22, 1 E.P.C. 36.

"Ringende Jacob." 1 C. Rob. 89, 1 E.P.C. 60.

"Twende Brodre." 4 C. Rob. 33, 1 E.P.C. 332.

"Apollo." 4 C. Rob. 158.

"Neptunus." 6 C. Rob. 403, 1 E.P.C. 595.



There is nothing in any of the above cases to show that confirmation of the treaty by an Act of Parliament was considered to be necessary.

The Declaration of Paris, 1856, is now universally regarded as binding on all the States that accepted it, and, so far as Sir E. Grey is aware, it has never been suggested that British Prize Courts would not apply its provisions; but the Declaration of Paris has never been embodied in an Act of Parliament.

It is true that no British prize decisions involving the application of the Declaration have ever been rendered, but it must be remembered that the 2nd and 3rd Articles of that Declaration only embody principles which Great Britain and France had mutually agreed to observe during the Crimean War in order that their previously divergent practices might be harmonized; and there is no case reported which indicates that any captor or claimant of goods thought it feasible to contend that those arrangements were not binding on British Prize Courts, or to argue that ships or cargoes should be released or condemned in disregard of them.

With regard to Courts other than Prize Courts, it is not easy to foresee cases in which such Courts would have to enforce the provisions of the Declaration. Cases might, it is true, arise with regard to insurance, in which it might be necessary to take the Declaration into account, but they would probably in the end turn upon whether or not the Declaration was to be regarded as binding in International Law. *Hobbs v. Henning*, 17 C.B. (N.S.) 791; and *Seymour v. London and Provincial Insurance Company*, 41 L.J.C.P. 193, may be cited as instances of the cases that might arise.

Sir E. Grey would be glad if you would take the papers into your consideration and would favour him with your opinion whether the Declaration of London does or does not require Parliamentary sanction in order to render it binding on British Prize Courts. He would also be glad to be favoured with any observations of a general nature which you may be good enough to offer.

I am to add that Sir E. Grey would be obliged if in favouring him with your report you would state whether you have any objection to your opinion being published, should it be subsequently decided, in view of the importance of the question, that it is desirable to take this course.

I have, &c.
W. LANGLEY.

List of Papers.

Parliamentary Paper "Miscellaneous, No. 4 (1909)," Library No. 4491.
Admiralty, July 7, 1909.

[11853]

[File No. 11853/10.]

Report.

In our opinion the Declaration of London does not require the sanction of the Legislature to make it binding on British Prize Courts. It is to be observed that the Declaration does not directly affect the private rights of British subjects in British Courts. British subjects whose property is affected by the action of a belligerent foreign State must seek redress in the Prize Courts of that State. In cases where the Declaration limits the rights of Great Britain as a belligerent power, the Crown will instruct its officers not to enforce the rights in question beyond the agreed limits, and if they were nevertheless to do so the Crown would hold itself responsible for any damages such officers might cause. It follows, therefore, that so far as the Declaration limits or restricts our rights, no claim inconsistent with it can be put forward in our courts. In cases where the Declaration extends belligerent rights beyond what has hitherto been claimed by Great Britain, the only persons who can or will put forward any claims in our courts in respect of the exercise of such new rights will be foreigners, and so far as their position in our Prize Courts is concerned, we think it is clear that the judges of those Courts will apply any treaty existing between their respective countries and the Sovereign of Great Britain. Treaties are a recognised branch of International Law though their direct operation is of course confined to those nations who are parties to them. This principle is well established by a number of cases of which perhaps the best is "*Twende Brodre*" (4 C. Rob., 33, 1 E.P.C., 332). In that case, the question was whether or not certain goods were contraband. By a Treaty between this country and Denmark it was provided that certain kinds of timber should not be contraband. Lord Stowell considered that effect

should be given to the Treaty, without thinking it necessary to enquire whether such kinds of timber would have been innocent goods according to International Law apart from the Treaty. On this principle, our Prize Courts would be bound to apply the Declaration of London to foreigners whose Sovereigns are parties thereto. See also "*The Fox*" and others Edwards 311 and 2 E.P.C. 61 and "*The Walsingham Packet*" 2 C. Rob. 77 and 1 E.P.C. 189.

We think that the Declaration casts upon this country no obligation to ensure that the provisions thereof shall be made law in our Courts so as to apply to non-Signatory Powers. Article 66 provides only that the Signatory Powers undertake to secure the reciprocal observance of the rules in cases where all the belligerents are parties to the Declaration. But we are of opinion that the British Prize Courts ought to apply the principles embodied in the Declaration to non-Signatory Powers. If, however, the English Prize Courts take a different view as to the position of non-Signatory Powers there would be no difficulty in then providing by Act of Parliament that they should apply the same principles to non-Signatory as to Signatory Powers, and we think that would be the better way of dealing with this contingency should it arise. In our opinion the international questions dealt with by the Declaration are within the prerogative of the Crown. They all relate to the conduct of war, which is peculiarly within that prerogative, and any Rules to which the Sovereign assents for the purpose of guiding his Officers in the exercise of his rights are independent of Parliamentary sanction.

2. It appears to us that the publication of Law Officers' opinions is undesirable, and we are unable to assent to it in this case.

We have, &c.
W. S. ROBSON.
RUFUS D. ISAACS.

Law Officers' Department,
April 5, 1910.

No. 8.

[File No. 5503/10.]

[April 6, 1910.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 29, 1910.

I HAVE the honour, by direction of Secretary Sir E. Grey, to inform you that the draft Foreign Jurisdiction (Admiralty) Order in Council, 1910, which was submitted for your approval in my letter of the 23rd November last, has been amended in accordance with the suggestions made in your Report of the 7th instant. The Order in its amended form is submitted to you herewith, the necessary additions being printed in italic, and the omissions in erased, type for convenience of reference.

I am to request that you will, at your earliest convenience, favour Sir E. Grey with your opinion as to whether the terms of the draft Order as now amended are fit and proper for submission to the King in Council for His Majesty's approval.

I have, &c.
W. LANGLEY.

Report.

This draft Order in Council may, in our opinion, properly be submitted to the King for the approval of His Majesty in Council.

W. S. ROBSON.
RUFUS D. ISAACS.

Law Officers' Department,
April 6, 1910.



Annex.

Draft Foreign Jurisdiction (Admiralty) Order in Council approved by Law Officers.

WHEREAS by Treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty the King has jurisdiction within the places referred to in this Order;

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested, is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as "The Foreign Jurisdiction (Admiralty) Order in Council, 1910."

2.—(1.) This Order extends to all persons and to all property subject to any of the following Orders:—

- "The China and Corea Order in Council, 1904,"
- "The Zanzibar Order in Council, 1906,"
- "The Siam Order in Council, 1906,"
- "The Persian Coast and Islands Order in Council, 1907,"
- "The Ottoman Order in Council, 1899 1910,"

or any Orders in Council substituted therefor.

(2.) This Order shall take effect on such day, not less than one month nor more than three months after it is first exhibited in the public office of the highest of His Majesty's Courts established by each of the said Orders in Council, as His Majesty's Representative shall by public notification appoint.

3. In this Order, and in Rules of Court made under it, the following terms shall, unless the context otherwise require, have the respective meanings hereinafter assigned to them, that is to say:—

"The Court" means the Court exercising Admiralty jurisdiction in accordance with this Order.

"Principal Order" means the Order in Council under which the Court is established, including therein any subsequent or amending Order affecting such jurisdiction.

"Provincial Court" includes, in the case of Siam, a district court, but in the case of Zanzibar does not include a subordinate court.

"His Majesty's Representative" means, in the Ottoman Empire, except Egypt, His Majesty's Ambassador; in Egypt and Zanzibar, His Majesty's Agent and Consul-General; in Siam, China, and Persia, His Majesty's Minister.

"Registrar" means: In the Ottoman Empire, the Registrar of the Supreme Court, and includes, in Egypt, the Registrar of His Majesty's Consular Court of Alexandria; in China and Corea, the Registrar of the Supreme Court; in Siam, the Registrar of the Court for Siam; in Zanzibar, the Assistant Judge, until the Judge, with the approval of the Secretary of State, shall otherwise order; in Persia, the person whom the Consul-General, with the approval of the Secretary of State, may appoint as Registrar.

"Marshal" means the Marshal of the Court, or the person who for the time being is performing the duties of Marshal.

"Judgment" includes a decree, order, and sentence.

"Appeal" means any appeal, rehearing, or review.

Expressions defined in the principal Order shall have the same meanings as are therein respectively assigned to them, unless the context or this Order otherwise require.

4.—(1.) The following Courts shall have Admiralty jurisdiction in civil matters for and within the limits of the principal Orders respectively, and over vessels and persons coming within the same: in the Ottoman dominions the Supreme Court, and during the absence from Egypt of a Judge of the Supreme Court, and subject to any rules of Court, the Provincial Court at Alexandria; in China and Corea, the Supreme Court; in Zanzibar, the Court for Zanzibar; in Siam, the Court for Siam; in Persia, the Court of the Consul-General for Fars and the coasts and islands of the Persian Gulf, whether held by the Consul-General or by the Judicial Assistant.

(2.) Such jurisdiction shall be exercised in accordance with the provisions of this Order, and of the principal Orders and of any rules of Court made under this Order.

(3.) Such jurisdiction shall, subject to the provisions of this Order, be over the like places, persons, matters, and things, when within the limits of the principal Order, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Court may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

5. (4.) Any reference to a Vice-Admiralty Court which is contained in any Act of the Imperial Parliament, or in any law of a British possession applicable within the limits of the principal Order, shall be construed as a reference to the Court or Courts upon which Admiralty jurisdiction is conferred by the principal this Order, and such Court shall have jurisdiction accordingly.

Provided that the as follows:—

(a.) The Court shall not have any greater jurisdiction in relation to the laws and regulations relating to His Majesty's navy at sea, or under any Act providing for the discipline of His Majesty's navy, than may be from time to time conferred on such Court by Order in Council.

(b.) Nothing in this Order shall be deemed to confer upon the Court jurisdiction in any prize cause or in any other matter within "The Naval Prize Act, 1864," or in any matter arising under any of the Acts for the suppression of the Slave Trade.

6. 5. An action under this Order shall be tried by a Judge sitting alone or with assessors appointed in the prescribed manner.

7. 6.—(1.) Where Provincial Courts have been established by the principal Order, the Judge may, by writing under his hand and the seal of the Court, order that the Registry of a Provincial Court within the jurisdiction of the Court be a District Registry of the Court for the purposes of this Order, and the Registrar and Marshal of the Provincial Court shall, within the jurisdiction of such Provincial Court, be the District Registrar and District Marshal of the Court, and may exercise within such jurisdiction all the prescribed functions and perform all the prescribed duties of the Registrar and Marshal of the Court.

(2.) Where an action has been commenced in a District Registry the Judge may order that such action shall be tried in the Provincial Court; but the making of any such Order shall not affect the power of the Judge to remove the said action at any time to the Supreme Court.

8. 7. In places where there is no District Registry, the Judge may direct that for the purposes of any particular matter or action "the powers of a District Registrar and Marshal may be exercised by the Provincial Court."

9. 8. The territorial waters adjacent to the district of a Provincial Court shall for the purposes of this Order be deemed to be within the jurisdiction of such Provincial Court.

10. 9. An appeal from any judgment of the Court, or of a Provincial Court, under this Order shall be subject to the provisions of the principal Order governing appeals in civil cases, and the Court having cognizance of such appeal shall, for the purpose thereof, possess all the jurisdiction conferred upon the Court by the principal Order or by this Order.

11. 10. The Colonial Courts of Admiralty Act, 1890, section 6, shall apply to appeals from the Court to His Majesty in Council as if the Court were a Colonial Court of Admiralty.

12. 11. Rules of Court for the purposes of this Order shall be made by the same authority, and in the same manner and subject to the same approval, as Rules of Court made in virtue of the powers conferred by the principal Order.

13. 12. The following Articles are hereby repealed:—

- Article 106 of "The Ottoman Order in Council, 1899";
- Article 100 of "The China and Corea Order in Council, 1904";
- Article 29 of "The Zanzibar Order in Council, 1906";
- Article 90 of "The Siam Order in Council, 1906";
- Article 29 of "The Persian Coast and Islands Order in Council, 1907";

Provided that—

(1.) Proceedings begun under any of the Articles repealed by this Order, and pending at the time when this Order comes into operation, shall, from and after that time, be regulated by the provisions of this Order, as far as the nature and circumstances of each case admit.

(2.) The Rules of Court and Table of Fees and Costs in force under the repealed Articles shall continue in force until rules are made and have come into force under the provisions of this Order.

14. 13. Nothing in this Order shall affect the criminal jurisdiction of any Court established by the principal Order.

15. 14. This Order shall not operate in Siam except to the extent and in the cases where the provisions of the principal Order are in operation.

And the Right Honourable Sir Edward Grey, Baronet, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein.

[1689]

No. 9.

[May 6, 1910.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 9, 1910.

WITH reference to your report of the 22nd December last, I have the honour, by direction of Secretary Sir Edward Grey, to enclose for your consideration, a revised draft of the Second Peace Conference (Conventions) Bill together with an amended copy of the notes on its clauses.

The draft Bill has been revised by Mr. F. F. Liddell, the Second Parliamentary

[420]

K

Second
Peace
Conference
(Conven-
tions) Bill:
revised
draft.



1910

Counsel, with the view of meeting the points raised in your reports of the 5th August and the 22nd December last. Copies of these reports are enclosed for convenience of reference.

I am to request that you will take the draft Bill into your consideration, and that the Secretary of State may be favoured at your earliest convenience with your opinion as to whether the Bill, as amended, may properly be introduced into Parliament, which it is desired to do early next month.

I have, &c.

F. A. CAMPBELL.

Report.

IN our opinion the draft amended Bill, as altered in red ink and initialled by us,* may properly be introduced into Parliament.

We have, &c.

W. S. ROBSON.

RUFUS D. ISAACS.

Law Officers' Department,
May 6, 1910.

Annex.

Draft of a Bill to make such Amendments in the Law with respect to International Tribunals, Neutrality, and other matters as are necessary to enable certain Conventions to be carried into effect.

WHEREAS at the Second Peace Conference, held at The Hague in the year 1907, various conventions were drawn up, but it is desirable that the same should not be ratified by His Majesty the King until such amendments of the law as are in this Act contained have been made:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1.) A Secretary of State, on the application of any international tribunal constituted in accordance with any treaty or convention to which His Majesty is a party for inquiring into or settling any questions of an international character, shall for the purpose of—

(i.) Enforcing the attendance of witnesses before any such tribunal, wherever sitting, whether within or without His Majesty's dominions, or ~~any members thereof, [and the issue of a commission or request to examine witnesses elsewhere than before the tribunal], before any member of any such tribunal or any other person duly authorised to take evidence in connection with any proceedings before any such tribunal, and~~

(ii.) Compelling the production of documents.

have power to issue orders which shall have the like effect as if the proceedings before the international tribunal were an action in the court and the order were a formal process ~~of issued by the court issued for the like purpose in such an action, and shall be enforceable by the court accordingly, in the due exercise of its jurisdiction, and shall be enforceable by the court accordingly, and disobedience to any such order shall be punishable as contempt of court: provided that—~~

(a.) No person shall be proceeded against or punished for disobedience to any order made under the powers given by this Act unless it shall be made to appear to the court that a reasonable and sufficient sum of money to defray the expenses of going and attending to give evidence and of returning from giving evidence had been tendered to such person at the time when such order was served upon him, and, in any case in which obedience to the order would involve the departure of such person out of the jurisdiction of the court in whose jurisdiction he was at the time when the order was served upon him, that such a further sum was agreed to be paid to him by way of compensation for the loss of time occasioned by his going and attending to give evidence and returning from so doing as to the court may seem, having regard to all the circumstances, to be reasonable and sufficient;

(b.) No person who may be ordered to attend at any place in any foreign State in which he would be liable to be arrested for any act done or omitted by him prior to the service of the order upon him, and who shall upon such service have notified the Secretary of State of his liability to arrest shall be compelled to attend or be punished for not attending at such place unless before the application to the court for the purpose of compelling him to attend or of punishing him for non-attendance a sufficient safe conduct from the foreign State in question shall have been offered to him.

* Alterations in red ink printed in italic.

(2.) A member of any such international tribunal, if not a British subject, shall, whilst residing or travelling in any part of His Majesty's dominions for the purpose of the performance of his duties as such member, enjoy all the privileges which are conferred by law or custom on Ambassadors and public Ministers of foreign States.

(3.) In this section the expression "the court" means in England and Ireland the High Court, in Scotland the Court of Session, and in any other place to which this Act extends a superior court of that place.

(4.) The powers conferred by this section on a Secretary of State may be exercised by him in any place to which this Act extends, and those powers may also be exercised by any of the following officers within their respective jurisdictions; that is to say,—

(i.) In Ireland, by the Lord Lieutenant;

(ii.) In Jersey, by the lieutenant-governor;

(iii.) In Guernsey, Alderney, and Sark, and dependent islands, by the lieutenant-governor;

(iv.) In the Isle of Man, by the lieutenant-governor;

(v.) In India, Canada, and Australia, by the Governor-General, including any person who for the time being has the powers of the Governor-General;

(vi.) In any British possession, by the governor.

2.—(1.) Without prejudice to any other powers exercisable by His Majesty for the purpose of enforcing the obligations of neutrality, His Majesty may by Order in Council—

(a.) Make regulations for preventing or prohibiting, or authorising subject to conditions or restrictions, the supply of fuel or stores to, and the repairing or manning of, ships belonging to any foreign State at war with any other foreign State at peace with His Majesty (in this Act referred to as a friendly State);

(b.) Authorise the arrest and detention of any persons forming part of the crew of any ship belonging to, or of the forces of, any foreign State at war with any friendly State whom His Majesty by virtue of any treaty, convention, or otherwise is under an obligation to intern;

(c.) Prohibit the erection by or on behalf of any foreign State at war with any friendly State of any wireless telegraphic station or any apparatus for the purpose of communicating with their forces on land or sea, and the use of any such station or apparatus established by any such State for purely military purposes before the commencement of the war and not previously opened for the service of public messages;

and the Order may contain such incidental, consequential, and supplemental provisions as may appear to His Majesty to be necessary or proper for the purposes of the Order, and any such Order may be revoked and varied by any subsequent Order in Council.

(2.) If any person contravenes the provisions of any such Order or obstructs any officer in the execution of his duties thereunder he shall be guilty of an offence under "The Foreign Enlistment Act, 1870," and shall be liable to be proceeded against and punished as if he had been guilty of increasing the warlike force of a foreign ship under section 10 of that Act.

(3.) An Order in Council under this section shall, if made before the outbreak of hostilities between two foreign States, come into force on the issue of a proclamation of neutrality by His Majesty in connection with such outbreak, and if made during such hostilities, come into force on the making thereof, and in either case shall, unless previously revoked, continue in force until the issue of a proclamation declaring such hostilities to be at an end, and whilst in force shall have effect as if enacted in this Act:

Provided that the issue of such last-mentioned proclamation shall not affect any legal proceeding commenced or offence committed whilst the Order in Council was still in force, but any such legal proceeding may be continued, and any such offence prosecuted, as if the Order remained in force.

3.—(1.) A British vessel other than a hospital ship, or a boat belonging thereto, shall not be painted white outside with a broad horizontal band of red or green so as to resemble such a ship or boat, and if any such vessel is so painted the owner or master of the vessel shall be liable to a fine not exceeding 100*l.*, and on a certificate from a surveyor of ships or a Board of Trade inspector under "The Merchant Shipping Act, 1894," that a vessel is so painted, the vessel may be detained until the defect has been remedied.

(2.) It shall not be lawful to display on any British ship or boat, other than a hospital ship or a boat belonging thereto, the Geneva flag, that is to say, a flag consisting of a red cross on a white ground, formed by reversing the federal colours of the Swiss Confederation, or any flag so nearly resembling the same as to be calculated to deceive, and if any such flag is displayed on any such vessel, the owner or master of the vessel shall be liable to a fine not exceeding 100*l.*

(3.) For the purposes of this and the next succeeding section the expression "hospital ship" means any ship constructed or adapted for the sole purpose of assisting the sick, wounded, or shipwrecked.

(4.) This section shall have effect and be construed as though it were part of "The Merchant Shipping Act, 1894," as amended by any subsequent enactment.

(5.) This section shall not come into operation until three months after the passing of this Act.

4.—(1.) The master of any British ship having on board any sick, wounded, or shipwrecked men, being combatants who have been rescued during or after a naval engagement in which they have taken part, shall, on demand being made in person by or on behalf of a commissioned officer actually in command of a war-ship of any of the belligerent States, deliver to him all such men.



1910

36

GENERAL.

- (2.) This section shall *not, except* as respects British hospital ships, extend to cases where the officer making the demand is an officer of a war-ship of a State at war with His Majesty.
- (3.) In this section expressions have the same meaning as in "The Merchant Shipping Act, 1894," as amended by any subsequent enactment.
- (5.) This Act shall extend to the whole of His Majesty's dominions.
- (6.) This Act may be cited as "The Second Peace Conference (Conventions) Act, 1910."

W. S. R.
R. D. I.

No. 10.

[File No. 74/10.]

[May 31, 1910.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

*Foreign Office, April 20, 1910.*Consular
Fees
(Lascar
Seamen)
Order in
Council.

I HAVE the honour to transmit to you, by direction of Secretary Sir E. Grey, the accompanying draft of an Order in Council, to be called "The Consular Fees (Amendment) Order in Council, 1910," dealing with the transfer of lascar seamen from foreign ships before British consular officers. The circumstances which have rendered advisable the issue of such an Order in Council, which has been drawn up by this Department in consultation with the India Office and the Board of Trade, are set forth in the letter from the India Office of the 2nd October last, copy of which is also enclosed herewith.

Copies of "The Consular Fees (General) Order in Council, 1906," "The China and Corea (Consular and Marriage Fees) Order in Council, 1906," and "The Japan (Consular and Marriage Fees) Order in Council, 1906," are enclosed for convenience of reference.

I have the honour to request that you will take the draft Order into your consideration, and that you will favour Sir E. Grey with your opinion as to whether it may, in its present form, be laid before the King in Council for His Majesty's approval.

I have, &c.
LOUIS MALLET.*List of Papers.*

Draft Consular Fees Order in Council, 1910.
India Office, October 2, 1910.
Consular Fees Order in Council, 1906.
China and Corea (Consular and Marriage Fees) Order in Council, 1906.
Japan (Consular and Marriage Fees) Order in Council, 1906.

Report.

In our opinion, His Majesty may properly be advised to approve this draft Order in Council as initialled by us.

W. S. ROBSON.
RUFUS D. ISAACS.Law Officers' Department,
May 31, 1910.

Annex.

Consular Fees (Amendment) Order in Council, 1910.

WHEREAS, by "The Consular Salaries and Fees Act, 1891," His Majesty the King is authorised by Order in Council to fix the fees to be taken in respect of any matter or thing done by a consular officer in the execution of his office, and to vary such fees by way of increase or decrease, and to abolish fees and to create new fees;

And whereas it is expedient that the tables of fees, as now fixed by "The Consular Fees (General) Order in Council, 1906," "The China and Corea (Consular and Marriage Fees) Order in Council, 1906," and "The Japan (Consular and Marriage Fees) Order in Council, 1906," should in certain respects be amended;

GENERAL.—JAPAN.

37

Now, therefore, in pursuance of the before-mentioned Act, His Majesty is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as "The Consular Fees (Amendment) Order in Council, 1910."
2. The following fee is hereby established, and shall be deemed to be added to Part II of the table of fees respectively annexed to "The Consular Fees (General) Order in Council, 1906," "The China and Corea (Consular and Marriage Fees) Order in Council, 1906," and "The Japan (Consular and Marriage Fees) Order in Council, 1906":—

"45 A.—For certifying the engagement, or discharge of, or the leaving behind of or for certifying any alteration in the agreement made under section 115 of "The Indian Merchant Shipping Act, 1859," with a lascar seaman by the master of a foreign ship, or for certifying the death of or the desertion of his ship by any such seaman, 2s.

"45 B.—For certifying the transfer of one or more lascar seamen with their agreements from one foreign ship to another foreign ship, per man, 4s.

"Note.—The fee under 45 (B) is inclusive of and not additional to the engagement and discharge fee in (A), and should be divided equally between the two ships concerned. The total maximum fee charged to both ships should not exceed 5l."

3. In all copies of the Orders in Council referred to in the preceding articles which may be printed after the commencement of this Order, the fee directed by this Order to be added to the tables of fees annexed to the said Orders shall be added thereto.

4. This Order shall come into operation on the 1st day of September, 1910, or at such later date as in the case of any particular consular jurisdiction, or part thereof, one of His Majesty's Principal Secretaries of State, by any general or particular instructions, may from time to time direct.

And the Right Honourable Sir Edward Grey, Baronet, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein.

(Initialled) W. S. R.
R. D. I.

JAPAN.

No. 11.

[File No. 15520/10.]

[September 10, 1910.]

Sir Edward Grey to the Lord Chancellor.

SECRETARY SIR E. GREY presents his compliments to the Lord Chancellor, and would be much obliged if his Lordship would favour him with his opinion on the question whether legislation is desirable in connexion with certain marriages of British subjects which have been solemnized in Japan.

In the early part of the year 1908 a petition was brought before the High Court of Justice in England by Charles William Marshall for the dissolution of a marriage between him and Kate Saville Corfield solemnized in Japan on the 24th October, 1899, in an English church in that country, according to the rites and ceremonies of the Church of England.

Evidence was given in the course of the case to the effect that the marriage had not been registered in accordance with the Japanese law, and was therefore not a valid marriage in contemplation of the *lex loci*. Mr. Justice Bargrave Deane therefore held that there was no marriage to dissolve, but gave leave to amend the petition into one for a declaration that the marriage was null and void, on the ground that it had not been registered as required by the law of Japan, and at a later date, after service of the amended petition, he made a decree *nisi* of nullity of marriage accordingly.

The case has not been reported in the "Law Reports," but was reported in the "Times," and a copy of such report is included in the papers (Paper (A)).

Up till the 16th July, 1899, Great Britain enjoyed extra-territorial jurisdiction in Japan, but on that date the treaty of 1894, under which that jurisdiction was surrendered, came into force.

There can be no doubt but that up till the 16th July, 1899, marriages between British subjects solemnized in accordance with the rites of the Church of England

[420]

Marriages
in Japan:
As to
Legislation
to validate
in certain
cases.



were valid because they were solemnized in accordance with English law, but the effect which the disappearance of the old treaty rights would have upon marriages so solemnized was not generally realised by the British community in Japan, and in several cases similar marriages were solemnized after the date when the new treaty came into force. Altogether, some thirty cases have been traced where the parties have been married in English churches in Japan since the 16th July, 1899, without any registration under the Japanese law being subsequently effected.

It appears probable that none of these marriages would be recognised as valid by an English court, and in consequence a feeling of considerable anxiety exists among the parties to these marriages as to their real position (see Papers (B) and (C)).

Sir E. Grey considers it most desirable that steps should be taken to regularize the position of the parties in question, who acted in perfect good faith, but he has been advised that legislation will be required to render these marriages valid in contemplation of English law.

He would be glad if the Lord Chancellor would be so good as to inform him whether his Lordship considers the above view to be correct, and whether he thinks it is desirable that legislation should be promoted with this object.

In the event of the Lord Chancellor being of opinion that legislation is desirable, Sir E. Grey would also be glad of an expression of opinion as to the lines upon which the Bill should be prepared. One possible course would be to specify the names of the parties to the various marriages which have been traced and are known not to have been registered in accordance with Japanese law, and declare them valid according to English law. In this case, it would be necessary to omit the marriage between Mr. Marshall and Miss Corfield which has been annulled, and one of the parties to which has since married another person.

An alternative course would be to follow the precedent of "The Greek Marriages Act, 1884" (copy of which is enclosed) (Paper (D)), and enable the parties to petition the court for a declaration that the marriage was valid.

Sir E. Grey would be grateful for any observations of a general nature which the Lord Chancellor may be good enough to offer.

Foreign Office, August 31, 1910.

List of Papers.

- (A.) Extract from the "Times," March 10, 1908: Marshall v. Marshall, otherwise Corfield.
- (B.) Sir C. MacDonald to Sir E. Grey (Telegraphic), May 5, 1910.
- (C.) Sir C. MacDonald to Sir E. Grey, No. 31, Consular, May 6, 1910.
- (D.) "Greek Marriages Act, 1884" (47 & 48 Vic., cap. 20).

Memorandum for Sir E. Grey as to Japanese Marriages alleged to be invalid for want of Registration in Japan.

THIS kind of case has occurred before, and it is due to the intricacy of the marriage laws.

I certainly think there ought to be legislation to validate these Japanese marriages, omitting, of course, the Marshall marriage, which has been declared null by the Probate and Divorce Court here. I agree with Sir E. Grey's view.

In regard to the lines on which legislation should proceed, I think the Bill ought to contain—

1. A general enactment that any marriage of the kind, solemnized in Japan up to the passing of the Act, in good faith by either party, to which objection may be made for non-registration, may be validated *ab initio*, with a proviso excluding such marriages as have been declared invalid by a competent court, the Marshall case, and cases where one of the parties has subsequently contracted another marriage valid in law.

I say "in good faith by either party," because no one ought to be allowed to take advantage of his or her own fraud. But probably there is no such case.

2. A machinery clause, such as clause 1 of "The Greek Marriages Act, 1884," to enable anyone to procure the validation of his or her marriage under this Act by going to the court.

3. A specific clause scheduling such marriages of the kind as are traced and are known not to be registered. It is not desirable to put these people to the expense and

anxiety of a litigation in England, and these marriages might be declared valid *ab initio* without more ado. Any doubtful cases might be omitted and the parties left to apply to the court under the earlier and general provision, which would also be applicable to cases which may exist, but are not traced.

I strongly deprecate any clause like clause 2 of the Greek Marriages Act. I think it would be most unjust to the children in cases of settled property or titles or even intestacy. Strangers can have no right to exclude a widow or children from their share or patrimony by reason of a technical oversight.

The clauses, especially that defining the kind of marriages (in church, for example, or chapel, or before a consular or other officer) which are to be regularized, must be very carefully drawn. The Greek Marriages Act in this respect would not be a very useful precedent. I will revise them with the draughtsman if Sir E. Grey desires it. I suggest also that Lord Gorell, the greatest living authority on this subject, might be asked his opinion. I should readily defer to his judgment in regard to the marriage law and its intricacies.

Very likely the Foreign Office has already given full instructions to its agents abroad as to how marriages can safely be contracted in foreign countries. If not, I venture to suggest that they might consider this.

LOREBURN.

September 10, 1910.

TURKEY.

No. 12.

[File No. 8285/10]

[March 7, 1910.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 3, 1910.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit herewith the draft of an Order in Council, to be called "The Ottoman Order in Council, 1910," and certain papers connected therewith.

The grounds upon which Sir E. Grey considers it desirable that the Order in Council of 1899 (see Paper A), as amended by the Order of 1905 (Paper B), should be superseded by a new Order are explained in the first paragraph of the Memorandum by Mr. Hurst, Assistant Legal Adviser to this Department (Paper C), accompanying a draft Order prepared by him in September of last year (Paper D).

The last-mentioned draft was referred to the Judge of His Majesty's Supreme Consular Court for the Ottoman dominions, whose observations upon it (Paper E) led to the preparation of the amended draft now submitted to you.

The points in which it is proposed to alter the existing Order in Council, and the reasons for the alterations, will, Sir E. Grey thinks, be found to be sufficiently explained in (1) the Memorandum above referred to (Paper C), and (2) the accompanying further Memorandum dated the 8th September, 1909 (Paper F).

Sir Edward desires, however, to call your special attention to the suggested Article 62 of the final draft, enabling sentence of death pronounced by the Supreme Court to be carried into execution upon the direction to that effect of His Majesty's Ambassador at Constantinople, or, as the case may be, of His Majesty's Agent and Consul-General at Cairo.

The annexed Memorandum (Paper G) shows that the system which now prevails—that of recording judgment of death, and subsequently directing a punishment of imprisonment not exceeding twenty years—was adopted in 1860 as a result of the most careful consideration by Lord John Russell (then Foreign Secretary), Mr. Hammond, and Lord Wodehouse, with the assistance of the Law Officers at the time. The practice then established has continued without alteration down to the present time, and, although in the absence of sufficient reasons to the contrary, it is no doubt desirable to assimilate the punishment provided by the Ottoman Order in Council to

Draft
Ottoman
Order in
Council—
1910.



the punishment provided in the like circumstances by other Orders in Council governing British extra-territorial jurisdiction elsewhere, as well as to that provided in the mother country and in the King's dominions beyond the seas, Sir Edward is not prepared to sanction the alteration of the uninterrupted practice of fifty years except upon a definite recommendation to that effect by the Law Officers of the Crown.

I am to request you to take the draft Order into your consideration, and to favour Sir E. Grey with your opinion as to whether its terms are fit and proper for submission to the King in Council for His Majesty's approval. Sir Edward will also be glad if you will indicate such amendments and modifications (if any) in the draft as you may consider necessary or desirable, and will add any observations of a general nature upon it which you may desire to offer.

I have, &c.
W. LANGLEY.

List of Papers.

- (A.)—Ottoman Order in Council, 1899.
- (B.)—Ottoman Order in Council, 1905.
- (C.)—Memorandum by Mr. Hurst, 1908* (with 30800/08).
- (D.)—Draft Order in Council, prepared in 1908 (with 30800/08).
- (E.)—Judge Cator, No. 19, May 26, 1909 (20466/09).
- (F.)—Memorandum by Mr. Hurst, September 8, 1909 (with 40859/09).
- (G.)—Library Memorandum (with 40859/09).

Report.

In our opinion, the change proposed to be effected by Article 62 of the draft Ottoman Order in Council, 1910, is one which should in the interests of justice be made.

The effect of the existing Ottoman Order in Council is that, if a murder is committed by a British subject in the Ottoman dominions and is tried in the Supreme Court there, he cannot suffer a greater sentence than imprisonment with hard labour for twenty years. If for such a murder a British subject is tried in England under "The Offences against the Person Act, 1861," section 9, or in some other part of the King's dominions under "The Foreign Jurisdiction Act, 1890," section 6, he may suffer the sentence of death. Thus, the sentence actually suffered varies according to the place where the criminal is tried, and may depend upon the question whether there is evidence available for use in England or some other part of the King's dominions. A murder of the worst description might be committed by a British subject in the Ottoman dominions, and yet the witnesses, although they could give evidence in the Supreme Court there, might not be available at a trial elsewhere, and in such a case the offender would escape the extreme penalty.

The present system leaves untouched cases other than murder for which the capital sentence can be inflicted, *e.g.*, treason and piracy.

According to the terms of the existing Order, the capital sentence might be carried out after a trial in the Supreme Court for one of these offences, but could not be carried out in the case of a trial for murder there.

There seems to be no reason why the Orders in Council applicable to China and Corea and to Siam should sanction the execution of the sentence of death pronounced in the British Courts in these countries while the Order in Council applicable to the Ottoman dominions should not sanction a similar proceeding in those dominions. It is worthy of note that since the determination of Lord John Russell to establish the present system, the power of recording a death sentence in cases of murder has been taken from the Courts in England by "The Offences against the Person Act, 1861," section 2.

As regards the place where the death sentence is to be carried into execution, under Article 62 of the draft Order, this is to a great extent an administrative matter; probably it would be better to have it carried out in one of the British possessions specified in Article 65, but to allow the power to remain of having it carried out in the Ottoman dominions. The places in the British possessions where the sentence might be carried out should be determined by directions given by Order in Council under section 7 of "The Foreign Jurisdiction Act, 1890." It is perhaps not desirable that the sentence should be carried out by the Turkish authorities. If Article 62 is

* Last Edition.

retained, and it is thought advisable to resort to the provisions of section 7 of "The Foreign Jurisdiction Act, 1890," Articles 65 and 133 will need some alterations. In Article 65 (1) the words "execution or" should be inserted before "imprisonment" in 1 (7), and in Article 133 the words "or execution" should be inserted after the word "imprisonment" in 1 (2).

As regards the rest of the Order, Article 71 is too wide in its terms, and should be limited by the insertion after the word "control" in line 2 of the words "situate in the Ottoman dominions."

Article 105 raises questions of the greatest difficulty and complexity.

It is difficult to see how it can be reconciled with Article 90, to which it is in part made subject. Moreover, real property in the Ottoman dominions is not within the jurisdiction of the Consular Courts at all, as British subjects can only hold such property in Turkey on condition that in respect of their ownership of such property they are solely amenable to the Ottoman Courts (see the Protocol of the 28th July, 1868). Lastly, it is very doubtful whether there is any power to make such a provision as that contained in the Article, which seems quite outside the terms of "The Foreign Jurisdiction Act, 1890." It would probably be better to omit this Article.

Subject to the foregoing observations, the terms of the draft Order are fit and proper for submission to the King in Council for His Majesty's approval.

W. S. ROBSON.
S. T. EVANS.

Law Officers' Department,
March 7, 1910.

[46347]

No. 13.

[April 15, 1910.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 22, 1910.

BY the direction of the Secretary of State for Foreign Affairs, I have the honour to submit to you papers, as detailed in the enclosed list, relative to a proposed amalgamation of the British and Turkish steam navigation interests on the Tigris and Euphrates Rivers.

In 1861 a British company, entitled the Euphrates and Tigris Steam Navigation Company, was formed for the purposes of trade and of carrying on a service of steam-vessels on the two rivers, under rights conceded by the Turkish Government to already existing British firms. Translations of the firman of 1834 and of the Grand Vizier's letters of 1842, 1846, and 1861, on which the rights of the British company to navigate the rivers are founded, are enclosed in the letter of the company of the 20th December last (Paper E). These rights have, however, been slightly extended since 1861, the company having been authorised to keep three steamers on the rivers instead of two, and to supplement their carrying capacity by towing barges.

Subsequently to 1861 commercial steam-vessels were placed on the rivers by the Turkish Government, and these were for some years previous to the Turkish revolution administered out of the civil list of the ex-Sultan Abdul Hamid II, running in competition with the British company's boats. They are now under the direct control of the Turkish Government.

In the summer of 1909 negotiations were entered into between the Euphrates and Tigris Steam Navigation Company and the Turkish Government with a view to effecting an amalgamation of the British and Turkish navigation interests on the Euphrates and Tigris Rivers. In these negotiations, which are still in progress, the British company have received the general support of His Majesty's Government, and a copy of a draft convention, designed to effect the proposed fusion, will be found among the papers enclosed in this letter (Paper A). This draft convention, though necessarily in an incomplete form, indicates generally the lines on which it is intended to carry out the proposed fusion. It will be seen that a new company is to be formed under Ottoman laws which shall take over the present rights and the steam-boats, docks, &c., belonging both to the existing British company and to the Turkish Government. The new company is to have exclusive rights of steam navigation in the two rivers for a stated number of years and over a certain defined area. There

[420]

M

Euphrates
and Tigris
Navigation
Amalgama-
tion of
British and
Turkish
Companies.



are also stipulations as to the apportionment of shares in the proposed new company into which it is not necessary to enter for the purposes of this reference.

In the course of the negotiations the Turkish Government have required, as a *conditio sine qua non* to their acceptance of the convention, the insertion of an additional article, which is not given in the draft enclosed herein (Paper A), but which in the letter of the Euphrates and Tigris Steam Navigation Company of the 1st December last (Paper D) is quoted as follows:—

“The privileges accorded to Mr. Lynch by the Imperial Government, and enjoyed by the vessels of the Euphrates and Tigris Steam Navigation Company (Limited), which at present conduct the navigation service on the Tigris, shall be completely annulled upon the promulgation of the Imperial firman confirming these presents, and upon the completion of the official transfer to the Société of the rights, privileges, and property to be brought into ‘apport’ by the Ottoman Government in accordance with article 8.

“In confirmation of this limitation the concessionnaire must obtain from Mr. Lynch a declaration to the above effect, confirmed by the English authorities, and hand the same to the Minister of Public Works at the time of the exchange of signatures to the convention, the ‘cahier des charges,’ and the statutes.”

The Euphrates and Tigris Steam Navigation Company state that they are prepared to assent to the inclusion in the proposed convention of the above-quoted article, provided that in the event of the concession being at any time withdrawn by the Turkish Government from the new company they would not be precluded from a return to their existing rights. To ascertain their legal rights in this respect the company have taken the opinion of Mr. W. F. Hamilton, K.C., a copy of which is enclosed in their letter of the 20th December. It is understood that no formal case was submitted to Mr. Hamilton, but that the opinion was written on the statement enclosed in the letter of the 20th December (Paper E), supplemented by verbal explanations. It will be seen that in Mr. Hamilton’s opinion the company would, in the contingency contemplated, be entitled to claim a *restitutio in integrum* or equivalent compensation.

The Euphrates and Tigris Steam Navigation Company have now enquired whether, if the Turkish Government should claim the power to put an end to the proposed new concession on the ground of some alleged or trifling breach of its provisions by the concessionnaire company, or on political or other grounds, His Majesty’s Government would adopt and support the view expressed by Mr. Hamilton.

I am accordingly directed by Secretary Sir Edward Grey to request that you will be so good as to take these papers into your consideration, and to favour him with your opinion—

1. Whether in the event of the withdrawal of the concession by the Turkish Government in the circumstances mentioned above the company would be entitled to demand a revival of the *status quo ante*, and to be restored to the rights and privileges which they at present enjoy, taking into consideration the insertion in the proposed convention of the article quoted above, which formally annuls the rights of the existing British company, and which is required to be confirmed in writing by His Majesty’s Government.

2. If your answer to the preceding question should be in the affirmative, whether the company would be entitled to the support of His Majesty’s Government in presenting such a demand on their behalf to the Turkish Government.

Sir Edward Grey would also be glad to receive any observations of a general character that you may desire to offer on the papers now submitted to you.

I have, &c.

LOUIS MALLET.

List of Papers.

(A.)	Draft convention communicated by Mr. Lynch	..	..	November 5.
(B.)	Mr. Lynch	..	..	.. 4.
(C.)	Euphrates and Tigris Steam Navigation Company	..	..	December 1.
(D.)	..	..	..	.. 1.
(E.)	..	..	..	.. 20.

[13244]

Report.

In our opinion:—

1. Treating the matter as one between two subjects, and to be decided according to English law, there is not any ground on which the Euphrates and Tigris Company could as of right demand the restoration of the *status quo ante* in the event of the withdrawal of the new concession by the Turkish Government. Such a withdrawal would in English law amount to a breach of contract for which full pecuniary compensation would be awarded, but for which, in the absence of fraud or misrepresentation inducing the contract, *restitutio in integrum* would not be awarded. Further, in this case the remedy could only be obtained in the Turkish courts, except in the very unlikely event of the Turkish Government submitting to the jurisdiction of an English court, and even if the Turkish Government did submit, the governing law would be the Turkish law, and it does not appear whether by that law there is any remedy against the Government, or under what circumstances the Government might be entitled, notwithstanding the articles of the concession, to withdraw it. Although there may be no legal or equitable right enforceable in a court of law or equity to restore the *status*, the company might, in the event of the withdrawal of the concession, claim a restoration of the *status quo* by a direct representation to the Turkish Government, on the ground that the company had entered into the contract and had consented to the annulment on the faith of the condition that the concession would be continued for the specified time, and therefore that the withdrawal of the concession was a breach of faith towards them.

2. In the event of such a representation being made the company would be entitled to the support of His Majesty’s Government.

3. His Majesty’s Government, in assenting to the annulment of the existing English rights, should state that the Government does so subject to the condition that the new concession is continued for the prescribed time, and that if the concession is withdrawn before the expiration of the prescribed time, or if the new company is dissolved, the English company (which we understand is to continue in existence throughout the period of the concession) will be restored to the rights and privileges which they enjoyed before the annulment.

W. S. ROBSON.
RUFUS D. ISAACS.

Law Officers’ Department, April 15, 1910.

No. 14.

[File No. 8285/10.]

[October 6, 1910.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 6, 1910.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to inform you that he has carefully considered your letter of the 7th March respecting the draft Ottoman Order in Council, 1910, and more especially the observations contained in that letter relative to the proposed adoption of article 62 of the draft Order providing for the infliction of the death penalty in cases of murder.

The considerations which led to the adoption of the present system, that of recording judgment of death, and subsequently directing a punishment of imprisonment not exceeding twenty years, were fully set out in the Memorandum (Paper G) enclosed in my letter of the 3rd January last, and on reconsideration of the question in the light of your observations, Sir Edward Grey has arrived at the conclusion that, unless it could be clearly shown that grave evil had in practice followed from the system, which has been in force for more than fifty years, it would be inadvisable to change that system, even though it might be theoretically open to some objection on the score of inconsistency.

Sir E. Grey has satisfied himself that no such evil has resulted, and, on the other hand, he is most anxious to avoid the administrative difficulties which might possibly arise when the death penalty had to be inflicted.

He shares to the full the doubts expressed by you as to the desirability of its infliction in the Ottoman dominions by or with the aid of the Turkish authorities, while he would be most unwilling to adopt the alternative of sending a convicted

Revised
draft
Ottoman
Order in
Council,
1910.



British subject to Malta or Gibraltar for the express purpose of being executed, a proceeding which would, he feels sure, be repugnant to a large section of public opinion, and which ought, if possible, to be avoided.

In the circumstances, Sir E. Grey has decided on political grounds to adhere to the system at present in force.

For these reasons the draft Order in Council has been revised by the substitution for Article 62, as it previously stood, of a new Article, which reproduces almost textually Article 46 of the Order 1899, but the Article has been extended to cover other capital cases as well as murder. Article 65 has also been amended, and the alteration you desired in Article 71 has been made. Article 105 has been omitted, and Article 104 has been divided into two Articles, so as to avoid the necessity for renumbering all the succeeding Articles.

I have the honour therefore to return the draft Order as amended, and to request that you will be so good as to reinitial it.

I have, &c.

W. LANGLEY.

Report.

We have perused the revised draft order,* and approve the same as initialled by us.

W. S. ROBSON.
RUFUS D. ISAACS.

Law Officers' Department,
October 6, 1910.

[7723]

No. 14^A

In Registrar-General's letter
of March 1, 1911
[R. 7723/11].

[November 17, 1910.]

Case.

Marriages
of English-
women to
foreigners:
As to
instructions
to Regis-
trars where
validity
abroad is
doubtful.

ON the 1st February, 1908, Margaret May Rich, a British subject, was married to Zarek Bakirgian, a Turkish subject of Armenian race, at the Chorlton Register Office. At the time of giving notice she was warned by the Deputy Superintendent Registrar that the marriage might not be legal in the Ottoman Dominions, and was advised to see that any necessary formalities requisite to secure such legality should be taken.

The marriage had, in fact, no validity in contemplation of Turkish law, because in the Ottoman Empire the various churches enjoy the privilege of deciding questions affecting the personal status of their members, and the Armenian Church does not recognise a civil marriage.

The husband left for Smyrna the day following. After three months' absence he wrote asking his wife to join him, but owing to her not having acquired Turkish nationality by this marriage, as it was not recognised, she was unable to obtain a passport. She received no replies to her letters, and was informed by the partner in her husband's firm at Manchester that her husband's father refused to acknowledge the marriage. Mrs. Bakirgian appealed to His Majesty's Consul-General at Smyrna, who reported to His Majesty's Ambassador at Constantinople that he had ascertained that Bakirgian had betrothed himself to the daughter of M. Boubli, an Armenian lawyer. The Consul-General saw the Armenian Archbishop who, however, refused to intervene on the ground that the civil marriage in England could not be recognised by the Armenian Church. The Armenian Patriarch took the same view. The facts were communicated to M. Boubli and also to his daughter, but in view of the opinions expressed by the Armenian Archbishop and Patriarch they decided to go on with the marriage, which was accordingly solemnised on the 27th January, 1909.

This procedure apparently leaves the English lady in the position of being Zarek Bakirgian's wife in contemplation of English law, and thereby incapacitated from contracting another marriage.

* The Order is contained in the "London Gazette" of November 18, 1910. [Conf. No. 9745*]

The Registrar-General desires, therefore, to be favoured with the opinion and advice of the Law Officers on the following—

Query.

1. Whether the Registrar-General is or is not entitled to instruct the Superintendent Registrar *not* to issue a licence or certificate for the purpose of a marriage in England between a male foreigner and a female British subject, where the Registrar-General has reason to believe that in the country to which the intended husband belongs the latter will be entitled to repudiate the marriage without legal proceedings, and will be free to contract another marriage;

2. Whether the Registrar-General is or is not entitled to instruct the Superintendent Registrar *not* to issue a licence or certificate for the purpose of a marriage in England between a male foreigner and a female British subject, where the Registrar-General has reason to believe that in the country to which the intended husband belongs the latter could, by process of law, obtain a decision declaring the marriage to be null and void and rendering him free to contract another marriage, on the ground that a marriage contracted in England does not fulfil the legal requirements for a valid marriage in the country to which the intended husband belongs or of his personal law.

The Acts dealing with the issue of certificates and licences by Superintendent Registrars are—

- 6 & 7 Will. IV, cap. 85.
- 7 Will. IV and 1 Vict., cap. 22.
- 3 & 4 Vict., cap. 72.
- 19 & 20 Vict., cap. 119.
- 61 & 62 Vict., cap. 58.
- 6 Edw. VII, cap. 40.

(The last-named Act has not yet been put into force as regards section 2.)

Opinion of the Law Officers of the Crown.

1 and 2. We are clearly of opinion that the Registrar-General is not entitled to issue to the Superintendent Registrar instructions such as are referred to in either of these questions.

The Registrar is a ministerial, and not a judicial, officer, and he could only decide that there were good grounds for his refusal to issue a licence or certificate if he took upon himself to make an investigation which is outside his province, and which might indeed often involve most difficult questions of foreign law.

We wish to point out that, if a woman marries a foreigner in England in a form recognised by English law, the circumstance that the law of her foreign husband's domicile does not recognise that form as effective to create a valid marriage does not in the least prevent the marriage from being valid and binding on both parties in England. Nor does the marriage cease to be a valid marriage in England merely because the courts of the foreign husband's domicile subsequently declare that marriage to be null on account of want of formality (*Ogden v. Ogden* (1908), p. 46; *Chetti v. Chetti* (1909), p. 67). Such a declaration, though it may render the husband free to contract another marriage abroad, would not appear to entitle him to marry again in England. Thus, even apart from the ministerial nature of the Registrar's office, this consideration would, we think, make it improper for an official who is solely concerned with English marriages to issue such instructions.

We do not, however, see any objection to the Registrar—in a proper case—warning the bride that the contemplated marriage may not be regarded as legal and binding abroad.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
November 17, 1910.

[420]

N



1910

(46)

UNITED STATES.

[10901]

No. 15.

[May 4, 1910.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 21, 1910.

Mode of
enforcing
claims
against His
Majesty's
Govern-
ment, &c.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith a note from the United States Chargé d'Affaires in London (document (A)) requesting information with regard to the enforcement of claims against His Majesty's Government and municipal corporations in this country.

Sir E. Grey is aware that authoritative declarations of law on this or any other subject can only be made by a competent Court of law sitting judicially for the decision of a question properly brought before it. Nevertheless, he considers it desirable, for political reasons, to give the United States Government as much information as possible in answer to their inquiry.

After consultation with the Lords Commissioners of the Treasury the enclosed Memorandum (document (B)) has been drafted, in concert with Mr. Mellor, the Treasury Solicitor, and Sir E. Grey proposes, with your concurrence, to communicate it to the United States Ambassador, pointing out, however, that the authority of the replies thus given is not conclusive.

He would therefore be obliged if you would favour him with your opinion as to the correctness of the proposed answers. He would at the same time be glad to receive any observations of a more general character which you may be good enough to offer.

I have, &c.

LOUIS MALLET.

List of Papers.

(A.) Mr. Phillips, January 14, 1910 [1697].

(B.) Treasury, March 30, 1910 [3655] (with papers annexed).

Report.

IN our opinion the revised answers as altered and initialled by us are a correct statement of the law, and may properly be communicated to the United States Ambassador.

W. S. ROBSON.
RUFUS D. ISAACSLaw Officers' Department,
May 4, 1910.

Annex.

Revised Answers.

1. A foreign Government is exempt from the jurisdiction of a British Court, but it is entitled to waive its privilege and appear as plaintiff in its own name in any British Court for the purpose of suing a private person who is subject to the jurisdiction of that Court, whether the claim arises out of contract or of tort.

If by "public claim" is meant a claim by a foreign Government against the Government of His Britannic Majesty no such action could be brought directly against the Government of the Crown by a foreign Sovereign. It is conceivable that an action might be brought by a foreign Government against an individual in the Courts of this country which would in reality be an action against the Government, but such a case would not come within the question of principle stated in the question.

2. No special Courts exist in this country for the trial and enforcement of private claims against the Government. Where suit can be instituted for the enforcement of such claims, it can be done in the ordinary Courts.

UNITED STATES.

47

3. A "Petition of Right" lies against the Crown for the recovery of land, or goods, or money in the possession of the Crown, or for compensation in money, if restitution cannot be given. This remedy is also open when a claim arises out of contract, as for goods supplied to the Crown or for the public service.

A petition of right cannot be brought without the fiat of the Crown, signified through the Home Secretary. The granting of the fiat is an act of grace, but in practice it is never refused where a *prima facie* case is made out.

A petition of right does not lie in respect of a claim founded upon tort, the reason being that in theory the Crown can do no wrong.

Claims against the Government arising out of tort must therefore be brought against the individual wrongdoer, but in such cases, if the individual was acting in the discharge of his duty, the usual practice is for the case is usually very frequently to be conducted by the Government authorities, and where the plaintiff is successful, for the damages to be are paid out of public funds.

In several cases proceedings by way of ordinary action against certain Government Departments are allowed by statute. Information with regard to these special cases can be supplied, if desired, but the subject is treated generally in G. S. Robertson's, "Civil Proceedings by and against the Crown."

4. A judgment against the Crown on a petition of right is satisfied in the manner provided in sections 13 and 14 of "The Petitions of Right Act, 1860," of which a copy is enclosed.

There can be little doubt that as regards the ordinary cases of petition of right, *i.e.*, cases not relating to matters personal to the Sovereign, assuming the Treasury to have in hand money voted or made applicable by Parliament for the purpose of satisfying such a judgment, mandamus would lie to them to enforce payment. The question has not, however, ever arisen, because payment is made as a matter of course directly a judgment is obtained against the Crown.

No provision was made in these sections for judgments involving the restoration of lands or other specific hereditaments or chattels because the judgment itself has the effect of "ouster le main" and the Crown is thereby put out of possession.

Where proceedings are taken against a Department in the cases where such a course is possible, the damages awarded are paid out of moneys provided by Parliament for the purpose, but such damages are always paid at once, the money being advanced out of the Civil Contingencies Fund if the Department has Treasury have no other moneys available for the particular purpose.

5. Municipal corporations are, except in so far as they are not liable for non-feasances, liable for injuries to private parties resulting from the negligence or other wrongful act of their employés on the same principle and to the same extent as private employers are responsible for the acts of their servants, but under "The Public Authorities' Protection Act, 1893," actions against such authorities upon the above grounds must be commenced within six months, and certain special rules as to costs are enacted. A copy of this statute is enclosed.

With regard to the police, however, it should be observed that a municipal corporation, even when it appoints and pays them, is not responsible for their negligent acts; and there are other officers whom the Corporation appoints and pays but for whose negligence it is not responsible.

The statement of the law as given above only applies while there is a state of peace between us and the foreign country in question.

There is one rule of procedure which is specially applicable to a foreign Government or a foreign plaintiff, namely, the rule requiring security for costs to be given unless the plaintiff has available assets within the jurisdiction.

In respect of "acts of State" a foreign litigant is in a different position from a subject litigant, and the defence of "act of State" may be raised against the foreigner when it could not be raised if the parties were both subjects.

W. S. R.
R. D. I.



1911

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. May 1912.

CONFIDENTIAL.

(10026.)

3

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1911.



1911

LIST OF REPORTS.

(Arranged according to Countries.)

NOTE.—The Reports not addressed to the Foreign Office are marked *LA*, &c.

BELGIUM.

No.		Date.	SUBJECT.	Page
1	Law Officers ..	Aug. 4, 1911	Draft Extradition Order in Council. Approving ..	1

FRANCE.

2	Law Officers ..	June 2, 1911	Paris Conference on Aerial Navigation. Opinion as to right of State to control vessels navigating the air lying over its territories (including territorial waters). Prefer term "sovereignty" to "property" over the air in describing this right in any Declaration ..	2
---	-----------------	--------------	--	---

GENERAL.

3	Law Officers ..	April 4, 1911	Position in a foreign country of British Colonial subjects belonging to a Colony withdrawing from a Commercial Treaty with that country, as regards personal rights ..	5
4	Law Officers ..	Aug. 16,	Warrants should be issued under Foreign Enlistment Act for detaining "Foam Queen" and "Arizona." They are understood to be fitting out for dispatch to Paraguay in connection with a revolution ..	8

GERMANY.

4A	Law Officers to Colonial Office	Oct. 25, 1911	Proposed Extradition Treaty for offences connected with the diamond industry in South Africa. Legislative means for giving effect to by the Union and in the Protectorates of South Africa ..	10
----	---------------------------------	---------------	---	----

PACIFIC ISLANDS.

4B	Law Officers to Colonial Office	Apr. 18, 1911	Draft joint Regulation relative to native labourers in the New Hebrides. Certain provisions of in conflict with Anglo-French Convention of 1906. Fresh Order in Council necessary if intention is to restrict rights of British subjects under the Convention ..	11
----	---------------------------------	---------------	--	----

PARAGUAY.

5	Law Officers ..	June 12, 1911	Draft Extradition Order in Council to give effect to Treaty with Paraguay. Approving.. ..	14
---	-----------------	---------------	---	----

[433]

LIST OF REPORTS.

iii

RUSSIA.

No.		Date.	SUBJECT.	Page
6	Law Officers ..	Oct. 16, 1911	"Woodburn" fired at by vessels escorting Imperial yacht "Standart." Do not advise arbitration. Chance of tribunal awarding compensation for damage very remote ..	15
7	Law Officers ..	Oct. 25,	Claim to treat Miss Kate Malecka—arrested in Russia on political grounds—as a British subject not sustainable because, though British born, she appears to be also Russian. Her father's naturalisation in United Kingdom had apparently no effect in Russian law ..	19

SIAM.

8	Law Officers ..	Oct. 23, 1911	Anglo-Siamese Extradition Treaty. Approving draft Order in Council to give effect to ..	22
---	-----------------	---------------	---	----

TURKEY.

9	Law Officers ..	Oct. 24, 1911	British subjects in service of His Majesty employed by Turkish Government to supervise construction in this country of war-vessels. They do not violate Foreign Enlistment Act, as the vessels cannot leave this country during actual hostilities. Condition on which British subjects can serve in Turkish naval establishments during the war with Italy ..	22
---	-----------------	---------------	--	----

UNITED STATES.

10	Law Officers ..	May 17, 1911	Reciprocity Treaty between the United States and Canada. Fiscal preference given by the United States to Canada would not be a preference to a foreign country, Canada not being a foreign country within the meaning of Article II of the Treaty of Commerce with the United States of July 3, 1815 ..	24
----	-----------------	--------------	---	----



1911

(iv)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1911.

[The figures refer to the numbers of the pages.]

AER—DIA.

A.

- Aerial Navigation Conference. Sovereignty of State over air-space, 2-5.
 Africa. *See* Union of South Africa.
 Air-space. As to right of property of State over, 4-5.
 " Best term to denote such right of property, 4.
 Arbitration. As to rights of Colonial British subjects of Dominion not adhering to a Treaty, 7.
 " In case of "Woodburn" fired on by Russians, 18-19.
 "Arizona." Detention of under Foreign Enlistment Act, 8.
 Arrest of Miss K. Malecka in Russia. Question of nationality, 19-21.

C.

- Canada. Claim to regard as foreign country in relation to Great Britain, 24-25.
 Civil Rights and National Status. Difference between, 20-21.
 Claim. "Woodburn" fired on by escort of Russian Imperial yacht, 15-19.
 Colombia objects to Colonies withdrawing separately from Commercial Treaties, 5-7.
 Colony not a foreign country. *See* Canada.
 Colonies not adhering to British Commercial Treaties. Rights of persons belonging to, 5-7.
 Commercial Treaties. *See* Treaties.
 Conference on Aerial Navigation. Sovereignty of State over air-space, 2-5.

D.

- Diamond industry, South Africa. Proposed Extradition Treaty for offences against, 10-11.

ENL—GRE.

E.

- Enlistment. *See* Foreign Enlistment.
 Extradition Order in Council. Treaty with Paraguay, 14.
 Extradition Order in Council. Treaty with Siam, 22.
 " Treaty with Belgium 1.
 " Treaty between British and German South Africa of offences connected with South Africa diamond industry, 10-11.
 " Mode of enforcing as regards Union of South Africa and Protectorates, 10-11.

F.

- Foreign Enlistment Act. Detention under of vessels to assist revolt in Paraguay, 8-9.
 " What constitutes expedition within meaning of, 9.
 " *See* Naval service.
 "Foam Queen." Detention of under Foreign Enlistment Act, 8.

G.

- Great Britain. Subjects. Position as of inhabitants of Colonies not adhering to Commercial Treaties, 5-7.
 " Same entitled to their personal rights as, 7.
 " In civil employ of a belligerent, 22-23.
 " Subject. Daughter of Russian naturalised in England claimed as. *See* Nationality.

ALPHABETICAL INDEX.—(Names and Subjects.)

IMP—PRO.

I.

- Imprisonment. *See* also Arrest.
 Innocent passage. Right of. Distinction between territorial waters and superincumbent air-space as regards, 2-5.

J.

- Japan. Position in of inhabitants of Colonies not adhering to Commercial Treaty with, 6.

L.

- Labourers, New Hebrides. Joint Regulations for recruitment of, 11-14.
 " Same conflict with Anglo-French Convention, 13.
 " Can only be enforced on British subjects by Order in Council, 13-14.

M.

- Malecka, Miss Kate, 19-21.
 Mendl, Mr. C. F., 8-9.

N.

- Nationality in Russia of person born in England of naturalised father, 19-21.
 Naval service of Turkey in civil capacity. British subjects in during war with Italy, 22-23.
 Neutrality. Infingement of. *See* Foreign Enlistment Act.
 New Hebrides. *See* Labourers.

O.

- Order in Council. *See* Extradition.
 " Necessary to enforce Regulations respecting native labourers in the New Hebrides, 13-14.

P.

- Paraguay. Vessels fitting out to assist rebels, 8-9.
 Protectorates. Mode of applying Extradition Treaties to, 11.

REC—WOO.

R.

- Reciprocity Agreement. Canada and United States. Claim under to regard Canada as a separate foreign country, 24-25.
 Regulations conflicting with Treaty as to labourers in New Hebrides, 11-14.
 Russia. Arrest of Miss K. Malecka in. Claim to regard her as Russian, 19-21.

S.

- "Salop." Dispatched in violation of Foreign Enlistment Act, 8.
 Secretan, Mr., 8.

T.

- Territorial waters. Right to sovereignty over air-space lying over, 2-5.
 " *See* also Innocent passage.
 Treaties (Commercial). Position of Colonial subjects of non-adhering Colonies, 5-7.
 Treaty with Belgium. Extradition Order in Council to enforce, 1.
 " *See* Extradition also.
 " With Paraguay. Extradition Order in Council, 14.
 " With Siam. Extradition Order in Council, 22.
 " Great Britain and United States of 1815. As to Canada being a foreign country within meaning of, 24-25.
 " Labourers in New Hebrides. *See* Labourers.

U.

- Union of South Africa. Mode of applying Extradition Treaties to, 11.

V.

- Vessel "Woodburn" fired on by escort of Russian Imperial yacht, 15-19.
 Vessels for Paraguay to assist rebels. Detention of under Foreign Enlistment Act, 8-9.
 " building for belligerents. No violation of Foreign Enlistment Act, 23.

W.

- War Italo-Turkish. Questions of neutrality. *See* Naval service.
 "Woodburn" fired on by escort of Imperial Russian yacht, 15-19.



1911

Printed for the use of the Foreign Office. May 1912.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1911.

BELGIUM.

No. 1.

[24542]

[File No. 596/11.]

[August 4, 1911.]

Foreign Office to the Law Officers of the Crown.

Foreign Office, June 6, 1911.

Gentlemen,

I HAVE the honour, by direction of the Secretary of State, to enclose the draft of an Order in Council for giving effect to a Supplementary Convention between the United Kingdom and Belgium, amending Article 6 of the Treaty of Extradition of the 29th October, 1901. The Supplementary Convention in question was signed at London on the 3rd March, 1911, and the ratifications exchanged at London on the 10th ultimo.

Draft Order
in Council.
Supple-
mentary
Extradition
Treaty with
Belgium

The various departments of His Majesty's Government, interested in the matter have concurred in the terms of the draft Order in Council, and I am now to enquire whether, in your opinion, it may properly be submitted to the King in Council for His Majesty's approval.

I have, &c.

F. A. CAMPBELL

[30804]

Report.

The draft Order may, in our opinion, properly be submitted to the King for the approval of His Majesty in Council.*

RUFUS D. ISAACS.
JOHN SIMON.

*Law Officers' Department,
August 4, 1911.*

* The Law Officers approved the Order in Council without introducing any alterations. The text is contained in the "London Gazette" of the 15th August, 1911. [Confidential No. 9891*.]



(2)

FRANCE.

No. 2.

[June 2, 1911.]

Foreign Office to the Law Officers of the Crown.

[5062]

[File 41/11]

Gentlemen,

*Foreign Office, February 16, 1911.*Conference
on Aerial
Navigation:
Sovereignty
of
State over
the air-
space.

I HAVE the honour, by direction of Secretary Sir E. Grey, to enclose, for your consideration, the papers noted in the accompanying list respecting the international conference on aerial navigation.

This conference met at Paris on the 18th May last, and was, on the motion of the British delegates, adjourned on the following 29th June to enable the Governments concerned to give full consideration to certain important questions on which a strong divergence of opinion had been found to exist. It has not yet reassembled, but it is anticipated that its meetings will recommence at an early date. A copy of the draft convention which was drawn up *ad referendum* at the conference is enclosed (Paper A).

As will be seen from the accompanying copy of correspondence with His Majesty's Ambassador at Paris (Papers B and C), it has been suggested that some form of preliminary declaration should be proposed to the Powers to the effect that the air superincumbent upon the territories of each State is as absolutely the property of such State as is the subjacent earth. Such a declaration would strengthen the hands of His Majesty's Government in securing the general recognition of the principle that each State should have liberty of action in regard to the control of foreign air-ships entering the air above its territory and territorial waters. Doubts have, however, been expressed as to the validity of a claim on the part of the State as *ultimus heres* (or of the Sovereign as Lord Paramount) in contradistinction or in addition to the claim of the private owner of the immediately subjacent land to "property" in the air, and the opinion has been advanced that such a claim should be confined to "sovereignty," in which case the proposed declaration would be to the effect that "the air superincumbent upon the territories of each State is as absolutely under the sovereignty of such State as is the subjacent earth."

There would appear to be a theoretical difficulty in conceding to the State a right of "property" in the air-space, except over land owned by the State. Of course it might be possible to invoke the dogma of English land law, based on feudal conceptions, that the King owns every bit of English soil, each tenant having only an estate in the land. It might then be held that the King owns the entire air-space above the land, the tenant's estate in the land, including also the air-space above it. Upon this view it might thus be held that the State has the "property" in the air superincumbent upon the land. At the same time, it must be recognised that this doctrine of the King's ownership of land is peculiar to English law and systems of law derived from it. Most systems of law concede to individuals full rights of ownership; and, indeed, in present-day English law the tenant in fee-simple seems to have, for all practical purposes, the true proprietary right in the land. There is some difficulty in holding that both the private landowner and the State have rights of "property" in the same piece of land and in the same air-space above that land. The State, it is true, owns privately—that is, on principles of the private law—certain tracts or pieces of land; and this right of property in these pieces of realty would clearly include the right of property in the air-space above them. As regards such pieces of land and the air-space above them, the State would clearly seem to have, on the sovereignty view, both the private law right of property and the public law right of sovereign dominion. Apart from such pieces of realty thus actually owned by the State, it seems sound to hold that the landowner, whoever he may be, owns the air-space above his land, but that the State has the same full right of sovereign dominion in that air-space which it has as regards that land itself; the landowner having the private law right, and the State the public law right.

There is further the question of the "right of innocent passage." No doubt publicists are not unanimous in opinion as to the legal character of the State's right in

FRANCE.

3

territorial waters, more especially the 3-mile strip, some—and perhaps the majority—maintaining that the State has sovereign dominions, limited by the right of innocent passage for foreign merchant-vessels, while others contend that the State's rights are less than even this limited sovereignty, amounting in reality to rights of "conservation" only, rights enabling the State to take measures for its own protection and welfare.

The question, therefore, naturally arises as to whether the adoption of the view that the State has sovereignty in the air-space above its territory and territorial waters involves the limitation upon that sovereignty by a right of innocent passage for foreign merchant air-vessels.

It is, perhaps, best to distinguish (1) the air-space above territorial waters (including the 3-mile strip) from (2) the air-space above the territory (land) itself.

State sovereignty limited by right of innocent passage in territorial waters might seem at first sight to involve naturally and necessarily the admission of State sovereignty limited by right of innocent passage for foreign merchant air-vessels in the air-space above the territorial waters. But a distinction can be drawn between territorial waters (especially the 3-mile strip) and the air-space above them. As far as the 3-mile strip of coastal waters is concerned, the coast-line itself acts as a natural and effective barrier to the passage of sea vessels from the strip into the territory itself (except, of course, where some water-way opens into the territory); while the imaginary air-line rising everywhere just above the coast-line *usque ad caelum* cannot in the nature of things act as a natural and effective barrier to the passage of air-vessels from the 3-mile perpendicular strip of air-space into the air-space above the territory (land) itself. It would be very difficult—and often indeed quite impossible—to prevent the entry into the air-space above the territory itself of air-vessels enjoying a right of innocent passage in the 3-mile strip of air-space. Greater inconvenience and greater danger to the territorial State would therefore seem to result from the admission of a right of innocent passage through the 3-mile strip of air-space than now result from the admission of a right of innocent passage through the subjacent 3-mile strip of water. These natural differences between the air-strip and the water-strip, together with the necessary consequences, would seem sufficiently great to prevent the adoption of the view that the right of innocent passage now existing in the one case must, on analogy, be conceded in the other case also. In other words, the admission of a State sovereignty, limited by right of innocent passage, in the water-strip does not force one to admit that a State sovereignty in the air-strip must likewise be limited by a right of innocent passage.

The argument seems even stronger as regards the air-space over the State's territory itself. The 3-mile strip of coastal waters is extremely useful to the State in maintaining its welfare and safety, but is not, perhaps, after all, strictly speaking, absolutely essential to State existence (note, for instance, inland States); while the air-space above the territory of all States is in reality absolutely essential to State existence itself. The existence of a right of innocent passage in the 3-mile strip of water seems to be of far less significance to the State than the existence of such a right in the air-space would be. While the State may therefore safely admit that its sovereign dominion over the water-strip is thus limited by the right of innocent passage, no State could safely admit that even a right of innocent passage should limit its sovereign dominion in the air-space directly over its own territory. State welfare and even existence demand unlimited sovereignty in the air-space just as they have demanded unlimited sovereignty over the territory itself; the land and the superincumbent column of air being far more intimately connected with and related to each other than is the case with the land and the adjacent strip of coastal water.

The analogies of the high sea and the 3-mile strip of coastal waters do not therefore on the whole appear to be safe ones to follow. It seems consistent with legal principle to maintain that, while the State's sovereignty over territorial waters may well be limited by right of innocent passage, yet no such limitation can exist as regards the State's sovereign dominion in (1) the air-space over territorial waters and in (2) the air-space over the State's territory itself. Admitting full sovereignty, each State can then grant such favours and subject them to such suitable limitations and conditions as it sees fit. Foreign merchant- or other air-vessels might be granted revocable licences to fly in the State's air-space which is subject to the State's full sovereign dominion.

As indicated earlier, there seems to be theoretical objections to maintaining a doctrine of the State's "property" in the air-space (except in the air-space over land in fact owned by the State); and it is open to question whether more could be



FRANCE.

4 claimed for the State by adopting the phraseology "property" or even "full property," since what is really meant after all is the public law right of "sovereignty" or "full sovereignty." It may, perhaps, be safer to assert the State's "full sovereignty" or "unlimited sovereignty" in the entire air-space over State territory and territorial waters; for then the "right of innocent passage" could not be read in by interpretation, as it might be conceivably if the words "sovereignty" or "sovereign dominion" were allowed to stand alone.

Another course which has been suggested to Sir E. Grey as perhaps preferable, and upon which he would be glad to have the benefit of your opinion, is to avoid the use of either of the words "sovereignty" or "property," and to employ the term "jurisdiction" instead. Jurisdiction is no doubt, in one sense, one of the attributes of sovereignty, and it would therefore seem at first sight as if the arguments against the use of the word "sovereignty" must necessarily all apply to the use of the word "jurisdiction," but as the object in view is to assert the unfettered right of the Sovereign to legislate (subject, of course, to any treaties in force now or in the future) on the subject of air-vessels using the superincumbent air-space, it has been suggested that this right would be adequately asserted by a declaration to the effect that the superincumbent air-space above the territory and the territorial waters of a State is, and remains, subject to its exclusive jurisdiction.

The question whether the words "property," "sovereignty," "jurisdiction," or any one or more, and if so which, of them should be used in this connexion will also affect the draft suggestion for a possible Bill (Paper D) for the purpose of regulating aerial navigation in this country, in which it will no doubt be held desirable to introduce a preamble in similar terms to that proposed for the convention.

A letter from the Home Office (Paper E) is also enclosed, while the general attitude adopted by His Majesty's Government in regard to the draft convention may be seen from the accompanying despatch to the British delegates to the international conference (Paper F).

I am accordingly to request that you will be good enough to take the above observations and the accompanying papers into your consideration, and that you will favour Sir E. Grey at your early convenience with your opinion as to—

1. Whether it is possible to claim for the State (1) as matter of public law, and (2) as matter of English municipal law (or "droit interne") the right of "property" over the air superincumbent upon its territories;

2. Whether, in any event, the term "sovereignty" used in this connexion would not confer on the State that absolute control over vessels navigating the air above its territories which His Majesty's Government consider to be indispensable.

3. What term, or terms, it would on the whole be most desirable and advantageous to employ in order to secure such absolute and undisputed control.

I am at the same time to request that you will be good enough to favour Sir E. Grey with any observations of a general nature which you may have to offer on the subject.

I have, &c.
LOUIS MALLET.

List of Papers.

- (A.)—Draft Convention on Aerial Navigation.
(B.)—Sir E. Grey to Sir F. Bertie, No. 246, Commercial, of December 1, 1910.
(C.)—Sir F. Bertie to Sir E. Grey, No. 368, Commercial, of December 4, 1910.
(D.)—Draft Bill on Aerial Navigation.
(E.)—Home Office to Foreign Office, January 11, 1911.
(F.)—Sir E. Grey to British Delegates to the International Conference on Aerial Navigation, November 3, 1910.

[21617]

Report.

In our opinion, the term "full and absolute sovereignty" would be the most desirable and advantageous term to employ in order to secure for the State absolute and undisputed control over vessels navigating the air above its territories. We prefer this phrase to the use of the word "property" when considering the rights of the State as a matter of international law; though the result is really the same, whichever expression is used.

FRANCE.—GENERAL.

As a matter of English municipal law the principle applies *cujus est solum ejus est usque ad cælum*, so that, theoretically, the rights of the private owner are as great in respect of the air-space above his land as over the surface of the land itself.

As regards the air-space superincumbent upon territorial waters, it is to be observed that the degree of control necessary to secure the safety of the State may well be greater than that required in reference to the use of the territorial waters themselves. And since the principle of State sovereignty involves the right of the State in relation to its own territories to exercise such powers as are necessary for the defence and security of its dominions, we think that jurisdiction over the air immediately surrounding the coasts, and for such a distance outwards as is necessary for the defence and security of the State, ought to be not less complete than that exercisable over the air-space which is actually above the territory of the State.

We have, &c.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
June 2, 1911.

GENERAL.

No. 3.

[7336]

[File 2904/11.]

[April 4, 1911.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 3, 1911.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith the papers, as noted in the accompanying list, respecting the position of British subjects who are inhabitants of a self-governing Dominion in the event of that Dominion withdrawing from or declining to adhere to a Commercial Treaty concluded by His Majesty's Government with a foreign Power.

2. In negotiating Commercial Conventions, it is now the custom of His Majesty's Government to provide in the Convention not only for the separate adherence, but also for the separate withdrawal of the different self-governing Dominions, on due notice being given. This is shown in the enclosed copy of the draft model Treaty (Paper A), on which all Commercial Conventions at present concluded between the United Kingdom and foreign Powers are, as far as possible, based. It will be seen that the privileges secured, such as the right to acquire property, or exemption from special taxation or from military service, are secured to "the subjects of each of the Contracting Parties," but that, by Article 20, "the stipulations of the present Treaty shall not be applicable to any of His Majesty's Colonies, &c., unless notice of adhesion shall have been given," most-favoured-nation treatment of colonial produce being however secured, so long as it is reciprocal. As, however, the Dominions are still bound by a number of older Conventions in which no provision is made for their separate withdrawal, His Majesty's Government have recently concluded with various countries special Agreements for the purpose of obtaining for the Dominions so bound this right of separate withdrawal.

3. On the Colombian Government, however, being approached with a view to enabling the Dominions to withdraw, if they so desired, from the Commercial Convention of 1866 between Great Britain and Colombia (Paper B), which also secured various rights to the subjects and citizens of the Contracting Parties, but contains no provision for the withdrawal of Colonies, the Colombian Government raised objections on the ground that, in the event of a self-governing Dominion withdrawing from the Treaty, the inhabitants thereof would still continue, in their capacity as British subjects, to enjoy the personal rights granted by the Treaty to British subjects generally, whereas Colombian citizens would enjoy no corresponding privileges in the territory of the non-adhering Dominion. Copy of the note from the Colombian Minister for Foreign Affairs setting forth these considerations is annexed hereto. (Paper C.)

4. The immediate objection of the Colombian Government might possibly have been met by His Majesty's Government making certain concessions which the

Position of
Colonial
British
subjects as
regards
Commercial
Treaties.



Colombian Government appeared, from the Minister's note, to be anxious to obtain in the matter of the most-favoured-nation treatment provided for in the Convention, or else by arranging for the self-governing Dominions to withdraw in this and all future cases from those clauses only of Commercial Treaties which were commercial in character, as distinct from those which were political in character. The division would, however, in any case have presented difficulties, and it has been argued that it would not in fact be possible. However this may be, any such solution would have still left the status of colonial British subjects vague and unsettled in the event of the point being raised again at any time, as it is quite possible it will be, in the case of any of the Commercial Treaties concluded by His Majesty's Government to which the self-governing Dominions, or some of them, are not adherents. His Majesty's Government have decided, therefore, that it is advisable to come to a clear decision as regards the main question before making any further progress with the Colombian Treaty.

5. In 1899 your then predecessors in office were consulted as regards the status in Japan of British subjects who belonged to a self-governing Dominion which had not adhered to the Commercial Treaty concluded by Her Majesty's Government in 1894 with that country. The Treaty with Japan refers to the rights of the "subjects of the High Contracting Parties," and provides (Article XIX) that the stipulation of the Treaty shall not apply to India and certain Colonies except on notice of adhesion. The Law Officers reported (see Paper D) that, in their opinion, Article XIX had not the effect of limiting the rights of British subjects connected with non-adhering Colonies or possessions, and that the question who are British subjects for the purpose of the Treaty is one of British law. No test, they said, could be suggested for discrimination against persons connected with non-adhering Colonies, and Article XIX merely provided that the privileges and obligations of the Treaty should not ensure for the benefit of non-adhering Colonies—*e.g.*, the produce of a non-adhering Colony would not be entitled to the Tariff prescribed by the Treaty. The discrimination of the Article was in fact, in their view, "territorial merely, and not personal," and they accordingly held that "all persons who by British law are recognised as possessing the rights of British citizenship all over the world are entitled to the benefits of its (*i.e.*, the Commercial Treaty's) stipulations, and this test includes the inhabitants, being British subjects, of all Colonies and dependencies, whether they adhere to the Treaty or not." This opinion they confirmed in a subsequent Report furnished in the same year on a kindred point, arising out of the International Convention for the Protection of Industrial Property, to which certain Dominions had not adhered. This subsequent Report is likewise enclosed (Paper E), as well as the Circular despatch (Paper F), in which the substance of both these Reports was communicated to the Colonies.

6. It must be borne in mind, however, that the circumstances attending the conclusion of the Commercial Convention with Japan were somewhat exceptional. Great Britain undertook to renounce those rights of extra-territoriality which British subjects had till then enjoyed in Japan in exchange for the privileges accorded in the Convention, so that the inhabitants of a non-adhering Dominion were in danger, on being deprived of the rights of extra-territoriality which they had so far enjoyed, of not being able to benefit by the fresh privileges which were manifestly intended as substitutes for those which were resigned. It is possible, therefore, that the peculiar circumstances of the case may perhaps have, to a certain extent, influenced your predecessors in arriving at their decision in the case of Japan.

7. However that may be, neither Japan nor any other Power has, so far, advanced the contention that it is possible to draw a distinction between colonial British subjects and the inhabitants of the United Kingdom, though this may be possibly because no case involving the question has ever occurred. On the other hand, it has been pointed out to Sir E. Grey by the Secretary of State for the Colonies that the admission of this distinction would entail considerable practical difficulties in certain cases—*e.g.*, if His Majesty's Government were compelled to differentiate between a Canadian and an Englishman both appealing in respect of the same grievance, or again, in the case of persons born in this country who emigrated to Australia, or in the case of Australians settled in this country. In neither of the latter cases would the change of domicile (in itself often a fact of considerable difficulty of proof) have effected any alteration in their status in the eyes of English law, but some test would clearly have to be devised whereby the moment of their change of status could be determined. I am to enclose herewith copy of a Memorandum drawn up in the Colonial Office which explains in detail the views held by the Secretary of State for the Colonies (Paper G).

8. In spite of the considerations therein set forth, Sir E. Grey is uncertain whether the decision taken in 1899 with regard to the Treaty with Japan should at the present

time be applied generally in the case of all Commercial Treaties where no exceptional circumstances, such as those existing in the case of Japan, have to be taken into account.

9. He will be glad, therefore, to be informed whether you consider that an International Court of Arbitration would be likely to approve the contention that all persons who by British law are recognised as possessing the rights of British citizenship all over the world are entitled to the benefits accorded to British subjects *eo nomine* in Commercial Conventions concluded by His Majesty's Government, and that this test includes the inhabitants—being British subjects—of each of the Dominions and dependencies, whether such dominion or dependency has adhered to the Convention or not. If, on the other hand, you consider that this contention cannot be maintained, I am to request that you will state what, in your opinion, constitutes an inhabitant of a self-governing Dominion of the Empire, for the purposes of excluding him from rights and privileges accorded to British subjects by a Treaty to which the Dominion to which he belongs is not a party. Sir E. Grey will at the same time be glad to be furnished with any further observations which you may be good enough to offer on the subject generally.

I have, &c.
LOUIS MALLET.

List of Papers [in File 2904/11].

- (A.) Draft of model Commercial Treaty. (Confidential No. 9378.)
- (B.) Treaty of Friendship, Commerce, and Navigation, between Great Britain and Colombia of February 16, 1866 [Treaty Library No. 495].
- (C.) Note from the Colombian Minister for Foreign Affairs to His Majesty's Minister, dated March 26, 1908.
- (D.) Foreign Office to the Law Officers and their Report in reply, dated January 23, 1899.
- (E.) Foreign Office to the Law Officers and their Report in reply, dated October 13, 1899.
- (F.) Circular to Colonies, dated December 2, 1899.
- (G.) Colonial Office Memorandum, January 1911.

[12454]

Report.

That every individual who owes personal allegiance to the British Crown is a British subject, wherever he resides or whatever may be his domicile. His international status as a British subject cannot be affected by the adhesion, or non-adhesion, to any Treaty of the Dominion or dependency which he inhabits. All such persons are, therefore, entitled to the benefits accorded to British subjects *eo nomine* in any Treaty or Convention concluded by His Majesty's Government, unless the particular Treaty or Convention indicates an intention that they, or any class of them, should be excluded from the benefits conferred by it upon British subjects at large. The question whether in the case of any given Treaty or Convention such an intention is indicated must, of course, depend upon the construction to be placed upon the particular document.

In the case of a Treaty in the form of the draft model (Paper A), the Treaty—apart from Articles 20 and 21—includes within its scope all British subjects and all British territory. The only exceptions to the generality of the Treaty are those contained in Article 20 (for Article 21 is merely complementary to Article 20, and goes no further in principle). Article 20, whilst it excepts from the operation of the Treaty certain portions of British territory and the goods produced or manufactured therein, does not except any persons, and so leaves the Treaty applicable to all British subjects without distinction.

The result is that, in our opinion, an International Court of Arbitration, in construing a Treaty in the form of the draft model, would hold that all subjects of the British Crown, including British subjects inhabiting a non-adhering Dominion or dependency, are entitled to all the benefits accorded to British subjects *eo nomine* in such a Treaty.

We have, &c.
RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department, Royal Courts
of Justice, April 4, 1911.



1911

8

GENERAL.

[32274]

No. 4.

[File 30492/11.]

[August 16, 1911.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

*Foreign Office, August 10, 1911.*Detention
of "Foam
Queen" and
"Arizona"
under
Foreign
Enlistment
Act.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to enclose the papers noted in the accompanying list, which involve the consideration of whether two vessels, one the "Foam Queen," at present lying at Maxim's wharf, Erith, and another, the "Arizona," lying at Barrow, may be deemed to be in course of fitting out to proceed against the dominions of a friendly State within the meaning of section 11 of "The Foreign Enlistment Act, 1870."

On the 1st instant the Portuguese Minister at this Court left at this Office a communication he had received from a correspondent at Lewisham, and the Commissioners of His Majesty's Customs were at once asked to enquire into and report upon the matter (Paper A).

The report of their water-guard inspector (Paper B) disclosed certain suspicious circumstances with regard to the "Foam Queen," and the Commissioners were asked to keep a watch on her movements, and to inform Sir E. Grey of any fresh developments that might come to their knowledge.

On the afternoon of the 5th instant the Customs telephoned to this department the terms of two messages they had received from their collector at Barrow (Papers C and D), and desired to be advised as to the action which should, in the opinion of Sir E. Grey, be taken with respect to the "Arizona." As the matter was pressing and the circumstances were distinctly suspicious, the telegram (Paper E) was sent to the Commissioners of Customs, and their reply (Paper F) was received the same evening.

On the afternoon of the 8th instant Sir Nathaniel Highmore, the Solicitor of His Majesty's Customs, called at this Office and discussed the matter with the head of the department which deals with this correspondence and with the assistant legal adviser. He also left with them a copy of a letter (Paper C) which he had that day received from a Mr. Secretan, the managing director of the company which now owns both the "Arizona" and the "Foam Queen," and it was then made manifest, for the first time, that both these vessels were being prepared to proceed to Paraguay, and that a Mr. C. F. Mendl, who is a director of the Paraguay Central Railway Company, and has other interests in that republic, was acting as the representative of certain persons in Paraguay, who are advancing a sum of some 120,000*l.* to some Paraguayan citizens, for the purchase and dispatch of these two vessels, and of another named the "Salop," which had already cleared from the port of London with stores and provisions for the same destination.

It seemed desirable in these circumstances to hear Mr. Mendl's own account of the precise object of this enterprise, and he was accordingly invited to attend at this Office, which he did yesterday.

He explained that things were in a very unsettled state in the republic, that revolutions were easily organised, and that, in short, there was no stable Government, and that neither life nor property was safe. The persons who were financing the dispatch of these vessels were people whose commercial interests rendered it of paramount importance to them that peace should be introduced and preserved, and who believed that the presence of these ships would ensure the observance of law and order.

They were confident that the more respectable elements of the present and former Governments would combine on their arrival to oust the less respectable and would together form a stable Government, and that a more satisfactory state of things would then be established and maintained. The ships would be handed over to those parties on their arrival, and would become their property.

There is no reason to doubt that Mr. Mendl's statements were made in perfectly good faith, and that so far as he is concerned credence may be attached to them.

The latest information in the possession of His Majesty's Government with regard to the position in Paraguay is contained in a telegram from His Majesty's chargé d'affaires at Buenos Ayres, dated the 13th ultimo, in which he states that Colonel Jara has been compelled to resign, and has left the country. New provisional President has been elected. All passed quietly, and requirements of constitution were observed.

GENERAL.

9

In reply to a question as to whether the present provisional President had any knowledge of the proposed dispatch of these vessels, Mr. Mendl replied that probably he had not, and that it would in no wise further matters, but the reverse, were His Majesty's Government to ask if he entertained any objection to their going out.

Such briefly are the facts of the case which are within the knowledge of this Office.

I am to enclose a book which contains a full report of the case of Regina v. Sandoval, Baird, and Call, in which the interpretation of section 11 of "The Foreign Enlistment Act of 1870" was very fully argued and discussed, and it was held by the late Justice A. L. Sraith and Mr. Justice Wills on pp. 86 and 90 that a full equipment, embracing both men and munitions of war, was not necessary to constitute an expedition within the meaning of section 11 of the Foreign Enlistment Act, but that any act which contributed in any material degree towards setting on foot an expedition fitted for warlike purposes, if done in this country, constituted an infraction of the section in question. No case appears to have arisen as to the precise meaning of the words "proceed against the dominions of a friendly State" in that section.

I am to request that you will take these papers into your consideration, and favour Sir Edward Grey at your earliest convenience with your opinion as to whether under all the circumstances warrants should be issued for the purpose of seizing and detaining the ships under section 23 of the Foreign Enlistment Act, and, if so, whether the terms of the draft warrants enclosed are fit and proper for the purpose.

I have, &c.

LOUIS MALLET.

List of Papers.

(A.) Memorandum communicated by Portuguese Minister	August 1, 1911.
Letter to Customs	" 2, "
(B.) Customs	" 3, "
(C.) Collector of Customs at Barrow to Secretary of Customs (Telegraphic)	" 5, "
(D.) Ditto	" 5, "
(E.) To Secretary of His Majesty's Customs. (Telegraphic)	" 5, "
(F.) Reply	" 5, "
(G.) Letter from Mr. Secretan to the Solicitor of His Majesty's Customs	" 8, "
(H.) "Foreign Enlistment Act, 1870."	
(I.) Draft warrants (2).	
(J.) G. J. Wheeler's Foreign Enlistment Acts, with notes on cases.	

R. port.

[32383]

[File 30492/11.]

In our opinion, warrants should be issued for the purpose of seizing and detaining the ships under section 23 of the Foreign Enlistment Act.

The terms of the draft warrants submitted to us are in order, and fit and proper for the purpose.

We have, &c.

RUFUS D. ISAACS.
JOHN SIMON.

[433]

D



(10)

GERMANY.

[46772]

No. 4^a.[In Colonial Office,
November 22, 1911.]

[File 554/11.]

[October 25, 1911.]

*Law Officers of the Crown to Colonial Office.—(Received at Foreign Office, November 23.)**Royal Courts of Justice,**October 25, 1911.*

Sir,

Extradition
for offences
respecting
diamond
industry in
Africa.

WE were honoured with your commands signified to us in Sir H. W. Just's letter of the 9th May last, stating that he was directed by you to forward to us, for our consideration, correspondence, as noted in the margin,* relative to a proposed supplementary extradition treaty between this country and Germany for the reciprocal surrender, as between British and German territories in South Africa, of persons guilty of offences in connection with the diamond industry.

That it would be observed that, as regards Southern Rhodesia and the South African Protectorates, no difficulty was apprehended in giving effect to the proposed extradition arrangement.

That the procedure to be adopted in respect of the Union of South Africa was, however, not entirely free from doubt, and that you desired to have our advice on the matter before approaching the Union Government on the subject.

That, as at present advised, you were inclined to the view, expressed in the Home Office letter of the 12th April, 1911, that the most suitable method of dealing with the situation would be (if the Union Government desired the conclusion of an extradition treaty with Germany), that the Union Government should pass an Act adding diamond offences to the list of extraditable crimes, as regards the territories of the Union; that an order in council should be passed under section 18 of the Extradition Act of 1870, directing that the new law should, within the Union of South Africa, have effect as if it were part of the Extradition Act; that the proposed extradition treaty should then be concluded; and that the order in council passed under section 2 of the Extradition Act of 1870, applying the Extradition Acts in respect of the new treaty to the Union of South Africa should apply those Acts, subject to the modification introduced.

That you would, however, be glad if we would take the papers into our consideration, and advise—

1. Whether the procedure proposed was, in our opinion, the proper procedure to be adopted in the circumstances of the case;
2. If not, what means should be adopted to attain the object in view;
3. Generally upon the questions raised in the correspondence.

We have taken the papers into our consideration, and, in obedience to your commands, have the honour to

Report—

1. That, in our opinion, the procedure proposed with reference to the Union of South Africa cannot be adopted in the circumstances of this case. The offences to be dealt with include many which are altogether outside the scope of the Imperial Extradition Acts, and cannot be brought within their scope save by the action of the Imperial Legislature.

2. That the object in view might be attained—

(a.) By amending the Imperial Act or by passing a new Act like that of 1906 (6 Ed. VII, cap. 15), adding offences against the diamond laws to the list of extradition crimes; or

* Colonial Office to Home Office, February 13; Home Office, March 3; to Home Office, March 17, 1911; Memorandum; Home Office, April 12, 1911; Canadian Extradition Act.

GERMANY.—PACIFIC ISLANDS.

11

- (b.) By passing an Act in the Union Parliament on the lines of the Canadian Act, cap. 155 of the revised Statutes, 1906, with its own list of extradition crimes, and also making provision for carrying into effect, in the Union territories, the surrender of fugitive criminals, as defined by the Imperial Act, the operation of which, in the Union, could then be suspended by order in council.

The effect of adopting course (b) would be, that persons in custody under the Act would only be lawfully in custody while within the territory of the Union itself, and, therefore, unless this difficulty is negligible in practice, course (a) is the proper course to adopt. If the difficulty is negligible in practice the choice between (a) and (b) is a question of policy merely.

3. That as to the South African Protectorates, the existing Imperial Extradition Acts cannot be applied to these, as they are not "British possessions." The protectorate ordinances have no extra-territorial effect. There is, therefore, no provision for the conveyance in custody of a prisoner beyond the territory of the protectorate. It seems to us to be eminently desirable that, if, as suggested by us in (2), Imperial legislation is resorted to, power should be taken to apply the Extradition Acts to protectorates.

We have, &c.

RUFUS D. ISAACS.
JOHN SIMON.

PACIFIC ISLANDS.

[39352]

No. 4^b.

[Colonial Office.]

[Case No. 608/10.]

[April 18, 1911.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, June 2, 1910.

I AM directed by the Earl of Crewe to transmit to you the accompanying despatches from the High Commissioner for the Western Pacific, forwarding the draft of a joint Regulation* to provide for the control of the recruitment and employment of native labourers in the New Hebrides.

2. I am also to enclose the drafts of two despatches in reply which Lord Crewe has had under consideration to address to Sir E. im Thurn, together with a copy of the Order in Council of the 2nd November, 1907, relating to the New Hebrides, to which are scheduled the Anglo-French Convention of the 20th October, 1906, and the notes exchanged on the 29th August, 1907, between His Majesty's Government and the Government of the French Republic.

3. The draft Regulation is intended to be made under the powers conferred by Article VII of the Convention "to issue jointly, for the peace, order, and good government of the group, as well as for the execution of the measures resulting from the present Convention, local Regulations binding on all the inhabitants of the group."

4. Lord Crewe apprehends that if there is any conflict between such Regulations and the provisions of the Convention the latter must prevail, but it does not seem unreasonable to conclude that the Regulations may amplify the Convention provided they are not contrary to it, and may in certain cases create offences or deal with matters not specifically dealt with by the Convention.

5. In regard to the subject-matter of the joint Regulation, of which a draft is now forwarded, elaborate provision is made by the Convention in Articles XXXI-LVI inclusive, and the question arises whether any provisions of the draft Regulation (as it would be modified by the draft despatch from the Secretary of State) would be invalid, as being in conflict with the Convention. You will observe that the question is raised by the High Commissioner in the fourth and fifth paragraphs of his despatch of the 5th January last.

* Not printed.

Draft Joint
Regulation
respecting
Native
Labourers
in the New
Hebrides.



1911

12

PACIFIC ISLANDS.

6. In particular Lord Crewe desires me to direct your attention to the following sections of the draft Regulation:—

(a.) Section 4 ("Forfeiture of Deposit"): Compare Article XXXI (2) of the Convention. This provision appears to carry out the spirit of the Convention, and it is presumed that it is legally valid.

(b.) Section 5 ("Power of Resident Commissioner to refuse or cancel Licences"): Compare Articles XXXI and LVI (4) of the Convention. Lord Crewe apprehends that the power to issue a licence carries with it the power to refuse at discretion; but he feels some doubt in regard to the general power to revoke or suspend licences during their currency.

(c.) Section 7 ("Engagement of Females and Boys prohibited"): Compare Article XXXIII of the Convention. It has been argued that, though the restrictions imposed by this Article on the engagement of females and boys cannot be diminished, they may be increased by a joint Regulation—on the ground that such action is not contrary to the Convention but is merely carrying further the policy initiated by it—inasmuch as previous to the Convention there were no legal restrictions on such engagements, at least so far as British subjects were concerned. In other words, the Convention confers, according to this view, no right, but restricts a pre-existing liberty, which may be diminished still further without running counter to the spirit of the Convention.

(d.) "Conditions to be endorsed on Licences to recruit Native Labourers in the New Hebrides" (annexed to the draft Regulation). As the issue of licences appears to be in the absolute discretion of the representatives of the two Powers, Lord Crewe desires that it may be made clear whether, as a condition of the issue of such licences, the licences may be required to perform certain acts not prescribed by law, or to refrain from performing certain acts legally permissible as may seem fit to the issuing authority.

7. A different question arises with regard to the method of making the provisions of the draft Regulation legally binding on British subjects alone.

8. A joint Regulation under Article VII of the Convention must of course be acceptable to both the British and French authorities, and it is possible that some provisions of the draft Regulation now under consideration may not meet with the approval of the French Government. In that case it would in some cases be convenient that they should be made binding on British subjects alone, by means of a King's Regulation under Article 108 of "The Pacific Order in Council, 1893" (of which a copy is enclosed for convenience of reference). As is explained in the draft Confidential despatch to the High Commissioner which is transmitted herewith, Lord Crewe is advised that there is no legal objection to this course, provided that such a King's Regulation contains nothing contrary to the Convention; and he would be glad to learn whether you concur in this view, which appears to be borne out in particular by Article 9 of the Order in Council of the 2nd November, 1907, relating to the New Hebrides.

9. I am accordingly to request that you will take the papers into your consideration and report—

(1.) Whether there are any provisions in the draft Regulations (with the suggested modifications) which are invalid on the grounds of repugnancy to the terms of the Anglo-French Convention of the 20th October, 1906, as amended by the notes exchanged on the 29th August, 1907, or on other grounds; and, if so, what sections?

(2.) Whether it is still competent for the High Commissioner under "The Pacific Order in Council, 1893," to make King's Regulations binding on British subjects in the New Hebrides both concerning the recruiting and employment of natives within the group and concerning other matters, such Regulations not being inconsistent with the Convention.

(3.) Generally.

I have, &c.

F. J. S. HOPWOOD.

PACIFIC ISLANDS.

13

[15433 and 16985.]

(Case No. 608/11.)

Report.

(1.) In our opinion the under-mentioned provisions of the draft Regulation conflict in the manner indicated with the Anglo-French Convention of the 20th October, 1906, and are consequently invalid:—

(a) and (b). The provisions of section 4 of the draft Regulation relating to the forfeiture of the deposit of 80*l.* and those of section 5 enabling the Resident Commissioner to refuse to issue licences and to revoke or suspend them conflict with the provisions of Articles VII, XXXI, and LVI. Article XXXI is expressed in language which more aptly describes a duty to issue licences than a discretionary power to do so, and the provisions of Article LVI make it clear that there is no power to suspend or revoke a licence at discretion, for even in the event of a conviction on a serious charge or for a second offence it gives a power of suspension only, and that for not more than two years. This Article disposes of any ambiguity there might be in Article XXXI, and points to there being no discretion to refuse to issue a licence. This being so, such a discretion cannot be given by the Regulation, and clause 5 of the draft Regulation is therefore void. As to the forfeiture of the deposit: Assuming that there had been a discretion as to the issue of the licence, any terms which might be thought desirable could have been imposed. But there being, as we have said, no such discretionary power, the provision as to forfeiture of the deposit becomes in effect the attempted imposition of a penalty, and by virtue of Article VII of the Convention the maximum penalty which can be imposed for the enforcement of any Regulation is 20*l.* The true view is that the deposit is, as Article XXXI calls it, a "security"—that is to say, a fund which is there to answer penalties or expenses of repatriation, and the like.

(c.) It is doubtful whether the provisions of section 7 of the draft Regulation forbidding the engagement of female natives are valid in view of the language of Article XXXIII of the Convention, which contemplates that women may be engaged subject to the consents therein mentioned being obtained.

(d.) The same considerations as are referred to in (a), (b), and (c) above apply to clauses 4 and 11 of the proposed conditions of licences, and these conditions cannot be imposed.

(e.) Section 19 of the draft Regulation appears to cover the transfer of a contract of engagement from a British subject to a French subject, or *vice versa*, with the consent of the British Resident Commissioner alone. Article XLIII (2) of the Convention (assuming that "or" is a mistake for "and") requires the joint authority of British and French Resident Commissioners.

(f.) Section 22 of the draft Regulation concludes with a proviso that the labourer is to be made clearly to understand that repatriation is not compulsory. It appears to us that Article LI makes repatriation compulsory, and Sir E. im Thurn, in paragraph 8 of his despatch of the 5th January, 1910, emphasises the importance of such a provision.

(g.) Section 33 of the draft Regulation in its first paragraph requires wages to be paid in cash; yet in its second paragraph it appears to contemplate deductions from wages to pay for articles purchased from the employer, and this in effect involves payment of wages in kind. We think it doubtful whether this second paragraph can be reconciled with Article XLVI of the Convention.

(h.) The provisions of section 36 of the draft Regulation as it stands at present are in conflict with Article XXVI of the Convention, and are to that extent void. We observe that in paragraph 24 of the draft despatch it is proposed to substitute the analogous provisions of the draft Solomon Islands Regulation. We are unaware of the effect of the Regulation which it is proposed to substitute, and cannot therefore say whether or not it is open to the same objection as section 36.

(2.) Yes.

(3.) The Convention has been given the force of law by the New Hebrides Order in Council of the 2nd November, 1907, which enacts that the provisions of the Order itself and of all laws and regulations made under it shall be read and construed subject to the Convention. "The Pacific Order in Council, 1893," is also applied to the New Hebrides, subject to the Convention.

If, therefore, it is desired to restrict or alter, so far as British subjects are concerned, the rights and liberties which they possess under the Convention, this

[433]

E



1911

14

PACIFIC ISLANDS.—PARAGUAY.

cannot be done by King's Regulations, but a fresh Order in Council would be required.

We have, &c.
(Signed) RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
April 18, 1911.

PARAGUAY.

[19697]

No. 5.

[File 9568.]

[June 12, 1911.]

Foreign Office to the Law Officers of the Crown.

Order in
Council:
Extradi-
tion Treaty
with
Paraguay.

Gentlemen,

Foreign Office, May 26, 1911.

I HAVE the honour, by direction of the Secretary of State, to enclose the draft of an Order in Council for giving effect to a Treaty of Extradition between the United Kingdom and the Republic of Paraguay, which was signed at Asuncion on the 12th September, 1908, and of which the ratifications were exchanged at Asuncion on the 30th January last.

The various Departments of His Majesty's Government which are interested in the matter have concurred in the terms of the draft Order in Council, and I am now to enquire whether, in your opinion, it may properly be submitted to the King in Council for His Majesty's approval.

I have, &c.
F. A. CAMPBELL.

Draft Order in Council (Extradition Treaty with Paraguay, September 12, 1908).

[23072]

Report.

That the draft Order in Council,* as initialled by us, may, in our opinion, properly be submitted to the King in Council for His Majesty's approval.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
June 12, 1911.

* The Order in Council, as issued, is contained in the "London Gazette" of the 7th July, 1911 (see Confidential Paper No. 9979*).

(15)

RUSSIA.

[8696]

No. 6.

[File 723/11.]

[October 16, 1911.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 10, 1911.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to submit to you, for your consideration, the papers noted in the accompanying list relative to the case of the steam-ship "Woodburn," a British merchant-vessel, which was fired upon when leaving Hurppu, in the Gulf of Finland, on the 3rd (16th) June, 1909, by vessels belonging to a Russian squadron, forming an escort to the Imperial yacht "Standart."

"Wood-
burn" fired
on by
escort of
"Standart."
Claim for
indemnity.

His Majesty's Government were informed of this incident in a telegram addressed to them on the 18th June, 1909, by the North of England Protecting and Indemnity Association (Paper A). This telegram, which was confirmed by a letter from the Association, dated the 18th June (Paper B), stated the bare facts of the case as received by cable from the captain of the vessel, namely, that a Russian torpedo-boat had fired on the ship while leaving port, carrying away her deck steam-pipes and holing her bulwarks and stokehole casing, that the fireman Coyne had been shot in the leg and sent to Viborg Hospital, and that the ship was proceeding as soon as her steam-pipes were repaired. The Association further asked that His Majesty's Government would cause His Majesty's Ambassador at St. Petersburg to make the necessary enquiries and representations to ensure indemnity to the shipowners and to the injured man.

The sworn statements of the master and crew of the steam-ship "Woodburn" (Paper C) constitute the greater part of the evidence provided by the shipowners in support of their claim for indemnity. Of these, the statement of Robertson, the master of the ship, is the fullest. According to this statement, the steam-ship "Woodburn" arrived at Hurppu on the 10th June. When she passed into Hurppu there were no signs of any Russian vessels, and the master of the ship had no information that any were expected, nor did the pilot who brought the "Woodburn" into Hurppu mention the approaching visit of the Russian squadron. On the 14th June the Chief of Police visited the "Woodburn" while at Hurppu, but gave no information or instructions as to navigation of the channel, and said nothing as to the existence of any special regulations. The crew of the "Woodburn" could, however, now see the Imperial yacht, and there were torpedo-boats in harbour with them. The "Woodburn" left Hurppu for the Tyne on the 16th June, after taking two pilots on board. The master had then no knowledge as to their course, nor as to any manœuvres necessitated by the presence of the Russian squadron. The course taken by the pilot brought the vessel between a guardship, which lay on her starboard side, and a torpedo-boat which lay on her port side, these vessels forming part of the escort to the Imperial yacht. The pilot's object was to steer between these two vessels, thereby passing through the ring of ships escorting the Imperial yacht. However, a torpedo-boat which appeared to be manœuvring between these two vessels drew up along the starboard side of the "Woodburn," and from this torpedo-boat some instructions were shouted through a megaphone in a language which the master of the ship took to be Russian; neither he nor the pilot, however, understood the language nor the instructions given. The same torpedo-boat then ran across on to the port bow of the "Woodburn" and fired a blank shot which, after swinging round, she followed up with a second blank shot. The master of the "Woodburn" states that immediately he heard the first gun he ordered "full speed astern," and that the order was at once obeyed from the engine-room. The effect of thus reversing the engines was to throw the head of the vessel to starboard, which put her into such a position that she was heading with the Imperial yacht a little on her port bow. When the "Woodburn" was in this position a live shell was fired which struck the vessel, inflicting the damage already described. The master states that he fails to understand why the live shell was fired, as it was plain to anyone understanding navigation that he was manœuvring to keep clear of the vessels. A second live shell was fired, but he could not ascertain from which of the torpedo-boats; this shell did not strike the



"Woodburn." The damage sustained by the ship then obliged her to come to a standstill, and the master let go his port anchor.

The master's statement proceeds to relate how the Chief Inspector of Police, who came on board the "Woodburn," asked why the "Woodburn" had proceeded on this course. He replied to this official that the pilot had led him to understand that there was neither sufficient room nor sufficient water to pass between the torpedo-boats and the shore. The Chief Inspector stated that he should have followed the same course as when entering Hurppu; the master replied that he had done so, proceeding in and out by the same channel. The master further told the Chief Inspector that the pilot had given him to understand that there was not sufficient water to pass between the torpedo boats and the shore. The Chief Inspector of Pilots for the Viborg district, the Chief of Finnish Pilots, and another officer then came on board the "Woodburn" and inspected the damage done. The wounded fireman received medical treatment and was conveyed to Viborg Hospital. Other Russian officials came on board in the course of the same evening. The "Woodburn" proceeded on her way the following day under the charge of the Chief of the Viborg District Pilots, having carried out her own repairs in a temporary fashion, and not having received assistance which had been promised her when the vessel was inspected.

The master states that, on proceeding on his way on the 17th June, he noticed that, owing to a change of wind, the torpedo-boats at anchor round the Imperial yacht had swung round so that, though their anchors were in the same places, they now left the proper channel open to his vessel.

He adds that he cannot understand why his vessel was fired at, seeing that when the first blank shell was fired he manoeuvred to steer clear of the fleet, and that it should have been plain that such a manoeuvre with such a vessel would necessitate a slight touch-ahead in order to keep the vessel in position before she could turn. In his anxiety to take the way off the vessel as quickly as possible, he took charge of the vessel himself at this moment as the pilots did not appear to understand the urgency of the case.

As master of the vessel, Robertson complains that he was unaware of any of the regulations governing such cases; that he was not informed of these regulations at any of the Finnish ports; that, although he passed within 50 yards of the guardship, he had no warning from that vessel; and that the only warning given him was the instruction imparted from the torpedo-boat through the megaphone, which instruction was unintelligible, both to himself and to the pilots. He further expresses his opinion that the Russian vessels had anchored without considering the possibility of a change of wind, which would make their vessels lie at anchor in such a way that the regulations (of which, however, he had no knowledge) would be inoperative, as there would not be water enough between the squadron and the shore to allow a vessel with the draught of the "Woodburn" to pass that way. On the other hand, on coming out with the wind blowing from the north-east, the vessels had swung round on their anchors, and left sufficient room. He states that even after the change of wind, his vessel was forced to pass very close to the anchors of the torpedo craft in order to find sufficient water.

The above statement of the master of the ship, which has been given at length, is endorsed by Davison, chief mate of the "Woodburn." Davison states that when the vessel was struck by the live shell, she was heading more or less in the direction of the Imperial yacht. Arthur Moffat, second mate, whose statement also endorses that of the master, states that when the second and third blank shots were fired the vessel was forging ahead slowly. He agrees that at one time the "Woodburn," which was swinging round, must have headed straight towards the Imperial yacht, but states that they were never within half-a-mile of her. The statement of the steward confirms those already mentioned. The chief engineer, whose statement is also in agreement with the others, mentions that the captain informed the Chief Inspector of Police that his vessel was drawing 12 feet going in, and 20 feet coming out of Hurppu, and that he was at the time acting under the directions of the pilots. Howston, the second engineer, who was on duty at the time, states that the moment the first blank shot was fired he received, and obeyed, the order full speed astern. He adds, that with the very quick reversing gear possessed by the "Woodburn" it would not be as much as 5 seconds from the time the order was received until the engines were reversing. The fireman Coyne states that he received a wound which was three-cornered in shape, and of such a size that he could put his finger-end into it. While in hospital he received a personal gift of 200 roubles from His Imperial Majesty the Czar.

In Paper C will also be found the logs of the chief engineer and chief officer.

In Paper D it will be seen that the fireman Coyne admits that the "Woodburn" was "erroneously" steering between the men-of-war.

With regard to the question as to the regulations to be observed by vessels approaching Russian squadrons at anchor, it was stated (Paper E) in the House of Commons by Mr. McKinnon Wood, in reply to a question asked by Major Anstruther-Gray, that according to these regulations "all vessels must pass between the shore and the squadron, and not through the squadron." An enclosure in Paper F gives these regulations in full. They were published by the Board of Trade in their "Notes to Mariners" (p. 78. 1st January. Baltic); they are as follows:—

"Russian waters: Caution. The following additional regulations for merchant-vessels meeting men-of-war in Russian waters have been published by the Russian Government.

"All vessels arriving at any anchorage, bay, or entry to a strait, where a squadron is at anchor, or a searchlight in operation, must obey all the directions given and signals made by the guard-ship. When entrance is prohibited three globes by day or three red lights vertical at night are shown from the guard-ship. When entrance is allowed under instructions she will hoist the special flag, blue with white stripes by day or three white lights at night. If a gun is fired the vessel should be at once stopped and await instructions. If no signal is made vessels may enter but must not pass between the anchored ships, but between the shore and the ship nearest the shore. Vessels not conforming to these rules will be fired on.

"Ships approaching Squadrons.—When the leading ship of a squadron shows a signal according to international agreement, and three globes by day or three red lights and the searchlight at night, all vessels must instantly steer clear and keep out of the course of the squadron. Should a vessel disobey this rule a blank shot will be fired, and if this warning is neglected she will be fired upon."

These regulations were inserted in the monthly editions of the "Notices to Mariners" for 1st October, 1908, and in the six succeeding monthly editions until that of 1st April, 1909, inclusive, after which date (in accordance with the usual practice) the regulations were omitted.

The Board of Trade, however, state (Paper F) that the master of the "Woodburn" received a copy of the "Notices to Mariners" containing the regulations at the commencement of his voyage.

From Paper G it will be seen that it has been ascertained that the incident took place in Russian territorial waters and that no question of the high seas is involved.

The Finnish pilot in his account (Paper H) states that the course actually taken between the torpedo-boat and the guard ship was the "only way possible in view of the narrowness of the course and the depth of the vessel." This account declares that no warning was given that this course was contrary to regulations; that no importance was attached to the manoeuvres of the torpedo-boat, which left the way free to the "Woodburn"; that the firing began without any signal; and that the shots were in such rapid succession that it was impossible to say which shot was intended as a warning. In other respects the account tallies with those already quoted, but it further states that the Russians declared that the shots were fired because the bow of the "Woodburn" had been turned towards the Imperial yacht.

The account drawn up by the Finnish Pilot Administration, and published in the Russian press (Paper J), bears out the pilot's statements, adding that the captain of the "Woodburn" could not make himself understood by the pilot, except for a few words of command; that the pilot was obliged to steer between the vessels owing to reefs and shallows on the land side; that he knew that it was contrary to regulations to steer within the ring of ships surrounding the yacht, but that he had reasons for believing that the ships lay outside the ring; that pilots had orders to steer steamers of deep draught unconditionally through the middle of the channel; and that he did not know that the order to keep outside the ring affected foreign merchant-vessels of such deep draught as the "Woodburn."

On the 10th October, 1909, His Majesty's Ambassador at St. Petersburg reported (Paper K) that the Chief of the Lloyd's Station at Viborg had been reprimanded for not having taken sufficient steps to make the pilots under his jurisdiction acquainted with the regulations, and that the pilot who had steered the "Woodburn" had been placed under arrest.

The view of the incident held by the Russian Government differs somewhat from that of the shipowners. Paper L gives the note of the Russian Minister



for Foreign Affairs summarising the reports furnished by the Russian naval officers concerned. It will be seen from this, firstly, that the Russian naval officers held that the pilot understood the signal given through the megaphone; secondly, that the "Woodburn" did not change her course after the first shot; thirdly, that the "Woodburn" only turned to starboard after the live shell was fired, and that up till then she was heading for the middle of the Imperial yacht. (The English account states that the engines were reversed after the first blank shot, and that the vessel's head was consequently turned to starboard, leaving the Imperial yacht on her port bow.) This report makes no mention of the change of wind. It further states that outside the "line of protection" the water was 8 or 9 "sagènes" (i.e., between 56 and 63 feet) deep, that no record was kept of the time which elapsed between the firing of the first blank shot and the discharge of the live shells, and that the instruction shouted through the megaphone was in the Swedish, and not the Russian, language. Paper M shows that the Russian Government consider that the "Woodburn" continued her course in spite of the warning given through the megaphone and the blank shots, and that the live shots were fired because it was seen that she was heading towards the Imperial yacht. In Paper N it is mentioned that the Ministry for Foreign Affairs regard the action of the pilot as inexplicable; while Paper O contains a supplementary note from M. Isvolsky concerning the case, in which the Russian Government state that the "Woodburn" was acting in a manner contrary to the Regulations quoted above for ships approaching a Russian squadron.

Before any action was taken by His Majesty's Government with a view to obtaining from the Russian Government the indemnity demanded by the North of England Protecting and Indemnity Association, the case was submitted to the Lords Commissioners of the Admiralty and to the Board of Trade for their opinions. Paper P gives the opinion of the Lords Commissioners of the Admiralty. Their Lordships observe that the signals which, according to the Regulations quoted above, should be shown to ships to indicate whether they may or may not approach a Russian squadron at anchor, were not shown. They consider that the action of the Russian naval officers was hasty in the extreme, and emphasise the fact that, as a duly qualified pilot was on board the "Woodburn," the responsibility for the safe navigation of the ship, as well as for compliance with national and local Regulations, would rest with him, and not with the captain. They state their opinion that the owners have a valid claim for compensation.

The views expressed by the Board of Trade will be found in Paper F, which contains a short Memorandum by the Professional Member of the Marine Department. This Memorandum agrees with the view held by the Lords Commissioners of the Admiralty, and the Board of Trade state their opinion that the owners have a *prima facie* case against the Russian Government.

Correspondence then ensued between this Department, the Board of Trade, and the North of England Protecting and Indemnity Association with a view to the settlement of the claim to be presented to the Russian Government (Papers Q, R, S, T, U).

The amount of the claim was ultimately fixed at 727l. 5s. 2d.

The claim, together with the documents, vouchers, and affidavits was forwarded by His Majesty's Ambassador at St. Petersburg to the Minister for Foreign Affairs in a private letter, together with a *pro-memoria*, on the 3rd February, 1910 (Paper V). In this *pro-memoria* were set forth the facts of the case in a summarised form. The reply of the Russian Government to this claim was received by His Majesty's Ambassador in October of last year. The reply (Paper W) stated that the Russian Government, after enquiry into the matter, had decided that the action taken by their naval officers was in entire conformity with the existing Regulations. The Russian Government suggested, however, that if the owners consider the pilot responsible, an action could be brought by them against him for recovery of damages.

In view of this refusal on the part of the Russian Government to grant compensation, and of the opinions already expressed by the Lords Commissioners of the Admiralty and the Board of Trade that the case of the owners of the "Woodburn" is a fair one, I am directed to request that you will be so good as to take the enclosed papers into your consideration, and to furnish Sir E. Grey with your opinion—

(1.) Whether in the circumstances His Majesty's Government are now justified in requesting the Russian Government to submit the case to arbitration.

(2.) If the answer to the previous question be in the affirmative, on what special grounds can such a request be most advantageously supported.

(3.) Sir Edward Grey would also be glad to receive any observations of a general character which you may be good enough to offer on the case.

I have, &c.

LOUIS MALLET.

List of Papers.

(A.) North of England Protecting and Indemnity Association	..	June	18, 1909.
(B.) " " " "	..	June	18, 1909.
(C.) " " " "	..	July	12, 1909.
(D.) Mr. Garnett (No. 390) ..	..	June	20, 1909.
(E.) Parliamentary Question ..	..	June	21, 1909.
(F.) Board of Trade ..	..	August	9, 1909.
(G.) Parliamentary Question ..	..	June	30, 1909.
(H.) Mr. Garnett (No. 399) ..	..	June	24, 1909.
(J.) Mr. O'Beirne (No. 418) ..	..	July	10, 1909.
(K.) Sir A. Nicolson (No. 550) ..	..	October	13, 1909.
(L.) Mr. O'Beirne (No. 428) ..	..	July	12, 1909.
(M.) Sir A. Nicolson (No. 387) ..	..	June	19, 1909.
(N.) Mr. Garnett (No. 397) ..	..	June	23, 1909.
(O.) " (No. 389) ..	..	June	19, 1909.
(P.) Admiralty ..	..	August	30, 1909.
(Q.) North of England Protecting and Indemnity Association	..	September	14, 1909.
(R.) Board of Trade ..	..	November	12, 1909.
(S.) " " " "	..	December	15, 1909.
(T.) North of England Protecting and Indemnity Association	..	December	24, 1909.
(U.) Board of Trade ..	..	January	11, 1910.
(V.) Sir A. Nicolson (No. 67) ..	..	February	4, 1910.
(W.) Mr. O'Beirne (No. 408) ..	..	October	11, 1910.

[40771]

Report.

(1) and (2). In our opinion, the chances of success in an arbitration upon this claim are so remote that we do not advise His Majesty's Government to request the Russian Government to submit the case to arbitration. Even if the facts, as stated by the officers of the "Woodburn," are accepted, we are of opinion that the tribunal would hold that the Russian officers had not so acted as to make the Russian Government liable to make compensation.

If the facts as stated by the Russian authorities are accepted, it is clear that the claim must fail.

(3.) We have nothing to add.

We have, &c.

RUFUS D. ISAACS.
JOHN SIMON.

Royal Courts of Justice,
October 16, 1911.

[30551]

No. 7.

[File 14102.]

[October 25, 1911.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 28, 1911.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you herewith papers, as noted in the accompanying list, respecting the claim of the Russian Government to treat Miss Kate Malecka as a Russian subject in Russia.

Miss Malecka's father, Dr. John Paul Malecki, a Pole by race, was born in the Russian Empire, a Russian subject, emigrated to England and settled there, and was granted a certificate of British naturalisation on the 3rd May, 1860 (Paper A). The same year, but subsequent to his naturalisation, Dr. Malecki married, in St. Jude's Church, Southwark, a British subject, and their daughter Kate was born in the United Kingdom in 1868.

Miss Kate Malecka continued to reside in this country till about two years ago,

Arrest of
Miss Kate
Malecka.
Claim to
regard her
as a Russian
subject.



when she went to live in Warsaw. She was then the bearer of a British passport, which appears to have been accepted without question at the time by the Russian authorities.

After the arrest of Miss Malecka on the 5th April last on a charge of conspiring against the Russian Government, which was the outcome of her connection with the Polish Socialist party, His Majesty's consul at Warsaw obtained the opinion of a leading lawyer of that place on the question of her nationality in Russia. This opinion (Paper B) was to the effect that by the laws of Poland, Dr. Malecki lost his Russian nationality when he emigrated, and that his daughter was therefore not a Russian subject in Russia in contemplation of Russian law. Opinions to the same effect were subsequently obtained from the legal adviser to His Majesty's Embassy at St. Petersburg (Papers C and D).

On the strength of these opinions, His Majesty's Ambassador at St. Petersburg, by Sir E. Grey's instructions, addressed a note to the Russian Government (Paper E), claiming Miss Malecka as a British subject in Russia.

To this the Russian Government replied (Paper F), pointing out that articles 325 and 326 of the Russian Criminal Code were made applicable to the Polish provinces by an Imperial ukase in 1850, and that, as neither Dr. Malecki nor his daughter had obtained the permission to renounce their Russian nationality which those articles prescribe, both must be regarded as Russian subjects in Russia. The Russian note further observed that this deduction was in conformity with the British ^{Naturalisation} Law of 1870.

Article 326 of the code, referred to but not quoted in the Russian note, runs, in translation, as follows:—

“Whoever absenting himself from the fatherland does not return to it upon being invited to do so by the Government is equally liable for the infraction to the loss of all civil rights and to perpetual banishment from the Empire, if within the term fixed at the option of the court he does not show that he has been impelled by circumstances independent of his will, or, at the least, extenuating circumstances. Up to that moment he is considered as absent, disappeared from his domicile, and his property is placed under guardianship, according to the regulations established to this effect by the civil laws.”

The effect of these articles and of the Russian views as to loss of Russian nationality have been the subject of much diplomatic discussion between Russia and the United States of America, as large numbers of Russian subjects, who have left Russia and become naturalised in the United States of America, have subsequently returned to Russia, and been tried for breach of the above laws. The United States Government have usually made remonstrances on their behalf. An account of these cases may be found in “Moore's Digest of International Law” (vol. iii. pp. 622-656).

It appears to be clear from a perusal of these cases that “loss of civil rights” in the relevant articles of the Criminal Code does not mean “loss of nationality,” and also that, whether it means loss of nationality or not, the consequence only follows where it is imposed by a criminal court, and does not follow automatically merely because the individual concerned has emigrated, and been naturalised without the consent of the Russian Government.

It may therefore be argued that these articles do not apply to Miss Malecka's father, and afford no ground for contending that he had lost his Russian nationality.

On the other hand, if Miss Malecka possesses both British and Russian nationality her Russian nationality must prevail in Russia, and His Majesty's Government have no right to claim to treat her there as a British subject.

The legal adviser to His Majesty's Embassy at St. Petersburg and the lawyer consulted by His Majesty's consul at Warsaw both considered that the effect of article 17 of the Polish code was that Dr. Malecki, the father, lost his Russian nationality on his naturalisation in Great Britain, and that Miss Malecka, the daughter, was in consequence only British by nationality, and had not inherited Russian nationality from her father.

The Russian note admits the existence of this special provision applicable to natives of Poland, but maintains that the subsequent extension of the Criminal Code to Poland and the introduction of the machinery for granting emigration passports to residents in the Polish provinces show that article 17 of the Civil Code applies only where there has been permission by the Government authorities to renounce Russian nationality.

The effect of this contention would, of course, be that Dr. Malecki remained a Russian subject despite his naturalisation, because no such permission was obtained.

Sir E. Grey would be glad if you would take the papers enclosed into your consideration, and furnish him with your opinion whether, under all the circumstances, he would be justified in continuing to claim that Miss Malecka should be treated as a British subject when within the limits of the Russian Empire.

I am, &c.

LOUIS MALLET.

List of Papers.

- (A.) Home Office, June 29, 1911.
- (B.) Consul Clive Bayley, No. 5, May 2, 1911.
- (C.) Mr. O'Beirne, No. 189, July 1, 1911.
- (D.) Sir G. Buchanan, No. 202, July 12, 1911.
- (E.) Sir G. Buchanan, No. 210, July 21, 1911.
- (F.) Sir G. Buchanan, No. 222, July 31, 1911.

Report.

[42225]

We understand that what we are asked to advise upon is the question whether the claim that Miss Malecka should be treated as a British subject when within the limits of the Russian Empire could be substantiated if brought before a legal tribunal. The answer to this question depends not upon British law or international law, but upon the law of Russia, and it is difficult, therefore, for us to express a very confident opinion upon the subject. We have, however, considered the arguments adduced on the one side by the Russian Ministry of Justice and on the other by M. Scheftel, and have arrived at the following conclusions:—

The case turns upon the question whether Dr. Malecki, in the view of the Russian law, did or did not retain his Russian nationality in spite of his naturalisation in this country.

Assuming that Dr. Malecki was subject to the Civil Code of Poland (which is by no means clear in view of his description of himself as “a subject of Russia in the province of Wolhynia”), and that article 17 of that code refers to loss of nationality as distinguished from loss of civil rights, it still remains to be considered whether under that article Russian nationality ceases *ipso facto* upon naturalisation abroad, or whether that consequence follows only when naturalisation has been effected in a way permitted by the Russian law. It appears clear that both by the general law of Russia, as represented by section 325 of the Criminal Code, and by the special provisions applicable to Poland, it is a punishable offence for a Russian subject to become naturalised abroad without the permission of his Government, and the argument of the Russian Ministry of Justice is to the effect that the fact that unauthorised naturalisation amounts in Russian law to a criminal offence shows that it cannot be recognised by that law as valid to effect a change in status. This argument is, in our view upon the materials before us, a sound one, and we have therefore arrived at the conclusion that, according to Russian law, Dr. Malecki would be held to have retained his Russian nationality, notwithstanding his naturalisation here. If he did retain his Russian nationality, it follows that Miss Malecka, notwithstanding that she is undoubtedly a British subject in the view of British law, is also a Russian subject in the view of the Russian law, and, consequently, that the claim that she should be treated as a British subject when within the Russian Empire is not maintainable.

We have, &c.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
October 25, 1911.

[433]

G



1911

22

SIAM.—TURKEY.

SIAM.

[35498]

No. 8.

[File 183/11.]

[October 23, 1911.]

*Sir Edward Grey to the Law Officers of the Crown.*Anglo-Siamese
Extradition
Treaty
Order in
Council.

Gentlemen,

Foreign Office, September 12, 1911.

I HAVE the honour to enclose the draft of an Order in Council for giving effect to a Treaty of Extradition concluded on the 4th March, 1911, between the United Kingdom and Siam, of which the ratifications were exchanged at London on the 1st August last.

The various departments of His Majesty's Government which are interested in the matter have concurred in the terms of the draft Order in Council, and I am now to enquire whether, in your opinion, it may properly be submitted to the King in Council for His Majesty's approval.

I have, &c.

E. GREY.

[41935]

Report.

In our opinion, the draft Order in Council* may properly be submitted to the King in Council for His Majesty's approval.

We have, &c.

RUFUS D. ISAACS.
JOHN SIMON.*Royal Courts of Justice,
October 23, 1911.*

TURKEY.

[39051]

No. 9.

[File 30691.]

[October 24, 1911.]

*Foreign Office to the Law Officers of the Crown.*British
subjects as
naval con-
structors
for Turkey
during war.

Gentlemen,

Foreign Office, October 5, 1911.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith, in view of the sudden outbreak of hostilities between Italy and Turkey, papers, as noted in the accompanying list, respecting the temporary employment of British subjects in the service of His Majesty's Government by the Turkish Government in the matter of naval construction.

2. I am to explain that the former of the two questions mentioned in the Foreign Office minute (Enclosure A), viz., whether the obligation to cease service applies to the British subjects employed by the Turkish Government ashore and in civilian capacities in that Government's naval establishments has been settled, as will be seen from Enclosure B (Sir G. Lowther's No. 221, Telegraphic, and Sir E. Grey's reply), in the sense that they may remain in Turkish employ provided that they take no part in hostilities.

3. With regard to the second point raised in the Foreign Office minute, it will be

* The Order in Council is contained in the "London Gazette" of the 14th November, 1911. (Confidential No. 9948*.)

TURKEY.

23

seen from the third paragraph of the undated letter from the Lords Commissioners of the Admiralty (Enclosure C (1)) that an offer was made to appoint, if so desired by the Turkish authorities, an overseer to supervise the construction of the ships ordered by the Turkish Government from the Armstrong, Vickers, and Brown Syndicate. This offer was communicated by Sir E. Grey to the Turkish Ambassador (Enclosure C (2)), and accepted by the latter in a note specifying the desires of his Government in this respect (Enclosure C (3)). The Turkish Ambassador's note was communicated to the Lords Commissioners of the Admiralty (Enclosure C (4)), and on the 23rd September the latter replied notifying the names of the officers detailed for the work in question. It will be seen (Enclosure C (5)) that an assistant constructor and two naval engineer captains were selected, and that the names and numbers of their subordinate staff were left for future determination. The Lords Commissioners of the Admiralty have now raised the question whether they should proceed with this arrangement in view of the state of war existing between Italy and Turkey.

4. I am to request that you will be good enough to take this question into your consideration at your earliest convenience, and will favour Sir E. Grey with your opinion whether, in the present circumstances, His Majesty's Government should during the continuance of the present hostilities decline to permit the services of these officers to be utilised by the Turkish Government for the purpose of supervising the construction of the Turkish battle-ships.

I have, &c.

LOUIS MALLET.

List of Papers.

- (A.) Foreign Office minutes.
(B.) (1)—Sir G. Lowther, No. 221, Telegraphic.
(2)—Sir E. Grey to Sir G. Lowther, No. 357, Telegraphic.
(C.) (1)—Admiralty letter, undated.
(2)—Sir E. Grey to Turkish Ambassador July 25, 1911.
(3)—Turkish Ambassador to Sir E. Grey August 2, "
(4)—Foreign Office to Admiralty August 8, "
(5)—Admiralty to Foreign Office.. .. September 23, "

[42079]

Report.

That, in our opinion, it cannot be a breach of neutrality for His Majesty's Government to permit the services of the officers in question to be utilised by the Turkish Government for the purpose of supervising the construction in this country of Turkish battle-ships, since such ships will not be allowed to leave this country until the present hostilities are at an end. We may point out that no argument to the contrary could gain any support from the language of "The Foreign Enlistment Act, 1870," for, assuming that Messrs. Armstrong, Vickers, and Brown have complied with the provisions of section 8 of that Act, the shipbuilding operations, in the supervision of which these officers are employed, are themselves permitted by the Foreign Enlistment Act.

With regard to the further question put to us in Mr. Mallet's letter of the 13th instant, there is, in our opinion, no objection to allowing British officers who were in Turkish employment at the outbreak of hostilities to continue at their posts, on the understanding that they take no part in hostilities and that their present services are not calculated to assist the belligerent in the present war.

We have, &c.

RUFUS D. ISAACS.
JOHN SIMON.*Royal Courts of Justice,
October 24, 1911.*



(24)

UNITED STATES.

[11232]

No. 10.

[File 491/11.]

[May 17, 1911.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 15, 1911.

As to
Canada
being a
"foreign
country" in
relation to
Treaty of
1815 with
United
States.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith the papers, as noted in the accompanying list, respecting the meaning of Article 2 of the Convention of Commerce between Great Britain and the United States of America, signed at London the 3rd July, 1815.

It will be observed (Paper B) that Mr. Bryce, His Majesty's Ambassador at Washington, maintains that a request, based on the most-favoured-nation clause in that Treaty, to have the same fiscal treatment accorded to His Majesty's Government by the United States as is given to Canada under the Reciprocity Agreement, would be met by the express words of the Treaty of 1815, which present no ground for the application of the clause where the benefits are given to Canada because Canada is not a foreign country, and because the last paragraph of Article 2 of that Treaty excepts from the provisions of that article the intercourse between the United States and the British possessions in North America.

On the other hand, it may be contended that, strictly speaking, the United Kingdom is entitled to claim the same fiscal treatment as is accorded to Canada by the present Agreement between Canada and the United States, because the United States are bound not to impose higher or other duties on the importation into the United States of any articles the growth, produce, or manufacture of His Britannic Majesty's territories in Europe, than are or shall be payable on the like subjects, being the growth, produce, or manufacture of any other foreign country; and because, in relation to the United States, Canada is a foreign country, and not a possession or colony of the United States.

With regard to the latter part of Mr. Bryce's statement that the express words of the Treaty of 1815 present no ground for the application of the most-favoured-nation clause where the benefits are given to Canada because Canada is excepted by the last paragraph of Article 2 referred to, it may be urged that that paragraph does not appear to admit of a more extended interpretation than this: that the West Indies and British North America shall not be bound to give, or entitled to receive, the benefits which form the subject of that Convention; and the fact that Canada is expressly excluded from the operation of the Convention as a part of His Majesty's Dominions would appear to strengthen, rather than to weaken, the claim of the United Kingdom to most-favoured-nation treatment in the present case.

In these circumstances Sir E. Grey would be glad to be informed whether you consider that Canada is a "foreign country," or not, within the meaning of the Treaty of 1815, and also to be favoured with any observations of a general nature which you may desire to offer on the papers now submitted to you.

I have, &c.

W. LANGLEY.

List of Papers.

(A.)—Convention of Commerce between Great Britain and the United States, July 3, 1815
[Library No. 162].

(B.)—Mr. Bryce's despatch No. 31, Commercial, of February 21, 1911.

UNITED STATES.

25

Foreign Office to the Law Officers of the Crown.

THE Under-Secretary of State for Foreign Affairs presents his compliments to His Majesty's Attorney-General and Solicitor-General, and with reference to the letter from this Office of the 15th April last, has the honour, by direction of Secretary Sir E. Grey, to enquire when he may expect to receive their report upon the meaning of Article 2 of the Convention of Commerce of the 3rd July, 1815, between the United Kingdom and the United States of America.

The question involved is to be raised by the Earl of Selborne in the House of Lords early next week, and it is important that Sir E. Grey should be able to advise Viscount Morley on the subject.

Foreign Office, May 11, 1911.

[18964]

Report.

[File 491/11.]

In our opinion, the words "any other foreign country," which are the material words in the first paragraph of Article 2 of the Treaty of 1815, relate to States other than the two Contracting States, and not to portions of the dominions of the Contracting States. In other words, Canada, whilst a "foreign country" in relation to the United States, is not "another foreign country" than Great Britain, but merely another part of the same foreign country, and a preference given by the United States to Canada is not, as regards Great Britain, a preference given to another foreign country, but is a preference given to Great Britain herself with respect to a portion of her own territory.

This interpretation of the first paragraph of Article 2 appears to us to be confirmed by the last paragraph of the same Article, for it would be strange to find the same place described in the first paragraph as "another country" and in the last as "part of His Majesty's possessions."

We have, &c.

RUFUS D. ISAACS.
JOHN SIMON.

*Law Officers' Department,
May 11, 1911.*

o

[433]

H



1912

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. April 1913.

CONFIDENTIAL.

(10192.)

5

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1912.



LIST OF REPORTS.

(Arranged according to Countries.)

NOTE.—The Reports not addressed to the Foreign Office are marked *1A*, &c.

BULGARIA.

No.		Date.	SUBJECT.	Page
1	Law Officers ..	Apr. 24, 1912	Bulgarian (Jurisdictional) Order in Council. Approving draft	1

CHINA.

<i>1A</i>	Law Officers to Colonial Office	Jan. 29, 1912	Royal prerogative of pardon at Hong Kong in case of prisoners from China under the China Order in Council, 1904. New Letters Patent should issue to cover all cases	3
-----------	---------------------------------	---------------	---	---

EGYPT.

2	Law Officers ..	Mar. 20, 1912	Conflict of jurisdiction between the British Consular Court and the Mixed Tribunal in Egypt. Case of Abramino Carasso. Defining relation between the Mixed Tribunal and the Consular Court	4
3	Law Officers ..	Dec. 23,	Writs from the Mixed Courts in Egypt. His Majesty's Government under no obligation to effect service in criminal cases	9
4	Law Officers ..	Dec. 27,	Deserters from the British Army in India. Consul-general at Port Said has power to arrest and detain persons suspected of being deserters	11

GENERAL.

<i>4A</i>	Law Officers to Board of Trade	Aug. 10, 1912	Position of foreign creditors under an English bankruptcy. Rights of a trustee in any English bankruptcy to property of the bankrupt situate abroad, and <i>mutatis mutandis</i> ..	13
-----------	--------------------------------	---------------	---	----

GERMANY.

5	Law Officers ..	Mar. 15, 1912	Arrest of fugitive criminals on German merchant-vessels in British territorial waters	14
6	Law Officers ..	Dec. 23,	Arrest of fugitive criminals on German merchant-vessels in British territorial waters. Further respecting ..	18

PERSIA.

7	Law Officers ..	Apr. 4, 1912	Persian Coast and Islands (Amendment) Order in Council. Approving draft	21
8	Law Officers ..	Dec. 23,	Imperial Bank of Persia. Powers of the Bank to increase the issue of notes.	22

LIST OF REPORTS.

iii

TURKEY.

No.		Date.	SUBJECT.	Page
9	Law Officers ..	Oct. 29, 1912	Turkish gun-boats interned in Egypt during the Turco-Italian war. As Turkey is at war with Greece, they are not entitled to an opportunity of leaving. If they were so entitled, their armaments should be returned to them	23

UNITED STATES.

10	Law Officers ..	Mar. 19, 1912	Panamá Canal. Bearing of the Hay-Pauncefote Treaty on the question of preferential treatment of United States' vessels using the Canal. Coastwise trade	25
11	Law Officers ..	Aug. 12,	Panamá Canal Bill. Bearing of the Hay-Pauncefote Treaty on Article 11 of the United States' Bill. Coastwise trade	27
12	Law Officers ..	Dec. 21,	Threatened diversion of the seal-skin market from London to the United States	28



(iv)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1912.

[The figures refer to the numbers of the pages.]

ARB—COU.

A.

- Arbitration. As to necessity under Arbitration Treaty to refer to arbitration the interpretation of the treaty itself, 18-21.
- Armaments. Release when interned vessel is released, 23-24.
- Army (British). Deserters. *See* Deserters.
- " " Desertion from. *See* Desertion.
- Arrest in territorial waters. *See* Territorial waters.
- " of deserters. *See* Deserters.

B.

- Bank-notes. Amount which Imperial Bank of Persia is entitled to issue, 22-23.
- Bankruptcy. Position of foreign creditors under an English bankruptcy, 13-14.
- " Rights of trustee to property of bankrupt situated abroad, 13-14.
- Belligerency. Effect of continuous belligerency of a State on internment of its vessels of war, 23-24.
- "Bürgermeister." *See* Territorial waters (arrest in).

C.

- Canada. Effect of United States Panamá Canal Bill on shipping owned by Canadian Railway Companies, 27-28.
- Carasso, A., 4.
- Coasting trade, American, and the Panamá Canal, 25-28.
- Consular Courts, China and Japan (criminals convicted by). Royal prerogative of pardon at Hong Kong, 3-4.
- " " Egypt. Conflict of jurisdiction with Mixed Tribunals, 4-9.
- Courts. *See* Consular Courts.
- " *See* Mixed Tribunals (Egypt).

DES—INT.

D.

- Deserters from British Army in India. Consular Court at Port Said has power to arrest and detain suspects, 11-13.
- Desertion (from British Army) an "offence" in English law, 11-13.

E.

- "Ernst Woermann." *See* Territorial waters (arrest in).
- Execution on goods (Carasso case). Conflict of jurisdiction between Mixed Tribunals (Egypt) and Consular Court, 4-9.
- Extradition to a third State. German Government's contention that "Ernst Woermann" and "Bürgermeister" cases involved the principle, 15-16.

G.

- Goldstein, E. Arrest resisted by master of German ship in British territorial waters ("Ernst Woermann" case), 14-21.

H.

- Harbours. *See* Ports and harbours.
- Hoffmann, W. and C. E. Arrest resisted by master of German ship in British territorial waters ("Bürgermeister" case), 14-21.
- Hong Kong. Prerogative of pardon: criminals convicted by Consular Courts in China and Japan, 3-4.

I.

- Imperial Bank of Persia. Extent to which notes may be issued, 22-23.
- Internment. Turkish vessels interned in Egypt during Turco-Italian War not to be liberated during succeeding Turco-Greek War, 23-24.
- " Restoration of armaments to vessels on release, 23-24.

ALPHABETICAL INDEX.—(Names and Subjects.)

v

JUR—PRI.

J.

- Jurisdiction. Conflict of. *See* Mixed Tribunals (Egypt).
- " Orders in Council. *See* Order in Council.

K.

- Kerr, H. F., and Co., 9-11.

L.

- Legislation. United States Panamá Canal Bill. *See* Panamá Canal.

M.

- Mixed Tribunals (Egypt). Jurisdiction: conflict with Consular Court, 4-9.
- " " " Writs in criminal cases not served by His Majesty's Government, 9-11.

N.

- Neguib Eheid, 4.

O.

- Order in Council. Bulgaria (Jurisdiction), 1912, 1-3.
- " " Persian Coast and Islands (Amendment), 1912, 21-22.

P.

- Panamá Canal. Preferential treatment of United States' vessels. Position under Hay-Pauncefote Treaty, 25-28.
- " " Position of Canadian vessels under United States' legislation, 27-28.
- " " Question of United States' sovereignty, 25-27.
- Panamá Canal Zone. Question of United States' sovereignty, 25-27.
- Pardon. Prerogative of. *See* Hong Kong.
- Pitt, G. S., 9-11.
- Ports and harbours. Arrest of fugitive criminals on foreign merchant-ship, 14-21.
- Prisoners at Hong Kong. *See* Hong Kong.

SEA—WRI.

S.

- Sealskin market. Threatened diversion from London to United States. Bearing of Treaty of July 7, 1911, 28-31.
- Silley, R., 4.
- Sovereignty. United States', over Panamá Canal and Panamá Canal Zone, 25-27.

T.

- Territorial waters. Arrest of fugitive criminals in German merchant-ships in British territorial waters. Cases of "Ernst Woermann" and "Bürgermeister," 14-21.
- " " " Scope of Arbitration Agreement of 1904 in this respect, 18-21.
- Treaty (Arbitration). As to necessity of arbitration on interpretation of terms of an Arbitration Agreement, 18-21.
- " Hay-Pauncefote, 1901. Right of United States' Government to give preferential treatment to United States' shipping in Panamá Canal, 25-28.
- " (Pelagic Sealing), 1911. Bearing of Article 11 on diversion of sealskin market from London to United States, 28-31.
- Tribunals. *See* Mixed Tribunals.
- Trustee in bankruptcy. *See* Bankruptcy.

V.

- Vessels. Preferential treatment of United States' vessels in Panamá Canal, 25-28.
- " *See* Territorial waters.
- " of war. Internment of. *See* Internment.

W.

- War. Internment of vessels. *See* Internment.
- Writs issued by Mixed Tribunals (Egypt). *See* Mixed Tribunals.



1912

Printed for the use of the Foreign Office. March 1913.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1912.

BULGARIA.

No. 1.

[14617]

[File 7826/1912]

[April 24, 1912.]

Foreign Office to the Law Officers of the Crown.

Gentlemen.

Foreign Office, April 11, 1912.

I HAVE the honour, by direction of the Secretary of State, to transmit to you the accompanying papers relative to the question of the issue of an Order in Council, to be entitled "The Bulgarian Order in Council, 1912," extending to Bulgaria the provisions of "The Ottoman Order in Council, 1910," subject to certain modifications.

Draft
Bulgarian
Order in
Council,
1912.

The territories which now form the Kingdom of Bulgaria were formerly part of the Ottoman Empire, and as such were subject to the Capitulations in force between the Sultan of Turkey and this country, under which British subjects were, in civil cases other than those concerning real property and in certain criminal cases, withdrawn from the jurisdiction of the local tribunals and were subject to Consular Courts established by their own Sovereign.

Bulgaria became an autonomous principality in 1878 and an independent kingdom in 1908. The number of British subjects resident in Bulgaria is very small, and of recent years there has been no occasion for the exercise on their behalf of the jurisdiction of British tribunals, but certain British plaintiffs have now commenced an action at Sophia by the issue of a writ against other British subjects, defendants in the British Consular Court at that capital.

The writ has been issued because they, and also British consular officers in Bulgaria, have been under the impression that "The Ottoman Order in Council, 1910," applied to Bulgaria, and that such a court existed under that Order. Sir E. Grey is, however, advised that this is not the case, since "The Ottoman Order in Council, 1910," is expressly limited in its scope to the Ottoman Dominions, and the Kingdom of Bulgaria has now ceased to be part of those Dominions.

His Majesty's Government have consistently maintained up to the present time that the Capitulations are still in force in Bulgaria, and cannot at this juncture abandon that contention though negotiations are in progress with the Bulgarian Government for their abolition on certain conditions which have not yet been fulfilled on the part of that Government. In the circumstances Sir E. Grey feels that it is desirable to issue an Order in Council under "The Foreign Jurisdiction Act, 1890," which will apply to Bulgaria the judicial machinery established for the Ottoman Dominions by the Ottoman Order in Council. The accompanying draft Order in Council (Paper A) has accordingly been prepared for this purpose.

[337]

B



BULGARIA.

The proposed Order in Council applies "The Ottoman Order in Council, 1910" (Paper B), to Bulgaria, with such modifications as appear to be necessary, but does not confer on His Majesty's Minister at Sophia the power to issue King's Regulations thereunder. It brings Bulgaria within the jurisdiction of the Supreme Court at Constantinople, established under "The Ottoman Order in Council, 1910," so as to obviate any separate appointment of the Judges of that court under the new Order.

Article 2 of the Order is intended to meet in advance any contention which might be raised that certain fees which appear in rare instances to have been levied in the Consular Courts in Bulgaria were wrongly levied and should be repaid, and also to confer *ex post facto* validity on the issue of the writ and on the steps taken in the earlier stages of the case already mentioned, to which the accompanying correspondence with his Majesty's Minister at Sophia relates. (Papers C, D, and E.)

Sir E. Grey desires me to request that you will take the matter into your consideration, and favour him, at your earliest possible convenience, with your opinion whether, having regard to all the circumstances of the case, the terms of the proposed Order in Council are right and proper for submission to the King in Council for His Majesty's approval.

I have, &c.

LOUIS MALLET.

List of Papers

- (A.)—Draft Bulgarian Order in Council.
- (B.)—Ottoman Order in Council (Confidential 9745*), November 7, 1910.
- (C.)—From Sir H. Bax-Ironside, No. 6, Treaty, March 27, 1912 (13694).
- (D.)—To Sir H. Bax-Ironside, No. 7, Telegraphic, Treaty, April 5, 1912 (13694).
- (E.)—From Sir H. Bax-Ironside, No. 4, Telegraphic, Treaty, April 8, 1912 (14617).

[17314]

Report.

The draft Order in Council, as initialled by us, may, in our opinion, properly be submitted to the King for the approval of His Majesty in Council.

We have, &c.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department, April 24, 1912.

ANNEX.

Bulgarian Order in Council.

WHEREAS by Treaty, Capitulation, grant, usage, sufferance, and other lawful means, His Majesty the King has jurisdiction within the territories which now constitute the Kingdom of Bulgaria, and whereas doubts have arisen whether adequate means are at present in force for the exercise of such jurisdiction:

Now, therefore, His Majesty, by virtue and in exercise of the powers in that behalf by "The Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

1. Subject to the other provisions of this Order and to any Treaties for the time being in force relating to Bulgaria, "The Ottoman Order in Council, 1910," shall, from and after the date of this Order, be deemed to be in force in Bulgaria, as if Bulgaria were substituted therein for "the Ottoman Dominions," subject to the exceptions, adaptations, and modifications following:—

- (1.) Articles 144–170 of the said Order shall not apply to Bulgaria.
- (2.) The jurisdiction of the Supreme Court under the said Order shall include Bulgaria.
- (3.) Except where the context otherwise requires, the Kingdom of Bulgaria is hereby substituted for the Ottoman Dominions, and the Bulgarian Government for the Sublime Ottoman Porte, and Bulgarian subjects for Ottoman subjects, and His Majesty's Minister for the Ambassador, wherever such expressions occur in the said Order.

BULGARIA.—CHINA.

(4.) Provincial Courts shall be held at Sophia, Varna, and Philippopolis, without such further appointment as is prescribed in the said Order, and the districts of the said Courts shall be the districts of the commissioned consular officers there stationed, provided that the Provincial Court at Sophia shall not exercise jurisdiction within the districts of the Provincial Courts at Varna or Philippopolis.

(5.) No local Court shall be established in Bulgaria.

(6.) For the purposes of Part II of "The Fugitive Offenders Act, 1881," Bulgaria and the other places named in Article 89 (d) of the said Order shall be deemed to be one group of British possessions.

2.—(1.) All proceedings which may have been taken in any Consular Court of His Majesty in Bulgaria previous to the passing of this Order shall be deemed to have been valid; and no such proceedings shall be questioned upon the ground of any lack of authority on the part of the Court in or before which they were taken.

(2.) Where any proceedings have been commenced in any Consular Court of His Majesty in Bulgaria, and are still pending at the date of this Order, all steps taken in the course of such proceedings shall be deemed to be valid, provided that they would have been valid if taken after the date of this Order.

(3.) This Order shall come into force forthwith.

(4.) This Order may be cited as "The Bulgarian Order in Council, 1912." And the Right Honourable Sir Edward Grey, Baronet, K.G., one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein.

R. D. I.
J. A. S.

CHINA.

No. 1A.

[9959]

[File No. 6465/12.]

[January 29, 1912.]

[In Colonial Office,
March 6, 1912.]

The Law Officers of the Crown to Colonial Office.

Law Officers' Department, January 29, 1912.

Sir,

WE were honoured with your commands signified in Mr. G. V. Fiddes's letter of the 21st October last, stating that he was directed by you to inform us that the Governor of Hong Kong had enquired whether the Royal Letters Patent of the 22nd October, 1866, empowering the officer for the time being administering the Government to pardon criminals convicted of offences by Her late Majesty's Consular Courts in China and Japan, were still in force. That copies of the Letters Patent of the 22nd October, 1866, and of all other Letters Patent issued for Hong Kong since that date were sent for our information.

That Mr. Fiddes was to observe that the Letters Patent expressly empowered the Governor of Hong Kong to exercise the Royal prerogative of pardon in respect of any British subjects who might be sent to undergo imprisonment in the Colony under the provisions of "The China and Japan Order in Council, 1865."

That that Order in Council was repealed by "The China and Corea Order in Council, 1904," but that it was expressly provided by section 169 of the latter Order that such repeal should not take away or abridge any protection or benefit given or to be enjoyed in relation to any of the Orders in Council repealed by "The China and Corea Order in Council, 1904." Further, that section 67 of sub-section 2 of the same Order provided that nothing in the Order should affect the King's prerogative of pardon; and that it was conceived that that provision would apply to any delegation of the prerogative.

That, in view of those circumstances and of the fact that the Letters Patent did not appear ever to have been specifically repealed, you were disposed to think that they were still in force, but that you had learnt that the Secretary of State for Foreign Affairs was of opinion that they were not in force at present. That Sir E. Grey considered that they would have remained in force in the case of prisoners who were sent to undergo imprisonment in Hong Kong under the provisions of the Order in Council of 1865, but that he added that that question did not now arise, as it was understood that the oldest sentence at present being served dated back only to September 1907, i.e., to a date subsequent to the issue of the second Order in Council.

Royal prerogative of pardon at Hong Kong in case of prisoners from China.



1912

4

CHINA.—EGYPT.

That Mr. Fiddes was therefore to request us to take the papers into our consideration, and to report whether, in our opinion, the Royal Letters Patent of the 22nd October, 1866, were still in force.

We have taken the papers into our consideration, and, in obedience to your commands, have the honour to

Report—

That, in our opinion, the Letters Patent of the 22nd October, 1866, though still in force to the extent of their application, are no longer effective to enable the prerogative of pardon to be exercised by the Governor of Hong Kong in the case of all persons who may be convicted under the China and Corea Order of 1904 and sent to Hong Kong for imprisonment. Under the latter Order British subjects convicted in Corea and "protected persons" convicted in either China or Corea may be imprisoned at Hong Kong as well as British subjects convicted in China. Of these only the last class, namely, British subjects convicted in China, are within the scope of the Letters Patent of 1866. It is therefore necessary, in order to enable the prerogative to be exercised by the Governor in the other cases, that new Letters Patent should issue, and, that being the case, we consider it desirable that the new Letters Patent should deal with all cases of convictions under the Order of 1904.

We have, &c.

RUFUS D. ISAACS.
JOHN SIMON.

EGYPT.

[32954/11]

[No. 2.]

[File No. 2357.]

[March 20, 1912.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, October 9, 1911.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit, for your consideration, the papers noted in the accompanying list relating to a case of conflict which has arisen between the British Consular Court and the Mixed Tribunal in Egypt. The particular case in question has now been disposed of by arrangement; but in view of the risk of similar occurrences in future, and of the attitude adopted by the Mixed Tribunal, Sir E. Grey is anxious to obtain the benefit of your opinion on the legal questions involved. The material facts of the case are briefly as follows:—

In October 1909 a local subject, Neguib Eheid, obtained judgment by default before the Mixed Tribunal of Cairo against a British subject, by name Abramino Carasso, for a sum of about 230*l.* No steps were taken at the time to enforce the judgment, and under Article 389 of the Mixed Code of Procedure, Civil and Commercial, it *prima facie* became of no effect after remaining unexecuted for six months. It appears, however, that the debtor, at some unknown date, noted upon the judgment his "acquiescal" therein. The legal effect of this proceeding appears to be doubtful, but no objection to the rights of Eheid has been taken on that ground in the case.

On the 30th December, 1910, a British subject named Silley obtained judgment before his Britannic Majesty's Provincial Court at Cairo against Carasso for 340*l.* 14*s.*

The Mixed Courts in Egypt were established under the provisions of the "Règlement d'Organisation judiciaire" (Paper 35). His Britannic Majesty's Provincial Court at Cairo was established by Order in Council under "The Foreign Jurisdiction Act, 1890." The Order in Council at present in force in Egypt is "The Ottoman Order in Council, 1910" (Paper 34).

On the 31st December Neguib Eheid applied to the Mixed Tribunal for execution under the judgment of October 1909. There is some ground for suspecting that this action was taken in collusion with the debtor.

Conflict of
Jurisdiction
between
Egyptian
Mixed
Tribunal
and
Consular
Court
[Carasso
Case].

EGYPT.

5

Under Article 18 (Title 1) of the Mixed Rules as to Judicial Organisation ("Règlement d'Organisation judiciaire") under which the Mixed Tribunal came into existence, it is necessary for the "huissier" of the Mixed Tribunal to notify, under penalty of nullity, any intended execution to the Consulate of the nationality to which the debtor belongs. By an error the notification was given in Neguib Eheid's case to the Italian Consulate instead of to the British.

Thereupon, on the 4th January, 1911, the "huissier" of the Mixed Court appears to have entered the debtor's flat, and to have purported to seize the goods therein, leaving the debtor in charge as judicial guardian. No official document was left, as is apparently necessary under section 510 of the "Code de Procédure civile et commerciale," nor were seals placed on the door.

On the same day (4th January) execution issued under the Consular judgment, and the Marshal went to the debtor's flat to seize his furniture. He arrived after the departure of the "huissier," and it is stated that he was informed by the debtor of what had occurred. He formally took possession of the furniture, made an inventory, and stationed an Egyptian policeman outside the flat. Subsequently the Consular seals were attached to the outer door. The sale of the furniture was then fixed for the 10th January and duly advertised.

On the 7th January the Mixed Tribunal authorities served upon the British Consulate a notice in due form of their intention to levy execution on the goods of Carasso. Upon this notice the Consul made the following annotation:—

"Par un jugement rendu par le Tribunal consulaire britannique, une saisie-exécution sur les meubles de Abramino Carasso a déjà été faite par le Ministère de ce Consulat.

"Les objets en question sont dans la possession de ce Consulat, qui est en train de réaliser en satisfaction du jugement précité; par conséquent aucune autre saisie ne peut être pratiquée.

"ARTHUR D. ALBAN,

His Britannic Majesty's Consul.

(L.S.)

"Consulat de Sa Majesté britannique,
"Le Caire, le 7 janvier, 1911."

Notwithstanding this warning, the "huissier," acting, as it is believed, under the orders of the President of the Mixed Tribunal, affixed the seals of the Mixed Tribunal upon the doors of the flat on the morning of the 10th January. The goods were thus in the custody of both Courts, and a conflict of jurisdiction arose.

The British Consul was authorised by Sir Eldon Gorst to address to the President of the Mixed Tribunal a letter, copy of which is sent herewith, protesting against the action of the Mixed Tribunal. The President replied that in similar cases foreign Consuls recognised the mixed jurisdiction, but that he was willing to remove the mixed seals and consent to the Consular sale on condition that the proceeds were paid into the Mixed Tribunal.

After some correspondence it was agreed, in order to avoid an unseemly dispute and possible disturbance, that the sale should be carried out by the Consular Court, and the proceeds lodged in the National Bank of Egypt to be paid out to the person to whom they should eventually be found to be due, the rights of all parties being reserved. The sale then took place, and the proceeds were paid into the bank.

Considerable correspondence ensued. It was at one time feared that the "mixed" creditor would apply to the Mixed Tribunal to attach the sum at the bank, but he did not do so. The Consular creditor did, however, apply to the Consular Court for an order directing the Marshal to pay to him the proceeds of the sale. This was refused, and the creditor lodged an appeal to the Supreme Court. When the appeal was heard the facts were not fully put before the Court; the Marshal admitted that officially the amount was in possession of the Court, and the Judge, though aware unofficially that difficulties had arisen in the matter, felt himself bound, as the application was practically unopposed, to make the order. The matter was then settled by the British Government paying to the "mixed" creditor a sum equivalent to the proceeds of the sale, while the money deposited in the bank was paid out to the Consular creditor. The immediate dispute thus terminated, both parties expressly maintaining their opinions.

Generally, it may be said that the views of the Mixed Tribunal were supported by the late Sir Eldon Gorst and his advisers, while the Department was inclined to

[337]

C



uphold the contentions of the Consular Court. The difficulty of the position in which the Secretary of State found himself, being bound at the same time to maintain the interests of the British creditor and those of the Egyptian Government, is apparent.

The views of the Mixed Tribunal will be found in the following documents:—

Memorandum by the Procureur général, the 11th February, 1911.

Memorandum by Sir M. McIlwraith, the 15th February, 1911.

Letter from the Vice-President of the Mixed Tribunal to the Minister of Justice, the 24th May, 1911.

Similar letter from the Procureur général, the 24th May, 1911.

Letter (with enclosures) from the Procureur général to the Judicial Adviser, the 10th June, 1911, with notes by the Judicial Adviser on the precedents cited.

The contentions of the Consular Court are embodied in the following documents:—

Letter from the British Consul to the President of the Mixed Tribunal, the 12th January, 1911.

Despatch from the Secretary of State to Sir E. Gorst, the 13th April, 1911.

Minute by Judge Cator, the 1st April, 1911.

Despatch from Judge Cator to the Secretary of State, the 14th August, 1911.

Letter from Judge Cator to Sir E. Davidson, the 15th August, 1911.

It may be remarked that most of the precedents quoted are cases not of judicial decisions, but of consular action; while, where judicial decisions are cited, they are of necessity given by one or other of the Courts which are parties to the present dispute. There is no doubt that the Mixed Tribunal is prepared, if opportunity arises, to decide all the points involved in its own favour, and that it is, and has been for some time, desirous of extending its jurisdiction in every possible way, and thus encroaching on the jurisdiction of the Consular Courts.

There are really three questions involved, and the arguments used may be briefly summarised under three heads:—

1. The Mixed Tribunal contends that the seizure made by its officer on the 4th January was good and valid, and that therefore the mixed seizure was in point of fact anterior to the consular. The words of Article 18 (Title 1) of the "Règlement d'Organisation judiciaire," "Seulement l'officier de justice chargé de l'exécution, par le Tribunal est obligé d'avertir les consulats du jour et de l'heure de l'exécution, et ce à peine de nullité et de dommages-intérêts contre lui," are said to mean only that the absence of proper notice to the Consulate rendered the seizure not void, but only voidable by the Mixed Tribunal; so that, no application to have the seizure declared void having been made, it remained valid. In support of this contention a case is quoted in which the Mixed Court of Appeal held that the absence of notice to the Consulate was a purely personal plea which could only be set up by the debtor himself, and which he could forego either expressly or tacitly.

The view taken by the Consular Court is that the failure to notify the Consulate rendered the seizure, under the terms of the Article in question, null and void, and that therefore the consular seizure was prior to time. This view is supported by the action of the Mixed Tribunal in giving notice to the British Consulate and levying a second execution. It is obvious that if the contention of the Mixed Court is correct, it would much facilitate the taking of collusive proceedings, such as are believed to have occurred in this case.

2. Assuming that the consular seizure was, in fact, prior to the mixed one, the Mixed Tribunal contends that in cases where such a conflict of jurisdiction has arisen, the Mixed Tribunal alone is competent to decide which jurisdiction is to prevail. Reliance is placed on the fact that no provision was made in the "Règlement d'Organisation judiciaire" for the establishment of a Court to decide on such questions of conflict in civil affairs, as was done in the case of criminal matters, and also on the terms of Article 18 (Title 1) of the "Règlement," "L'exécution des jugements aura lieu en dehors de toute action administrative, consulaire ou autre . . .", as interpreted in the light of the preliminary discussions as to the wording of the Article. The cases which are quoted by the Procureur général in his Memorandum of the 11th February, 1911, and letter of the 18th May, 1911, seem to have more bearing on the third point. Although the point does not seem to have been raised in this case, another argument may be founded on the wording of Article 22 of "The Ottoman Order in Council,

1910," which deals *inter alia* with the constitution and powers of the Egyptian Consular Court, or, more accurately, the "Provincial Court at Cairo" or elsewhere:—

"All His Majesty's jurisdiction, civil and criminal, not under this Order vested exclusively in the Supreme Court, shall to the extent and in the manner provided by this Order be vested in the Provincial and Local Courts.

"Provided that, as regards all such matters and cases as come within the jurisdiction of any Egyptian Courts established with the concurrence of His Majesty, the operation of this Order is hereby suspended until His Majesty, by and with the advice of His Privy Council, shall otherwise order."

This Article is reproduced verbatim from the former Order. It would be possible to argue that the Consular Court is unable to decide whether a particular case comes within the jurisdiction of an Egyptian Court (in this case the Mixed Court) administering a foreign law of which the Consular Court officially knows nothing, and that therefore the Mixed Tribunal is alone competent to decide the question of jurisdiction.

In support of the position of the Consular Court, it may be argued that every Court has the right to decide whether a particular case is within its jurisdiction or not. Article 18 of the "Règlement" refers only to administrative Consular interference, and not to the interference of another duly constituted Judicial Tribunal acting in pursuance of jurisdiction which properly belonged to it. Judge Cator refers to two cases in which it was held that the Consular Court had authority to decide the question of jurisdiction. One of these cases is the one now under discussion, and it appears from Assistant Judge Grain's letter of the 14th August, 1911, to Judge Cator, which is sent herewith, that the facts of the case were not fully before the Court. The other case, that of Reid, Barnard and Co. v. Russell, was decided by Judge Cator, and a copy of his judgment accompanies. A copy of an opinion on the decision by Mr. Brunyate, one of the legal advisers to the Egyptian Government, is sent herewith, from which it will be seen that he considers that Judge Cator exceeded his powers in accepting jurisdiction; but of course unless the Privy Council has an opportunity of pronouncing on the question, that judgment will remain binding on the Consular Court.

3. On behalf of the Mixed Tribunal, the Procureur général of the Egyptian Government contends that the effect of the appearance of a "mixed" interest is to put an end to the jurisdiction of the Consular Court, and to transfer the affair to the Mixed Tribunal. It would follow that the duty of the Consular Court was to remove its seals and officers and hand over the property to the custody of the Mixed Tribunal. The claim is put in the widest possible way: "Dès l'apparition d'un intérêt mixte avant la complète exécution d'un jugement consulaire, l'affaire devenait mixte, et seule la juridiction mixte pouvait statuer sur les droits respectifs des parties."

Reliance is placed on Article 9 (Title 1) of the "Règlement d'Organisation judiciaire": "Ces Tribunaux connaîtront seules de toutes les contestations en matière civile et commerciale entre indigènes et étrangers, et entre étrangers de nationalités différentes, en dehors du statut personnel."

A considerable number of precedents are also quoted in support of the proposition. Many of these are cases of bankruptcy, and may therefore not be considered to be in point, though the Procureur général argues that they are. The cases which seem most important are those of Meimaris, Lévy, and Rottolo (quoted in the Procureur général's Memorandum of the 11th February, 1911), and Condogeorgis, Kemner, Crossland, and Schaefer (cited in the enclosures to his letter of the 10th June, 1911, to the Judicial Adviser). The last case is of particular importance, both because the facts were very similar to those of the present case, and because the Mixed Tribunal gave a decision which shows clearly how they would deal with all similar cases if their jurisdiction were established.

Sir E. Grey is advised that cases in which the Consular Courts saw fit to give way do not constitute binding precedents. The present case is not so much one of a conflict of jurisdiction, but of a concurrent and overlapping jurisdiction. This being so, and the Consular Court having put in its execution first, the ordinary maxim, "*Qui prior est tempore potior est jure*," applies, and the Consular Court was entitled to carry out the sale and satisfy its judgment out of the proceeds, any balance being handed over to the Mixed Tribunal. It will be seen that Judge Cator has expressed some doubt whether this view can be supported except on the ground that the property in the goods has passed to the creditors; but to meet this view it would be sufficient



Egyptian Civil and Commercial Procedure Code, such service being effected through the Solicitor to the Treasury, and this procedure has been followed up to the present time. A memorandum setting forth in detail the circumstances in which this service was undertaken is enclosed (No. 2 of Paper (E)).

The present question has arisen in consequence of the service of a writ upon Mr. G. S. Pitt in connection with the liabilities incurred in Egypt by a company trading under the style of H. F. Kerr and Co. The circumstances leading up to the service of this writ are briefly outlined in the minute on the letter from Waltons and Co. of the 7th March last (Paper (C)). As the result of representations made in the matter, His Majesty's agent and consul-general at Cairo was instructed on the 25th March last to furnish a report on the whole subject, and two despatches have now been received from Lord Kitchener (Papers (H) and (I)), the one stating that the procureur général had abandoned proceedings against Mr. Pitt, and the other enclosing opinions by the legal adviser to the Egyptian Ministry of Justice and by the senior member of the Egyptian State Legal Department on the general obligation of His Majesty's Government to effect service of writs in criminal cases.

A letter has also been received (Paper (J)) from Mr. A. S. Preston, British Crown Advocate in Egypt, who has acted as Mr. Pitt's professional adviser, enclosing notes by himself and by the senior Khedivial councillor on the subject, and a summary of the arguments on both sides will be found in the minute by Mr. Malkin on Lord Kitchener's despatch No. 26, Treaty, of the 3rd instant (Paper (I)). Sir Edward is disposed to concur in the view expressed in that minute and in that held by Mr. Preston rather than in the arguments set forth on behalf of the Egyptian Government by Sir M. McIlwraith and Señor de Rocca Serra. The fact that the provision for service of documents through the diplomatic channel, a provision which has been accepted and acted upon by His Majesty's Government, appears only in the Egyptian Code de Procédure civile et commerciale, and not in the Règlement d'Organisation Judiciaire, the Code Pénal, or the Code d'Instruction Criminelle, would appear, according to the ordinary rules of construction "expressio unius est exclusio alterius" and "expressum facit cessare tacitum," to indicate that the obligation of His Majesty's Government to effect service of documents emanating from the mixed courts does not extend to criminal matters, especially as the mixed courts at the time of their establishment were given criminal jurisdiction in certain cases. Sir E. Grey is also advised that there is no general rule of international law which compels His Majesty's Government to effect service of documents emanating from foreign tribunals in criminal matters, and in this connection it is of interest to observe that the convention signed by most of the European Powers (but not by Great Britain) on the 17th July, 1905 (Paper (K)), which provides for the mutual service of judicial documents, is expressly confined to civil and commercial matters.

I am to request that you will take these papers into your consideration, and that you will favour the Secretary of State with your opinion—

1. Whether, having regard to the fact that His Majesty's Government have only undertaken, in accordance with article 11 of the Civil and Commercial Code of Procedure, to serve writs in civil and commercial cases, and that no corresponding provision exists in the Règlement d'Organisation Judiciaire, the Code Pénal, or the Code d'Instruction Criminelle, they are under any obligation to effect service in the case of writs issued by the mixed tribunals in criminal cases.

2. If not, whether the Egyptian Government may properly be informed that, in criminal cases, service should be effected through a private agent without the intervention of His Majesty's Government.

3. Sir Edward would also be glad to be furnished with any observations of a general nature which you may desire to offer upon the papers now submitted to you.

I have, &c.

LOUIS MALLET.

List of Papers.

(A.)	Viscount Kitchener	..	(No. 12. Treaty)	February	11, 1912.
(B.)	Treasury ..	..	..	February	22, 1912.
(C.)	Waltons and Co. ..	..	..	March	7, 1912.
	To Waltons and Co. ..	..	..	March	25, 1912.
(D.)	To Viscount Kitchener ..	..	(No. 26. Treaty)	March	25, 1912.
	Waltons and Co. ..	..	..	March	11, 1912.
(E.)	Memoranda ..	..	..	March	25, 1912.
(F.)	To Viscount Kitchener ..	..	(No. 37. Treaty)	April	11, 1912.
	Waltons and Co. ..	..	..	March	27, 1912.
(G.)	Waltons and Co. ..	..	..	April	29, 1912.
(H.)	Viscount Kitchener ..	..	(No. 25. Treaty)	May	3, 1912.
(I.)	Viscount Kitchener ..	..	(No. 26. Treaty)	May	3, 1912.
(J.)	Mr. A. S. Preston to Sir E. Davidson ..	..	..	May	3, 1912.
(K.)	Convention signed at The Hague ("State Papers," vol. xcix, p. 990) ..	..	..	July	17, 1905.

Report.

1. No.
2. Yes.
3. We have nothing to add.

We have, &c.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
December 23, 1912.

[55423]

No. 4.

[File 13166/12.]

[December 27, 1912.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 15, 1912.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit for your consideration the papers noted in the accompanying list relating to the power of His Majesty's Consul-General at Port Said to arrest and detain persons under suspicion of being deserters from the British Army in India.

You will observe that the Government of India consider (Paper (C)) that the Consul-General has such power under Articles 25 and 28 of the Ottoman Order in Council, 1899 (now represented by Articles 35 and 36 of the Ottoman Order in Council, 1910, Paper (A)), combined with section 154 of the Army Act (Paper (B)), and that the Judge Advocate-General is, for the reasons given in his minute (Paper (G)), of the same opinion. Sir E. Grey is, however, advised that the correctness of this opinion is, at any rate, open to some doubt.

Under Article 35 (1) of the Ottoman Order in Council, 1910, "any Act that would not by a Court of Justice having criminal jurisdiction in England be deemed an offence in England shall not, in the exercise of criminal jurisdiction under this Order, be deemed an offence, or be the subject of any criminal proceeding under this Order"; and under Article 36 of the same Order in Council "every Court may cause to be summoned or arrested, and brought before it, any person subject to, and being within the limits of, its jurisdiction, and accused of having committed an offence cognisable under this Order" It seems clear, therefore, that the Consul-General, as Judge of the Provincial Court at Port Said, can only deal with persons charged with desertion if desertion is an act that would be deemed an offence in England by a Court of Justice having criminal jurisdiction in England. The powers of Courts of Justice in England as to deserters are conferred on them by section 154 of the Army Act, the heading of which is "Apprehension of Deserters," and under that section the Courts have no power to punish such persons, but can only, on being

Power of
Consul-
General at
Port Said
to arrest
deserters
from British
Army in
India.



satisfied that they are deserters, deliver them into military custody. Sir E. Grey is advised that in order to constitute an act an "offence in England" within the meaning of Article 35 (1) of the Ottoman Order in Council, such act must be punishable by criminal proceedings in an English Criminal Court, and that an act which merely gives the Court power to hand the prisoner over to the military authorities is not an "offence" within the meaning of that Article.

In this connection it may be useful to compare the provisions of sections 221 and 238 of "The Merchant Shipping Act, 1894." Under the former section desertion from a British ship is described as an "offence," and is punishable by the Criminal Court; under the latter desertion from a foreign ship merely gives the Court power to send the man on board his ship, and is not described as an "offence."

There is, of course, no doubt that desertion is, under section 12 of the Army Act, an offence against military law, but Sir E. Grey is advised that that fact does not render it an act which would be deemed an "offence in England" by an English Criminal Court. There are several acts which, under Part I of the Army Act, are offences against military law, such as simple drunkenness by a soldier, which would certainly not be regarded as an "offence" by an English Criminal Court. I am also to draw your attention to the fact that "offence" is defined in the Ottoman Order (Article 3) as including crime and any act or omission punishable criminally in a summary way or otherwise. It is suggested that the opinion of the Judge Advocate-General, that "desertion is by statute (Army Act) an 'offence' in England," can hardly mean more than that desertion is by statute an offence against military law; and the further opinion of the Judge Advocate-General, that the word "offence," "in view of the heading to Part I of the Act, may be taken to be equivalent to 'crime,'" would appear only to be applicable when the word "crime" is used, as it is in the passage quoted, in its technical military sense.

With regard to the latter part of section 154, subsection 3, of the Army Act, on which reliance is placed by the Judge Advocate-General, Sir E. Grey is advised, in view of the heading and the other provisions of the section, that these words should be taken as referring merely to the procedure to be adopted in deciding whether the person charged with being a deserter shall be handed over to the military authorities.

It would appear also that even assuming that a Criminal Court "can take cognisance" of a charge of desertion, or "exercise jurisdiction in the matter," it can only regard desertion as an offence against military law, which is not punishable under the only law which the Court is entitled to administer, and that these facts could therefore hardly justify the statement that the Court would deem it an "offence in England" within the meaning of Article 35 (1) of the Ottoman Order in Council, 1910.

In these circumstances, I have the honour to request that you will take these papers into your consideration, and inform Sir E. Grey whether, in your opinion, His Majesty's Consul-General at Port Said, as Judge of the Provincial Consular Court at that place, has power under Articles 35 and 36 of the Ottoman Order in Council, 1910, combined with section 154 of the Army Act, to arrest and detain persons suspected of being deserters from the British Army in India, with the object of handing them over to the military authorities.

Sir E. Grey would be glad to be furnished at the same time with any general observations which you may be good enough to offer on the subject.

I have, &c.

ALGERNON LAW.

List of Papers.

- (A.) Ottoman Order in Council of 1910.
- (B.) Army Act.
- (C.) Letter from India Office, dated May 4, 1911, and enclosures.
- (D.) Letter from India Office, dated June 30, 1911.
- (E.) Letter from War Office, dated August 9, 1911.
- (F.) Letter from War Office, dated September 30, 1911, and enclosure.
- (G.) Letter from War Office, dated October 26, 1911, and opinion of Judge Advocate-General enclosed therewith.
- (H.) Letter from India Office, dated December 7, 1911.
- (I.) Letter from War Office, dated March 27, 1912, and Opinion of Judge Advocate-General enclosed therewith. (Received since letter to the Law Officers was written.)

Report.

In our opinion, desertion is an act which would, "by a Court of Justice having criminal jurisdiction in England, be deemed an offence in England." The fact that the duty of punishing the offence is entrusted by the Army Act to a court-martial does not make it the less an offence. That this is so is made clear by section 153 of the Army Act, which enables the Civil Courts to impose imprisonment on persons not subject to military law for aiding and abetting desertion.

In our opinion, therefore, His Majesty's Consul-General at Port Said, as Judge of the Provincial Consular Court at that place, has power under Articles 35 and 36 of the Ottoman Order in Council, 1910, combined with section 154 of the Army Act, to arrest and detain persons suspected of being deserters from the British Army in India, with the object of handing them over to the military authorities.

RUFUS D. ISAACS.
JOHN SIMON.

*Law Officers' Department,
December 27, 1912.*

GENERAL.

[36293]

No. 4A.

[File 16942]

[August 10, 1912.]

[In Board of Trade,
August 27, 1912.]

Opinion of the Law Officers of the Crown and Mr. E. W. Hansell.

Question 1.

WHAT is the position of foreign creditors under an English bankruptcy?

All creditors, whatever their nationality, are entitled to prove their debts under an English bankruptcy, and to share in the assets *pari passu*. Certain debts, however, for rates, taxes, salary and wages are entitled to preferential payment over those due to the general body of creditors. But there is this limitation, that if a foreign creditor has received in the foreign country under process of law any payment on account of his debt he must "bring in for the purpose of dividend the sum which he has received abroad." As was said by Lord Eldon, "It has been decided that a person cannot come in under an English Commission without bringing into the common fund what he has received abroad;" and Lord Eldon goes on to point out, what is obviously the case, that a creditor, because he happened personally to be in England, would not be obliged to bring this sum in to the common fund; he might keep it if he liked; he might ignore the English bankruptcy if he pleased (per Lord Cairns, L.C., in *Banco de Portugal v. Waddell*, 5 A.C., at p. 167). No contribution to the assets need, however, be made in respect of anything received by virtue of the law of the foreign country apart from process there, e.g., under a mortgage or charge obtaining in the foreign country and recognised by its law. (*Re Somes* 3, *Manson* 131.)

Position of foreign creditors under an English bankruptcy. Rights of a trustee in an English bankruptcy to property of the bankrupt situate abroad, and *mutatis mutandis*.

Question 2.

What are the rights of a trustee in an English bankruptcy to property of the bankrupt situate abroad, and of a trustee in a foreign bankruptcy to property of the bankrupt situate in England?

(a.) As to movables.

The English Act vests in the trustee in an English bankruptcy all the movables of the bankrupt, wherever situate.

And the English courts recognise the title of a trustee in a foreign bankruptcy to such movables in England as would, by the law of the country where the bankruptcy



takes place, pass to him, and will uphold such title against a subsequent trustee in an English bankruptcy or suing creditor. (See Foote's "Private International Jurisprudence," 3rd edition, p. 326, and cases cited; *re* Anderson 1911, 1 K.B. 896.) There appears to be no such exception as that created by the Danish Royal Order of the 30th November, 1821.

(b.) As to immovables.

The English Act purports to vest in the trustee immovable property abroad, but only subject to all local laws (*ex parte* Rogers, 16 Ch. D., 665), the title of the trustee being dependent on the *lex situs*, and unless the English court orders the bankrupt to convey the land in accordance with the local law, and the local courts recognise such title, the trustee could not effectively obtain the benefit of the property for the creditors. So also a trustee in a foreign bankruptcy would not get a title to immovable property situate in England merely by virtue of the foreign bankruptcy law, but if the foreign court thought fit to compel the bankrupt to convey the land to the trustee by a conveyance in accordance with English law, thus giving a title independent of the foreign law, the English courts would recognise and give effect to such title (see Foote, p. 229).

RUFUS D. ISAACS.
JOHN SIMON.
E. W. HANSELL.

Law Officers' Department,
August 10, 1912.

GERMANY.

[11413]

No. 5.

[March 15, 1912.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, December 4, 1911.

Arrest of
Fugitive
Criminals on
German
Merchant-
ships in
British
Territorial
Waters.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to enclose, for your consideration, a selection of printed correspondence* which has passed between this Department, the Home and Colonial Offices and His Majesty's Embassy at Berlin within the past few years, respecting futile attempts to effect the arrest of fugitive criminals on board of German merchant-vessels calling at Southampton on their way from South Africa to Germany. The difficulties placed by the commanders of these vessels in the way of British police officers endeavouring to carry out their duty have, in two cases, enabled the fugitives concerned to evade the ends of justice, and His Majesty's Government have accordingly to consider what steps they can properly take to obviate a recurrence of such incidents.

The circumstances of the two cases referred to are as follows:—

On the 9th December, 1905, a telegram from Cape Town was received by the Agent-General for the Cape, stating that a warrant had been issued in the Colony for the apprehension of one Elias Goldstein, a Polish Jew, on the charge of fraudulent insolvency, an offence punishable with hard labour for twelve months. He was stated to be a passenger on the German liner "Ernst Woermann," due at Southampton on the 15th December, and it was requested that steps might be taken for his arrest on the arrival of the vessel at that port, with a view to his rendition to Cape Colony under the provisions of the Fugitive Offenders Act. The Agent-General thereupon communicated with the authorities at Scotland Yard, and, as a result of this communication, a provisional warrant of arrest was issued at the Bow Street Police Court on the 12th December. What subsequently happened is explained in detail in the extract of the police report (Enclosure 4 in No. 1 of Print). A Metropolitan police officer proceeded from London to Southampton on the 14th December, where he called upon the Chief Constable of Hampshire, who detailed a detective-sergeant

* Confidential, No. 10161*.

to assist him in executing his provisional warrant. He also called upon the German consul at Southampton, who gave him a letter, in German, addressed to the captain of the "Ernst Woermann." That vessel duly arrived in Southampton Water, and shortly after 6 A.M. on the 16th December the two police officers went out in the tender to where the "Ernst Woermann" was lying off Netley Hospital. There they handed the letter from the German consul to the officer (Captain Schade) in command of the vessel, and they also found Goldstein with his wife and child on board travelling second class to Hamburg.

Captain Schade refused to allow the officers to take the fugitive off the ship on the ground that he was a German on a German vessel. (As a matter of fact, he was not a German, but a Russian subject.) Goldstein declined to go on board the tender, and the police officers had no alternative but to return to shore, and the vessel proceeded on its voyage. The subsequent efforts of this Department to trace the man's movements on the Continent with a view to his possible extradition thence proved abortive, and nothing more was heard of him.

The circumstances of the second incident are set out in detail in the enclosures in the Home Office letter of the 1st February, 1909 (No. 18 of Print). Stated shortly, they are as follows:—

At 6.30 P.M. on the 23rd December, 1908, a telegram was received at Scotland Yard from the Attorney-General, Cape Town, requesting the arrest of William and Christoffelina Elizabeth Hoffmann, of whom the first named was believed to be a German. They were charged with the offence of forgery and uttering at Cape Town, and were reported to be passengers on the German steam-ship "Bürgermeister," due at Southampton the following day.

On receipt of this message a telegram (Enclosure 3 in No. 18 of Print) was dispatched from Scotland Yard to the chief constable at Southampton requesting him to keep the fugitives under observation, and adding that a provisional warrant of arrest would be applied for on the following day. This was done, and the warrant was issued at 10.45 A.M. on the 24th. There was no time to send it to be made use of at Southampton, as the vessel arrived at that port on the afternoon of the same day, but the Southampton police were notified by telegraph of its issue, and were requested to effect the arrest of the Hoffmanns (Enclosure 4 in No. 18 of Print).

The "Bürgermeister" duly arrived and anchored off Netley on the afternoon of the 24th, when Detective-Sergeant Pollock boarded the steamer. His action is fully detailed in his report (Enclosure 1 in No. 18 of Print). He failed to obtain the assent of the captain to the arrest of the Hoffmanns, nor could he persuade them to go on shore in the tender. He accordingly had to leave them on board, and returned on the tender to Southampton. Nothing further was heard of these persons, and efforts made to obtain their provisional arrest, with a view to extradition, proved of no avail.

I am now to invite your consideration of the correspondence which has passed with the German Government and with His Majesty's Embassy at Berlin in regard to these two incidents (Papers numbered 3, 5, 6, 7, 12, 14, 16, 19, 23, 24, 33, 34, 35, 39, and 42 in the enclosed Print).

In their reply to the representations addressed to them in the case of Goldstein (Enclosure in No. 7 of Print), the German Government defended the attitude taken up by the captain of the "Ernst Woermann" on grounds to which, in Sir E. Grey's opinion, no great weight can well be attached.]

These grounds shortly were:—

1. That the German consul at Southampton had merely given the police officer a letter to the captain to assist that officer in a visit of search, and it was not an instruction to allow an arrest on the ship.
2. That the police officer did not consider himself authorised to effect such arrest.
3. That in 1881, the magistrate at Bow Street had expressed doubts as to whether a warrant could be legally executed on a German ship only touching at Southampton.
4. That there was a distinction between an arrest on land and an arrest on board of a merchant-ship lying in British territorial waters.
5. That the arrest was analogous to a case for extradition to a third country, and that the consent of the German Government was therefore a pre-requisite for such an arrest, and that it would, presumably, have been given had it been asked for.



On these points it is to be observed that no evidence could be traced of the magistrate at Bow Street, in 1881 (the late Sir James Vaughan), ever having expressed any such view as that attributed to him in Fertig's case (see No. 10 of Print); that there was no question of any extradition to a third State, and that considerations of time alone would have made it impossible to have obtained the consent of the Imperial German Government without detaining the ship pending the result of the necessary communications between the two Governments. His Majesty's Ambassador at Berlin was consequently instructed to bring these considerations to the notice of the German Government (No. 12 of Print), but no further communication was received from them so far as the Goldstein case was concerned.

After the lapse of many months that Government replied to the enquiry made by His Majesty's Government as to the grounds on which the arrest of the Hoffmanns had been opposed by the captain of the steam-ship "Bürgermeister." This reply is contained in Paper No. 24. In it some stress was laid on the circumstance of the police having no warrant [Superintendent Froest observes, with much force (Enclosure 2 in No. 18 of Print), that it would have made no difference if they had had a warrant in their possession, and the production of a warrant certainly produced no better result in Goldstein's case], and they reverted to the argument already advanced that their consent was necessary because the case was in the nature of an extradition to a third State, instancing, in support of this contention, that when a fugitive criminal was extradited from Canada to Germany, and was disembarked to cross this country *in transitu*, the Imperial Government were required to commence extradition proceedings *de novo* to some extent in England. This unfortunately is the case at present, and the reasons why this formality is deemed to be necessary, in Canadian cases, is fully explained on pp. 32 and 33 of the Print, in a memorandum by Mr. Maycock, the Superintendent of the Treaty Department of this Office. It will be seen on reference to the Home Office letter of the 10th February, 1910 (No. 30 of Print), that it is contemplated to consider what practical steps can be adopted to remove this anomaly, and to place Canada on the same footing, in this respect, as all other parts of His Majesty's Dominions.

The reply which His Majesty's Ambassador at Berlin was instructed to make to the German Government will be found in paper No. 33, and the rejoinder thereto of Herr Kiderlen-Waechter is in paper No. 34 of the Print. The Imperial Government in this last-mentioned note emphatically reiterate that they will not assent to any kind of British warrant being executed, unless their consent has been previously obtained, on German ships of commerce—lying *only temporarily* in British waters, and allusion is made to their sovereign rights over such ships.

Sir Edward Grey is unable to see that the general principle involved is in the remotest degree affected by the circumstance of whether the duration of the stay of a foreign merchant-ship in a British port is brief or protracted.

The last despatch addressed to His Majesty's Ambassador at Berlin is that in No. 35 of the Print, in which is embodied such information as this Department possesses with regard to the practice of other countries in these matters, and the final reply of the German Government is in No. 42 of the printed correspondence. It will be gathered from it that the Imperial Government, while not claiming any extra-territoriality for German merchant-ships, and disclaiming any wish that they should be utilised as asylums for fugitive criminals, are unable to concur in the views of His Majesty's Government, and show no indication of abandoning the stand-point—reiterated so many times in their previous communications—that their consent is an absolute pre-requisite to the carrying out of an arrest on a merchant-ship flying the German flag in British territorial waters.

It will not escape your notice that, in this last communication, the German Government seek again to draw a distinction between the case of fugitive criminals who take refuge on merchant-vessels lying in foreign harbours, and fugitive criminals who are already on board of such vessels when they touch temporarily in such harbours. So far as Sir E. Grey is aware, there are no recognised grounds for any such distinction in international law. The note further seems to imply that a principle of general international law is created by the mere fact of the existence of certain specific provisions in a Consular Convention between Germany and the United States of America. Sir E. Grey, as at present advised, conceives this contention to be also untenable for the reasons stated by Sir Edward Davidson in his minute of the 3rd October last, printed on p. 55 of the correspondence enclosed, to which I am to invite your special attention.

Though perhaps not directly pertinent to the issue now involved, it may not be

out of place to mention that, in consequence of a complaint made some years ago by the German consul-general at Cape Town that an arrest had been effected on a German merchant-vessel at that port without notice having been given to him, enquiries were made of His Majesty's consular officers at some of the principal German ports as to whether, in the converse case, they received any notice from the German authorities of arrests or contemplated arrests on British merchant-vessels. The replies showed that there was no uniformity of practice in such matters. In some places the police authorities notified the British consular officer after an arrest had been made, and in others no such notification was vouchsafed at all. At any rate, there is no record of the assent of His Majesty's Government having been solicited before such arrests were effected, nor would His Majesty's Government deem themselves justified in demanding it.

It will be seen from the Home Office letter of the 2nd instant (No. 45 of Print), that, pending a decision as to what action His Majesty's Government should take in the by no means improbable event of cases like those of Goldstein and the Hoffmanns recurring, the Metropolitan Police have been instructed not to attempt to execute any warrant issued either under the Extradition Acts or under the Fugitive Offenders Act on board a German merchant-ship touching at an English port.

The question, therefore, that demands the most careful consideration is whether, in the event of arrest being again obstructed, as in the cases of Goldstein and the Hoffmanns, His Majesty's Government would be warranted in taking forcible measures to carry out what Sir Edward Grey believes to be their indisputable rights, so far as the municipal law of this country is concerned, after having previously notified the German Government that they will feel compelled to do so in the interests of justice.

With regard to the resort to force, I am to invite your attention to the Departmental minutes on p. 26 of the Print; to the letter to the Home Office (No. 21 of Print) and minutes thereunder, and to the Home Office reply (No. 22 of Print); also to the paragraph at foot of p. 37 in the Home Office letter of the 10th February, 1910 (No. 30 of Print); and, lastly, to the Home Office letter of the 21st October last (No. 44 of Print). In the last-mentioned letter you will notice that the late Home Secretary thought it desirable that your opinion should also be invited on the subsidiary points therein set out.

I am accordingly to request that you will take this important question into your careful consideration and favour Sir Edward Grey with your opinion—

1. As to whether you consider the question of the obligation of His Majesty's Government under general principles of international law, or the usages of international comity, to obtain the assent of the Imperial Government before effecting arrests on German merchant-ships in British waters, which is the one point in dispute, is one in regard to which His Majesty's Government should propose to the German Government a submission to arbitration by The Hague Tribunal (on this point I am to direct your attention to the Home Office letter of the 21st December, 1910, and minutes thereon, No. 38 of the Print, as well as to the minutes on paper No. 44);

2. Should you consider that it is inexpedient to suggest such arbitration, as to whether His Majesty's Government would be warranted in informing the German Government that, as the arguments they have adduced have failed to convince them that their previous assent to arrests is not necessary, and that they are not entitled to demand it, and as it is useless to further prolong the discussion, His Majesty's Government regret that they will be under the disagreeable necessity, should another case arise, of taking effective steps to ensure the vindication of what they conceive to be their undoubted rights in respect to the execution of British warrants on board foreign merchant vessels touching at British ports;

3. As to the subsidiary questions raised in the Home Office letter of the 21st October last; and

4. That you will favour Sir E. Grey with any general observations you may think it desirable to offer on the whole subject, which is one of considerable importance both from a legal and from a political stand-point.

I have, &c.

F. A. CAMPBELL.

*Report.*

1. In our opinion, the principle of international law which is decisive of the present case is that a sovereign State has complete control over its ports and harbours, and that it may either exclude foreign vessels altogether from entering them for the purposes of trade, or may admit them upon such terms and conditions as it may choose.

This principle being conceded, it follows that the amount, if any, of exemption from the local jurisdiction which a sovereign State may allow to foreign vessels voluntarily entering its ports or harbours for the purposes of trade is a matter entirely for the territorial State to determine for itself. We think that there can be no doubt as to the correctness of the principle stated above, and that it would be most undesirable to suggest the possibility of a doubt upon it by offering to submit it to arbitration. We think it right, for the sake of clearness, to add that we confine ourselves to dealing with ports and harbours as distinct from territorial waters forming part of the littoral seas over which it might be contended that a right of innocent passage exists, and as to which, therefore, somewhat different considerations might apply.

Although no such point arises in the case now for our opinion, we think it right to indicate generally that, in the absence of notice or express agreement by consular convention or otherwise, a question might arise as to the extent of exemption from the territorial jurisdiction which is to be implied by international law from mere permission to enter and trade. Upon this point there is room for doubt both as to whether there is any such uniform and long-continued practice as to amount to international law at all, and if there is not such a uniform and long-continued practice, then as to the practice of any particular country.

2. We consider, therefore, that His Majesty's Government would be quite justified in giving notice to the German Government that it must be clearly understood for the future that we do not consider foreign merchant-vessels entering our ports and harbours as exempt from our territorial jurisdiction in any way, and that should occasion arise for the arrest of any person on board, the arrest will be effected and the ship detained for so long as may be necessary for this to be done.

3. The above answers apply to the four questions raised in the Home Office letter of the 21st October last.

No attempt to make an arrest should be undertaken unless the police are armed with a proper warrant, and notice that an arrest is to be made should be given to the consul of the vessel's nationality. The person to make the arrest should be conveyed to the foreign vessel by one of our own Government vessels and not in the company's tender.

RUFUS D. ISAACS.
JOHN SIMON.

*Law Officers' Department,
March 15, 1912.*

[54996]

No. 6.

[File 11413.]

[December 23, 1912.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, May 10, 1912.

SECRETARY SIR EDWARD GREY has received your report of the 15th March on the subject of attempts to arrest fugitive offenders on board German merchant vessels when calling at Southampton on their way to Germany.

In view of the opinion expressed in paragraph 1 of your report that, having regard to the principle involved, any offer by His Majesty's Government to submit the question to arbitration is to be deprecated, I have the honour, by Sir Edward Grey's direction, to invite your attention to the provisions of the Arbitration Agreement between this country and Germany of the 12th July, 1904 (Paper (A)), which agreement was renewed, by exchanges of notes, dated the 7th June and 9th July, 1909, and the 23rd November and 7th December, 1909, for a further period of five years.

Arrest of
fugitive
criminals on
German
merchant-
ships in
British
territorial
waters.

By the terms of article 1 of that agreement, either of the high contracting parties has the right to claim a reference to arbitration of differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the contracting parties and which it may not have been possible to settle by diplomacy, unless the principle involved affects the vital interests, independence, or honour of the contracting States. The present question is certainly not a difference relating to the interpretation of treaties, and Sir E. Grey is advised that it is open to doubt whether it is a "difference of a legal nature" within the meaning of the phrase as used in the agreement. The law which is indicated appears to be, not the municipal law of either State, but the general principles of the *jus commune* and it seems very doubtful whether a dispute, such as the present is conceived to be, with regard to what is the municipal law of this country, can be considered as coming within the scope of the agreement. In this connexion I am to enclose a memorandum (Paper (E)) showing the circumstances in which the words "differences of a legal nature" were adopted as the translation of "différends d'ordre juridique" in the English text of the Anglo-French Arbitration Agreement of 1903, on which the Anglo-German Agreement of 1904 was based. As having a special bearing on the point, I am to call your particular attention to the facts connected with the Arbitration Convention between Brazil and Venezuela of the 30th April, 1909, which are set forth at the end of the memorandum.

It will be seen that the parties to that arbitration convention (which contained in article 1 an engagement to refer differences "of a juridical nature") subsequently exchanged notes in which it was stated that it was, "of course, understood between them that article 1 excludes from the obligatory arbitration questions which according to the territorial law must be settled by the national tribunals."

The note then proceeds as follows:—

"Even though this declaration appears unnecessary, it is convenient to state it here in writing, and to mention it later on in the act of the exchange of the ratifications of the convention referred to, in order to avoid any doubt in the future,"

and this explanation was included in the protocol of the exchange of ratifications of the 8th January, 1912.

Should a contention to the effect that the present dispute is not within the scope of the agreement be put forward by His Majesty's Government, but not accepted by the German Government, a question might arise as to whether the ensuing difference of opinion as to the scope of the agreement would not be a "difference of a legal nature, or relating to the interpretation of treaties," on which the German Government would be entitled to claim arbitration. In this connexion I am to enclose a copy of a report dated the 19th January, 1910, by the then Law Officers of the Crown (Paper (B)) on the subject of certain claims by the German Government arising out of the South African War, with special reference to paragraph 12 and question 3 of the reference, and to the reply to the latter. This report of your predecessors would appear to be decisive on the point suggested, should you find yourselves in agreement with it. In the event of its being necessary to refer to arbitration the question whether the present dispute is within the scope of the Anglo-German Arbitration Agreement, the facts relating to the convention between Brazil and Venezuela, as set out above, would afford a strong argument in support of the contention of His Majesty's Government.

In the present instance it is possible that a similar case of the kind now under discussion may arise at any time, and, assuming that His Majesty's Government resorted to forcible measures in order to assert their rights on board a German vessel in British waters, it is probable that the German Government would, in the first instance, protest, and in the event of such protest proving of no avail, ultimately demand a reference to arbitration. In these circumstances three courses would apparently be open to His Majesty's Government:—

1. To agree to arbitration;
2. To contend that the question did not, on a reasonable construction of the language of article 1 of the Anglo-German Arbitration Agreement, come within the scope of such agreement at all; or
3. To claim that the matter was one affecting their vital interests, independence, or honour.

It appears to Sir Edward desirable that the question should be definitely decided whether either or both of the two latter pleas would or would not be justified.



In these circumstances, before addressing any fresh communication to the German Government, Sir Edward would be glad to be favoured with your opinion on three further points:—

1. Whether the question now at issue is one which, on a reasonable construction of article 1 of the Anglo-German Arbitration Agreement of 1904, comes within the scope of such agreement at all.
2. Whether, in the event of a difference of opinion between His Majesty's Government and the German Government as to whether the question now at issue is within the scope of the arbitration agreement, such difference of opinion would be a "difference of a legal nature, or relating to the interpretation of treaties," on which the German Government would be entitled to claim arbitration.
3. Whether, in any case, the question is one which should, in no circumstances, be referred to arbitration, as involving, in the opinion of His Majesty's Government, a question of the vital interests, independence, or honour of this country.

The correspondence transmitted to you on the 4th December last, together with your report of the 15th ultimo, is returned herewith for convenience of reference. (Papers (C) and (D).)

I have, &c.
EYRE A. CROWE.

List of Papers.

(A.) Arbitration Agreement between Great Britain and Germany. (No. 1170. Treaty)	.. .. .	July	12, 1904.
(B.) Law Officers' Report	.. .. .	January	19, 1910.
(C.) Law Officers' Report (in original with Minutes)	.. .. .	March	15, 1912.
(D.) Printed correspondence.	.. .. .		
(E.) Memorandum by the Librarian	.. .. .	April	19, 1912.

Report.

1 and 3. The principle upon which our report of the 15th March, 1912, was based is that, as a matter of international law, a sovereign State has complete control over its ports and harbours, and that it may either exclude foreign vessels altogether from entering them for the purposes of trade, or may admit them upon such terms and conditions as it may choose.

If this principle were disputed by Germany we think the difference would be a difference within the scope of the Anglo-German Arbitration Agreement of 1904, unless excluded by the proviso. The expression "difference of a legal nature" is somewhat indefinite, and might, perhaps, be construed to include more than would "contentious question of law"—the literal rendering of the German text; but the latter expression is wide enough to cover such a difference as that here supposed. In our opinion, however, a difference upon this point would be excluded from the operation of the agreement by the proviso.

It is true that, construed strictly, the proviso only excludes questions which affect the vital interests, independence, or honour of the two contracting Powers, but it is clear that the intention must have been to exclude questions of this nature, although affecting only one and not the two contracting Powers in any of the directions indicated.

The question of our right to the absolute control of our own ports and harbours is a matter which affects us in all the three ways stated, and a difference upon this point is, therefore, excluded from the scope of the agreement.

2. We are unable to concur in the opinion expressed by our predecessors to the effect that a difference as to whether a particular question was or was not within the arbitration agreement is a matter which under that agreement must itself be referred to arbitration.

We are led to this conclusion by the consideration that, if it is for the tribunal to decide whether a particular question is a "difference of a legal nature or relating to the interpretation of a treaty" within the meaning of the opening words of article 1, it must equally be for the tribunal to decide whether it affects the vital interests, independence, or honour of the objecting country within the meaning of

the proviso—a result which cannot have been intended. Moreover, the provisions of article 2 point to the conclusion that the functions of the tribunal are only to be called into operation when both Powers agree that there is a question which under the treaty is to be submitted to arbitration.

We have, &c.
RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
December 23, 1912.

PERSIA.

[8918]

No. 7.

[File 574/12.]

[April 4, 1912.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, March 22, 1912.

I HAVE the honour to transmit to you herewith, by direction of Secretary Sir E. Grey, the papers enclosed relating to the draft of a "Persian Coast and Islands (Amendment) Order in Council," which has been rendered necessary by the desirability of defining more strictly the districts comprised in the "Persian Coast and Islands Order" of 1907, and excluded from the Persian Order in Council of 1889.

The preparation of this draft order has been delayed by the consideration of a scheme for a new comprehensive Order in Council, embracing the whole Persian Gulf; this scheme has now been abandoned.

The draft has been approved by the Secretary of State for India in Council.

I am to request you to take the draft Order in Council into your consideration, and to favour Sir E. Grey with your opinion as to whether its terms are fit and proper for submission to the King in Council for His Majesty's approval. Sir E. Grey will also be glad to be favoured with any observations of a general nature which you may desire to offer on the papers now submitted to you.

I have, &c.
LOUIS MALLET.

[14540]
[File 574/12.]

Report.

The draft order as initialled by us is, in our opinion, fit and proper in its terms for submission to the King, for the approval of His Majesty in Council.

We have, &c.
RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
April 4, 1912.

Annex.

Draft Persian Coast and Islands (Amendment) Order in Council.

Whereas by treaty, grant, usage, sufferance, and other lawful means, His Majesty the King has power and jurisdiction within the dominions of His Majesty the Shah of Persia, and

Whereas the exercise of such jurisdiction is at present regulated by "The Persia Order in Council, 1889," and "The Persian Coast and Islands Order in Council, 1907," and

[337]

G



Whereas it is desirable more strictly to define the limits within which "The Persian Coast and Islands Order in Council, 1907," applies:

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise, in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

1. Article 2 of "The Persian Coast and Islands Order in Council, 1907," is hereby repealed, and the following article is substituted therefor: "The limits of this order are Mohammerah with its dependencies, the coast, and maritime provinces of Persia from Mohammerah to Gwettur, both inclusive, and the islands of the Persian Gulf and Gulf of Oman, being within the dominions of His Majesty the Shah of Persia, including the territorial waters of Persia adjacent to the said coast and islands.

"Mohammerah with its dependencies includes all places within the territory geographically known as Arabistan.

"The term 'the maritime provinces of Persia' means the provinces of Arabistan, Fars, Laristan, Karman, Persian Baluchistan, and those districts by custom and for the time being included under the authority of the Persian Governor of the Gulf ports."

2. This order may be cited as "The Persian Coast and Islands (Amendment) Order in Council, 1912," and shall be read as one with "The Persian Coast and Islands Order in Council, 1907."

And the Most Honourable the Marquess of Crewe, K.G., and the Right Honourable Sir Edward Grey, Baronet, two of His Majesty's Principal Secretaries of State, are to give the necessary directions herein as to them may respectively appertain.

R. D. I.
J. A. S.

[55007]

No. 8.

[File 33477/12.]

[December 23, 1912.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 21, 1912.

I HAVE the honour, by direction of the Secretary of State, to transmit to you the papers noted in the accompanying list, from which it appears that the expansion of the note circulation of the Imperial Bank of Persia has a tendency rapidly to progress, and that the question has of late engaged the serious consideration of the Board of Directors of the Bank, who are endeavouring to determine the extent to which such expansion may be carried out.

Sir Edward Grey is advised that the opinion given by the Bank's Solicitors to the effect that, assuming the requisite notice has been given to the Persian Government under Article 3 of the Concession, the Bank may properly carry out a contemplated increase of the issue and circulation of notes in Persia up to a total amount of 1,300,000*l.*, provided that the amount of the metallic reserve held against such issue be maintained at the proportion of 50 per cent. of the amount of notes issued and in circulation, which in such a case would be 650,000*l.*, equal to the amount of the paid-up capital of the Bank, is correct.

In view, however, of the importance to His Majesty's Government that the Charter of the Imperial Bank should not be jeopardized, Sir E. Grey would be glad to have the benefit of your opinion, and I therefore have the honour to request you to be so good as to take the papers into your consideration, and to favour him with your opinion as to whether the Imperial Bank of Persia may, under the terms of their Concession and Deed of Settlement, issue notes to the equivalent of 1,300,000*l.*, provided that they keep a metallic reserve against this issue of 50 per cent., say 650,000*l.*, whereby the difference between the metallic reserve and the notes so issued will not exceed the paid-up capital of the Bank, namely, 650,000*l.*

I have, &c.

LOUIS MALLET.

Expansion
of note
circulation
of Imperial
Bank of
Persia.

List of Papers.

- (A.) Imperial Bank of Persia, August 7, 1912.
(B.) Charter, Deed of Settlement, and Concession, 1889.

Report.

The proposal to increase the issue of notes to a total of 1,300,000*l.* against a metallic reserve of 650,000*l.*—the paid-up capital of the Bank being 650,000*l.*—is within the powers of the Bank so far as the Concession and Deed of Settlement are concerned. But Article 3 (b) of the Charter contains the provision that the difference between the metallic reserve and the amount of notes in circulation is not to exceed the amount of the Company's paid-up capital "after deduction of the amount which, in pursuance of the Deed of Settlement hereinafter mentioned, is to be paid for the acquisition of the said Concession." The provisions for the transfer of the Concession are contained in Articles 6 and 7 of the Deed of Settlement, but we are not aware whether anything was paid thereunder. If any payment was made, the amount thereof must be deducted from the 1,300,000*l.* proposed as the amount of the issue in order to make the issue comply with article 3 of the Charter.

RUFUS D. ISAACS.
JOHN SIMON.

*Law Officers' Department,
December 23, 1912.*

TURKEY.

[46311]

No. 9.

[File 44974/12.]

[October 29, 1912.]

Memorandum.

THE Secretary of State for Foreign Affairs is anxious to be favoured, with the least possible delay, with the opinion of the Law Officers of the Crown on the following matter:—

During the war between Turkey and Italy certain Turkish gun-boats, which were in the Port of Suez, were given notice to leave in 24 hours by the Egyptian authorities. They failed to do so, and were therefore interned and disarmed, in pursuance of the obligations which rested upon Egypt in consequence of her being considered and treated, in spite of her special relations to Turkey, as a neutral Power. Turkey being now at peace with Italy, but at war with Greece, the Greek chargé d'affaires has asked officially that the gun-boats may continue to be interned without being given an opportunity to leave the Egyptian port. For the purposes of this reference it may be taken that Turkey was at war with Greece before she was at peace with Italy, and therefore her state of belligerency against either one power or the other was continuous.

Turkish
gun-boats
interned in
Egypt
during
Turco-
Italian war:
Request of
Greek
Government
that
they be not
liberated.

Three questions thus present themselves:—

1. Are the gun-boats now entitled to an opportunity of leaving the Egyptian port, should they desire to do so?
2. If they are entitled to leave, should their armament be previously returned to them by the Egyptian authorities?
3. If they are entitled to leave, it is presumed that the proper course would be for the Egyptian authorities to give them notice to do so within 24 hours. If so, from what time should the 24 hours run?

As to (1), it may be argued, in support of a refusal to allow the gun-boats an opportunity of leaving, that they were originally interned and disarmed because they



belonged to a belligerent Power. Turkey is still, and has not ceased to be, a belligerent, and it is a matter of indifference with whom Turkey is at war; what matters is that she is at war, and her status as a belligerent is in no way changed owing to the fact that she was at first fighting Italy, was then for a short time fighting both Italy and Greece, and is now fighting Greece, but not Italy.

On the other side it may be urged that the gun-boats were originally interned because they were national ships of a Power which was at war with Italy. When that war came to an end, they were *prima facie* entitled to depart. But at that moment a new war was in progress between Turkey and Greece, and it may be claimed that Egypt was then a Power which had been informed of the outbreak of hostilities between Turkey and Greece, and found Turkish war-ships in her ports, and that therefore her proper course was, in accordance with the usual practice which is now embodied in article 13 of The Hague Convention, No. 13 of the 18th October, 1907, to give them notice to leave within 24 hours.

As to (2) it may be said, that if the Egyptian authorities were to return the armament, they would be adding to their fighting force, and if Egypt permitted such addition to be made in her ports, and in effect armed belligerent war-ships, she would be guilty of a breach of neutrality.

On the other hand it may be argued that if the Egyptian authorities merely restore the gun-boats to their original condition at the time when they were interned, with reference to the war then existing merely placing on board what was removed probably for convenience in guarding them, they would not be increasing their armaments within the true meaning of the term. The fighting capacity which must not be increased is the fighting capacity with which the belligerent vessel entered the port.

As to (3), the question would appear to be whether the 24 hours should have run from the conclusion of peace between Turkey and Italy, or should be reckoned from the time when notice to leave is given by the Egyptian authorities. If it is considered that the vessels are entitled to have their armaments returned, the further question arises whether these should not be replaced before the period of 24 hours begins to run.

Opinion of Law Officers of the Crown respecting Turkish Gun-boats disarmed and interned by Egypt.

(1.) We are of opinion that the Turkish gun-boats are not entitled to an opportunity of leaving Egypt. It is the right and duty of a neutral to intern the war-ships of a belligerent, unless such ships depart within the time prescribed. These gun-boats were given the opportunity to depart when Turkey became a belligerent, and since that date Turkey has continued to be at war. It is immaterial that the enemy which Turkey is fighting has changed, so long as the Turkish gun-boats have uninterruptedly continued to be the war-ships of a belligerent. This we think is the real effect of article 12 of The Hague Convention; it is, moreover, consistent with principle.

(2) and (3). These questions do not now arise, but, we may add, that if (contrary to our view) the Turkish gun-boats were entitled to another opportunity of leaving Egypt, they would in our opinion be entitled to have their armaments restored to them, and to be treated in all respects as though there had never been any Turco-Italian war.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
October 29, 1912.

[1350]

No. 10.

[File 521/12]

[March 19, 1912.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 12, 1912.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith the papers noted in the accompanying list on the question of advantages which may be accorded by the United States' Government to American shipping using the Panamá Canal, and the compatibility of any of the schemes, which have been proposed with this end in view, with the obligations of the United States' Government under the treaty between the United States and the United Kingdom of the 18th November, 1901, commonly known as the Hay-Pauncefote Treaty.

Preferential
treatment
of United
States'
vessels
using the
Panamá
Canal.

2. The article in the treaty of the 18th November, 1901, which directly governs the question now being discussed is article 3, which provides, *inter alia*, that "the Canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise."

3. The proposals which have been made in the United States for according preferential treatment to United States' shipping using the Panamá Canal fall into two classes—those relating to the coastwise traffic of the United States, *i.e.*, to vessels plying from one United States' port to another, and those of a more general nature.

4. In considering the first class of proposals, it is to be borne in mind that by the present laws of the United States the coasting traffic, both in goods and in passengers between two United States' ports, is restricted to vessels built in the United States and flying the American flag.

5. It has been proposed to exempt altogether United States' mercantile vessels plying from one American port to another from payment of any dues or tolls in the Canal. This proposal would, on the face of it, appear to be inconsistent with the provisions of the article of the treaty quoted above. It is, however, defended on the ground that as foreign vessels cannot compete in coastwise traffic with those of the United States no injury is inflicted upon them, because they are out of the traffic altogether, and therefore not prejudiced. In reply to this contention, it may be urged, first, that in the Hay-Pauncefote Treaty no exception was made for United States' coastwise vessels, an exception which ought to have been made, if it was intended to qualify the full generality of the expression cited above; and, further, that it might well happen that this provision could be used to secure traffic from places outside the United States, either to United States' ports in the Pacific or to other ports, in some such manner as the following: Shippers of goods from Atlantic ports outside the United States to Pacific ports in the United States might be induced by the offer of favourable terms by the managers of United States' lines engaged in the coasting trade to send their goods to a United States' Atlantic port for transshipment into a United States' vessel passing through the Canal. Foreign lines would thus lose the profits to be gained on taking the goods the whole distance, while the coasting trade of the United States might be greatly stimulated at their expense. If the destination of the goods were a Pacific port outside the United States the goods might be taken through the Canal in a United States' vessel paying no tolls and transhipped at Panamá into some other vessel proceeding to the foreign port. A United States' vessel might even take the goods on board at the foreign port whence they were sent, and, after first touching at an Atlantic port in the United States, be considered as engaged in the coasting trade, and so be allowed to pass through the Canal without paying tolls. In this case, foreign shipping would suffer even more serious damage. The possibility of such practices being adopted shows that the exemption of United States' coastwise traffic might in effect prejudice foreign shipping and infringe the principle of equality laid down in the treaty.

6. The United States' Government would perhaps, if this point were taken, offer to make rules, providing that United States' vessels should forfeit their exemption if



they carried cargo for foreign ports, but such provisions would be difficult to enforce or could be easily defeated by evasion, so that the mischief apprehended could not be fully averted.

7. The above considerations apply in the case of exemption of coastwise traffic from the payment of dues. It is evident that the arguments against such exemption in the case of United States' vessels generally are considerably stronger, in view of the stipulations of the Hay-Pauncefote Treaty.

8. A second plan, which has been suggested for giving some special benefit to United States' shipping, is, while maintaining equality of tolls for all vessels passing through the Canal, to refund to United States' vessels such tolls as they may have paid. Such a scheme might be held to respect the treaty in letter, but to break it in spirit. On the other hand, it might be urged that such a refund would be equivalent to a bounty; that any country may offer bounties to its shipping, or to some particular line of shipping engaged in a particular trade; and that the United States could not be expected to refrain from paying the dues for its shipping if other countries do so.

9. An argument against the right to exempt United States' vessels from the payment of dues or to refund the tolls may be found in the fact that any remission of tolls, whether limited to one class of or extended to all United States' vessels, might throw an increased burden, in respect of the charges for the upkeep of the Canal, upon shipping not so favoured, which would consequently be called upon to pay more than the fair rates necessary to make the Canal self-supporting. This argument may, however, be difficult to sustain at present, in view of the possibility of the tolls being fixed at a level below that which would make the Canal, at any rate for a certain period of time, a self-supporting enterprise. It would in this case in all probability be difficult to show that an extra burden was laid on foreign shipping, and not merely on the United States' Treasury, by the remission of tolls in favour of United States' vessels.

10. Sir E. Grey would be glad if you would consider the proposals discussed above and in the papers enclosed herein, and would furnish him at your early convenience with your opinion as to whether, and, if so, how far they are, or any of them is, compatible with the provisions of the treaty of the 18th November, 1901, between this country and the United States.

11. Another point in connection with the question of the Panamá Canal is raised in a despatch from His Majesty's consul-general in New York, a copy of which also accompanies this letter.

12. Mr. Bennett states that there is scarcely any doubt that when the Canal is completed the United States' Government will hold that trade between American ports and ports in the Canal Zone is American coastwise trade, and is, as such, closed to foreign ships.

13. By the convention of the 18th November, 1903, between the United States and the Republic of Panamá, the United States' Government were granted a lease in perpetuity of the zone traversed by the Canal.

14. A copy of the convention is transmitted herewith. It does not appear that the actual sovereignty over the zone was made over to the United States, and it seems to Sir E. Grey to be very doubtful whether the United States' Government have the power, under the terms of the convention, to declare that ports in the zone are to be considered as American ports for the purposes of the coasting trade.

15. Sir E. Grey would be glad to be favoured with your opinion on this question also, and with any observations of a more general nature which you may be good enough to offer on the whole subject.

I have, &c.
EYRE A. CROWE.

List of Papers.

1. Hay-Pauncefote Treaty of November 18, 1901. [Treaty Series No. 6, 1902.]
2. Mr. Bryce to Sir E. Grey, No. 158, Commercial, September 20, 1911.
3. Board of Trade to Foreign Office, November 11, 1911.
4. Mr. Bryce to Sir E. Grey, No. 195, Commercial, November 13, 1911.
5. Mr. Bryce to Sir E. Grey, No. 199, Commercial, November 14, 1911.
6. Consul-General Bennett, No. 82, Commercial, November 17, 1911.
7. Convention between United States and Republic of Panamá, November 18, 1903.

[11889]

[File 521/12]

Report.

1. That with reference to the suggestion that all American vessels should be allowed free passage of the Panamá Canal and to the alternative suggestion that the tolls paid by them should be repaid by the Government, we consider that there is no difference in principle between changing tolls only to refund them and remitting tolls altogether. The result is the same in either case, and the only object of adopting the first method of freeing the ships in question from the tolls in preference to the second must be to attempt to comply with the letter of the treaty whilst contravening its spirit. In our opinion, the argument which seeks to justify a refund of tolls by saying that it amounts merely to a subsidy and that there is nothing in the Hay-Pauncefote Treaty which limits the right of the United States to subsidise its shipping is unsound. It is true that there is nothing in the treaty to prevent the United States' Government from subsidising its shipping, and if it chose to grant a subsidy His Majesty's Government would not be in a position to complain. But there is a great distinction between a general subsidy, either to shipping at large or to shipping engaged in any given trade, and a subsidy calculated particularly with reference to the amount of user of the Canal by the subsidised lines or vessels. If such a subsidy were granted it would, in our opinion, stand self-confessed as a colourable attempt to avoid the obligations of the treaty. It follows that either of the suggestions in question, if adopted, would involve an infraction of the treaty.

2. As to the proposal that exemption should be given to vessels engaged in the coastwise trade, we think a more difficult question arises. If the trade could be so regulated as to make it certain that only traffic which under the United States' law is reserved for United States' vessels would be benefited by the exemption, it is not easy to see upon what ground objection could be taken. But it appears to us that this proposal may be combated, on the ground that it would be impossible to frame regulations which would prevent the exemption from resulting, in fact, in a preference to United States' shipping and consequently in an infraction of the treaty.

3. As to the suggested intention of the United States' Government to declare ports in the Canal Zone American ports for the purpose of the rule as to coastwise traffic, a distinction is to be drawn between ports in the Canal and those which, whilst in the Canal Zone, are not in the Canal. As to the latter, although actual sovereignty is not vested in the United States, yet the treaty with Panamá gives them all the rights and powers which actual sovereignty would confer, and it cannot be said that the United States would not be justified in declaring that these should be considered American ports for the purpose of coastwise trade. Ports in the Canal itself, however, would come within the stipulations of article 4 of the Hay-Pauncefote Treaty, and could not be declared to be American ports.

We have, &c.
RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
March 19, 1912.

[29418]

No. 11.

[File 521/1912.]

[August 12, 1912.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 22, 1912.

I HAVE the honour, by direction of Secretary Sir E. Grey, to submit to you herewith a copy of a Bill, at present before the Congress of the United States, to provide for the opening, maintenance, protection, and operation of the Panamá Canal.

You have already, in your report of the 19th March, furnished Sir E. Grey with your views as to whether the provision now embodied in article 5 of this Bill, for the purpose of benefiting United States' shipping, is compatible with the obligations of the United States' Government under article 3 of the treaty between the United States

Article 11
of United
States' Bill
relating to
Panamá
Canal.



1912

28

UNITED STATES.

and the United Kingdom of the 18th November, 1901, commonly known as the Hay-Pauncefote Treaty, which provides, *inter alia*, that "the canal shall be free and open to the vessels of all nations observing these rules on terms of entire equality, so that there shall be no discrimination against any such nation or its citizens or subjects in respect of the condition or charges of traffic or otherwise."

I am now to call your attention to the further provision contained in article 11 of this Bill, which, as amended, limits in various particulars the liberty of using the canal in the case of ships owned or controlled by railroad companies. Having regard to the fact that a substantial proportion of Canadian shipping is owned by railway companies, and that it has been argued that for certain purposes Canadian railway companies whose operations extend to the United States are within the scope of the Inter-State Commerce Act, referred to in the present Bill as "the Act to regulate commerce approved February 4th, 1887," Sir E. Grey will be glad to learn whether in your opinion the proposed restrictions to be placed on vessels owned by railway companies could be held, if applied to such Canadian vessels, to be a breach of the Hay-Pauncefote Treaty above mentioned. A copy of the treaty is also enclosed herewith.

I have, &c.
ALGERNON LAW.

List of Papers.

United States Bill, Panamá Canal.
Treaty, November 18, 1901: Library No. 1,127.

Report.

In our opinion, section 11 of the Panamá Canal Bill refers only to United States' vessels which are entitled to engage in coastwise trade between ports of the United States, and has no application to Canadian vessels.

If it did apply to Canadian vessels the section would, in our opinion, involve an infraction of article 3 (1) of the Hay-Pauncefote Treaty. This clause forbids discrimination between the subjects of any nation as well as discrimination between one nation and another, and so prevents special restrictions being imposed upon a special class of owners. The canal is to be free and open to the vessels of commerce of all nations, and a provision excluding certain vessels of commerce, even though applied regardless of the vessels' nationality, would not be in accordance with the treaty.

We have, &c.
RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
August 12, 1912.

[54835]

No. 12.

[File 514/1912]

[December 21, 1912.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 17, 1912.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you the papers noted in the annexed list, and to request you to furnish him with your opinion on the following point:—

For many years past the United States' Government have been much alarmed at the rapid diminution in numbers of the fur seals on the Pribiloff Islands in the Behring Sea. This diminution has been chiefly ascribed to pelagic sealing, that is to say, to the killing of the seals on the high seas outside any territorial jurisdiction.

Behring Sea.
Threatened
diversion of
seal-skin
market from
London to
the United
States.

UNITED STATES.

29

With a view to preserve the seal herd the United States' Government have restricted the number of seals allowed to be killed annually on the islands, which form part of the United States' territory, but they have until recently been unable, except by means of international agreements, to secure any restriction of pelagic sealing which is chiefly carried on by Canadian and Japanese sealers.

It should be observed that the seals also frequent other islands in the Behring Sea within the jurisdiction of Japan and Russia, but that there are no islands within the dominion of Canada to which the seals resort. Canadian sealers are therefore unable to take seals, except by means of pelagic sealing.

The United States' Government consequently saw that, in order to secure the total suspension of pelagic sealing, they must first obtain the discontinuance of that form of sealing by Canadian sealers. They would then be in a position to approach Japan and Russia, which Powers were interested both in pelagic sealing and as owners of islands frequented by seals.

The Canadian Government refused to surrender the incontestable right of Canadian sealers to take seals on the high seas, except in return for suitable compensation.

Negotiations over the question of compensation were carried on for some years until finally a treaty (Paper (A)) was signed by the United States' Government and His Majesty's Government (on behalf of Canada) on the 7th February, 1911, under which both Powers undertook to prohibit pelagic sealing by their respective subjects and citizens.

In return the United States' Government undertook to hand over to the Canadian Government one-fifth in number and value of the seal-skins taken on the Pribiloff Islands. But as the United States' Government were contemplating the temporary suspension of the killing of seals on the islands, it was also provided that they should pay to His Majesty's Government the sum of 200,000 dollars "as an advance payment in lieu of such number of fur-seal skins, to which Great Britain would be entitled under the provisions of this treaty, as would be equivalent to that amount reckoned at their market value at London at the date of delivery, before dressing or curing and less cost of transportation from the Pribiloff Islands" and the United States' Government were to retain the one-fifth share of the annual catch due to Canada until they had recouped themselves for the 200,000 dollars advanced.

In the draft of that treaty as originally agreed upon with the United States' Government the place where the market value of the seal-skins was to be calculated was left blank. The word "London" was inserted at the suggestion of the Canadian Government (see Paper (B)) for the reason apparently that London was and still is the chief seal-skin market of the world.

Shortly after the signature of the treaty of the 7th February the United States' Government issued invitations to His Majesty's, the Russian and Japanese Governments to send representatives to a conference at Washington to discuss further measures for the preservation of the seal herds in the Behring Sea.

The conference assembled on the 11th May, 1911. His Majesty's Government were represented by Mr. Bryce, His Majesty's Ambassador at Washington, and Mr. Pope (for Canada), assisted by Messrs. Poland and Fraser as expert representatives of the seal-skin industry in England.

Prior to the first meeting Mr. Poland urged upon Mr. Bryce the desirability of doing whatever could be done to retain the industry of dressing and curing the skins in London, and to frustrate the alleged efforts of the United States' administration to transfer it to the United States.

Mr. Bryce observed (see Paper (C)) "that as the matter need not arise on any of the United States' proposals, it is doubtful whether any opportunity will arise for taking such action, and that it is not clear what form of proceeding would be possible to secure it. Something, perhaps, as much as was possible, has been done in getting the London market price specifically recognised in the treaty as the standard valuation of skins. Though Canada or His Majesty's Government will retain control of one-fifth of the skins, the United States will be able, as they always have been able, to send their much larger share to whatever market they please. As to whether they could under the terms of the treaty also divert from the London market the Canadian fifth share for as long as it is retained in reimbursement of the advance of 200,000 dollars, is a question which will require careful consideration subsequently. That substitution of a sum for the first skins had been made necessary by the wish of Canada to have a sum down paid to her. The attempt artificially to

[237]

1



transfer the industry to the United States, of which I had information from various sources, had, however, already failed once and might well fail again. Rumour says that it originated largely in the connexion of Mr. Nagel, secretary of commerce and labour and president of the conference, with St. Louis, a place which was particularly anxious to acquire the industry. The most favourable circumstances for such a transfer would arise if the hold of London on the business were broken by a suspension of the land catch. Probably such suspension would not be resorted to until the effect of the cessation of pelagic sealing was ascertained."

The Washington conference led to the signature on the 7th July, 1911, of a treaty (Paper (D)) by His Majesty's Government, the United States', Russian and Japanese Governments whereby each Power undertook to prohibit pelagic sealing by its nationals. The Powers owning islands frequented by the seal herds also undertook to compensate the other Powers for the suspension of pelagic sealing.

Article 11, providing for payment of compensation by the United States to Great Britain (for Canada) and Japan is, *mutatis mutandis*, identical with the compensation article in the treaty of the 7th February, 1911 (Paper (A)), and London is again taken as the market where the value of the skins is to be reckoned.

There is no mention in the protocols of the conference of the reasons for the selection of London. The only references to this point in the correspondence with His Majesty's Embassy at Washington are those contained in the Papers (C) and (F) transmitted herewith.

On the 16th November, 1911, His Majesty's consul at Philadelphia reported (Paper (E)) that proposals were under consideration for the diversion of the seal-skin market from London to the United States.

Mr. Bryce was asked to furnish his observations on the report, and replied by sending home a memorandum by the First Secretary to His Majesty's Embassy at Washington (Paper (F)) to the following effect:—

"The possibility of the United States' Government renewing their efforts to establish a wholesale trade in the United States which would enable them to market the Alaskan skins there instead of sending them to London was kept in view at the recent conference in Washington. Nothing could be done directly to hinder this, although the expert representatives of the trade here were privately sounded as to whether they would be prepared to make any outlay on securing the interests of the London business should a means be found of doing so. They were not willing to do anything of this nature, and so the most that could be done was to get the London market recognised in the treaty as fixing the price for purposes of compensation to Canada.

"But there is reason to believe that the Department of Commerce and Labour fully realise the risk of serious loss of revenue involved in transferring the wholesale market to the United States. The market here would be much smaller, as continental buyers would probably not attend, and prices would be lower—in fact, could probably be kept low by combination. The skins would anyhow go for some time to London to be dressed and dyed. As during the years 1899–1910 only 957 raw skins were shipped to the United States as against 209,522 dressed ones, it would seem that there is no sufficient skilled industry in this country to supply the demand. Moreover, the price largely depends on the skilled sorting of the skins into various grades, which requires a centralisation of the whole annual supply at some one spot.

"The saving of the customs duty of 20 per cent. by dressing and dyeing in the United States is not an argument likely to appeal to the United States' Government.

"Since the expiration of the lease to the company the United States' Government have marketed their skins in London through Messrs. Lampson. There seems to be no reason at present to fear that the efforts to upset this arrangement on the part of St. Louis will prevail against those of the New York fur merchants to maintain it. But, in any case, we can do nothing to prevent such a change."

The Board of Trade, to which department the report of His Majesty's consul at Philadelphia was also sent, propounded the view (Paper (G)) that the United States' Government are bound by Article 11 of the treaty of the 7th July, 1911 (Paper (D)), to send the whole of their catch of seal-skins to London (at least until such time as the compensation due to Canada becomes payable in skins instead of in cash) with a view to the proper determination of the London market value of the skins.

Sir E. Grey was advised that such an interpretation of article 11 of the treaty could not be maintained and the Board were so informed (Paper (G)).

In reply the Board furnished further arguments in support of their view (Paper (H)), and repeated their suggestion that the matter should be referred to you.

Sir E. Grey is fully alive to the loss which would be inflicted upon the trade of this country if the United States succeeded in transferring to that country the industry of dressing and preparing the seal-skins, and to the advantage which would accrue if article 11 of the treaty could be held to oblige the United States to send to London the catch of skins so long as the first paragraph of article 11 was in operation, and in view of the arguments put forward by the Board of Trade he would be glad to learn whether in your opinion the treaty can be so construed as to oblige the United States' Government until such time as they shall have recouped themselves for the 200,000 dollars advance payment to Canada to sell all their skins in London. He would also be glad to be favoured with any observations of a general character which you may be good enough to offer.

I have, &c.

EYRE A. CROWE.

List of Papers.

(A.) Treaty between Great Britain and the United States. (Library No. 1440)	February 7, 1911.
(B.) Mr. Mitchell Innes (No. 247)	December 23, 1910.
(C.) Mr. Bryce (No. 137)	May 16, 1911.
(D.) Treaty between Great Britain, the United States, Russia, and Japan. (Library No. 1444)	July 7, 1911.
(E.) Consul Powell (No. 20. Commercial)	November 16, 1911.
(F.) Mr. Bryce (No. 294)	December 26, 1911.
(G.) Board of Trade	January 12, 1912.
(H.) Board of Trade	March 21, 1912.

Report.

In our opinion it is impossible to contend that article 11 of the treaty of the 7th July, 1911, imports an obligation upon the United States of America to send to the London market the whole of the seal-skins taken from the American herd until such time as the United States' Government shall have recouped themselves for the advance payment of 200,000 dollars.

The utmost that could be contended is that the treaty imports an obligation in respect of the British and Japanese shares, viz., 30 per cent. in number and value of the total. The argument would be that this obligation arises by implication from the provision that the number of skins to be retained by the United States of America is to be reckoned by reference to "their market value at London at the date of their delivery and less cost of transport from the Pribiloff Islands." This argument is no doubt supported by the circumstance that the words "date of their delivery" suggest an actual delivery in London, and the application of these words is obscure unless the British and Japanese share of skins are, in fact, sent to London. If the fixing of this date is essential to the agreement, this might bring the case within the proposition of law, that where one party enters into an arrangement which can only take effect by the continuance of a certain state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances in which alone the agreement can be operative.

There is no provision in the treaty which would support the argument that the United States of America are obliged to continue to send a 70 per cent. balance of skins to London. The utmost that could be contended would be that this obligation exists in respect of the 30 per cent. We do not, however, feel at all confident that this view would prevail even as to the 30 per cent., but we indicate the above argument as being the best way of putting the contention so far as it will go.

We have, &c.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
December 21, 1912.



1913

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. March 1914.

CONFIDENTIAL.

(10391.)

17

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1913.



LIST OF REPORTS.

(Arranged according to Countries.)

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 7^a, &c.

ABYSSINIA.

No.		Date.	SUBJECT.	Page.
1	Law Officers ..	Oct. 31, 1913	Abyssinia Order in Council, 1913: approving draft ..	1

AUSTRIA-HUNGARY.

2	Law Officers ..	Aug. 20, 1913	Coasting trade of the British Colonies: rights of Austria-Hungary under Treaty of 30th April, 1868. Trade between adjacent Colonies becomes coasting trade after their administrative union ..	2
---	-----------------	---------------	--	---

BAHREIN.

3	Law Officers ..	Apr. 30, 1913	Bahrein Order in Council, 1913: approving draft as altered ..	6
---	-----------------	---------------	---	---

CHINA.

4	Law Officers ..	Mar. 13, 1913	China (Amendment) Order in Council, 1913: approving draft as altered ..	19
---	-----------------	---------------	---	----

GENERAL.

5	Law Officers ..	June 27, 1913	Suspension of killing of seals on Pribyloff and Commander Islands: Legislation of Russia and the United States not in conflict with Fur Seal Convention of 7th July, 1911 ..	25
6	Law Officers ..	July 8,	Appointment of Notary Public to act in a foreign country in which His Majesty has extra-territorial jurisdiction: is within the power of the Master of the Faculties ..	27
7	Law Officers ..	Aug. 9,	Foreign Marriages Regulations, 1913: approving draft ..	30
7 ^a	Law Officers to Admiralty	Nov. 20,	Illegal trawling in British territorial waters: employment of force in effecting arrest ..	32A

GREECE.

8	Law Officers ..	Dec. 5, 1913	Certificate of neutral destination required by Greek Government in case of coal carried to ports in Black Sea. Steamship "Trevarrack": as to compensation for detention ..	32
---	-----------------	--------------	--	----

[219]

LIST OF REPORTS.

iii

ITALY.

No.		Date.	SUBJECT.	Page.
9	Law Officers ..	July 18, 1913	Condemnation by Italian Prize Court of specie, the property of Imperial Ottoman Bank, seized on British steamship "Menzaleh": locus standi of underwriters: points which might be submitted to arbitration ..	35

PERSIA.

10	Law Officers ..	Mar. 13, 1913	Imperial Bank of Persia: Note circulation may be increased to 1,100,000 <i>l.</i> ..	40
----	-----------------	---------------	--	----

SIAM.

11	Law Officers ..	Feb. 5, 1913	Siam Order in Council, 1913: approving draft ..	41
----	-----------------	--------------	---	----

UNITED STATES.

12	Law Officers ..	July 14, 1913	Island of Naos, Panamá Canal: a port on west side may be considered to be a port on the Canal, but a port on east side as in Canal Zone merely ..	42
----	-----------------	---------------	---	----



(iv)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1913.

[The figures refer to the numbers of the pages.]

ARR—COU.

A.

Arrest of vessel in Territorial waters. *See* Territorial waters.
Australia, Commonwealth of: Coasting trade provisions of Navigation Bill, 2-6.

B.

Bahrein. *See* Order in Council.
Bank. *See* Imperial Bank of Persia.
" *See* Specie of Imperial Ottoman Bank.
Bank-notes: amount which Imperial Bank of Persia is entitled to issue, 40-41.
Black Sea ports. *See* Certificate of neutral destination.

C.

Certificate of neutral destination: requirements of Greek Government in case of coal for Black Sea ports, 32-34.
Claim for detention. *See* Detention.
Coal as contraband: "Trevarrack" case, 32-34.
Coasting trade of British Colonies: relationship with Intercolonial trade, 2-6.
" " " " : bearing of Treaty of 1868 with Austria - Hungary, 2-6.
" " " " : participation of Foreign Countries, 2-6.
" " " " : Orders in Council, 2-6.
Colonies. *See* Coasting trade.
Commander Islands: killing of seals. *See* Treaty.
Consuls, Court of. *See* Court.
Contraband. *See* Coal.
" *See* Specie.
Court of Consuls (China), 20, 25.

DEC—MAS.

D.

Declaration of Paris. *See* Treaty.
Detention of vessel: "Trevarrack" claim, 32-34.

E.

Enemy state property on neutral vessel: liability to seizure, 35-40.
Extra-territorial Jurisdiction. *See* Jurisdiction.

F.

Fishing in Territorial waters. *See* Territorial waters.

I.

Imperial Bank of Persia: amount of notes which may be issued, 40-41.
Imperial Ottoman Bank. *See* Specie.
Insurance: *locus standi* of underwriters before Prize Courts. *See* Prize Court.
Intercolonial trade and Coasting trade: relationship, 2-6.

J.

Jurisdiction: Orders in Council. *See* Order in Council.
" : appointment of Notaries in countries where His Britannic Majesty has extra-territorial jurisdiction, 27-29.

L.

Legislation: possible conflict with Treaty. *See* Treaty.

M.

Marriages, Foreign: Regulations 1913, 30-32.
Master of the Faculties: appointment of Notaries. *See* Notaries.

ALPHABETICAL INDEX.—(Names and Subjects.)

MEN—PRI.

"Menzaleh": specie condemned by Italian Prize Court, 35-40.
Most-favoured-nation clause in Anglo-Austrian Treaty of 1868, 2-6.

N.

Naos, Island of: position as respects Panamá Canal and Zone, 42-43.
National Treatment: clause in Anglo-Austrian Treaty of 1868, 2-6.
Navigation. *See* Coasting trade.
Neutral destination. *See* Certificate of neutral destination.
Notaries: power of Master of Faculties to appoint, in countries where His Britannic Majesty has extra-territorial jurisdiction, 27-29.

O.

Order in Council: Abyssinia, 1913, 1.
" " : Bahrein, 1913, 6-19.
" " : China (Amendment), 1913, 19-25.
" " : Foreign Marriages Regulations, 1913, 30-32.
" " : Siam, 1913, 41-42.
Orders in Council: Coasting trade of British Colonies, 2-6.

P.

Panamá Canal and Canal Zone. *See* Naos, Island of.
Pribyloff Islands: killing of seals. *See* Treaty.
Prize Court: coal as contraband. *See* Coal.
" : specie as contraband. *See* Specie.
" : *locus standi* of Enemy claimant and underwriters, 35-40.

SEA—VES.

S.

Seals: suspension of killing on Pribyloff and Commander Islands. *See* Treaty.
Specie belonging to Imperial Ottoman Bank condemned by Italian Prize Court. "Menzaleh" case, 35-40.

T.

Territorial waters: force which may be used for arrest of vessel engaged in illegal trawling, 32A-B.
Treaty: Great Britain and Austria-Hungary, 1868: bearing on Coasting trade of British Colonies, 2-6.
" : Fur Seal Convention of 7th July, 1911, and legal suspension of killing of seals on Pribyloff and Commander Islands, 25-27.
" : Declaration of Paris: interpretation of article 2, 35-40.
"Trevarrack": seizure by Greek Navy, 32-34.

U.

Underwriters. *See* Prize Court.

V.

Vessels: Certificates of neutral destination of cargoes of coal for Black Sea ports, 32-34.
" *See also* Detention.
" *See also* Enemy state property.
" *See also* Territorial waters.



1913

Printed for the use of the Foreign Office. March 1914.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1913.

ABYSSINIA.

[49734]

No. 1.

[File 4489/13.]

[October 31, 1913.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 9, 1913.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit herewith the draft of an Order in Council to be called "The Abyssinia Order in Council, 1913," which has been prepared in this Department for the purpose of regularising the exercise of His Majesty's extra-territorial jurisdiction in Abyssinia. Abyssinia Order in Council, 1913.

The draft follows the general lines of "The Persia Order in Council, 1889," which seemed to afford the best precedent in view of the local conditions. It provides for the application of Indian law in view of the fact that the majority of the civil and commercial cases in Abyssinia concern British Indian subjects.

I am to request you to take the draft Order into your consideration, and to favour Sir Edward Grey with your opinion as to whether its terms are fit and proper for submission to the King in Council for His Majesty's approval. Sir Edward will also be glad if you will indicate such amendments and modifications (if any) in the draft as you may consider necessary or desirable, and will add any observations on it of a general nature which you may wish to offer.

I have, &c.

W. LANGLEY.

List of Papers.

- (A.) Draft Abyssinia Order in Council.
- (B.) Mr. Thesiger (Adis Ababa), No. 77, September 4, 1912.
- (C.) Mr. Thesiger, No. 80, September 27, 1912.
- (D.) To Mr. Thesiger, No. 30, April 25, 1913.
- (E.) Mr. Thesiger, No. 33, May 28, 1913.

Report.

This draft Order in Council,* as initialled by us, may, in our opinion, properly be submitted to the King for the approval of His Majesty in Council.

JOHN SIMON.

STANLEY O. BUCKMASTER.

Law Officers' Department,

October 31, 1913.

* The text of the Order in Council will be found in the "London Gazette" of the 23rd December, 1913, (Confidential No. 10352*).



(2)

AUSTRIA-HUNGARY.

[38589]

No. 2.

[File 9689/13.]

[August 20, 1913.]

Gentlemen,

Foreign Office, May 31, 1913.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to inform you that, in connexion with the Navigation Bill recently passed by the Parliament of the Australian Commonwealth, and now reserved for His Majesty's pleasure, the question has been raised as to the extent to which Austria-Hungary is entitled, in virtue of the Anglo-Austrian Treaty of the 30th April, 1868, to take part in the coasting trade of the Commonwealth, and incidentally in the coasting trade of certain others of the self-governing Dominions. Copies of the treaty and of the Navigation Bill above referred to are enclosed herewith.

2. Article 1 of the treaty, in its first paragraph, provides for the grant to Austrian and Hungarian merchant ships of the same treatment as national ships. In the second paragraph provision is made for most-favoured-nation treatment also. Article 2 applies the provisions of Article 1 to the British colonies and foreign possessions, but limits it, in the case of the coasting trade, to "those colonies and foreign possessions the coasting trade of which shall have been, or shall hereafter be, opened to foreign ships, in conformity with the Acts of Parliament which govern the matter." In the second paragraph of the article it is stated that the foreign possessions and colonies, the coasting trade of which had been already so opened to foreign ships, and in which therefore the ships belonging to Austro-Hungarian subjects were placed on the national footing, were British India, Ceylon, Cape of Good Hope, Victoria, and St. Lucia.

3. The main purpose of Article 1 appears to be, on the British side, to give national treatment to Austrian and Hungarian ships throughout the Empire, without reservation, for the period of the currency of the treaty, but the addition of most-favoured-nation treatment, certainly in the case of the United Kingdom, is wholly unmeaning, and the second paragraph appears to have been added without any due consideration of the context. From the general grant a special derogation is then made in the case of fisheries.

4. The main purpose of Article 2 appears to be to make a further exception from the general grant of national treatment in the case of the coasting trade in the colonies. The article begins by applying both paragraph 1 (national treatment) and paragraph 2 (most-favoured-nation treatment) to the colonies, thus importing into Article 2 the confusion existing in Article 1. National treatment has, however, already been granted in all His Majesty's dominions by Article 1 to Austrian and Hungarian ships generally, and unless the article is mere repetition, it must be intended to qualify the application of Article 1. The most reasonable interpretation would seem to be that it confers most-favoured-nation treatment in the colonial coasting trade, a view which is supported by the references, not to Austrian or Hungarian, but to foreign ships. The last paragraph of Article 2, therefore, records that Austrian and Hungarian ships are entitled, in British India, &c., to the treatment which other foreign nations have, under the Acts referred to, received, viz., national treatment.

5. If it had been intended that the opening of the coasting trade of a colony to foreign ships should operate so as to place such coasting trade, for the purposes of the treaty, on the same footing as the coasting trade of the United Kingdom, it is not clear (a) why article 2 was not drawn so as to run as follows: "But as regards the coasting trade only in British India, Ceylon, &c., and in any other colonies and foreign possessions, the coasting trade of which shall be hereafter opened to foreign ships, &c.," nor (b) why, if it is possible to hold that the purpose of the application of the provisions of Article 1 to the colonial coasting trade was to involve the grant of national plus most-favoured-nation treatment, there is no reference to most-favoured-nation treatment in the description of the position as regards the coasting trade of British India, &c. It may be pointed out that the opening of the coasting trade of a colony to foreign ships (*vide* section 328 of the Imperial Act of 1853, quoted in paragraph 13, *infra*), did not necessarily involve the grant of national rights, and it is difficult to

Coasting
trade of
British
Colonies in
relation to
Anglo-
Austro-
Hungarian
Treaty of
1868 and
to Colonial
constitu-
tional
changes.

AUSTRIA-HUNGARY.

3

suppose that it was the intention to give Austrian and Hungarian ships more favourable treatment than other foreign ships. The treaty contains, of course, no guarantee that other foreign ships would be accorded any particular treatment for any particular period. On this interpretation, therefore, the effect of Article 2 was merely to guarantee to Austrian and Hungarian ships such rights in the colonial coasting trade as might be granted to other foreign ships for the period during which such rights were in force.

6. This interpretation of the Article in question appears to be borne out by the history of the procedure in Canada. In 1868 the coasting trade of the recently formed Dominion of Canada—then including Ontario, Quebec, Nova Scotia, and New Brunswick—had not been opened to foreign ships, as section 163 of "The Customs Consolidation Act, 1853," was still in force, and by that section it was provided that no goods or passengers might be carried from one port of any British possession in America to another port of the same possession except in British ships. The provisions of this Act were dealt with by "The Merchant Shipping (Colonial) Act, 1869," which repealed section 163 as from the date in the case of each British possession at which either an Act or Ordinance with respect to the coasting trade made within two years after the commencement of the Act of 1869 in such British possession came into operation, or, if there were no such Act or Ordinance, at which the said two years expired. The Act of 1869 was to be proclaimed in every British possession by the Governor as soon as might be after he received notice of the Act, and was to come into operation on the day of proclamation. The Act contained in section 7 provision that in the construction of "The Merchant Shipping Act, 1854," and of the Acts amending that Act, Canada should be deemed to be one British possession. The term "Canada" is presumably applied only to the Dominion of Canada as then existing, as "Canada" was not at that time a collective term for British North America.

7. In virtue of the authority given by the Imperial Act of 1869, the Parliament of Canada, by cap. 14, 33 Vict., reciting the authority of that statute, provided that no goods or passengers could be carried coastwise in Canada except in British ships, but it was also provided that the Governor-in-Council might declare that the terms of the Act should not apply to the ships or vessels of any foreign country in which British ships were admitted to the coasting trade of the country, and, in addition, an express saving was made of any Treaty rights made before the passing of the Act of 1869. In virtue of the authority contained in this Act, an Order-in-Council was enacted on the 1st June, 1876, by which the ships of the Austro-Hungarian Empire were admitted to the coasting trade on the same conditions as Canadian vessels. Similar Orders-in-Council were made with regard to the vessels of Italy (13th October, 1873), the vessels of Germany (14th May, 1874), the vessels of the Netherlands (5th November, 1874), the vessels of Sweden and Norway (5th November, 1874), the vessels of Denmark (25th January, 1877), the vessels of Belgium (13th September, 1879), and the vessels of the Argentine Republic (10th May, 1881).

8. By an Order-in-Council of the 13th January, 1908, these Orders-in-Council were repealed on, from, and after the 1st January, 1909, and the ships and vessels referred to thus became subject to the terms of section 955 of Chapter 113 of the Revised Statutes of Canada, 1906, which provided that goods or passengers may only be carried by water from one port of Canada to another in British ships.

9. By an Order-in-Council of the 17th December, 1908, the Order-in-Council of the 13th January, 1908, was revoked, and the ships of the country concerned were made subject to the provisions of sections 952-957 of the Canada Shipping Act, prohibiting foreign ships from engaging in the coasting trade of Canada, but with a proviso admitting steamships of not less than 1,500 gross tonnage of Italy, Germany, the Netherlands, Sweden and Norway, Austria-Hungary, Denmark, Belgium, the Argentine Republic, and Japan to the coasting trade between any port in the province of Nova Scotia and any port in the province of Quebec until the 31st December, 1911. This has been extended by Order-in-Council of the 8th December, 1911, to the 31st December, 1913.

10. Another Order-in-Council of the 31st December, 1908, allowed the steamships of foreign countries which were under charter to engage in the coasting trade in the maritime provinces until the 1st July, 1909.

11. By an Order-in-Council of the 9th December, 1909, it was ordered that, despite anything contained in the Order-in-Council of the 17th December, 1908, vessels of Italy, Germany, the Netherlands, Sweden, Norway, Austria-Hungary, Denmark, Belgium, the Argentine Republic, and Japan should be admitted to the coasting trade of Canada for the carrying of goods between Atlantic provinces and any port on the



Pacific Coast of Canada, on the same conditions as Canadian vessels, until the 31st December, 1911. This has not been extended so far as appears.

12. It will be seen from these facts that the Canadian Parliament and Government have assumed that the throwing open of the coasting trade of the Dominion of Canada to Austrian and Hungarian ships which took place on the 1st June, 1876, has in no way bound Canada to maintain the opening of the trade despite the existence of the Treaty of 1868. No protest has been made by the Austro-Hungarian Government against the action taken by Canada in this matter, although Austrian and Hungarian ships are directly affected.

13. In the case of Australia, in 1868 the coasting trade of Victoria had been opened to foreign vessels by an Imperial Order-in-Council of the 24th June, 1856, made in virtue of the authority given by section 328 of the Act of 1853, which provides as follows:—

"If the Legislature or proper legislative authority of any of the British possessions abroad shall present an address to Her Majesty, praying Her Majesty to authorise or permit the conveyance of goods or passengers from one part of such possession to another part thereof in other than British ships, or if the Legislatures of any two or more possessions, which for the purposes of this Act Her Majesty in Council shall declare to be neighbouring possessions, shall present addresses or a joint address to Her Majesty, praying Her Majesty to place the trade between them on the footing of a coasting trade, or of otherwise regulating the same, so far as relates to the vessels in which it is to be carried on, it shall thereupon be lawful for Her Majesty by Order-in-Council, so to authorise the conveyance of such goods or passengers, or so to regulate the trade between such neighbouring possessions, as the case may be, on such terms and under such conditions as to Her Majesty may seem good."

The text of the Order-in-Council will be found in Hertslet's "Treaties," vol. x, p. 432.

14. The coasting trade of the other Australian Colonies was not thrown open until the passing of the Act of 1869, under which the coasting trade automatically became open within two years after the commencement of the Act in the absence of any legislation reimposing restrictions on the engagement of foreign vessels in that trade.

15. It would appear, therefore, that on the analogy of the case of Canada there is no obligation on the Commonwealth Government to keep open the coasting trade of the Commonwealth so far as it concerns the trade between any two ports in any of the five States of New South Wales, Queensland, South Australia, Western Australia, and Tasmania. The northern territory of Australia was formerly part of the State of South Australia, and there seems no reason on Treaty grounds on which the Government could be required to open the coasting trade of the territory to Austrian and Hungarian ships. In the case of Victoria a different question arises, namely, whether the express mention of that Colony (now State) in paragraph 2 of Article 2 of the Treaty prevents steps being taken for the closing of the coasting trade, but, on the argument indicated above, it would seem that there is no sufficient ground for regarding the grant as being irrevocable, that is to say, while most-favoured-nation treatment must be assigned to Austrian and Hungarian ships it is not necessary that as regards the coasting trade national treatment should be accorded.

16. In the case of the Union of South Africa, the coasting trade of the Cape of Good Hope was opened by Order-in-Council made on the 7th December, 1855, in virtue of section 328 of the Imperial Act of 1853 (*vide* "Hertslet's Treaties," vol. x, p. 405). The trade was therefore open in 1868, but it would seem that after the repeal of section 328 of the Act of 1853 the coasting trade of the Cape was again closed in view of the express terms of section 163 which confined the coasting trade of the British possessions in Africa to British ships. It does not appear, however, that this was held at the time to be the case, for a Cape Act, No. 26 of 1872 (*vide* "Hertslet's Treaties," vol. xv, p. 722) threw open the coasting trade to foreign ships generally "subject to the provisions of any Act of the Imperial Parliament and so long as Her Majesty's Order-in-Council of the 7th December, 1855, shall remain unrevoked and in force." In the case of Natal the coasting trade was automatically opened under the operation of the Act of 1869, and on the line of reasoning which has been adopted in the case of the Commonwealth of Australia, it would seem that the coasting trade of the Cape Province and of the Natal Province could now be closed if desired to Austrian and Hungarian ships.

17. There arises, however, a further question. In the case of Canada, in 1868 when the Treaty was made, Prince Edward Island and British Columbia were independent Colonies and not parts of the Dominion. In the case of Australia there was no Commonwealth and the six States were six Colonies. In the case of South Africa there was no Union and the Cape of Good Hope and Natal were separate Colonies. Since that date Canada has been completed by the addition of British Columbia in 1871, and Prince Edward Island in 1873; the six States of Australia have been merged in the Commonwealth, and the Cape and Natal form part of the Union, and trade therefore between any port in Canada and another port, between any port in the Commonwealth and another port, and between any port in the Union and another port, has become a coasting trade in the contemplation of the Imperial Merchant Shipping Acts. It is clear that in 1868, under the unambiguous terms of paragraph 1 of Article 1 of the Anglo-Austro-Hungarian Treaty as applied to Her Majesty's Colonies and foreign possessions by paragraph 1 of Article 2, the trade between Canada and British Columbia or Prince Edward Island, between the different Colonies in Australia, and between the Cape and Natal, was not a coasting trade and was open to Austrian and Hungarian ships under the Treaty on the terms laid down in Article 1. The question therefore arises whether the completion of the Confederation of Canada, and the Federation of the Commonwealth, and the Union of South Africa have altered the position and confer upon the Governments and Parliaments of these Dominions the right to exclude Austrian and Hungarian ships from the coasting trade in the sense of the carriage of passengers or goods from one Province or State to another Province or State.

18. In this connexion I am desired by Sir E. Grey to draw your attention to the opinions given by your predecessors on the 11th March, 1902, and the 2nd December, 1907 (copies of which are appended), which deal with the question whether Confederation determined the application of a Treaty to a part of the Commonwealth in which it had previously been in force. It would appear that these opinions were based on the view that the application of the Treaty with Japan, which is discussed in both opinions, was not conditioned by the existence of Queensland as a separate Colony, whereas it would appear to be necessary to read some such condition into the Austro-Hungarian Treaty if it is to be held that what was intercolonial trade in 1868 must remain on the same footing during the currency of the Treaty.

19. I am also to point out that the Treaty is regarded as applicable to British Possessions acquired since 1868, and that it would therefore be not inconsistent, since Austria-Hungary is given the benefit of any increase in the number of British Colonies, to ask the Austro-Hungarian Government to accept the effect of any reduction in that number which is due to *bonâ fide* reorganisation. If what was a Colony in 1868 must remain a Colony for the purposes of the Treaty, it would appear that there is no alternative to holding that the terms of the Treaty have no application to territories such as Papua and the Cook Islands, which were not Colonies at that time.

20. I am further to observe that in the case of Canada, as will be seen from the facts set out above, the Canadian Government have assumed that they have the right to exclude Austrian and Hungarian ships from the coasting trade between the eastern provinces and British Columbia, and between the four provinces forming Canada, as it existed in 1868, and Prince Edward Island, and that the Austro-Hungarian Government have not protested against this action. It is, however, the case that the instance of Canada differs from the other two cases, inasmuch as the Constitution of the Dominion, which contemplated the admission of both British Columbia and Prince Edward Island, was an existing fact in 1868, and one which the Austro-Hungarian Government may have been taken to have had under contemplation when the Treaty was entered into.

21. The points raised above would also apply to any case in which, as in the case of the annexation of the Cook Islands to New Zealand, new territory has been added since 1868 to an existing British Possession.

22. The definition of coasting trade, as it is dealt with by Part 6 of the Navigation Bill of the Commonwealth, will be found in clause 7. It will be observed that it covers both inter-State and intra-State trade. Except for the special privileges conferred on British ships by clauses 286 and 287, foreign ships are admitted by the Bill to the coasting trade on the same terms as British ships, but the question of the power of the Commonwealth to exclude foreign vessels was raised in the Commonwealth Parliament during the discussion of the Bill, and the matter may become of practical importance at any time.



23. I am to request, therefore, that you will take this matter into your consideration, and that you will report to Sir E. Grey—

(1.) Whether, in your opinion, it is competent for a Colonial Legislature, during the currency of the Treaty of 1868, to exclude Austrian and Hungarian ships from a coasting trade to which they have once been admitted;

(2.) Whether any distinction can in this respect be drawn between cases in which the coasting trade of a Colony had already been opened when the Treaty was concluded, and cases in which it was opened subsequently; and

(3.) Whether what was merely trade between Colony and Colony when the Treaty was concluded in 1868, can be treated as coasting trade if the Colonies have been merged into a larger unit by process of *bonâ fide* reorganisation.

24. Sir E. Grey would also be glad to receive any observations of a general nature which you may desire to offer upon the papers now submitted to you.

I have, &c.

ALGERNON LAW.

List of Papers.

Anglo-Austrian Treaty of April 30, 1868.
Australian Navigation Bill.
Hertslet's "Commercial Treaties," vol. x and vol. xv.
Law Officers' Report of March 11, 1902.
" " December 2, 1907.

Report.

(1.) In our opinion the effect of the Treaty of 1868 is to place ships of Austria-Hungary upon a national footing as regards the coasting trade of Colonies and possessions only when and for so long as that trade is open to foreign vessels.

(2.) No.

(3.) Yes. The reason for treating trade between two neighbouring Colonies as inter-colonial as opposed to coasting is merely that they are under distinct internal Administrations, though both part of His Majesty's Dominions. If they become one administrative unit the only reason for regarding the trade between them as anything but coasting trade disappears.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
August 20, 1913.

BAHREIN.

No. 3.

[April 30, 1913.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, March 29, 1913.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you herewith the draft of an Order in Council to be entitled "The Bahrein Order in Council, 1913."

In explanation of the terms of the draft, I am to state that on the 26th January, 1909, the Sub-Committee of the Committee of Imperial Defence appointed by the Prime Minister to consider questions relating to the Persian Gulf and Bagdad Railway, issued a report containing the following passage:—

"It would strengthen our position in Bahrein and remove risks of interference by foreign Powers, other than Turkey or Persia, if the jurisdiction over foreigners in the

Bahrein
Order in
Council,
1913.

island were placed in our hands. The Government of India should be instructed to approach the Sheikh with the object of inducing him to prefer a request to be relieved from the responsibility of exercising jurisdiction over foreigners. If this can be arranged, an Order in Council should be drawn up, the preamble of which should recite the circumstances in which the transfer of jurisdiction has been effected."

This recommendation was made in accordance with proposals put forward in November 1907 by the Government of India, to whom, on the 21st May, 1909, a despatch,* copy of which is enclosed, was accordingly addressed by His Majesty's then Secretary of State for India, conveying the necessary instructions as to approaching the Sheikh of Bahrein with a view to induce him to request His Majesty's Government to relieve him of the responsibility of exercising jurisdiction over foreigners in his possessions.

The Sheikh was approached and in due course preferred the desired request to give effect to which the Order has now been drafted.

I am to request that you will take the draft Order into your consideration and that you will favour Sir E. Grey at your earliest convenience with your opinion whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

I have, &c.

LOUIS MALLET.

Report.

In our opinion this draft Order, as altered and initialled by us, may properly be submitted to the King for the approval of His Majesty in Council.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department, April 30, 1913.

Annex.

Draft Bahrein Order in Council, 1913.

(Approved by the Law Officers.)

WHEREAS by Treaty, Capitulation, grant, usage, sufferance, and other lawful means His Majesty the King has jurisdiction in Bahrein;

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested, is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, as follows:—

PART I.—*Preliminary and General.*

1. This Order may be cited as "The Bahrein Order in Council, 1913."
2. The limits of this Order are the islands and islets of Bahrein, including the territorial waters thereof, and all other territories, islands, and islets which may be included in the Principality and be the possessions of the ruling Sheikh of Bahrein, together with their territorial waters.
3. This Order is divided into parts, as follows:—

Parts.	Subject.	Articles.
I	Preliminary and General	1-10
II	Application of Law of British India and the United Kingdom ...	11-13
III	Criminal Matters	14-34
IV	Civil Matters	35-43
V	Bahrein Subjects and Tribunals	44-50
VI	Registration	51-59
VII	Miscellaneous Provisions	60-79
	Schedule.	

* Lord Morley to Government of India, May 21, 1909.



4. In the construction of this Order the following words and expressions have the meanings hereby assigned to them, unless there be something in the subject or context repugnant thereto, that is to say :—

"Administration" means letters of administration, including the same with will annexed, or granted for special or limited purposes, or limited in duration.

"Bahrein" includes all places and waters within the limits of the Order.

"Bahrein subject" means a subject of the Sheikh of Bahrein.

"British ship" means a merchant-ship being a British ship within the meaning of "The Merchant Shipping Act, 1894," and, except where the context otherwise requires, includes a ship belonging to any British subject as hereinafter defined.

"British subject" includes a British protected person.

"Judicial Assistant" means the officer for the time being holding the office of Judicial Assistant under the provisions of "The Persian Coast and Islands Order in Council, 1907."

"Chief Court" means a Court held by the Political Resident as hereinafter defined.

"District Court" means a Court held by the Political Agent or by the Judicial Assistant.

"The Court" means a Court held by the Political Resident, the Political Agent, or the Judicial Assistant to the Political Resident.

"Joint Court" means a Court composed of the Political Agent and an official appointed by the Sheikh of Bahrein.

"Majlis-el-Urf" means a Civil Court composed of not less than four members selected by the Political Agent in concert with the Sheikh of Bahrein.

"Salifah Court" means a Court consisting of one or more Judges who have knowledge of the local diving and customary marine law, and are appointed by the Sheikh of Bahrein and the Political Agent in concert.

"Kazi" means any official Kazi appointed by the Sheikh of Bahrein and accepted by the Political Agent.

"Foreigner" means any person not a British or Bahrein subject.

"Imprisonment" means imprisonment of either description as defined in the Indian Penal Code.

"Month" means calendar month.

"Oath" or "Affidavit" includes affirmation or declaration.

"Offence" means any act or omission made punishable by any law for the time being in force.

"Person" includes corporation.

"Political Agent" means His Majesty's Agent at Bahrein appointed by the Governor-General of India in Council, including a person acting temporarily with the approval of the Governor-General of India in Council for such Political Agent.

"Political Agency" means the office, residence, Court, or other appointed place of business of the Political Agent.

"Political Resident" means His Majesty's Political Resident in the Persian Gulf, including a person acting temporarily with the approval of the Governor-General of India in Council for such Political Resident.

"Rules of Court" means rules of Court made under the provisions of this Order.

"Secretary of State" means one of His Majesty's Principal Secretaries of State.

"Sheikh of Bahrein" means the ruling Sheikh of Bahrein, or his duly accredited representative for the time being.

"Ship" includes any vessel used in navigation, however propelled, with her tackle, furniture, and apparel, and any boat or other craft.

"Treaty" includes any Capitulations, Convention, Agreement, or Arrangement made by or on behalf of His Majesty with any State or Government, King, Chief, people, or tribe, or to the benefits of which His Majesty has succeeded, whether the Sheikh of Bahrein is or is not a party thereto.

"Will" means will, codicil, or other testamentary instrument.

Expressions used in any enactments applied to Bahrein, or in any Rules, Regulations, or Orders made under this Order, shall, unless a contrary intention appears, have the same respective meanings in this Order.

5.—(1.) In this Order words importing the plural or the singular may be construed as referring to one person or thing, or to more than one person or thing, and words importing the masculine as referring to the feminine, as the case may require.

(2.) Where this Order confers any power or imposes any duty, then, unless a contrary intention appears, the power may be exercised, and the duty shall be performed from time to time as occasion requires.

(3.) Where this Order confers a power, or imposes a duty on, or with respect to a holder of an office, as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by, or with respect to, the holder for the time being of the office or the person temporarily acting for the holder.

(4.) Where this Order confers a power to make any Rules, Regulations, or Orders, the power shall, unless a contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, vary, or amend the Rules, Regulations, or Orders.

(5.) This Article shall apply to the construction of any Regulations, Rules, or Orders made under this Order, unless a contrary intention appears.

6. Where this Order refers to any specified Act or Acts of Parliament, such reference shall, unless a contrary intention appears, be deemed to include any Act or Acts amending or substituted for the same.

7. In the event of the death, incapacity, removal, or absence from Bahrein of the Political Agent for the time being, all and every the powers, authorities, and immunities by this Order granted to him shall, until His Majesty's further pleasure is signified through the Governor-General of India in Council, be vested in the Political Resident.

8. The powers conferred by this Order shall extend to the persons and matters following, in so far as by Treaty, grant, usage, sufferance, or other lawful means, His Majesty has jurisdiction in relation to such persons, matters, and things, that is to say :—

(1.) British subjects, as herein defined, within the limits of this Order.

(2.) Foreigners, with respect to whom the Sheikh of Bahrein has agreed with His Majesty for, or consented to, the exercise of jurisdiction by His Majesty.

(3.) Bahrein subjects registered in the Political Agency as being in the regular service of British subjects or foreigners; with the proviso that all cases wherein such Bahrein subjects are concerned shall be dealt with in accordance with the provisions of Part V of this Order.

(4.) The expression "person to whom this Order applies" shall be construed in accordance with the above three sub-Articles.

(5.) The property and all personal or proprietary rights and liabilities within the said limits of British subjects and of foreigners within sub-Article (2) and of Bahrein subjects within sub-Article (3), whether such persons are themselves within or without the limits of this Order.

(6.) British ships and ships belonging to foreigners within sub-Article (2) with their boats, and the persons and property on board thereof, or belonging thereto, being within the limits of this Order; provided that jurisdiction over foreign ships shall not be exercised otherwise than according to the practice of the High Court in England in the exercise of jurisdiction over foreign ships.

(7.) If any question arises whether the subjects or citizens of any country, State, or tribe have or have not been placed under the jurisdiction of His Majesty by agreement with, or the consent of, the Sheikh of Bahrein, it shall be referred by the Court to the Political Resident, and a certificate under his hand and seal shall be conclusive on the question, and judicial notice shall be taken thereof.

9. All His Majesty's jurisdiction exercisable within the limits of this Order for the hearing and determination of criminal and civil matters, or for the maintenance of order, or for the control or administration of persons or property, or in relation thereto, shall be exercised, under and according to the provisions of this Order, so far as this Order extends and applies.

10. Nothing in this Order shall be deemed to relieve any officer or person in the service of His Majesty of the duty, as far as there is proper opportunity, of promoting reconciliation, and encouraging and facilitating the settlement in an amicable way, and without recourse to litigation, of matters in difference between persons subject to this Order, or between persons subject to this Order, and persons who are not subject to this Order, within the limits of this Order.

PART II.—Application of Law of British India and of the United Kingdom.

11.—(1.) Subject to the other provisions of this Order, and to any Treaties for the time being in force relating to Bahrein, His Majesty's criminal and civil jurisdiction in Bahrein shall, so far as circumstances admit, be exercised on the principles of, and in conformity with, the enactments for the time being applicable as hereinafter mentioned of the Governor-General of India in Council, and of the Governor of Bombay in Council, and in accordance with the powers vested in, and the course of procedure and practice observed by and before, the Courts in the Presidency of Bombay beyond the limits of the ordinary original jurisdiction of the High Court of Judicature at Bombay according to their respective jurisdiction and authority, and so far as such enactments, powers, procedure, and practice, are inapplicable, shall be exercised in accordance with justice, equity, and good conscience.

(2.) The enactments mentioned in the Schedule to this Order shall as from the commencement of this Order apply to all persons subject to this Order.

(3.) Any other existing or future enactments of the Governor-General of India in Council, or of the Governor of Bombay in Council, may be applied to Bahrein by King's Regulations under Article 70 of this Order.

(4.) Any Act of the Governor-General of India in Council, or of the Governor of Bombay in Council, whether passed before or after the commencement of this Order, amending or substituted for any Act of either of those Legislatures which applies or may be applied to Bahrein, shall, subject to the provisions of this Article, also apply to Bahrein.

(5.) The Court may construe any enactments in force in Bahrein, under the provisions of this Article, with such alterations not affecting the substance, as may be necessary or proper to adapt the same to the matter before the Court.

12. The enactments described in the first schedule to "The Foreign Jurisdiction Act, 1890," shall apply to Bahrein, as if it were a British colony or possession, but subject to the provisions of this Order, and to the exceptions, adaptations, and modifications following, that is to say :—

(i.) The Political Resident in the Persian Gulf is hereby substituted for the Governor of a colony or British possession, and the Chief Court is hereby substituted for a Superior Court or



Supreme Court, and the District Court for a Magistrate or Justice of the Peace of a colony or British possession.

(ii.) For the portions of the Merchant Shipping Acts, 1854 and 1867, referred to in the said Schedule, shall be substituted Part XIII of "The Merchant Shipping Act, 1894."

(iii.) In Section 51 of "The Conveyancing (Scotland) Act, 1874," the Court of the Political Agent is substituted for a Court of Probate in a colony.

(iv.) With respect to "The Fugitive Offenders Act, 1881"—

(a.) So much of the 4th and 5th sections of the said Act as relates to sending a report of the issue of a warrant, together with the information, or a copy thereof, or to the sending of a certificate of committal and report of a case, or to the information to be given by a Magistrate to a fugitive, shall be excepted, and in lieu of such information the person acting as the Magistrate shall inform the fugitive that in the British possession or protectorate to which he may be conveyed he has the right to apply for a writ of *habeas corpus* or other like process.

(b.) So much of the 6th section of the said Act as requires the expiration of fifteen days before issue of warrant shall be excepted.

(c.) The Political Resident shall not be bound to return a fugitive offender to a British possession unless satisfied that the proceedings to obtain his return are taken with the consent of the Governor of that possession.

(d.) For the purposes of Part II of the said Act, Bahrein, Muscat, the Persian Coast and Islands, and all other places on the shores of the Persian Gulf or the Gulf of Oman, Aden, and British India, shall be deemed to be one group of British possessions.

13. Where, by virtue of any Imperial Act, or of this Order, or otherwise, any provisions of any Imperial Acts, or of any Law in force in India, or of any Orders in Council other than this Order, are applicable within the limits of this Order, or any forms, Regulations, or procedure prescribed or established by or under such Act, Law, or Order, are made applicable for any purpose of this Order, or any other Order relating to Bahrein, such Acts, Laws, Orders, forms, Regulations, or procedure may be construed or used with such alterations and adaptations not affecting the substance as may be necessary having regard to local circumstances, and anything required to be done by, to, or before any Court, Judge, officer, or authority may be done by, to, or before a Court, Judge, officer, or authority having the like or analogous functions, or by, to, or before any officer designated by the Secretary of State or by the Court (as the case may require) for that purpose; and in case any difficulty occurs in the application the Secretary of State, or with his previous or subsequent assent the Governor-General of India in Council, may direct by, to, or before whom and in what manner anything is to be done, and such Act, Law, Order, form, Regulation, or procedure shall be construed accordingly.

Where under any such Imperial Act, Law, or Order, any publication is required to be made, as respects any judicial proceeding in any "Gazette" or otherwise, such publication shall be made by such mode as the Court shall think fit to direct.

PART III.—Criminal.

14.—(1.) Subject to the other provisions of this Order, the Code of Criminal Procedure and the other enactments relating to the administration of criminal justice in British India for the time being shall be applicable to Bahrein. The Political Resident in the Persian Gulf shall hold and form a Court, to be called the Chief Court, which shall have all the powers of a High Court of Judicature; the Political Agent at Bahrein shall be deemed to be the District Magistrate and Sessions Judge; the Judicial Assistant to the Political Resident shall be deemed to be the Additional District Magistrate and Additional Sessions Judge; and the powers of the Governor-General in Council and of the Local Government under those enactments shall be exercisable by the Secretary of State, or, with his previous or subsequent assent, by the Governor-General of India in Council.

Notwithstanding, in any case triable by a Subordinate Magistrate under Chapters XVI to XXIII inclusive of the Indian Penal Code, if both the complainant and defendant are Mahomedans and are acquiescent in such procedure, the Political Agent may order the case to be tried by a Kazi, a representative from the Agency attending to record briefly the proceedings. In such suits the judgment passed by the Kazi cannot be carried into effect until it is ratified by the Political Agent, and the Political Agent is empowered to revise the finding and sentence as if the Kazi were a Subordinate Magistrate, or to return the case for re-trial to the same or another Kazi. The sentence of the Kazi, when ratified by the Political Agent, shall for all purposes be regarded as if it were the decision of the Political Agent in the District Court.

(2.) Any jurisdiction exercisable by the Chief Court in criminal matters under this Order may be exercised by the Judge of that Court either within the limits of this Order or elsewhere.

15. In cases in which the Code of Criminal Procedure requires the sentence of a Court of Session to be confirmed by the High Court, the sentence shall be referred for confirmation to the Governor-General of India in Council instead of to the Chief Court.

16. Where a person subject to this Order is accused of the commission of an offence the cognizance whereof appertains to the Court, and it is expedient that the offence be inquired of, tried, determined, and punished in a British possession, the accused may (under "The Foreign Jurisdiction Act, 1890," section 6) be sent for trial to Bombay.

The Chief Court may, where it appears so expedient, by warrant under the hand and seal of the Political Resident, cause the accused to be sent for trial to Bombay accordingly.

The warrant shall be sufficient authority to any person to whom it is directed to receive and detain the person therein named, and to carry him to and deliver him up at Bombay according to the warrant.

Where any person is to be so sent to Bombay, the Court before which he is charged shall take the preliminary examination, and shall bind over such of the proper witnesses as are British subjects in their own recognizances to appear and give evidence on the trial.

17.—(1.) The Political Resident may by General Order prescribe the manner in which, and the places at which, sentences of imprisonment are to be carried into execution within the limits of the Order.

(2.) The Court may, in any case by warrant sealed with its seal, cause an offender convicted and sentenced to imprisonment before the Court to be removed to, and imprisoned in, any place that shall be prescribed by the Political Resident under the authority provided for in subsection (1) of this Article.

18. Where an offender convicted before any Court under this Order is sentenced to imprisonment, and the Political Resident proceeding under section 7 of "The Foreign Jurisdiction Act, 1890," authority in that behalf being hereby given to him, considers it expedient that the sentence should be carried into effect elsewhere than within the limits of this Order, and the offender is accordingly sent for imprisonment to a place outside the limits of this Order, the place shall be either a place in the Presidency of Bombay, or a place in some other part of His Majesty's dominions, the Government whereof consents that offenders may be sent thither under this Article, or a place in which by Treaty, grant, usage, sufferance or other lawful means His Majesty has jurisdiction, provided that if a person is not a British subject he shall only be sent under this Article to a place in His Majesty's dominions.

19.—(1.) In cases of murder or culpable homicide, if either the death or the criminal act which wholly or partly caused the death happened in Bahrein, a Court acting under this Order shall have the like jurisdiction over any person to whom this Order applies who is charged either as a principal offender or as an abettor as if both such criminal act and the death had happened in Bahrein.

(2.) In the case of any offence committed on the high seas or within the Admiralty jurisdiction by any person who at the time of committing such offence was on board a British ship, or by any British subject on board a foreign ship to which he did not belong, the Court shall, subject to the provisions of this Order, have jurisdiction over such person as if the offence had been committed within its jurisdiction.

(3.) In cases tried under this Article no different sentence can be passed from the sentence which could be passed in England if the crime were tried there.

(4.) The foregoing provisions of this Article shall be deemed to be adaptations, for the purposes of this Order and of "The Foreign Jurisdiction Act, 1890," of the following enactments, namely:—

- "The Admiralty Offences (Colonial) Act, 1849";
- "The Admiralty Offences (Colonial) Act, 1860";
- "The Merchant Shipping Act, 1894," Part XIII;

and those enactments shall apply accordingly, and be administered in Bahrein.

20. Where a person is convicted of an offence, the Court before which he is convicted may, if it thinks fit at any time before he is discharged, require him to give security to the satisfaction of the Court for his future good behaviour, and for that purpose may, if it thinks fit, cause him to come or be brought before the Court.

21.—(1.) Where it is shown by evidence on oath, to the satisfaction of the District Court, that any British subject has committed, or is about to commit, an offence against this Order, or is otherwise conducting himself so as to be dangerous to peace and good order, or is endeavouring to excite enmity between the people of Bahrein and His Majesty, or is intriguing within the limits of this Order against His Majesty's power and authority, the Court may, if it thinks fit, by order under its seal, prohibit that person from being within the limits of this Order, during any time therein specified, not exceeding two years.

(2.) The Court, by order in writing under its seal, may vary any order of prohibition (not extending the duration thereof), and may revoke any order of prohibition or removal.

(3.) The Court shall forthwith report the order and the grounds thereof to the Chief Court, which shall forthwith report to the Governor-General of India in Council every order made under this Article, and the grounds thereof, and the proceedings thereunder.

22.—(1.) If any British subject fails to give security for good behaviour or for keeping the peace when lawfully required to do so, or fails to comply with an order of prohibition made under this Order, the Chief Court or the District Court may, if it thinks fit, order that he be deported from any place within its jurisdiction as prescribed by this Order.

(2.) If the order of deportation is made by the District Court, it shall forthwith report to the Chief Court the order and the grounds thereof.

(3.) Thereupon the person ordered to be deported shall, unless the Chief Court thinks fit otherwise to direct, be as soon as practicable, and in the case of a person convicted either under execution of the sentence or while it is in course of execution, removed in custody under warrant to the place named in the warrant.

(4.) The place shall be a place in that part of His Majesty's dominions, or in the British Protectorate, to which the person belongs, or the Government of which consents to the reception of persons deported under this Order.

(5.) The Court, on making an order of deportation, may, if it thinks fit, order the person to be deported to pay all or any part of the expenses of his deportation, to be fixed by the Court in



the order. Subject thereto, the expenses of deportation shall be defrayed as the Secretary of State, with the concurrence of the Treasury, or with the previous or subsequent assent of the Secretary of State, the Governor-General of India in Council, directs.

(6.) The Chief Court shall forthwith report to the Governor-General of India in Council every order of deportation made under this Order, and the grounds thereof, and the proceedings thereunder.

(7.) If a person deported under this Order returns to Bahrein without permission in writing of the Chief Court, or the Governor-General of India in Council, or the Secretary of State (which permission the Chief Court, or the Governor-General of India in Council, or the Secretary of State respectively may give, he shall be punished with imprisonment for a term which may extend to two months, or with a fine which may extend to 1,000 rupees, or with both.

(8.) He shall also be liable to be forthwith again deported under the original or a new order, and a fresh warrant.

23. An appeal shall not lie against an order of prohibition, or removal, or deportation made under this Order.

24.—(1.) Where under this Order a person is to be sent or removed or deported from any place within the jurisdiction of the Court as prescribed by this Order he shall, by warrant of the Court sealed with its seal, be detained, if necessary, in custody, or in prison, until a fit opportunity for his removal or deportation occurs, and then be put on board a vessel belonging to, or in the service of, His Majesty, or if no such vessel is available, then on board some other British or other fit vessel.

(2.) The warrant shall be sufficient authority to the person to whom it is directed or delivered for execution, and to the Commanding Officer or master of the vessel, to receive and detain the person therein named, in the manner therein prescribed, and to send or remove and carry him to the place therein named, according to the warrant.

(3.) In case of sending or removal for any purpose other than deportation, the warrant shall be issued in duplicate, and the person executing it shall, as soon as practicable after his arrival at the place therein named, deliver, according to the warrant, with one of the duplicates of the warrant, to a constable, or proper officer of police, or keeper of a prison, or other proper authority or person there, the person named in the warrant, to be produced on the order of the proper Court or authority there, or to be otherwise dealt with according to law.

25. If any person to whom this Order applies does any of the following things, namely:—

(i.) Wilfully by act or threat obstructs any officer of or person executing any process of the Court in the performance of his duty; or

(ii.) Within or close to the room or place where the Court is sitting wilfully misbehaves in a violent, threatening, or disrespectful manner to the disturbance of the Court, or to the intimidation of suitors or others resorting thereto; or

(iii.) Wilfully insults any member of the Court, or any assessor, or any person acting as a Clerk or Officer of the Court during his sitting or attendance in Court, or in his going to or returning from Court; or

(iv.) Does any act in relation to the Court or a Judge thereof, or a matter pending therein, which, if done in relation to a Superior Court in England or in India, would be punishable as a contempt of such Court, or as a libel on such Court or the Judges thereof, or the administration of justice therein, such person shall be liable to be apprehended by order of the Court with or without warrant, and, on enquiry and consideration and after the hearing of any defence which such person may offer, without further process or trial, to be punished with a fine not exceeding 100 rupees, or with imprisonment not exceeding twenty-four hours.

A Minute shall be made and kept of every such case of punishment, recording the facts of the offence and the extent of the punishment.

Provided that, if the Court thinks fit, instead of proceeding under the preceding provisions, it may direct or cause the offender to be tried in a separate criminal prosecution or proceeding, in which the offender shall be liable to any punishment to which he would be liable if the offence were committed in relation to the Court of a Sessions Judge in India.

Nothing herein shall interfere with the power of the Court to remove or exclude persons who interrupt or obstruct the proceedings of the Court.

26. If any person to whom this Order applies smuggles or imports into or exports from Bahrein any goods whereon any duty is charged or payable to the Sheikh of Bahrein, with intent to evade payment of the duty, he shall be punished with imprisonment for a term which may extend to two months, or with fine which may extend to 1,000 rupees, or a sum equal to treble the value of the goods (whichever shall be the greater), or with both imprisonment and fine.

27. If any person to whom this Order applies smuggles or imports into or exports from Bahrein any goods the importation or exportation whereof is lawfully prohibited, he shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to 2,000 rupees, or a sum equal to treble the value of the goods (whichever shall be the greater), or with imprisonment and fine.

28. Any act which if done in British India would be an offence against the law for the time being in force in British India relating to trade-marks, merchandise marks, copyright designs, or inventions, shall, if done in Bahrein, be an offence punishable with imprisonment for a term which may extend to two months, or with a fine which may extend to 1,000 rupees, or with both.

29.—(1.) If any person to whom this Order applies—

(i.) Publicly derides, mocks, or insults any religion established or observed within the limits of this Order; or

(ii.) Publicly offers insult to any religious service, feast, or ceremony, established or kept in any place within those limits, or to any place of worship, tomb, or sanctuary belonging to any religion established or observed within those limits, or belonging to the Ministers or professors thereof; or

(iii.) Publicly and wilfully commits any act tending to bring any religion established or observed within those limits, or its ceremonies, mode of worship, or observances, into hatred, ridicule, or contempt, and thereby to provoke a breach of the public peace;

he shall be guilty of an offence, and on conviction thereof, liable to imprisonment which may extend to two years, with or without a fine not exceeding 500 rupees, or to a fine alone not exceeding 500 rupees.

(2.) The Political Agent shall take such precautionary measures as seem to him proper and expedient for the prevention of such offences.

30. Any person being within the limits of this Order may be proceeded against, tried, and punished under this Order for piracy wherever committed.

31. If any person, subject to this Order, violates, or fails to observe within the limits of this Order, any stipulation of any Treaty between His Majesty, his predecessors, heirs, or successors, and the Sheikh of Bahrein, for the time being in force, and applicable to such person, in respect of the violation whereof any penalty is stipulated for in the Treaty, he shall be deemed guilty of an offence, and on conviction thereof under this Order shall be liable to a penalty in accordance with the stipulations of the Treaty, or the provisions of this Order.

32. "The Foreign Jurisdiction Neutrality Order in Council, 1904," shall apply to all persons and to all property subject to this Order.

33. Where a person entitled to appeal to the Chief Court from any judgment or order passed in the exercise of criminal jurisdiction under this Order desires so to appeal, he shall present his petition of appeal to the Court which passed the judgment or order; and the petition shall with all practicable speed be transmitted to the Chief Court with certified copies of the charge (if any) and proceedings of all documentary evidence admitted or tendered, of the depositions, of the notes of the oral testimony, and of the judgment or order, and any argument on the petition of appeal that the appellant desires to submit to the Chief Court.

34. The Court against whose judgment or order the appeal is preferred may postpone the execution of the sentence pending the appeal, and shall, if necessary, commit the person convicted to prison for safe custody, or detain him in prison for safe custody, or shall admit him to bail, and may take security, by recognisance, deposit of money, or otherwise, for his payment of any fine.

PART IV.—Civil.

35.—(1.) Subject to the other provisions of this Order, the Code of Civil Procedure and the other Indian enactments, relating to the administration of Civil justice and to insolvency and bankruptcy, shall have effect as if Bahrein were a district in the Presidency of Bombay. The Political Agent shall be deemed to be the District Judge, and his Court shall be deemed to be the District or Principal Civil Court of Original Jurisdiction in the District; the Judicial Assistant to the Political Resident shall be deemed to be an Additional District Judge, and his Court shall be an Additional District Court of Original Civil Jurisdiction; the Court of the Political Resident shall be deemed to be the highest Civil Court of Appeal for the District, and the Court authorised to hear appeals from the decisions of the District Court; and the powers, both of the Governor-General in Council and the Local Government, under those enactments shall be exercisable by the Secretary of State, or, with his previous or subsequent assent, by the Governor-General of India in Council.

(2.) Any jurisdiction exercisable by the Chief Court under this Order in civil matters may be exercised by the Judge of that Court, either within the limits of this Order or elsewhere.

36. When a suit between persons to whom this Order applies is filed in the Political Agency, the Political Agent shall enquire from the several parties whether they desire that proceedings shall be instituted in accordance with the Code of Civil Procedure and the Indian enactments made applicable to Bahrein, or in accordance with local usage, and shall record their replies.

37. When any of the several parties desire that the suit shall be determined in accordance with the Code of Civil Procedure and other enactments made applicable to Bahrein, the District Court shall forthwith proceed to decide the suit in accordance with the provisions of such enactments, as far as local conditions permit.

Nothing in this section shall prevent the District Court from referring—

(a.) A question of local custom to the Majlis-el-Urf, for consideration and report;

(b.) A dispute over accounts between pearling-masters and divers to the Salifah Court for scrutiny and adjustment;

nor shall prevent the District Court, the Majlis-el-Urf, or the Salifah Court from referring any matter in the progress of a suit which involves a point of Mahomedan Law to a Kazi for decision, or from sending any party or witness, being a Mahomedan, to a Kazi for the administration of an oath.

38.—(1.) The Foreign Jurisdiction (Admiralty) Order in Council, 1910, shall apply to



Bahrein, and the Chief Court shall have the jurisdiction conferred by Article 4 of that Order, and the District Court shall be deemed to be a Provincial Court, and the Registry thereof a District Registry within the meaning of the said Order.

(2.) Admiralty actions commenced in the said Registry shall be tried in the District Court, unless the Chief Court is at the time sitting within the limits of this Order, or unless all parties agree that the action shall be tried in the Chief Court sitting elsewhere than within the limits of this Order.

(3.) The duties of the Registrar and of the Marshal either of the Chief Court or of the District Court under the said Order shall be performed by such officers as the Political Resident shall direct.

39.—(1.) The District Court shall endeavour to obtain, as early as may be, notice of the deaths of all British subjects or foreigners leaving property in any place within the jurisdiction of the Court as prescribed by this Order, and all such information as may serve to guide the Court with respect to the securing and administration of their property.

(2.) On receiving notice of the death of such a person, the Court shall put up a notice thereof at the Court-house, and shall keep the same there until probate or administration is granted, or, where it appears to the Court that probate or administration will not be applied for, or cannot be granted, for such time as it thinks fit.

(3.) The Court shall, where the circumstances of the case appear so to require, as soon as may be, take possession of the property left by the deceased in any place within the jurisdiction of the Court as prescribed by this Order, or put it under its seal (in either case, if the nature of the property or other circumstances so require, making an inventory), and so keep it until it can be dealt with according to law; perishable articles being disposed of as the Court may consider best in the interests of the estate.

(4.) All expenses incurred on behalf of the Court in so doing shall be the first charge on the property of the deceased, and the Court shall, by sale of part of that property, or otherwise, provide for the discharge of these expenses.

(5.) When a British subject or foreigner dies within the jurisdiction of the Court as prescribed by this Order intestate, his property, or so much thereof as is within those limits, shall, until administration is granted, vest in the Political Agent.

40. If a person to whom this Order applies be named executor in a will, and to the establishment of whose title as such it is necessary to obtain probate of that will, take possession of and administers, or otherwise deals with, any part of the property of the deceased, and does not obtain probate within one month after the death or after the termination of any proceeding respecting probate or administration, he shall be liable to pay double the amount of any fees chargeable on obtaining probate, and he shall also be liable to a fine which may extend to 1,000 rupees.

41. If any person, to whom this Order applies, other than the person named executor, or the administrator, or a person entitled to represent the deceased without obtaining probate or letters of administration, or an officer of the Court, takes possession of and administers, or otherwise deals with, any part of the property of the deceased, he shall, as soon as practicable, notify the fact and the circumstances to the District Court, and shall furnish to the Court all such information as the Court requires, and shall conform to any direction of the Court in relation to the custody, disposal, or transmission of the property or the proceeds thereof, and, in case of any contravention of this Article, he shall be punished with fine, which may extend to 1,000 rupees.

42.—(1.) When the peculiar circumstances of the case appear to the District Court so to require; for reasons recorded in its proceedings, the Court may, if it thinks fit, of its own motion or otherwise, grant letters of administration to an officer of the Court.

(2.) The officer so appointed shall act under the direction of the Court, and shall be indemnified thereby.

(3.) He shall publish such notices, if any, as the Court thinks fit, in Bahrein, the Persian Coast and Islands, Bombay, the United Kingdom, and elsewhere.

(4.) The Court shall require and compel him to file, in the proper office of the Court, his accounts of his administration at intervals not exceeding three months, and shall forthwith examine them and report thereon to the Chief Court.

(5.) The accounts shall be audited under the direction of the District Court.

(6.) All expenses incurred on behalf of the Court in execution of this Article shall be the first charge on the estate of the deceased as dealt with in accordance with the provisions of this Order; and the Court shall, by the sale of that estate or otherwise, provide for the discharge of those expenses.

43. In cases where parties are Mahomedans the District Court may refer any question, concerning probate of wills or administration of property of deceased persons to whom this Order applied, to a Kazi for settlement under the general supervision of the Court.

PART V.—Bahrein Subjects and Tribunals.

(a.) Criminal.

44.—(1.) When a Bahrein subject desires to institute a complaint against a person to whom this Order applies, or a person to whom this Order applies desires to institute a complaint against a Bahrein subject, the Political Agent shall entertain the same, and may—

(a.) With the concurrence of the Sheikh of Bahrein, himself hear and determine it in his District Court; or

(b.) Send it to the Joint Court; or

(c.) If the defendant is a Mahomedan, refer it to a Kazi for decision, sending a representative of the Agency to record briefly the proceedings. Such decision, when endorsed by the Political Agent, shall for all purposes be considered as if it were that of the District Court.

(2.) Nothing in this Article shall prevent the Political Resident from exercising the revisory powers possessed by him under Article 4 of the Convention with Bahrein, dated the 31st May, 1861.

(b.) Civil.

45.—(1.) When a Bahrein subject desires to bring a suit against a person to whom this Order applies, or a person to whom this Order applies desires to bring a suit against a Bahrein subject, the Political Agent shall admit the complaint, and

(a.) With the concurrence of the Sheikh of Bahrein, may hear and determine the suit in his District Court; or

(b.) May hear and determine it in a Joint Court; or

(c.) May refer it to the Majlis-el-Urf for decision; or

(d.) In cases between pearling-masters and divers, may refer it to the Salifah Court; or

(e.) With the consent of the several parties, may refer the case to one or more Arbitrators for settlement.

(2.) The judgment of the Joint Court or of the Majlis-el-Urf shall for all purposes be considered the same as if it were that of the District Court.

(3.) An appeal from the decision of the Salifah Court shall lie to the Political Agent acting in concert with the Sheikh of Bahrein, and in all Salifah cases their joint decision shall be final.

(4.) The award of the Arbitrator under sub-Article 1 (e) shall be final, and shall not be open to appeal unless the same shall, within a reasonable time, have been ordered by the Political Agent to be set aside on the ground that it is not final or is defective, or that the Arbitrator has exceeded his authority or has been guilty of misconduct in the matter.

(5.) Nothing herein mentioned shall prevent the District Court, the Joint Court, the Majlis-el-Urf, the Salifah Court, or the Arbitrator from referring any matter in the progress of a suit which involves a point of Mahomedan law to a Kazi for decision, or from sending any party or witnesses, being a Mahomedan, to a Kazi for the administration of an oath.

46.—(1.) Where a Bahrein subject obtains, in a Court established under this Order, a decree or order against a defendant being a British subject, or foreigner, and in another suit that defendant is plaintiff and the Bahrein subject is defendant, the Court may, if it thinks fit, on the application of the British subject, or foreigner, stay the enforcement of the decree or order pending that other suit, and may set off any amount decreed or ordered to be paid by one party in one suit against any amount decreed or ordered to be paid by the other party in the other suit.

(2.) Where a plaintiff, being a Bahrein subject, obtains a decree or order, in a Court established under this Order, against two or more defendants, being British subjects, or foreigners, jointly, and in another suit one of them is a plaintiff and the Bahrein subject is defendant, the Court may, if it thinks fit, on the application of the British subjects, or foreigners, stay the enforcement of the decree or order pending that other suit, and may set off any amount decreed or ordered to be paid by one party in one suit against any amount decreed or ordered to be paid by the other party in the other suit, without prejudice to the right of the British subject or foreigner to obtain contribution from his co-defendants under the joint liability.

(3.) Where in a suit a Bahrein subject is co-plaintiff with a British subject or foreigner who is in Bahrein, it shall not be necessary for the Bahrein subject to give security under this Article as regards fees and costs, unless the Court so directs; but the co-plaintiff British subject, or foreigner, shall be responsible for all fees and costs.

47.—(1.) Every agreement for reference to arbitration between a person to whom this Order applies on the one hand, and a Bahrein subject on the other hand, may, on the application of any party, be filed for execution in the office of the Court.

(2.) The Court shall thereupon have authority to enforce the agreement, and the award made thereunder, and to control and regulate the proceedings before and after the award, in such manner and on such terms as the Court may think fit, in concert with the Sheikh or his representative.

(c.) General.

48.—(1.) Where it is proved that the attendance of a person to whom this Order applies, to give evidence, or for any other purpose connected with the administration of justice, is required before a Bahrein Tribunal, a Court established under this Order may, if it thinks fit, in a case and in circumstances in which the Court would require the attendance of that person before the Court, order that he do attend as required.

(2.) If the person ordered to attend, having reasonable notice of the time and place at which he is required to attend, fails to attend accordingly and does not excuse his failure to the satisfaction of the Court, he shall, independently of any other liability, be liable to be punished with imprisonment for a term which may extend to two months, or with fine which may extend to 1,000 rupees, or with both.



49. When a person to whom this Order applies invokes or submits to the jurisdiction of a Bahrain Tribunal, and engages in writing to abide by the decision of that Tribunal or to pay any fees or expenses ordered by that Tribunal to be paid by him, the Court may, on such evidence as it thinks fit to require, enforce payment of such fees and expenses in the same manner as if they were fees payable in a proceeding in the Court, and shall pay over and account for the same, when levied, to the proper Bahrain authority, as the Court may direct.

50.—(1.) If a person to whom this Order applies wilfully gives false evidence in a proceeding before a Bahrain Tribunal, or in an arbitration between a person to whom this Order applies, on the one hand, and a Bahrain subject, on the other hand, he shall be guilty of an offence, and shall, on conviction, be liable to be punished with imprisonment for a term which may extend to two months, or with a fine which may extend to 1,000 rupees, or with both.

(2.) Nothing in this Article shall exempt a person from liability under any other British or British Indian law to any other or higher punishment or penalty:

Provided that no person shall be punished twice for the same offence.

PART VI.—Registration.

51. A register of persons to whom this Order applies shall be kept in the Political Agency.

52. Every person to whom this Order applies, being of the age of 21 years or upwards, or being married, or a widower, or a widow, though under that age, shall register himself at the Political Agency within three months of the commencement of this Order, if resident within the limits of this Order at that time, or, if arriving within the limits of this Order, within one month after such arrival:

Provided that a person who fails to register himself within the time limited by this Article may be registered at any time if he excuses his failure to the satisfaction of the Political Agent.

53. The registration of a man shall comprise the registration of his wife, or wives, if living with him; and the registration of the head of a family shall comprise the registration of all females and minors, being his relatives in whatever degree, living under the same roof with him at the time of his registration.

54. Registration under this Order shall be renewed annually in the month of January.

55. Every person who has not previously been registered applying to be registered under this Order shall, unless excused by the Political Agent, attend personally for that purpose at the Political Agency; but no person applying for the renewal of his registration need attend personally unless directed by the Political Agent so to do.

56. Every person registering himself under this Order may obtain, if he so desire, a certificate of registration in such form as may be prescribed by the Political Resident.

57. If any person to whom this Order applies neglects to register himself under its provisions he shall not be entitled to the protection, assistance, or good offices of the Political Agent, and shall be liable to a fine not exceeding 20 rupees for each instance of such failure, but he shall, although not registered, be subject to the jurisdiction of the Courts established by this Order.

58. A person applying to be registered under this Order must produce such evidence as the Political Agent may think necessary that he is entitled to be registered.

59. Registration under this Order shall be no evidence of nationality, and a statement to that effect shall be inserted on the face of every certificate of registration issued under this Order.

PART VII.—Miscellaneous Provisions.

60. Subject to the control of the Secretary of State the Political Resident may, from time to time, with the previous sanction of the Governor-General of India in Council, make rules of procedure and other rules, consistent with this Order, for the better execution of the provisions herein contained in respect of any matter arising in the course of any civil or criminal case, including insolvency and bankruptcy proceedings.

61.—(1.) Subject to the control of the Secretary of State acting with the concurrence of the Treasury, the Political Resident may, from time to time, with the previous sanction of the Governor-General of India in Council, make rules imposing fees leviable in respect of any proceedings in, or processes issued out of, any Court established under this Order.

(2.) But a Court before which any matter is pending may, in any case, if it thinks fit, on account of the poverty of a party, or for any other reason, dispense in whole or in part with the payment of any fees chargeable in respect of such matter.

62.—(1.) All fees, charges, expenses, costs, fines, damages, and other money payable under this Order, or under any law made applicable by this Order, may be enforced under order of the Court by seizure and sale of goods, and, in default of sufficient goods, by imprisonment as a civil prisoner for a term not exceeding one month, but such imprisonment shall not operate as a satisfaction or extinguishment of the liability.

(2.) Any bill of sale or mortgage, or transfer of property, made with the view of avoiding such seizure or sale, shall not be effectual to defeat the provisions of this Order.

(3.) All fees, penalties, fines, and forfeitures levied under this Order upon a British subject, and fees, other than actual Court fees, that may be levied under the provisions of this Order, on a person to whom this Order applies, shall be paid to the public account, and shall be applied in such manner as the Secretary of State, with the consent of the Treasury, or, with the previous or

subsequent assent of the Secretary of State, as the Governor-General of India in Council may direct.

63. Whenever an Acting Political Agent or Acting Judicial Assistant has commenced the hearing of any cause or matter, civil or criminal, he may, unless the Political Resident otherwise directs, continue and complete the hearing and determination thereof, notwithstanding that his authority to act as Political Agent or Judicial Assistant has otherwise ceased by reason of the expiration of the time for which he was appointed to act, or by reason of the happening of any event by which his authority is determined.

64.—(1.) If an officer of the Court, employed to execute a decree or order, loses, by neglect or omission, the opportunity of executing it, then, on complaint of the persons aggrieved, and proof of the fact alleged, the Court may, if it thinks fit, order the officer to pay the damages sustained by the person complaining, or part thereof.

(2.) The order may be enforced as an order directing payment of money.

65.—(1.) If a clerk or officer of the Court, acting under pretence of the process or authority of the Court, is charged with extortion, or with not paying over money duly levied, or with other misconduct, the Court may, if it thinks fit, enquire into the charge in a summary way, and may for that purpose summon and enforce the attendance of all necessary persons as in a suit, and may make such order for the repayment of any money extorted, or for the payment over of any money levied, and for the payment of any such damages and costs as the Court thinks fit.

(2.) The Court may also, if it thinks fit, on the same enquiry, impose on the clerk or officer such fine, not exceeding 50 rupees for each offence, as the Court thinks fit.

(3.) A clerk or officer punished under this Article shall not, without the leave of the Court, be liable to a civil suit in respect of the same matter; and any such suit, if already or afterwards begun, may be stayed by the Court in such manner and on such terms as the Court thinks fit.

(4.) Nothing in this Article shall be deemed to prevent any person from being prosecuted under any other British or British Indian law for any act or omission punishable under this Article, or from being liable under that other law to any other or higher punishment or penalty than that provided by this Article:

Provided that no person shall be punished twice for the same offence.

66. The Political Resident or the Political Agent may exercise any power conferred on any Justices of the Peace within His Majesty's dominions by any Act of Parliament, for the time being in force, regulating merchant seamen or the mercantile marine.

67. Where under "The Merchant Shipping Act, 1894," anything is authorised to be done by, to, or before a Consular officer, such thing may be done in any place in Bahrain by, to, or before the Political Resident, or the Political Agent.

68. The Political Resident and the Political Agent shall each be entitled in Bahrain to act as a Notary Public.

69. The Court shall have jurisdiction from time to time to make an order requiring a person to whom this Order applies to contribute in such manner as the Court directs, to the support of his wife, or to the support of his or her child, whether legitimate or not, being, in the opinion of the Court, under the age of 16 years. Any such order may be made in a summary way, as if the neglect to provide for the support of such wife or child were an offence, and any failure to comply with any such order shall be deemed to be an offence, and shall be punishable with a fine not exceeding 10 rupees for any one default, and the Court may direct any penalty imposed for such offence to be applied for the support of such wife or child in such manner as the Court thinks fit.

70. The Political Resident shall have power to make Regulations (to be called "King's Regulations") for the following purposes (that is to say):—

(a.) For the peace, order, and good government of persons to whom this Order applies in relation to matters not provided for by this Order.

(b.) For securing the observance of any Treaty for the time being in force relating to any place within the limits of this Order, or of any native or local law or custom, whether relating to trade, commerce, revenue, or any other matter.

(c.) For applying, amending, modifying, or repealing, with respect to Bahrain, any Acts or enactments which apply, or are made applicable, or have been brought into operation in Bahrain by or under any of the provisions of Article 11 of this Order.

(d.) For regulating or preventing the importation or exportation in British ships, or by any person to whom this Order applies, of arms or munitions of war, or any parts or ingredients thereof, and for giving effect to any Treaty relating to the importation or exportation of the same.

(e.) For requiring returns to be made of the nature, quantity, and value of articles exported from or imported into Bahrain by or on account of any person to whom this Order applies, or in any British ship, and for prescribing the times and manner at or in which, and the persons by whom, such Returns are to be made.

(f.) For the governance, visitation, care, and superintendence of prisons.

71.—1. Any Regulations made under the preceding Article may provide for forfeiture of any goods, receptacles, or things in relation to which, or to the contents of which, any breach is committed of such Regulations, or of any Treaty or any native or local law or custom, the observance of which is provided for by such Regulations.

(2.) Any person to whom this Order applies committing a breach of any such Regulations shall, in addition to any forfeiture prescribed thereby, be liable, on conviction, to imprisonment for a period not exceeding three months, or to a fine, or to both.



(3.) Any fine imposed for a breach of Regulation shall not exceed 1,500 rupees: provided that in the case of any breach of any native or local law relating to customs law, or under which the importation or exportation of any goods is prohibited or restricted, the fine may extend to a sum equivalent to treble the value of the goods in relation to which the breach is committed.

72.—(1.) King's Regulations shall not take effect until they are allowed by a Secretary of State, or, with his previous or subsequent assent, by the Governor-General of India in Council: provided that in case of urgency declared in any such Regulations, the same shall take effect before such allowance, and shall continue to have effect unless and until they are disallowed by the Secretary of State, or, with his previous or subsequent assent, by the Governor-General of India in Council, and until notification of such disallowance is received and published by the Political Resident, and such disallowance shall be without prejudice to anything done or suffered under such Regulations in the meantime.

(2.) All King's Regulations shall be published by the Political Resident in such manner and at such places as he may think proper.

(3.) In this Order "breach of the Regulations" includes the breach of any native or local law or custom, the observance of which is required by any King's Regulations.

73. Judicial notice shall be taken of this Order and of the commencement thereof, and of the appointment of the Political Resident, Political Agent, and Judicial Assistant, and of the constitution and limits of the Courts and districts, and of the seals and signatures, and of any Rules and Regulations made or in force under this Order, and no proof shall be required of any such matters.

74. Nothing in this Order shall deprive the Political Resident, or an officer subordinate to him, of the right to observe, and to enforce the observance of, or shall deprive any person of the benefit of any reasonable custom existing in Bahrein, unless this Order contains some express and specific provision incompatible with the observance thereof.

75. Nothing in this Order shall—

(i.) Affect any power or jurisdiction conferred by, or referred to in, the Act of the Governor-General of India in Council, entitled "The Foreign Jurisdiction and Extradition Act, 1879" (Act XXI of 1879), or in "The Indian (Foreign Jurisdiction) Order in Council, 1902"; or

(ii.) Affect any jurisdiction for the time being exercisable by the Political Resident under any Imperial Act other than "The Foreign Jurisdiction Act, 1890"; or

(iii.) Prevent the Political Agent from doing anything which His Majesty's Consuls in the dominions of any State in amity with His Majesty are for the time being, by law, usage, or sufferance, entitled or enabled to do.

76. If a question arises whether any place is or is not in Bahrein for the purposes of this Order, it shall be referred to the Political Resident, and a certificate under his hand and seal shall be conclusive on the question, and shall be taken judicial notice of by any Court established under this Order.

77. Not later than the 31st day of March in each year, or such other day as the Secretary of State, or, with his previous or subsequent assent, as the Governor-General of India in Council, directs from time to time, the Political Resident shall send to the Governor-General of India in Council, for transmission to the Secretary of State, a Report on the operation of this Order up to the 31st day of December in the previous year, or such other date as the Secretary of State, or, with his previous or subsequent assent, as the Governor-General of India in Council directs from time to time, showing for the last twelve months the number and nature of the proceedings, criminal and civil, taken under this Order, and the result thereof, and the number and amount of fees received, and such other information, and being in such form as the Secretary of State, or, with his previous or subsequent assent, as the Governor-General of India in Council from time to time directs.

78.—(1.) A printed copy of this Order, and of all Rules of Procedure and other Rules for the time being in force under this Order, shall be kept open to inspection free of charge in the office of the Political Agent and of each Court established under this Order.

(2.) Printed copies thereof shall be sold within the islands of Bahrein at such reasonable price as the Political Agent from time to time directs.

79.—(1.) This Order shall be published in the "Gazette of India" within such time after the passing thereof as the Secretary of State may prescribe, and shall come into force on such day (in this Order referred to as the commencement of this Order), within six months after that publication, as the Governor-General of India in Council may, by notification in the said "Gazette," appoint in this behalf.

(2.) But any appointment under this Order may be made at any time after its passing, and no proof shall, in any proceedings, be required of any of the matters prescribed by this Article.

And the Most Honourable the Marquess of Crewe K.G., and the Right Honourable Sir Edward Grey, Bart., K.G., two of His Majesty's Principal Secretaries of State, are to give the necessary directions herein as to them may respectively appertain.

SCHEDULE.

Indian Acts Applied.

Acts XXXV and XXXVI of 1858 relating respectively to lunatics and lunatic asylums.
The Indian Penal Code (Act XLV of 1860).
The Whipping Act, 1864 (Act VI of 1864).
The Indian Succession Act (Act X of 1865).
The Indian Divorce Act (Act IV of 1869), except so much as relates to divorce and nullity of marriage.
The Bombay Civil Courts Act, 1869 (Act XIV of 1869), except sections 6, 15, 23, 32, 33, 34, 38 to 43 (both inclusive), the last clause of section 19, and the last two clauses of section 22.
The Indian Evidence Act, 1872 (Act I of 1872).
The Indian Contract Act, 1872 (Act IX of 1872).
The Indian Oaths Act, 1873 (Act X of 1873).
The Indian Majority Act (Act IX of 1875).
The Provincial Small Cause Courts Act, 1887 (Act IX of 1887).
The Prevention of Cruelty to Animals Act, 1890 (Act XI of 1890).
The Indian Pilgrim Ships Act (Act XIV of 1895).
The Code of Criminal Procedure (Act V of 1898), except Chapter XXXIII.
So much of The Indian Post Office Act, 1898 (Act VI of 1898), as relates to offences against the Post Office.
The Code of Civil Procedure, 1908 (Act V of 1908).
The Indian Limitation Act, 1908 (Act IX of 1908), so far as it applies to appeals and applications.
And the enactments relating to insolvency and bankruptcy for the time being in force in the Presidency of Bombay beyond the limits of the ordinary original jurisdiction of the High Court of Judicature at Bombay.

CHINA.

[11864]

No. 4.

[Files 815/12 and 237/13.]

[March 13, 1913.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, November 28, 1912.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith the draft of an Order in Council (Paper (A)) to be entitled "The China (Amendment) Order in Council, 1912."

In explanation of the terms of the draft, I am to point out that clause 3 provides a penalty to be imposed for the breach of approved international regulations under article 74 of the China Order in Council of 1904 (Paper (B)) in cases where no such penalty is laid down in the Regulations themselves, as some inconvenience has been experienced in the past owing to the absence of any such provision.

Clause 4 is intended to meet cases of false swearing in foreign Courts, which act has been held by His Majesty's Assistant Judge in a recent case, *Rex v. Shekury* (Paper (E)), not to be a criminal offence against English law.

Clause 5 enables the Court to punish British subjects who may be guilty of contempt of Court or similar offences in the course of proceedings before a foreign Court in China. At present such offenders cannot be dealt with in any Court.

Clauses 6-17 are an adaptation of "The Criminal Appeal Act, 1907," with certain alterations suggested by the Judge of the Supreme Court at Shanghai (Paper (F)).

Clauses 18-42 embody the rules which the Privy Council have now adopted as the model which they wish to be followed in regulating appeals to the Judicial Committee of that body.

Clauses 43-50 introduce for China the system of keeping a register of British companies at the consulates as well as the register of British subjects. They are taken from "The Ottoman Order in Council, 1910," articles 163-170 (Paper (G)), with certain amendments based upon recommendations made by His Majesty's consular officers in China (Paper (H)).

Clause 51 has been drawn up in view of Sir J. Jordan's representations as to the inadequate means which now exist for bringing suits against public institutions of an international (though not Chinese) character in their corporate capacity, such as the Cemetery and Hospital Boards and the Plague Committee, which are situated in the foreign concessions in Hankow and are under foreign administration (Papers (I) and (J)).

China
(Amendment)
Order
in Council,
1913.



A Court of Consuls, which takes cognisance of such suits, has existed at Shanghai since 1869. Particulars with regard to this Court will be found in a memorandum in Paper (I). There is a difficulty however with regard to this Court, in that there is some doubt as to whether it has any valid existence in law.

The Shanghai Land Regulations under which it was established were expressly sanctioned, in view of doubts which had been expressed as to their validity, by the China and Japan Order in Council of 1881, but this Order was repealed by article 169 of the China and Corea Order in Council of 1904, and Sir E. Grey is advised that it is probable, in spite of the terms of article 169 (2) of that Order, that the Court has now no legal basis. The Court, however, exists *de facto*, and is a useful institution, and Sir E. Grey considers that provision should be made for enforcing the orders of this Court and those of similar Courts which may be established at Hankow or elsewhere upon persons subject to British jurisdiction. As such Courts are international in character, no means exist of establishing them by Order in Council; and, further, as the public institutions over which they exercise jurisdiction are not incorporated under the laws of any of the Treaty Powers they are not, and cannot be treated as, units subject to any of their Courts. The only course therefore which appears to be open, in order to provide for the exercise of jurisdiction over such institutions by Courts of the nature of a Court of Consuls, is to treat such Courts as foreign bodies and enforce their orders on persons subject to British jurisdiction, provided that the Secretary of State, on behalf of His Majesty's Government, has approved the instrument under which the Court of Consuls exists.

I am to request that you will take the draft Order into your consideration, and that you will favour Sir E. Grey with your opinion whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

I have, &c.

ALGERNON LAW.

List of Papers.

- (A.) Draft Order in Council.†
- (B.) China Order in Council, 1904. (Confidential No. 8278*.)
- (C.) China (Amendment) Order in Council, 1907. (Confidential No. 8887*.)
- (D.) China (Amendment) Order in Council, 1910. (Confidential No. 9717*.)
- (E.) Sir H. W. de Sausmarez, No. 44, November 16, 1911.
- (F.) Sir J. Jordan, No. 93, July 19, 1912.
- (G.) Ottoman Order in Council, 1910. (Confidential No. 9745*.)
- (H.) Sir J. Jordan, No. 115, September 13, 1912.
- (I.) Sir J. Jordan, No. 316, July 26, 1912.
- (J.) Peking Legation to China Department, October 22, 1912.

Report.

As altered and initialled by us, the above mentioned draft Order may, in our opinion, properly be submitted to the King for the approval of His Majesty in Council.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
March 13, 1913.

ANNEX.

Draft China Order in Council.

WHEREAS by treaty, grant, usage, sufferance, or other lawful means, His Majesty the King has jurisdiction within the dominions of the Emperor of China:

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The

† NOTE.—Article 6 of the Order in Council as passed was prepared to meet a necessity which arose while the draft Order was under the consideration of the Law Officers, and was therefore not included in the draft as sent to them.

Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as "The China (Amendment) Order in Council, 1912," and shall be read as one with "The China Order in Council, 1904," hereinafter referred to as the "Principal Order," and this Order and the China Orders in Council, 1904 to 1910, may be cited together as "The China Orders in Council, 1904 to 1912."

2. In this Order, unless the context otherwise requires:—

"Judgment" includes decree, order, sentence or decision;

"Record" means the aggregate of papers relating to an Appeal to His Majesty in Council (including the pleadings, proceedings, evidence, and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal;

"Registrar" includes the officer having the custody of the Records in the Supreme Court.

3.—(1.) Any person committing a breach of any International Regulations approved by the Secretary of State under article 74 of the Principal Order shall, on conviction, be liable to the punishment, forfeiture, or fine therein prescribed, or, if no such punishment or fine is prescribed, he shall be liable, on conviction, to imprisonment, with or without hard labour, for a period not exceeding one month, or to a fine not exceeding 20*l*.

(2.) Where a fine is recovered for breach of such Regulations, and the Regulations contain no provisions as to the manner in which it shall be disposed of and applied, it shall be disposed of and applied in such manner as the Minister may direct.

4. In the application of "The Perjury Act, 1911," by the Court, in the exercise of its criminal jurisdiction on the principles of, and in conformity with, English law for the time being under article 35 (2) of the Principal Order, the words "judicial proceeding" in the said Act shall be deemed to include a proceeding before a Chinese Court or a Court in China of any State in amity with His Majesty.

5. If any person subject to the jurisdiction of the Court does any act in relation to proceedings in a Chinese Court, or before a Chinese judicial officer, or in a Court or before a judicial officer in China of any State in amity with His Majesty, which, if done in the course of, or in relation to, any proceedings in the Court, would have been punishable as an offence, such person shall be guilty of an offence, and shall be liable, on conviction, to such punishment as he would have been liable to if the offence had been committed in the course of, or in relation to, proceedings in the Court.

Appeals in Criminal Cases.

6. Any person who is convicted of an offence on a trial under article 45 of the Principal Order, or who is sentenced, on a conviction for an offence under article 48 of the Principal Order, to be imprisoned without the option of a fine, may appeal to the Full Court—

(i.) Against his conviction—

- (a.) On any ground of appeal which involves a question of law alone; or
- (b.) With the leave of the Full Court, or upon the certificate of the Court which tried him, that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact; or
- (c.) With the leave of the Full Court on any other ground which appears to the Full Court to be a sufficient ground of appeal.

(ii.) With the leave of the Full Court, against the sentence passed on his conviction, unless the sentence is one fixed by law.

7. After the hearing and determination at a summary trial under article 48 of the Principal Order of any information or complaint, either party to such summary trial may, if dissatisfied with the said determination as being erroneous in point of law, appeal to the Full Court.

8.—(1.) When a person desires to appeal to the Full Court under articles 6 or 7 he shall give notice of his appeal, or of his application for leave to appeal, to the Court against whose judgment or sentence he desires to appeal, in such manner as may be prescribed, within seven days of the date of his conviction or of the determination of an information or complaint.

(2.) An appellant may, in such manner as may be prescribed, present his case and his argument in writing, and deliver the same to the Registrar of the Court before which the trial took place. The ~~prosecutor~~ respondent may in like manner present his case and argument in writing, and deliver the same to the Registrar of the said Court.

(3.) Such Court shall thereupon send, under the seal of the Court, to the Registrar of the Supreme Court the notice, the case, and the argument, if any, and a report by the Judge who presided at the trial, together with such other papers and in such manner as may be prescribed.

(4.) Where the trial took place before a Judge of the Supreme Court, sitting elsewhere than at Shanghai, the papers may be transmitted to the Registrar of the Supreme Court through the Provincial Court of the district.

9. Where notice is given under article 8, the Court before which the trial was had may, as it thinks fit, either postpone judgment on the conviction or respite execution of the judgment, and either commit the person convicted to prison, or take security for him to come up for judgment, or to deliver himself for execution of the judgment (as the case may require) at an appointed time and place.

10. An appellant shall not be entitled to be present at the hearing of an appeal except by leave of the Full Court, or of the Court before which he was convicted.



11. (1.) Appeals under articles 6 and 7 of this Order shall be heard and determined by the Full Court.

(2.) In the hearing and determination of such appeals the Full Court shall, so far as circumstances admit, follow the practice of the Court of Criminal Appeal in England and the provisions contained in sections 1 (5), 4, 5, 6, 8, 9, 11 (2), 14 (2) (3), 17, and 21 of "The Criminal Appeal Act, 1907," or of any law amending or substituted for the same.

(3.) Provided that the Full Court shall not annul a conviction or sentence, or vary a sentence, on the ground—

- (a.) Of any objection which, if stated during the trial, might, in the opinion of the Court, have been properly met by amendment at the trial; or
- (b.) Of any error in the summoning of the jury or the assessors; or
- (c.) Of any person having served as a jurymen or an assessor who was not qualified; or
- (d.) Of any objection to any person as a jurymen or assessor which might have been raised before or at the trial; or
- (e.) Of any informality in the swearing of any witness; or
- (f.) Of any error or informality which, in the opinion of the Court, did not affect the substance of the case or subject the convicted person to any undue prejudice.

(4.) The Full Court shall not award costs to either side in an appeal under this part of the Order, save in an appeal under article 7.

12. The power of the Judge of the Supreme Court, under article 119 of the Principal Order, to make rules of Court shall extend to rules for the purpose of regulating the manner of presenting appeals, as to the papers which are to be sent to the Full Court, and the transmission of the same, and generally as to the conduct of appeals and all matters connected therewith.

13. Article 52 of the Principal Order shall apply to all proceedings before the Full Court under this Order.

14. When notice has been given of any appeal or application for leave to appeal, the Judge of the Supreme Court shall, save where the trial took place before himself, have power, for reasons to be recorded in the minutes, to order that it shall be heard and determined or dealt with in the manner provided in this Order by himself alone instead of by the Full Court.

15. Where a person is convicted of any offence before any Court, if the Judge of such Court thinks fit to reserve for the consideration of the Full Court any question of law arising at the trial, he shall state a case, setting out the facts and the grounds of the conviction, and the question of law, and send or deliver it to the Registrar of the Supreme Court.

The jurisdiction of the Full Court under this article shall be exercised subject to the provisions of this Order.

16. There shall be no appeal in a criminal case to His Majesty the King in Council from a decision of the Full Court or from a decision of the Judge alone under article 14, except by special leave of His Majesty in Council.

17. Reports to the Minister under article 64 of the Principal Order of sentences of death shall not be sent until the expiration of the time allowed for an appeal, or for applying for leave to appeal, against the conviction, or, if there is an appeal, until the determination of the appeal.

Appeals to His Majesty in Council.

18. Subject to the provisions of this Order, an appeal shall lie to His Majesty in Council—

- (1.) As of right, from any final judgment of the Supreme Court made in a civil action, where the matter in dispute on the Appeal amounts to or is of the value of 500*l.* or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of 500*l.* or upwards; and
- (2.) At the discretion of the Supreme Court, from any other judgment of the Supreme Court, whether final or interlocutory, if, in the opinion of the Supreme Court, the question involved in the Appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

19. Applications to the Supreme Court for leave to appeal shall be made by motion within fifteen days from the date of the judgment to be appealed from, and, unless the application is made in Court at the time when such judgment is given, the applicant shall give the opposite party notice of his intended application.

20. Leave to appeal under article 12 shall only be granted by the Supreme Court in the first instance—

- (a.) Upon condition of the appellant, within two months from the date of the hearing of the application for leave to appeal, giving security, to the satisfaction of the Court, to an amount not exceeding 500*l.*, for the due prosecution of the Appeal, and for the payment of all such costs as may become payable to the respondent in the event of the appellant's not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the appellant to pay the respondent's costs of the Appeal (as the case may be); and
- (b.) Upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

21. Where the judgment appealed from requires the appellant to pay money or perform a duty, the Supreme Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the Appeal, as to the Court shall seem just, and in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such order as His Majesty in Council shall think fit to make thereon.

22. The preparation of the Record shall be subject to the supervision of the Supreme Court, and the parties may submit any disputed question arising in connection therewith to the decision of the Court, and the Court shall give such directions thereon as the justice of the case may require.

23. The Registrar, as well as the parties and their legal agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) which are not relevant to the subject-matter of the Appeal, and, generally, to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be copied or printed shall be enumerated in a list to be placed after the index or at the end of the Record.

24. Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the Record, as finally printed, shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

25. The Record shall be printed in accordance with the rules in the Schedule to this Order, and may be printed either locally or in England.

26. Where the Record is printed locally the Registrar shall, at the expense of the appellant, transmit to the Registrar of the Privy Council forty copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof, and by affixing thereto the seal of the Supreme Court.

27. Where the Record is to be printed in England, the Registrar shall, at the expense of the appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the agents in England by or on behalf of the parties to the Appeal.

28. Where part of the Record is printed locally and part is to be printed in England, articles 20 and 21 shall, as far as practicable, apply to such parts as are printed locally and such as are to be printed in England respectively.

29. The reasons given by the Judge, or any of the Judges, for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises, shall, unless they are included in the Record, be communicated in writing by such Judge or Judges to the Registrar, and shall by him be transmitted to the Registrar of the Privy Council at the same time when the Record is transmitted.

30. Where there are two or more applications for leave to appeal arising out of the same matter, and the Supreme Court is of opinion that it would be for the convenience of the Lords of the Judicial Committee and all parties concerned that the Appeals should be consolidated, the Court may direct the Appeals to be consolidated, and grant leave to appeal by a single order.

31. An appellant, who has obtained an order granting him conditional leave to appeal, may at any time prior to the making of an order granting him final leave to appeal withdraw his appeal on such terms as to costs and otherwise as the Supreme Court may direct.

32. Where an appellant, having obtained an order granting him conditional leave to appeal, and having complied with the conditions imposed on him by such order, fails thereafter to apply with due diligence to the Supreme Court for an order granting him final leave to appeal, the Court may, on an application in that behalf made by the respondent, rescind the order granting conditional leave to appeal, notwithstanding the appellant's compliance with the conditions imposed by such order, and may give such directions as to the costs of the Appeal and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires.

33. On an application for final leave to appeal, the Supreme Court may enquire whether notice, or sufficient notice, of the application has been given by the appellant to all parties concerned, and, if not satisfied as to the notices given, may defer the granting of the final leave to appeal, or may give such other directions in the matter as, in the opinion of the Court, the justice of the case requires.

34. An appellant who has obtained final leave to appeal shall prosecute his appeal, in accordance with the rules for the time being regulating the general practice and procedure in Appeals to His Majesty in Council.

35. Where an appellant, having obtained final leave to appeal, desires, prior to the despatch of the Record to England, to withdraw his appeal, the Supreme Court may, upon an application in that behalf made by the appellant, grant him a certificate to the effect that the Appeal has been withdrawn, and the Appeal shall thereupon be deemed, as from the date of such certificate, to stand dismissed without express order of His Majesty in Council, and the costs of the Appeal and the security entered into by the appellant shall be dealt with in such manner as the Court may direct.

36. Where an appellant, having obtained final leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of procuring the despatch of the Record to England, the respondent may, after giving the appellant due notice of his intended application, apply to the Supreme Court for a certificate that the Appeal has not been effectually prosecuted by the appellant, and if the Court sees fit to grant such a certificate, the appeal shall be deemed, as from the date of such certificate, to stand dismissed for non prosecution without express order of His Majesty in Council, and the costs



of the Appeal and the security entered into by the appellant shall be dealt with in such manner as the Court may direct.

37. Where at any time between the order granting final leave to appeal and the despatch of the Record to England the Record becomes defective by reason of the death, or change of status, of a party to the Appeal, the Supreme Court may, notwithstanding the order granting final leave to appeal, on an application in that behalf made by any person interested, grant a certificate showing who, in the opinion of the Court, is the proper person to be substituted or entered on the Record in place of, or in addition to, the party who has died, or undergone a change of status, and the name of such person shall thereupon be deemed to be so substituted or entered on the Record as aforesaid without express order of His Majesty in Council.

38. Where the Record subsequently to its despatch to England becomes defective by reason of the death, or change of status, of a party to the Appeal, the Supreme Court shall, upon an application in that behalf made by any person interested, cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted, or entered, on the Record, in place of, or in addition to, the party who has died or undergone a change of status.

39. The Case of each party to the Appeal may be printed either locally or in England, and shall in either event, be printed in accordance with the rules in the Schedule to this Order, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the counsel who attends at the hearing of the Appeal, or by the party himself if he conducts his appeal in person.

40. The Case shall consist of paragraphs numbered consecutively, and shall state, as concisely as possible, the circumstances out of which the Appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the Record as printed shall, as far as practicable, be printed in the margin, and care shall be taken to avoid, as far as possible, the reprinting in the Case of long extracts from the Record. The taxing officer, in taxing the costs of the Appeal, shall, either of his own motion, or at the instance of the opposite party, enquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

41. Where the Judicial Committee directs a party to bear the costs of an appeal incurred in China, such costs shall be taxed by the proper officer of the Supreme Court in accordance with the rules for the time being regulating taxation in the Supreme Court.

42. The Supreme Court shall execute any order which His Majesty in Council may think fit to make on an appeal from a judgment of the Supreme Court in like manner as any original judgment of the Supreme Court should or might have been executed.

Consular Registers of Companies.

43. A register of companies incorporated or registered in the United Kingdom or in any British possession and carrying on business in China shall be kept in the office of every consulate in China.

44. The consulate at which companies shall be registered shall be that in the district of which their chief local office is situated, or their business is chiefly carried on, and notice shall be given at the consulate of any other district in which the company is also carrying on business as to the place at which the company is so registered.

45. On the registration of a company at a consulate there shall be deposited and filed in the office of the consulate a copy of the certificate of incorporation of the company, or other document corresponding thereto, a copy of the memorandum and articles of association or other documents corresponding thereto, a statement showing the nominal capital of the company, and the amounts thereof which have been subscribed and paid up respectively, and, if the company has been incorporated under a law which provides for the periodical filing of a list of the shareholders, a copy of the last list so filed.

46. The consular officer shall, on the registration of a company at the consulate, issue to the person making the registration a certificate, signed and sealed with the consular seal, that the company has been so registered.

47.—(1.) Every company registered under this Order shall register the name and address of the manager or other chief local representative in China, and shall from time to time, as may be necessary, register any alteration of the representative of the company or in his address. Names and addresses so registered shall be open to the inspection of the public.

(2.) Rules of Court made under article 119 of the Principal Order may provide that service of writs, notices, or other documents upon the person registered under this article, or at his address, shall be good service of such documents upon the company.

48. Registration of a company under this Order shall not require to be renewed annually, but may be renewed from time to time as the parties may desire, and must be renewed when any change takes place in the name of the company.

49. On every registration of a company under this Order, and on every renewal thereof, there shall be payable a fee of 1*l.*, and on every registration under article 47 there shall be payable a fee of 2*s.*

50.—(1.) A company shall not be entitled to be recognised or protected as a British company unless it is registered under this Order, but shall, although not so registered, be subject to the jurisdiction of His Majesty's Courts in China.

(2.) Nothing in this article shall affect the right of the Secretary of State to direct that British protection shall not be accorded to a company, even though it has been registered under this Order.

Orders of a Court of Consuls.

51.—(1.) Where by agreement among the diplomatic representatives in China of foreign States, Regulations have been, or are, made for the establishment, control or procedure of a Court of Consuls, or other like Court, to deal with disputes or suits relating to the property or proceedings of any board, committee, association, or other like group of persons which has been appointed for public purposes at any treaty port or foreign settlement or concession in China, and on which other nations besides Great Britain are represented, and such Regulations have been or are approved by the Secretary of State, the jurisdiction of the said Court shall not, so far as persons subject to the Principal Order are concerned, be deemed to conflict with article 6 of the Principal Order, and the Court shall enforce on all persons subject to its jurisdiction the orders and decrees of such Court of Consuls or other like Court.

(2.) Regulations approved by the Secretary of State under this article shall be published in the same manner as King's Regulations.

52.—(1.) Articles 85, 86, 87, 115, and 116 of the Principal Order are hereby repealed, but such repeal shall not—

- (a.) Affect the past operation of such articles, or any right, title, obligation, or liability thereunder; or
- (b.) Interfere with the institution or prosecution of any legal proceedings thereunder.

(2.) Appeals in criminal cases and Appeals to His Majesty in Council commenced under any articles hereby repealed shall be continued so far as is practicable in accordance with this Order.

And the Right Honourable Sir Edward Grey, Baronet, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein.

R. D. I.
J. A. S.

SCHEDULE.

1. Records and Cases in Appeals to His Majesty in Council shall be printed in the form known as Demy Quarto (*i.e.*, 54 ems in length and 42 in width).

2. The size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches in height and 8½ inches in width.

3. The type to be used in the text shall be pica type, but long primer shall be used in printing accounts, tabular matter, and notes.

4. The number of lines in each page of pica type shall be forty-seven or thereabouts, and every tenth line shall be numbered in the margin.

GENERAL.

[29649]

No. 5.

[File 1148/13.]

[June 27, 1913.]

Foreign Office to Law Officers of the Crown.

Gentlemen.

Foreign Office, January 13, 1913.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit herewith the papers noted in the enclosed list, in original for return, respecting recent legislation in the United States of America and Russia to suspend, for a period of five years, the killing of seals on the Pribyloff and Commander Islands.

It will be seen that, although the Japanese Government have protested against the United States' legislation in question, Sir E. Grey has, after consideration of the circumstances, come to the conclusion that His Majesty's Government would appear to have no ground for protesting as of right against the suspension of the land-catch of seals proposed by the United States' Government.

The Board of Trade have, however, expressed the desire that you should be consulted as to whether this legislation could, in your opinion, be regarded as in conflict with the provisions of the Treaty of the 7th July, 1911, a copy of which is

[219]

H

Suspension
of the
killing of
seals on
Pribyloff
and
Commander
Islands.



also enclosed, in view of the fact that it ties the hands of the United States' administration for a definite period of years.

Sir E. Grey would therefore be glad to receive your report on this point, as on the similar point arising out of the Russian legislation in regard to the Commander Islands, and to be favoured with any observations of a general character that you may be good enough to offer.

I have, &c.
LOUIS MALLET.

List of Papers with draft to Law Officers.

Board of Trade	..	..	..	..	..	August 21, 1912.
Telegram to Washington	..	..	..	..	(No. 161)	August 22, "
Mr. Mitchell Innes	..	..	..	(No. 100.	Telegraphic)	August 23, "
"	..	..	..	..	..	August 19, "
"	..	..	..	(No. 102.	Telegraphic)	August 27, "
To Mr. Mitchell Innes	..	..	..	(No. 167.	Telegraphic)	August 30, "
Mr. Mitchell Innes	..	..	..	..	..	August 21, "
"	..	..	..	..	(Telegraphic)	September 2, "
"	..	..	..	..	..	August 28, "
"	..	..	..	..	(No. 192)	September 3, "
Board of Trade	..	..	..	..	..	September 24, "
To Mr. Bryce..	..	..	..	(No. 175.	Telegraphic)	September 26, "
Colonial Office	..	..	..	..	..	September 26, "
Mr. Bryce ..	..	..	..	(No. 109.	Telegraphic)	September 27, "
"	..	..	..	..	(No. 200)	September 25, "
To Board of Trade	..	..	..	..	..	November 30, "
Mr. Bryce ..	..	..	..	..	(No. 221)	November 1, "
Board of Trade	..	..	..	..	..	December 10, "
To Colonial Office	..	..	..	..	..	December 31, "
Sir G. Buchanan	..	..	..	..	(No. 368)	December 12, "
Fur Seal Convention of July 7, 1911.						

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, February 7, 1913.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit a letter from the Colonial Office,* enclosing a copy of a despatch from the Governor-General of the Dominion of Canada, forwarding copies of an approved Minute of the Privy Council for Canada, setting out the grounds on which the Canadian Government take exception to the prohibition of the killing of seals by the United States' Government.

Sir E. Grey would be glad if you would take this despatch into consideration with the other papers on the same subject submitted to you in the letter from this Department of the 13th ultimo.

I have, &c.
LOUIS MALLET.

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, April 21, 1913.

ON the 13th January last I had the honour, by direction of Sir E. Grey, to request your opinion on the right of the United States' Government to suspend for five years the killing of fur seals on the Pribyloff Islands.

I am now to transmit to you herewith copy of a Memorandum communicated by the Japanese Government,† enquiring the views of His Majesty's Government on that particular point, and to state that Sir E. Grey would be glad to receive your opinion on this matter as soon as possible.

I have, &c.
LOUIS MALLET.

Report.

In our opinion, the legislation in the United States of America and Russia suspending for five years the killing of seals on the Pribyloff and Commander Islands

* Colonial Office, February 4, 1913.

† Japanese Embassy, Memorandum of April 16, 1913.

is not in conflict with the provisions of the Treaty of the 7th July, 1911. The treaty expressly reserves to both the United States and Russia power to restrict killing or to prohibit it altogether, as may seem necessary to protect and preserve the seal herd or to increase its numbers, and an absolute prohibition for any period cannot be in conflict with the provisions of the treaty if the action of the country enacting it is a *bonâ fide* exercise of the discretion conferred by the treaty as above stated. There is no evidence to the contrary in the present case.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
June 27, 1913.

[31572]

No. 6.

[File 3433/13]

[July 8, 1913.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, February 17, 1913.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you the papers noted in the accompanying list, relative to the power of the Master of the Faculties to appoint Notaries Public to practise in places in foreign countries where His Majesty exercises extra-territorial jurisdiction.

So far as Sir E. Grey is aware, no such appointments had ever been made before the year 1910, when two gentlemen, one a member of the English Bar, and the other a solicitor, were appointed by the Master of the Faculties to practise in Shanghai. Before the appointments were made, a firm of solicitors were informed by this Department, in answer to an enquiry as to the position of Shanghai, that it was "a place where His Majesty has extra-territorial jurisdiction."

Sir E. Grey was, however, not aware of the appointments until a complaint was made (Paper (A)) by the same solicitors to the effect that His Majesty's Consul-General at Shanghai had refused to recognise the appointment of one of these gentlemen.

As a result of the correspondence which has passed between this Department and the Master of the Faculties on the subject (Papers (I), (K), (L), (M), (N), (P), (Q), and (R)), it has now been arranged that no such appointments shall be made in future. A practical question, however, remains still open, as to the treatment to be accorded to the two gentlemen who have already obtained faculties, and are still practising as Notaries Public at Shanghai.

Sir E. Fraser, His Majesty's Consul-General at Shanghai, is strongly of opinion that it is undesirable that Notaries Public should be permitted to practise at Shanghai (see Papers (B), (E), and (O)), and he has recently suggested (Paper (T)) that a notice should be issued to the public that His Majesty's diplomatic and consular officers are the only persons having authority to perform notarial acts there. Sir E. Grey fully agrees with Sir E. Fraser as to the advisability of confining the power to execute notarial acts in Shanghai to consular officers, but he would not feel justified in taking the course suggested in the case of the two gentlemen already appointed unless you should be of opinion that the appointment of Notaries Public by the Master of the Faculties to practise in such places was *ultra vires*.

Section 4 of "The Public Notaries Act, 1843," provides that the Master of the Faculties may require testimonials of ability, &c., from persons applying for admission as a Notary to practise in England "or in any of His Majesty's foreign territories, colonies, settlements, dominions, forts, factories, or possessions." So far as Sir E. Grey is aware, this is the only definition to be found of the places out of England in which Notaries may be appointed to practise, and the question would therefore appear to be whether any of the words quoted would cover a place in which His Majesty exercises extra-territorial jurisdiction.

The Master of the Faculties has expressed the opinion (Paper (K)) that His Majesty's jurisdiction in Shanghai brings that place within "His Majesty's foreign colonies, territories, and dominions." Sir E. Grey is advised that this contention is open at the least to very serious doubt; His Majesty exercises jurisdiction over

Power of Master of Faculties to appoint Notaries to act in foreign countries where His Majesty has extra-territorial jurisdiction.



British subjects in China, as in other countries, in virtue of rights granted under treaty by the local Sovereign, or accorded by prescription and usage, but His Majesty has no sovereign rights over Shanghai such as would render that place part of "His Majesty's foreign colonies, territories, and dominions," and it must be remembered that similar rights are enjoyed in Shanghai by other foreign Sovereigns, who would, if such a contention were correct, be equally entitled to consider that place as forming part of their dominions. Such a contention would also involve the assumption that Shanghai was at the same time part of His Majesty's dominions and a foreign place to which His Majesty was entitled to appoint consular officers.

Sir E. Grey is therefore advised that the words "His Majesty's foreign territories, colonies, and dominions" only cover places within the British Empire, and the same would appear to be the case with regard to the word "possessions." It may, however, be argued that the words "settlements, forts, and factories" do cover places in foreign countries in which His Majesty exercises extra-territorial jurisdiction, and such a contention has actually been advanced by one of the gentlemen concerned (Paper (E)).

It seems clear that the words in question have not been construed as enabling the Master of the Faculties to appoint Notaries to practise outside the British Empire. The form of words used until recently in appointing Notaries to practise out of England authorised the Notary to act at the place indicated in the appointment, "and also in all other His Majesty's foreign territories, colonies, and dominions, and not in any other place whatsoever" ("Brooke's Notary," sixth edition, p. 18.) This form has now been altered, and the appointment is confined to the place specified therein (Paper (K)); but the wording of the old form would appear to indicate clearly that it was not thought that the effect of the section was to authorise the appointment of Notaries to practise in places not covered by the words "His Majesty's foreign territories, colonies, and dominions." This conclusion is also supported by the rules issued by the Court of Faculties, in which it is stated that "No service is required previous to the admission of Notaries to practise out of England (viz., in any of His Majesty's foreign territories, colonies, or dominions)" ("Brooke's Notary," sixth edition, p. 55). Reference may also be made to section 10 of the Act of 1843, prescribing penalties for unauthorised practice as a Notary, wherein it is provided that the penalty may be recovered in any of His Majesty's superior Courts of Record at Westminster, "or if the cause of action shall have arisen in any colony or place to His Majesty belonging out of England, then in the Supreme Court of Law of such colony or place."

It may be added that in "The Laws of England," volume 21, at p. 497, the law is stated as being that "The Master of the Faculties has power to issue a faculty to practise as a Notary in the British Dominions or Colonies beyond the seas."

It would therefore appear probable that the words "His Majesty's settlements, forts, and factories" were not intended to apply to places in foreign countries in which His Majesty has extra-territorial jurisdiction, and the phrase certainly seems inapplicable in view of the fact that His Majesty's rights in such places are not exclusive, but are enjoyed equally by other Sovereigns. Provision for the performance of Notarial acts in such places is made by section 6 of "The Commissioners for Oaths Act, 1889," and it may perhaps be inferred from this that Notaries cannot be appointed to practise in places where His Majesty has diplomatic or consular representation.

I am therefore to request you to take the accompanying papers into consideration, and to favour Sir E. Grey with your opinion as to whether Notaries Public can legally be appointed to practise in places in foreign countries where His Majesty has extra-territorial jurisdiction.

Sir E. Grey would also be glad to be favoured with any observations of a general nature which you may desire to offer.

I have, &c.
ALGERNON LAW.

P.S.—It is requested that the enclosed papers, which are in original, may be returned.

A. L.

List of Papers.

- (A.) Messrs. Wadeson and Malleson, October 31, 1911.
- (B.) Consul-General Fraser (No. 2), January 4, 1912.
- (C.) " " (and enclosure) (No. 1), January 4, 1912.
- (D.) To Messrs. Wadeson and Malleson, February 27, 1912.
- (E.) Consul-General Fraser (and enclosure) (No. 4), January 8, 1912.
- (F.) Messrs. Wadeson and Malleson, February 29, 1912.
- (G.) To Messrs. Wadeson and Malleson, March 12, 1912.
- (H.) Messrs. Wadeson and Malleson (and enclosures), May 9, 1912.
- (I.) To the Master of the Faculties, May 23, 1912.
- (J.) To Messrs. Wadeson and Malleson, May 23, 1912.
- (K.) The Master of the Faculties, June 5, 1912.
- (L.) To the Master of the Faculties, June 21, 1912.
- (M.) The Master of the Faculties (and enclosure), July 5, 1912.
- (N.) To the Master of the Faculties, July 19th, 1912.
- (O.) Consul-General Sir E. Fraser (No. 16, Confidential), August 26, 1912.
- (P.) To the Master of the Faculties, October 1, 1912.
- (Q.) The Master of the Faculties, November 19, 1912.
- (R.) To the Master of the Faculties, November 28, 1912.
- (S.) To Consul-General Fraser (No. 20, Confidential), November 28, 1912.
- (T.) Consul-General Sir E. Fraser (No. 1, Confidential), January 4, 1913.

Report.

In our opinion, the operation of "The Public Notaries Act, 1843," is confined to places belonging to His Majesty, and consequently that Statute does not empower the Master of the Faculties to appoint Notaries to act in places outside the King's dominions in which His Majesty exercises foreign jurisdiction.

The power of the Archbishop, and, through him, of the Master of the Faculties, to appoint Notaries is not, however, conferred by the Act of 1843, but depends upon the 25 Henry VIII, cap. 21, which empowers the Archbishop to grant to British subjects all such faculties as had theretofore "been accustomed to be had at the See of Rome or by the authority thereof."

It is therefore necessary, in order to say exactly what are the powers of the Archbishop with regard to appointing Notaries, to ascertain what powers the Pope was accustomed to use in this behalf before 1533. Apart from records which, no doubt, exist at the Faculty Office, or in Lambeth, this is by no means easy to do with any certainty. It is clear, however, that the Pope did, before that date, appoint Notaries to act in places where he had no territorial jurisdiction and where such jurisdiction as he did possess was extra-territorial—*e.g.*, in this country and in France. It appears also that so early, at all events, as 1681 Notaries were appointed by him to act in China, Cochin China, Turkey, Siam, and other places in the Orient (see "Dictionnaire de Droit canonique," by Durand de Maillane, 3rd edition, 1766, vol. iv, p. 144).

Assuming that the Pope did exercise the power of making appointments of Notaries to act in foreign countries, we see no ground for saying that the Act of 1533 did not confer a similar power upon the Archbishop, and in fact the form of faculty in use in England in 1691 purports to appoint the grantee to exercise the office of Notary *ubique locorum* (see "Codex Jur. Eccl. Angl., 1761," vol. ii, p. 1563).

On the whole, therefore, we are of opinion that the appointment of a Notary to act in a foreign country where His Majesty has extra-territorial jurisdiction is a matter which is *intra vires* of the Master of the Faculties.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department, July 8, 1913.



[37153]

No. 7.

[File 12601/13.]

[August 9, 1913.]

*Foreign Office to the Law Officers of the Crown.*Foreign
Marriages
Regula-
tions, 1913.

Gentlemen,

Foreign Office, April 19, 1913.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith draft Foreign Marriages Regulations,* which have been prepared in this Department, in consultation with the Lords Commissioners of the Admiralty, the Colonial Office, the India Office, and the Registrar-General.

The regulations consolidate and amend the three Orders in Council under "The Foreign Marriage Act, 1892," viz.: "The Foreign Marriages Order in Council, 1892," "The Foreign Marriages Order in Council, 1895," and "The Foreign Marriages Order in Council, 1903," copies of which are enclosed.†

The order of the articles has been altered so as to make it correspond with the order in which the subjects, in regard to which the King in Council is authorised by the Act to make regulations, are mentioned in section 21 of the Act.

In the following paragraphs the number first given is that of the article in the draft regulations; the second number (in brackets) is, unless otherwise stated, that of the corresponding article in the Order in Council of 1892.

Article 1 (article 4), paragraph (d) has been added. It is possible that there are countries, other than those to which reference is excluded by the first words of the article, in which a consular marriage between a British subject and a subject of the country is not prohibited.

Article 2 (article 5), paragraphs (b) and (c) have been added. The new provisions are compatible with the object of the original restriction, namely, to protect female British subjects from the danger of being disowned by their foreign husbands in the country of the latter. With regard to (b) there seems to be no objection to permitting a British consular officer to perform a ceremony of marriage between a foreigner and a woman who was a British subject, but who has acquired the nationality of the foreigner by an immediately preceding marriage with him in some other form, and has thus technically lost her right to the benefit of the Foreign Marriage Act.

In connection with this article, the Registrar-General has pointed out that it is in conflict with the General Instructions of 1907, and that he is by no means certain that a British marriage officer could refuse to solemnise a marriage on the grounds stated, if the woman to be married, being a British subject, had fulfilled the statutory conditions as to residence, &c., and possessed the full legal capacity for contracting the intended marriage, and if there was nothing to show that such intended marriage was prohibited by the law of the country to which the foreigner belonged. Sir E. Grey is alive to this difficulty, but the provision in question is so valuable that he is strongly of opinion that it should be retained. If at any time a British subject whom, in pursuance of the regulations, a marriage officer has refused to marry under article 2, takes legal proceedings to enforce the right to marry and does so with success, the regulations must of course be altered. But until such an eventuality occurs, Sir E. Grey conceives it to be conducive to the public welfare that the rule laid down in article 2 shall be acted on by marriage officers abroad.

Article 3 is identical with article 2 of the Order in Council of 1892.

Article 4 (article 1). This has been altered so as to enable an officer serving at an embassy or legation, not being the head of the mission, of rank higher than "secretary," to act as a marriage officer, such as a counsellor.

Articles 7 to 17 (article 6 of the Order in Council, 1892, and the Order in Council of 1903). The amendments contained in these articles are intended, except in the case of article 8, to afford increased facilities for giving notice of marriage, which experience has shown to be desirable.

Article 8. A question has been raised whether the existing regulations (article 6 of the Order in Council of 1892) require notice to be given, in the case mentioned, by the resident party. It was probably intended to make such notice

* The draft Regulations are embodied in the Foreign Marriages Order in Council, 1913, of which the text is in the "London Gazette" of the 28th November, 1913. (Confidential No. 10343*.)

† In addition to the papers mentioned, a copy of the General Instructions to His Majesty's consular officers, 1907 edition, was sent to the Law Officers on April 26, 1913.

obligatory, and it has always been the custom of His Majesty's consular officers to require it, in accordance with their instructions.

Articles 10 and 11 correspond with articles 1 and 2 of the Order in Council of 1903, with certain verbal alterations suggested by the Colonial Office, and with the following modifications:—

Article 10 (b) has been inserted with a view to enable a person desiring to be married under the Foreign Marriage Act, residing in a colony in which special facilities do not exist for giving notice of a marriage to be solemnised under that Act, to give notice in the manner provided by the law of that colony for the purpose of a marriage there. Under the existing regulations it is necessary for such a person, if he is unable to take up his residence for the required period at a place in which notice can be given, to obtain the special permission of the Secretary of State for the solemnisation of the marriage.

Article 11 (1). The words in article 2 (1) of the Order in Council of 1903, "who has had his or her usual place of abode for three consecutive weeks immediately preceding," have been replaced by the words "who has had his or her usual place of abode for a period of not less than one week immediately preceding."

Article 3 of the Order in Council of 1903 has been replaced by article 22 of the draft regulations.

Article 13 is new and is intended to facilitate the giving of notice of a marriage to be solemnised under the Foreign Marriage Act by persons living in (1) foreign countries in which British consular officers reside, where it is undesirable to issue marriage warrants to such officers, and (2) countries under British protection.

Article 14 makes it possible for a marriage to be solemnised by a consular officer within whose district neither of the parties has resided.

Article 15. Article 6 (1) (b) of the Order in Council, 1892, empowers the Secretary of State to give special permission for a marriage to be solemnised only in a case in which one of the parties has dwelt within the district of the marriage officer. It is desired to remove this restriction.

Article 16 (article 6 (2)). Under the existing regulations each of the parties is required to state to the marriage officer the place where the non-resident party has, within three months immediately preceding, had for three consecutive weeks his or her usual place of abode, and the notice which has been given in that place during those three weeks. This statement is to be made even in the cases (1) in which notice has been given in England or in a British colony the law of which does not require a residence of three consecutive weeks as a condition of the grant of a certificate of the giving of notice, and (2) in which the Secretary of State has given special permission, although the Secretary of State is not, by article 6 (1) (b) of the Order in Council of 1892, bound to require a residence in one place of three consecutive weeks or the giving of notice at that place. The amended article only requires the parties to state what notice has, in fact, been given as to which the marriage officer will have other evidence in the shape of the certificate or certificates produced by the parties. Form No. 2 of the schedule has been altered accordingly.

Article 18 (1) replaces article 1 of the Order in Council of 1895.

Article 18 (2), (3), and (4) (article 8 (1), (2), and (3)). Under the existing regulations it appears to be impossible to authorise British consular officers in Japan to register marriages contracted there in the form provided by Japanese law, because there is in such cases no actual "solemnisation" of marriage. There is, however, nothing in the Act itself which could prevent the registration of these marriages, and the new regulations have been made to follow the wording of the Act.

I have the honour to request that you will take the draft regulations into your consideration, and favour Sir E. Grey with your opinion as to whether their terms are fit and proper for submission to the King in Council for His Majesty's approval.

Sir E. Grey would also be glad to receive any observations on the point raised by the Registrar-General in connection with article 2 of the draft regulations, or of a general nature, which you may be good enough to offer.

I have, &c.

ALGERNON LAW.



1913

32

GENERAL.—GREECE.

Report.

In our opinion the draft regulations are fit and proper for submission to the King in Council for His Majesty's approval.

With regard to article 2, we think that the insertion of the valuable provisions of this article may be justified under either section 21 (1) (a) or section 21 (1) (h) of "The Foreign Marriage Act, 1892," and as regulations once made and laid before Parliament are to be deemed to be within the powers of the Act by virtue of section 21 (2), no question as to the validity of this article could subsequently be raised with success.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
August 9, 1913.

GREECE.

[55095]

No. 8.

[File 50/1913.]

[December 5, 1913.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, October 6, 1913.

Seizure of
British ship
"Trevarrack"
by
Greek navy.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you, in original for return, the papers noted in the annexed list relating to the case of the British steamship "Trevarrack," which was seized by the Greek navy in December last when carrying a cargo of coal consigned to Constanza.

As will be seen from the enclosed papers the vessel was stopped on the 14th December and taken in the first place to Lemnos, and later to the Piræus. The case was referred to the Greek Prize Court of First Instance, which gave judgment on the 12th January last, declaring the vessel not to be liable to capture, but recognizing that the Greek Government had a right of pre-emption over the cargo and admitting that they were entitled to class coal in the category of absolute contraband.

The Greek Government appealed against this decision, and the judgment on appeal, given on the 21st June last, whilst directing the Government to pay the value of the cargo, less the expenses of sending the ship to the Piræus, discharging her, &c., declared that no compensation was due for the ship's detention since no certificate from the Consular Authority of Roumania was on board showing that the coal was destined for consumption at a neutral port. It will be observed that the Court thus ignored the fact that the Roumanian Minister had informed the Greek Government officially that the coal was destined for the municipality of Constanza.

The circumstances of the case are such that the Secretary of State feels in considerable doubt as to whether he would be justified in making diplomatic representations to the Greek Government, as desired by the representatives of the owners, urging them to grant compensation for the detention of the vessel. The cargo, as stated above, was being conveyed to a Roumanian port, and in order to reach her destination the vessel had to pass through the Dardanelles. The Turkish Government were at the time greatly in need of coal and the Dardanelles was, in existing circumstances, practically an enemy port.

It seems to Sir E. Grey that, in view of the exceptional geographical position of the Dardanelles the Greek Government were not, in practice, acting unreasonably in requiring that ships carrying coal to neutral ports in the Black Sea should be provided with a certificate from the Legation or Consular Authority of the country of destination to the effect that the coal was intended for local consumption at the neutral port.

According to the old rules, applied in British Prize Courts, the coal would

GENERAL.

32A

[6094]

No. 7^A.

[Admiralty.]

[File 67/14]

[November 20, 1913.]

Case for the Opinion of the Law Officers of the Crown.

AT 12.35 A.M., on the 18th August, 1912, H.M.S. "Spanker," a torpedo gunboat detailed for fishery duties in the North Sea, discovered the Belgian sailing trawler "O-100" fishing off Southwold in territorial waters. An officer was sent to her to effect her arrest for fishing within the exclusive limits, but the crew made no attempt to comply with his orders, and, instead, hastened the getting in of their trawl. As soon as this was done the trawler went about and made full sail, by which manœuvres she nearly swamped the "Spanker's" boat alongside.

It being perfectly apparent that the trawler intended to endeavour to escape, the officer returned to the "Spanker," which closed on the trawler and hailed her to come alongside and lower her sails. No attention being paid to this order, the "Spanker" went up close alongside the trawler and stopped. The trawler drifted on to the "Spanker," and her mizzen-boom caught in the starboard after-backstay of the "Spanker's" fore-topmast, carrying the topmast and the trawler's mizzen-mast away. Whilst the wreckage was being cleared, the trawler, which carried no navigation lights, got out of the rays of the searchlight, and the commanding officer of His Majesty's vessel, having sufficient evidence to identify the vessel, made no effort to follow her. In acting thus he purported to comply with Admiralty Instructions to Sea Fishery Officers, to the effect that these officers should never use force unless imperatively necessary for purposes of self-defence. The instructions further say that if fishermen maintain resistance to lawful orders, the sea-fishery officer should, after ensuring identification, report the matter to the superior naval authority.

The extent of territorial waters in the North Sea, for the purposes now in question, is fixed by the second article of the International Convention for the purpose of regulating the Police of the Fisheries in the North Sea outside Territorial Waters, scheduled to and confirmed by "The Sea Fisheries Act, 1883" (46 and 47 Vict., cap. 22).

Section 7 of this Act provides that if a foreign fishing-boat enters the exclusive fishery limits of the British Isles (defined in section 28), no person on board the boat shall fish or attempt to fish while the boat remains within those limits, and any breach of the provisions of the section renders the guilty person liable to a fine not exceeding 10*l.* in the case of a first offence or 20*l.* in the case of a subsequent offence.

Section 12 of the Act confers certain powers upon British sea-fishery officers (including all commissioned officers of any of His Majesty's ships on full pay—section 11 (2)) with respect to all sea-fishing boats within the exclusive limits of the British Islands, including the power to arrest offenders and take them and their boat to the nearest or most convenient port for trial (sub-section (8)).

Section 14 (1) incorporates certain provisions of "The Customs Consolidation Act, 1876," but not, apparently, those contained in section 181 of that Act, expressly authorising the firing at offenders. By section 14 (2), if any person obstructs any sea-fishery officer acting under the powers conferred by the Act or refuses to comply with any direction lawfully made or given, he is liable on summary conviction to a fine not exceeding 50*l.* or three months' imprisonment with hard labour.

The Belgian trawler, in the case in question, appears to have committed two offences:—

- (a.) Trawling in British waters; and
- (b.) Resisting the lawful orders of a sea-fishery officer.

The Admiralty reported the matter to the Foreign Office, asking that Department to represent the case to the Belgian Government, with a view to action being taken against the trawler in the Belgian Courts. The Belgian Government replied in due course that the offences alleged did not fall within the convention, since that has for its object the regulation of the police of the North Sea fisheries outside territorial waters, and that therefore the Belgian Courts have no jurisdiction in the matter. This view of the Belgian Government seems correct, and has been concurred in by the

[219A]

Illegal
trawling in
British
territorial
waters:
Employ-
ment of
force in
effecting
arrest.



Board of Trade and the Foreign Office, and the question has been raised whether the "Spanker" would have had power to have arrested the trawler by force.

There is clearly power to deal with the trawler under English law for the offences in question—power which the British Parliament are internationally recognised as entitled to exercise over their territorial waters—and the trawler, having been caught in actual contravention of the Act, might have been pursued even beyond the limits of the territorial waters. (See Westlake's "International Law," Part I, Peace, p. 173.)

The views of the Treasury Solicitor are set out in his Minute of the 11th June, 1913, to which reference may perhaps be permitted.

The use of force by one of His Majesty's vessels in such cases must, of course, be attended with more or less danger to the lives of those on board the vessel pursued, as even though, in the case of a sailing trawler, the firing might be directed at the sails, aim cannot be perfectly sure, and ricochet shots may result in unlooked-for personal injury.

The Law Officers are requested to advise the Admiralty generally as to the right to use force when necessary to effect the arrest of trawlers committing in territorial waters offences against the provisions of "The Sea Fisheries Act, 1883," including the killing or maiming of an offender who otherwise appears likely to escape capture.

Opinion of the Law Officers of the Crown.

Offences against "The Sea Fisheries Act, 1883," are not felonies, and therefore the common law rule justifying the killing of a felon who is flying from justice if he cannot otherwise be overtaken has no application. By section 12 (8) of the Act, a British sea-fishery officer may, in the case of any person who appears to him to have contravened the Act, take the offender and the boat to which he belongs and the crew thereof to the nearest, or most convenient, port and detain him for the purposes of prosecution. It follows that such an officer is entitled to use force when necessary to carry out these purposes, but we do not think the statute justifies the taking of human life. Section 14 (1) of the Act cannot be read to confer by reference an indemnity upon the officer who commits such a homicide as a means of arrest, though any necessary damage short of the taking of life would be justified as flowing from the execution of an authorised act. The defence of "act of State" would not be available to excuse a homicide committed in territorial waters, although the person killed is a foreigner, since the foreigner, so long as he is in territorial waters, must be regarded as under "temporary allegiance" to the British Crown.

JOHN SIMON.

STANLEY O. BUCKMASTER

*Law Officers' Department,
November 20, 1913.*

Sir E. Grey is advised, have been liable to capture by the Greeks in the Aegean Sea as a cargo on its way to a hostile port of naval equipment at the time of the capture; the ultimate neutral destination would have been ignored. Consequently His Majesty's Government could not reasonably raise objection to the more lenient rule introduced by the Greek Government, according to which such vessels could escape capture by carrying a particular certificate.

Sir E. Grey would be glad if you would take all the circumstances of the case into consideration and favour him with your opinion as to whether, since the judgment of the 21st June is a final one His Majesty's Government would be justified in making diplomatic representations and pressing the Greek Government to grant compensation for the detention of the vessel, and if so, on what grounds such representations could most advantageously be based. Sir E. Grey would also be glad to receive any general observations on the case which you may be good enough to offer.

Inasmuch as it is desirable that a reply should be given as soon as possible to the request for diplomatic assistance put forward on behalf of the shipowners, Sir E. Grey would be much obliged if you would favour him with your opinion at your earliest convenience.

I have, &c.
RALPH PAGET.

List of Papers.

Foreign Office Minute, December 16, 1912.
Sir F. Elliot, Telegram, No. 33, Treaty, December 17, 1912.
To Sir G. Lowther, Telegram, No. 45, Treaty, December 17, 1912.
To Sir F. Elliot, Telegram, No. 23, Treaty, December 17, 1912.
Messrs. Botterell and Roche, Telegram, December 18, 1912.
To ditto, December 18, 1912.
Sir G. Lowther, Telegram, No. 34, Treaty, December 19, 1912.
Messrs. Botterell and Roche, Telegram, December 20, 1912.
To ditto, December 20, 1912.
From ditto, December 20, 1912.
Sir F. Elliot, Telegram, No. 34, Treaty, December 21, 1912.
To Messrs. Botterell and Roche, December 31, 1912.
North of England Protecting and Indemnity Association, December 21, 1912.
Sir F. Elliot, Telegram, No. 35, Treaty, December 26, 1912.
Messrs. Botterell and Roche, Telegram, December 27, 1912.
North of England Protecting and Indemnity Association, December 27, 1912.
To ditto, December 31, 1912.
From ditto, December 31, 1912.
Messrs. Botterell and Roche, January 3, 1913.
To ditto, January 15, 1913.
To Sir F. Elliot, No. 8, Treaty, January 15, 1913.
North of England Protecting and Indemnity Association, January 3, 1913.
Messrs. Botterell and Roche, January 16, 1913.
Sir F. Elliot, Telegram, No. 4, Treaty, January 21, 1913.
Sir F. Elliot, Telegram, No. 5, Treaty, January 28, 1913.
To Messrs. Botterell and Roche, January 24, 1913.
Sir F. Elliot, Telegram, No. 6, Treaty, January 26, 1913.
To Messrs. Botterell and Roche, Telegram, January 27, 1913.
Sir F. Elliot, Telegram, No. 9, Treaty, February 2, 1913.
Messrs. Botterell and Roche, February 3, 1913.
To ditto, February 6, 1913.
From ditto, March 1, 1913.
To ditto, March 5, 1913.
To Sir F. Elliot, No. 26, Treaty, March 5, 1913.
Sir F. Elliot, Telegram, No. 15, Treaty, March 18, 1913.
To Lloyd's, March 19, 1913.
Sir F. Elliot, No. 22, Treaty, March 17, 1913.
Lloyd's, March 20, 1913.
To Sir F. Elliot, Telegram, No. 13, Treaty, March 25, 1913.
Sir F. Elliot, Telegram, No. 22, Treaty, March 24, 1913.
To Sir F. Elliot, Telegram, No. 12, Treaty, March 25, 1913.
Lloyd's, March 25, 1913.
Sir F. Elliot, Telegram, No. 24, Treaty, March 26, 1913.
To Sir F. Elliot, Telegram, No. 17, Treaty, March 27, 1913.
Messrs. Botterell and Roche, March 27, 1913.
To ditto, March 31, 1913.
From ditto, Telegram, April 3, 1913.
To Sir F. Elliot, Telegram, No. 18, Treaty, April 3, 1913.
Messrs. Botterell and Roche (papers communicated by), April 3, 1913.
From ditto, April 4, 1913.



GREECE.

Sir F. Elliot, Telegram, No. 26, Treaty, April 11, 1913.
 Ditto, No. 30 A, Treaty, April 9, 1913.
 Ditto, No. 32, Treaty, April 12, 1913.
 To Messrs. Botterell and Roche, April 21, 1913.
 From ditto, April 22, 1913.
 To ditto, April 28, 1913.
 Sir F. Elliot, No. 59, Treaty, August 5, 1913.
 Messrs. Botterell and Roche, September 18, 1913.
 Sir F. Elliot, Telegram, No. 7, Treaty, January 30, 1913.
 To Sir F. Elliot, Telegram, No. 4, Treaty, January 30, 1913.
 Sir F. Elliot, Telegram, No. 8, Treaty, January 31, 1913.
 To Lloyd's, &c., Telegram, January 31, 1913.
 Sir F. Elliot, No. 8, Treaty, January 31, 1913.

Report.

The Judgment of the Greek Court of Appeal appears to proceed upon the basis that coal had become absolute contraband, and that the Greek Government, by its notice requiring cargoes of coal with a neutral destination to be provided with a certificate, was making a concession to traders of which they might take advantage if they liked; whereas, if a cargo with a neutral destination did not provide itself with such a certificate the ship could be detained without compensation. In our opinion, however, coal is not, and ought not, to be treated as absolute contraband; it is of the class of conditional or relative contraband, and the finding of both the Greek Courts that the *bond fide* destination of this coal was neutral makes the cargo in fact innocent. The question, therefore, comes to be whether the failure of the "Trevarrack" to be provided with a certificate of a neutral destination afforded such ground for stopping the ship on the suspicion that a cargo in fact innocent would turn out to be destined for the enemy, as excuses the captors from compensating the ship for detention when the true facts are ascertained.

The argument in favour of the ship and against the Greek Government would be as follows: There was in fact nothing irregular or suspicious about the ship's papers, and the Greek Government had no right to treat a cargo as open to suspicion merely because it had not been provided with a certificate which the Greek Government had been pleased to require; the ship was under no obligation to have such a certificate, and was in fact engaged on perfectly lawful trade with another neutral; a ship carrying a cargo which is in the class of conditional contraband does not render its cargo liable to seizure merely because it is calling at a hostile port on a *bond fide* voyage to a neutral destination; and even though the Greek Government might be entitled to bring in the ship and cargo and to exercise a right of pre-emption over the cargo in order to prevent the possibility of Turkey doing likewise when the ship reached the Dardanelles, it does not necessarily follow that the Greek Government, if they chose to exercise such a right, should not compensate a neutral ship for the injury done by her detention.

But, upon the whole, we are of opinion that the above line of argument would not prevail. A belligerent is not necessarily required to compensate a ship for detention because, when investigation has been made, cargo of doubtful character is found to be innocent. The duty to compensate the ship depends upon whether the belligerent acted unreasonably in detaining her for examination, and in view of the absence of any certificate of neutral destination after the warnings which the Greek Government had issued, and of the geographical position of the Dardanelles and the high probability that the coal would pass to Turkey if the ship were not detained, we are afraid that an International Tribunal would be likely to consider the action of the Greek Government as reasonable.

JOHN SIMON.
 STANLEY O. BUCKMASTER.

Law Officers' Department,
 December 5, 1913.

ITALY.

[33304]

No. 9.

[File 6138/13.]

[July 18, 1913.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 14, 1913.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you the papers noted in the accompanying list, relative to the condemnation by the Italian Prize Court during the Turco-Italian war of certain specie seized on board the steamship "Menzaleh," a British vessel belonging to the Khedivial Mail Steamship and Graving Dock Company (Limited). The facts of the case are as follows:—

Steamship
 "Menzaleh":
 Condemnation of
 specie by
 Italian Prize
 Court.

The "Menzaleh," which is stated by the Khedivial Line to run between Suez and Aden, was carrying 30,000*l.* in specie belonging to the Imperial Ottoman Bank, consigned in equal amounts to two private firms at Hodeidah. On the 21st December, 1911, she was stopped off Jeddah and searched by the Italian cruiser "Calabria," and the specie in question was removed. A further sum of money, consigned by the Ottoman post-office at Smyrna to the Ottoman post-office at Hodeidah, was also removed, but with this His Majesty's Government are not concerned. The "Menzaleh" was then allowed to proceed.

In view of the provisions of articles 44 and 54 of the Declaration of London, the principles of which instrument the Italian Government had stated that it was their intention to observe, His Majesty's Government did not raise any formal objection to the action of the Italian naval authorities in taking that course, instead of bringing the steamer in for adjudication before an Italian Prize Court. Sir R. Rodd was, however, instructed to impress upon the Italian Government that it was incumbent upon them to institute proceedings in their Prize Court, and there establish the fact that the gold was contraband (Paper (B)).

The Italian Government at first contended that the specie in question was the property of the Turkish Government, and that its seizure was justifiable in accordance with the principle embodied in article 53 of the regulations annexed to the convention concerning the laws and customs of war on land, signed at The Hague in 1907, and that there was, therefore, no reason why the seizure should be submitted to the decision of a Prize Court (Paper (F)). This view was contested by His Majesty's Government, who pointed out that the article in question, relating as it does to war upon land, had no bearing upon cases of maritime capture, and stated that in their opinion the matter was governed entirely by the doctrine of article 2 of the Declaration of Paris, viz., that the neutral flag covers enemy goods, with the exception of contraband of war, and that whether a particular article was or was not contraband of war was a question exclusively for the decision of a Prize Court. It was added that it might well be that His Majesty's Government would be unable to admit the contention that the money was the property of the Ottoman Government, but in any event it would seem to have no material bearing on the case, except in so far as might concern the elucidation of the question whether the specie was contraband or not (Paper (G)). The Italian Government then referred the case to the Prize Court (Paper (J)).

The gold was insured by the Marine Insurance Company, of London, to whom the Imperial Ottoman Bank immediately abandoned their rights, and the underwriters paid the full sum for which the gold was insured, and entered a claim in the Prize Court for the release of the 30,000*l.* The question was then raised by the Italian Government whether the underwriters were entitled to intervene in the case (Paper (M)), and the Prize Court finally determined to permit the underwriters to appear in the proceedings, while reserving its decision as to the admissibility of their intervention until judgment was pronounced on the whole case (Paper (Q)).

Final judgment was given in September 1912 (Paper (W)). The judgment is very long, but the findings of the Court may be summarised as follows:—

1. That the underwriters have no *locus standi*, and are not entitled to enter a claim.
2. That the specie was the property of the Ottoman Government, and therefore derives no protection from article 2 of the Declaration of Paris.
3. That the specie was contraband of war.



Sir E. Grey is advised that no appeal is open from this decision.

Messrs. Waltons and Co., the solicitors for the underwriters, instructed Mr. F. E. Bray, barrister-at-law, of the Inner Temple and the South-Eastern Circuit, who had followed the case, on their instructions, from the outset on behalf of their clients, and had paid two visits to Rome to confer with the Italian lawyers retained, to prepare a memorandum embodying his observations on the judgment, and they have been good enough to supply Sir E. Grey with a copy of it (Paper (X)). Sir E. Grey is advised that the arguments and conclusions of Mr. Bray's memorandum are sound, and afford a useful exposition of the matter with which it deals.

In view of the great importance to British interests of the principles laid down in the judgment, especially the interpretation placed upon article 2 of the Declaration of Paris, Sir E. Grey considered it advisable to ascertain the views of the Lords Commissioners of the Admiralty and the Board of Trade (Paper (Y)), and their replies are transmitted herewith (Papers (AA) and (CC)). Of the three findings of the Prize Court that numbered (2) above is by far the most important, and will be considered first. The Court held that the immunity conferred by article 2 of the Declaration of Paris on enemy property (with the exception of contraband of war) under a neutral flag only extends to private enemy property, and does not cover property of the enemy State. The same principle was affirmed by the Prize Court in two other cases, the "Newa" and the "Sheffield." Translations of the judgments in these two cases are transmitted herewith (Papers (GG) and (HH)), but the point is much more fully considered in the judgment in the case of the "Menzaleh." The references to this point will be found on pp. 11 and 12 of the judgment in the case of the "Newa," and on pp. 10 and 11 of that in the case of the "Sheffield." In these two cases the decisions of the Court can be supported on other grounds, and Sir E. Grey does not propose to take any action, except in so far as it may be necessary to do so in connection with the interpretation put upon article 2 of the Declaration of Paris.

It is clear that the effect of the decision in the case of the "Menzaleh" on this point will be to make the position of neutral ship-owners much more difficult. As the Board of Trade point out (Paper (AA)), it has never previously been held open to doubt that goods can only be contraband or liable to seizure by virtue of either their nature or their destination. To import the test of ownership is to deprive neutral ship-owners of all security, for it is usually impossible for any ship-owner to determine the true ownership of the goods he carries. It would also be possible, when this country was neutral, for an enterprising belligerent very considerably to hamper our trade by sending in vessels for adjudication on suspicion of carrying State property.

Nor does it appear that the adoption of the principle laid down by the Italian Prize Court would be to the advantage of this country when at war. If admitted it would be equivalent to a very great extension of the doctrine of contraband, as under such a definition all State property of whatever description would be liable to seizure, and its effect upon the provisions of the Declaration of London might necessitate the remodelling of that agreement. As a belligerent, it would enable this country to seize all enemy goods that could be in any way suspected of being State property; but this would only be a nominal advantage, as the State ownership would be a fact extremely difficult of proof, and unless there was irrebuttable evidence the captors could not hope to succeed in a British Prize Court. It is not to the interests of this country to raise in war disputable questions of this nature with neutrals, having in view the doubtful advantage likely to be derived from it; and, moreover, it is highly undesirable to give an enemy an excuse for interfering with neutral trade coming to British ports in time of war. It has sometimes been contended that the Declaration of Paris is a serious obstacle to the enforcement of British sea power in time of war. From this point of view a decision which makes such an inroad upon the principles of that instrument should rather be welcomed, but Sir E. Grey does not share this view, and you will observe that the Lords Commissioners of the Admiralty hesitate to give an opinion upon the question whether it might be an advantage to this country, as a potential belligerent, that the authority of the Declaration of Paris shall be undermined until it is clear that there is a prospect of the abandonment of the Declaration as a matter of practical politics. They presume, however, that an instrument which has lasted so long, and by general acceptance has been raised to a doctrine of international law, must be regarded as a permanent security for the rights of neutral shipping, which neutral States—always certain to be in a majority during war—will never to any serious extent renounce in favour of the belligerents (Paper (CC)).

Sir E. Grey is therefore of opinion that the interests of this country, both as a

neutral and as a belligerent, require that the decision of the Italian Prize Court on this point—which, if left unchallenged, would constitute a precedent—should be contested, and that a protest should be addressed to the Italian Government and the reference of the question to arbitration requested, should you be of opinion that this course may properly be adopted.

The judgment contains a lengthy argument in defence of the interpretation adopted of article 2 of the Declaration of Paris, but no precedents are quoted in support of it. I am to call attention to the criticisms of these arguments contained in Mr. Bray's memorandum (Paper (X)), with which Sir E. Grey is disposed to agree. So far as he is aware, the point has never been raised in practice before, but it would appear that the terms of the article have usually been considered to cover State property as well as private property. On this point I am to refer to the opinion of Professor Holland (Paper (FF)), of which a copy has kindly been supplied by Messrs. Waltons and Co., who consulted him in connection with this case. The only pronouncement in favour of the interpretation adopted by the Italian Prize Court with which Sir E. Grey is acquainted is a passage in Rivier ("Principes du Droit des Gens," vol. ii, p. 429): "Quant à la propriété de l'État ennemi, il va de soi qu'elle n'est point couverte par le pavillon neutre; même trouvée sur le navire neutre, elle est butin." This opinion is, however, considered to be untenable by Professor Oppenheim. ("International Law," 2nd edition, vol. ii, p. 220, note.)

There is one other point in connection with this part of the case. It has been suggested (Paper (Z)) that it is doubtful whether the word "marchandise" in article 2 of the Declaration of Paris is wide enough to cover specie. You will observe that the Board of Trade are of opinion that the interests of this country are deeply involved in maintaining the doctrine that the article in question covers goods of all kinds other than contraband, whether such "goods" consist of merchandise in the more limited sense of the word or of specie (Paper (A A)). In this connection I am to point out that in the English version of the article the word "marchandise" is translated "goods," and, so far as Sir E. Grey is aware, it has never previously been suggested that the French word was used in a narrower sense; further, the word "marchandise" is used in article 3 of the Declaration, and if in that article the word were construed in the same restricted sense the result would be rather surprising.

Before leaving this part of the case, I am to say that Sir E. Grey is not, as at present advised, prepared to accept the finding of the Prize Court to the effect that the status of the Imperial Ottoman Bank was such that gold belonging to it was the property of the Turkish Government, but if you are of opinion that the interpretation of article 2 of the Declaration of Paris adopted by the Court was wrong this question will not arise.

Passing now to the finding of the Court numbered (3) above, that the specie in question was contraband of war, I am to point out that there is little doubt that the specie was destined to the Turkish Government authorities, and there can be no question that the Italian Government would have been entitled to declare specie to be contraband of war, but, in Sir E. Grey's opinion, the declaration of contraband issued by the Italian Government can by no process of fair interpretation be made to cover specie. This declaration (as published in the "London Gazette") is transmitted herewith (Paper (DD)), and the same list of contraband articles is given in article 6 of the Italian Decree as to Capture and Prize (Paper (EE)). You will observe that the list, after mentioning various articles, all of which are undoubtedly absolute contraband, adds "everything which, without manipulation, can serve directly for land or sea armament," or, as it is otherwise translated, "everything which, without manipulation, can be put to immediate use in connection with land or maritime warfare." Taken by themselves, these words might include some articles of conditional contraband, but, as Mr. Bray points out (Paper (X)), they must be construed as *ejusdem generis* with the articles specifically mentioned, and thus be limited to absolute contraband. Further, the second paragraph of article 6 of the Decree as to Capture and Prize appears to place the matter beyond doubt by stating that such articles are subject to capture, if their destination is the enemy's territory, a rule which is only applicable to absolute contraband.

This being so, Sir E. Grey does not consider that the finding of the Court on this point can be justified by a reference to the Declaration of London, as the Italian Government had issued a list of articles to be considered as contraband which was not identical with that contained in the Declaration of London, and they are therefore not entitled to rely on the latter list in order to condemn articles which are not contained in the former. In any case, the preamble to the Decree as to Capture and Prize states



that the principles of the Declaration of London are to be observed "in so far as the dispositions of the laws of the kingdom allow," and Sir E. Grey understands that the list of contraband given in the Italian Code is identical with that contained in article 6 of the decree. He is therefore of opinion that British subjects who acted on the faith of the Italian declaration as to contraband are entitled to any assistance that His Majesty's Government can give them.

As regards the finding of the Court numbered (1) above to the effect that the underwriters had no *locus standi* and were not entitled to enter or claim, Sir E. Grey is advised that the proper course would have been that the proceedings should have been taken by the underwriters in the name of the Imperial Ottoman Bank, and that there can be no question as to the right of the underwriters to exercise, in the name of the bank, whatever rights of claim in the Prize Court the latter had, and there would appear to be considerable force in Mr. Bray's contention (Paper X) that the objection should have been raised at the outset, when there was still time for this course to have been adopted. There were three cases before the Russian Prize Courts during the Russo-Japanese war, in which underwriters were allowed to appear and present claims, the "Ikhona," the "St. Kilda," and the "Prinsesse Marie" (see "Russian and Japanese Prize Cases," vol. 1, pp. 226, 188, and 276 respectively), and there were similar cases before the Japanese Prize Courts.

A reference to the report in the case of the "Ikhona" will show that the Italian Prize Court was mistaken in supposing that the insurance companies were not claimants in the first instance.

As to the contention in the judgment that the Imperial Ottoman Bank, as a department of the enemy Government, could have no *locus standi*, and was absolutely debarred from appearing before the Prize Courts of the other belligerent, Sir E. Grey does not consider that the Imperial Ottoman Bank can properly be described as a department of the Turkish Government, or its property as the property of that Government. In any case the proper view would appear to be that, if property is entitled to be released, the owner is entitled to come before the Prize Court and claim it, whether that owner be the enemy State or not. If not, it would appear that property can be rendered liable to condemnation by depriving the owner of the right to appear and claim it. As Mr. Bray points out (Paper X), the difficulty has arisen in the English Courts in cases where the claimant was a private enemy subject, and has been overcome on proving *locus standi*, and Sir E. Grey understands that in certain cases before the Japanese Prize Courts Russian subjects were allowed to present claims.

I am to request that you will take these papers into your consideration, and that you will favour Sir Edward Grey with your opinion on the following points:—

1. Whether the interpretation placed upon article 2 of the Declaration of Paris by the Italian Prize Court is correct.

2. Whether the word "merchandise" in that article can be held to cover specie.

3. Whether, in the circumstances of this case, the Court was right in holding the specie to be contraband of war.

4. Whether the Court was right in holding that the underwriters had no *locus standi* and were not entitled to enter a claim.

5. Whether the circumstances of the case are such as to justify His Majesty's Government in making representations to the Italian Government and in requesting a reference to arbitration, and, if so, on what grounds such representations could most advantageously be based.

Sir E. Grey would also be glad to be favoured with any observations of a general character which you may be good enough to offer upon the papers now submitted for your consideration.

Inasmuch as it is obviously important that any representations which may be thought desirable should be addressed to the Italian Government as soon as possible, Sir E. Grey would be very grateful if he could be favoured with your report at your early convenience.

I have, &c.

ALGERNON LAW.

List of Papers.

- (A.) Sir G. Lowther, No. 30, January 12, 1912.
- (B.) To Sir R. Rodd, No. 6, Treaty, February 3, 1912.
- (C.) The Khedivial Mail Steamship and Graving Dock Company (Limited), January 29, 1912.
- (D.) To the Khedivial Mail Steamship and Graving Dock Company (Limited), February 5, 1912.
- (E.) Viscount Kitchener, No. 9, Treaty, January 28th, 1912.
- (F.) Sir R. Rodd, No. 21, Treaty, February 29, 1912.
- (G.) To Sir R. Rodd, No. 20, Treaty, March 14, 1912.
- (H.) Sir R. Rodd, No. 23, Treaty, Telegraphic, May 1, 1912.
- (I.) To Messrs. Waltons and Co., May 4, 1912.
- (J.) Sir R. Rodd, No. 47, Treaty, May 7, 1912.
- (K.) Messrs. Waltons and Co., May 21, 1912.
- (L.) To Mr. Dering, No. 60, Treaty, May 25, 1912.
- (M.) Sir R. Rodd, No. 39, Treaty, Telegraphic, June 14, 1912.
- (N.) Sir R. Rodd, No. 61, Treaty, June 11, 1912.
- (O.) To Sir R. Rodd, No. 80, Treaty, July 13, 1912.
- (P.) Sir R. Rodd, No. 63, Treaty, June 17, 1912.
- (Q.) Sir R. Rodd, No. 70, Treaty, July 5, 1912.
- (R.) Foreign Office Minute (Mr. Hurst), July 24, 1912.
- (S.) Sir R. Rodd, No. 86, Treaty, August 4, 1912.
- (T.) Sir R. Rodd to Mr. Maycock, August 24, 1912.
- (U.) Sir R. Rodd, No. 137, Treaty, October 28, 1912.
- (V.) Sir R. Rodd, No. 138, Treaty, October 29, 1912.
- (W.) Translation of the judgment in the case of the "Menzaleh."
- (X.) Memorandum by Mr. F. E. Bray, December 11, 1912.
- (Y.) To Admiralty (and Board of Trade), January 11, 1913.
- (Z.) Foreign Office Minute (Mr. Hurst), February 7, 1913.
- (AA.) Board of Trade, March 3, 1913.
- (BB.) To Admiralty, March 7, 1913.
- (CC.) Admiralty, March 18, 1913.
- (DD.) Italian Declaration as to Contraband of War, October 4, 1911.
- (EE.) Italian Decree as to Capture and Prize, October 13, 1911.
- (FF.) Opinion of Professor Holland.
- (GG.) Translation of the judgment in the case of the "Newa."
- (HH.) Translation of the judgment in the case of the "Sheffield."

Report.

1 and 2. In our opinion, the interpretation placed upon article 2 of the Declaration of Paris by the Italian Prize Court is not correct. The point made by the Court as to the word "merchandise" does not appear to us to be that "merchandise" does not include specie, but that the word is not apt to describe State property. We do not think that this construction is correct, for there is no reason for supposing that the word is used in article 2 in any different sense from that in which it is used in article 3, and if in article 3 the meaning of the word is confined to private property as distinguished from State property, article 3 would permit of the property of a neutral State being seized from an enemy ship, which would be an extraordinary result. The similar argument based upon the result which would follow if "merchandise" was construed as not including specie, leads us to the conclusion that specie is intended to be included, and that the word is really properly translated by the English word goods.

3. In our opinion, the Court was wrong in holding the specie to be contraband of war. The view taken by the Court that the Declaration and Decree of the Italian Government with regard to contraband were wide enough to include conditional contraband, is not, in our opinion, correct, though the strongest argument for holding that conditional contraband is not included, namely, the argument that if it is that Declaration and Decree would constitute an infraction of Italy's treaty obligations to the United States of America under the Treaty of 1871 and to all other countries who, like Great Britain, are entitled to the benefits of that Treaty by virtue of a most-favoured-nation clause, does not appear to have been brought to the attention of the Court.

4. In our opinion, the Court was right in holding that the underwriters had no *locus standi* for the reason that their assured—the Ottoman Bank—whether it can be regarded as identical with the Ottoman Government or not, must be regarded as of Ottoman nationality, and consequently an alien enemy *qua* the Italian Court, and as such (there being no suggestion of any peculiar circumstances which, *pro hac vice*, discharge them from their enemy character) not entitled to make a claim before the Italian Court.



1913

40

ITALY.—PERSIA.

5. In view of the want of *locus standi* on the part of the claimants, it appears to us that no useful purpose would be served by attempting to get the claim of the underwriters referred to arbitration.

We think, however, that diplomatic representations might fairly be made to Italy, pointing out that if the decision of the Italian Prize Court as to the meaning and intention of the Italian Decree and Declaration as to contraband is correct, then that Decree and Declaration constituted an infraction by Italy of her Treaty obligations above referred to, but that if, on the other hand, the Court has gone wrong in its interpretation of the Decree, the specie should not have been seized at all, and contending that in either event the 30,000*l.* should be returned to His Majesty's Government as having been wrongfully taken from a British ship.

It is possible that if the Italians dispute this contention the question so arising between them and His Majesty's Government might be made the subject of a request for arbitration, but that is a matter upon which we could better express an opinion when the precise grounds taken by the Italian Government have been made manifest.

We would point out that neither in such an arbitration nor in an arbitration as to the claim of the underwriters would the question of the construction of article 2 of the Declaration of Paris have necessarily to be decided, but we see no reason why, if it is considered desirable to enter a protest against the decision of the Prize Court upon this point, such a protest should not be included in the representations which we have suggested might be made with regard to this matter.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
July 18, 1913.

PERSIA.

[11876]

No. 10.

[File 527/13.]

[March 13, 1913.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Expansion
of note
circulation
of Imperial
Bank of
Persia.

WITH reference to your report of the 23rd December last, on the subject of the proposal of the Imperial Bank of Persia to increase its note circulation, I have the honour, by direction of the Secretary of State, to transmit to you further papers, noted in the accompanying list, from which it appears that a premium of 2*l.* per share, or 200,000*l.* in all, was the sum paid to the late Baron Julius de Reuter for the acquisition of the concession.

Sir E. Grey would therefore propose, subject to your concurrence, to inform the Imperial Bank that he has carefully considered the matter in consultation with the Law Officers of the Crown, and that he is of opinion that the bank has the right to expand its note circulation to 1,100,000*l.* only and not to 1,300,000*l.* as was the intention of the directors. He would add that the reason for this opinion is that the paid-up capital of the company (650,000*l.*), less the sum paid for the concession (200,000*l.*), amounts to 450,000*l.*, and that therefore the difference between the metallic reserve (650,000*l.*), and the amount of the notes in circulation must not exceed that sum (450,000*l.*).

I am to request you to be good enough to take the Papers into your consideration and to inform the Secretary of State at your early convenience, whether in your opinion the terms of the proposed reply to the Imperial Bank of Persia are right and proper in the circumstances, or whether, and if so to what extent, they can advantageously be amended or modified.

I have, &c.
LOUIS MALLET.

PERSIA—SIAM.

41

List of Papers.

- (A.) Imperial Bank of Persia, August 7, 1912.
(B.) Charter, Deed of Settlement and Concession, 1889.
(C.) Imperial Bank of Persia, January 4, 1913, with enclosures.
(D.) Ditto, January 28, 1913.

Report.

In our opinion the terms of the proposed reply to the Imperial Bank of Persia are right and proper in the circumstances.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
March 13, 1913.

SIAM.

5905]

No. 11.

[File 983/13.]

[February 5, 1913.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 9, 1913.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith the draft of an Order in Council to be entitled "The Siam Order in Council, 1913." Siam Order
in Council,
1913.

In explanation of the terms of the draft, I am to state that it has been drawn up with a view to meeting two points, first, the inability of the Secretary of State to reduce a sentence passed by the Court for Siam except on the recommendation of the Judge of that Court, and, second, the necessity of amending the provision which authorises the issue of Rules of Court by the Judge.

With reference to the first point, cases have arisen in which it has been desirable that the Secretary of State should be in a position of his own initiative to remit or reduce a sentence passed by a Court in Siam, and article 2 of the draft is designed to meet this contingency.

Having regard to the second point, I am to explain that the Judge of the Court for Siam, while technically remaining the Judge of the British Court for the purpose of dealing with certain special cases which might, under the present arrangement, still come before the Court, is now in the service of the Siamese Government and receives no pay from His Majesty's Government. It is consequently undesirable that he should in any respect, that it is not absolutely essential, be called upon to exercise functions appertaining to his nominal post of British Judge. As it will shortly, and may again in the future, become necessary to issue Rules of Court under the Siam Orders in Council it is proposed to transfer the powers at present held by the Judge in this respect to His Majesty's Minister at Bangkok, and article 3 of the draft has been drawn up with this end in view.

I am to request that you will take the draft order into your consideration, and that you will favour Sir E. Grey at your earliest convenience with your opinion whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

I have, &c.
ALGERNON LAW.

[219]

M



1913

42

SIAM.—UNITED STATES.

Report.

In our opinion the terms of the draft Order in Council, as initialled by us, are fit and proper for submission to the King for His Majesty's approval.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
February 5, 1913.

ANNEX.

[Approved by the Law Officers.]

Draft Siam Order in Council.

WHEREAS by Treaty, grant, usage, sufferance, and other lawful means, His Majesty the King has certain powers of jurisdiction within the dominions of the King of Siam:

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered as follows:—

1. This Order may be cited as "The Siam Order in Council, 1913," and shall be read as one with the Siam Order in Council, 1906, hereinafter called the "Principal Order," and with the Siam Order in Council, 1909, and the said Orders and this Order may be cited together as "The Siam Orders in Council, 1906 to 1913."

2. The power of the Secretary of State under article 57 (1) of the Principal Order to mitigate or remit the punishment awarded by any Court may be exercised by him either of his own motion, or upon the recommendation of any Court, or upon such medical or other evidence as he may think fit, and whether such punishment was awarded before or after the passing of this Order.

3. The power of the Judge of the Court for Siam under article 108 of the Principal Order to make Rules of Court shall, from and after the passing of this Order, be exercised by the Minister, and the said power shall extend to Rules for the purpose of amending or repealing Rules in force at the date of this Order.

And the Right Honourable Sir Edward Grey, Baronet, K.G., M.P., one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein.

R. D. I.
J. A. S.

UNITED STATES.

[32609]

No. 12.

[File 78/13.]

[July 14, 1913.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, January 31, 1913.

Panamá Canal: as to whether a port on the island of Naos should be regarded as a port in the Canal or in the Canal Zone.

ON the 12th January of last year I had the honour, by direction of Secretary Sir E. Grey, to request your opinion on certain matters connected with the tolls to be levied in the Panamá Canal. In the last paragraph of your report, dated the 19th March last (Paper A), you stated that for the purpose of the rule as to coastwise traffic a distinction is to be drawn between ports in the Canal and those which, whilst in the Canal Zone, are not in the Canal.

In the penultimate paragraph of the enclosed despatch (Paper B) His Majesty's Ambassador at Washington enquires whether a port constructed on a certain island near the Pacific entrance to the Canal and connected with the mainland by a breakwater should be regarded as a port in the Canal or in the Canal Zone.

UNITED STATES.

43

The limits of the Canal Zone are defined in the treaty between the United States and the Republic of Panamá, signed on the 18th November, 1903 (Paper C). The positions of the island and of the proposed breakwater are shown on the annexed map (Paper D), published by the Isthmian Canal Commission, while the nature of the work to be carried out, length of breakwater, &c., are given on p. 22 of the Official Handbook of the Panamá Canal for 1911 (Paper E).

Sir E. Grey would be obliged if you would take these papers into your consideration, and favour him with your opinion on the question raised by Mr. Bryce as to the status of ports on the island of Naos and adjacent islands, and with any observations which you may desire to offer on the matter generally.

I have, &c.

LOUIS MALLET.

List of Papers.

- (A.) Law Officers' Report, March 19, 1912.
- (B.) Mr. Bryce, No. 252, December 20, 1912.
- (C.) Treaty between the United States and Panamá, November 18, 1903.
- (D.) Map Library, No. 119A.
- (E.) Official Handbook of the Panamá Canal, 1911.
- (F.) Board of Trade, January 18, 1913.

Report.

The question whether a port in the island of Naos should be regarded as a port on the Canal, or as a port merely within the Canal Zone, is largely one of fact. It appears from the Official Handbook of the Panamá Canal that the Canal is regarded as extending not only from shore line to shore line, but from deep water to deep water, and it appears to us, from the map, to extend at least as far as the island of Naos. Moreover, the breakwater which is to extend from the mainland to the island would, we think, fall within the meaning of article 3 (6) of the Hay-Pauncefote Treaty, and so be deemed to form part of the Canal. In view of these considerations, we think it might fairly be urged that a port on the west side of the island was a port on the Canal. If the port were on the east side, we think it would be on the other side of the line distinguishing ports on the Canal from ports which, though within the Canal Zone, are not on the Canal.

RUFUS D. ISAACS.
JOHN SIMON.

Law Officers' Department,
July 14, 1913.



1914

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. March 1915.

CONFIDENTIAL.

(10537.)

21

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1914.



LIST OF REPORTS.

(Arranged according to Countries.)

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 1^a, &c.

GENERAL.

No.		Date.	SUBJECT.	Page.
1 ^a	Law Officers to Treasury	Aug. 24, 1914	Shares in English Companies held by shareholders resident in hostile territory: effect of war on payment of dividends and registration of transfers ..	1
1	Attorney-General	Oct. 6,	Commercial domicile in a State where Foreign Powers have extra-territorial rights is not affected by those rights ..	4
1 ^b	Attorney-General to Admiralty	Nov. 4,	Unneutral use of a British ship by charterer, the subject of a neutral Power, avoids the charter ..	6
1 ^c	Law Officers to Treasury	Nov. 12,	Debts due from British debtors to enemy creditors, assigned after outbreak of hostilities to subjects of neutral states: payment cannot be enforced. Legislation is in contemplation to suspend rights arising similarly under negotiable instruments ..	6

GERMANY.

2	Law Officers ..	Mar. 23, 1914	Extradition Order in Council, 1914 (Germany: White Slave Traffic Convention of 1910): approving draft ..	8
---	-----------------	---------------	--	---

MEXICO.

3	Law Officers ..	May 7, 1914	Chartering of British vessels for transport of United States troops to Mexico in event of war: would be an offence against provisions of Foreign Enlistment Act, wherever the vessel might be at the time of chartering, but those provisions are in excess of the requirements of International Law ..	11
---	-----------------	-------------	---	----

MUSCAT.

4	Law Officers ..	July 2, 1914	Muscat Order in Council, 1915: approving draft, with observations respecting Article 21 ..	12
---	-----------------	--------------	--	----

PERSIA.

5	Law Officers ..	Apr. 20, 1914	Persian Coast and Islands (Slave Trade Jurisdiction) Order in Council, 1914: approving draft ..	13
---	-----------------	---------------	---	----

(iii)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1914.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

ABD—EXT.

A.

Abdul Messih v. Farra, 5, 6.
Alien Enemy. *See* Enemy.
Anglo-Chinese } Domicil. *See* Domicil.
Anglo-Oriental }
Army: transport of troops on vessel chartered from a Neutral, 11.

B.

Balth, Bliccles, and Wwe, 7.

C.

Charter of Vessel. *See* Vessels.
China, Domicil in. *See* Domicil.
" Extra-territorial Courts. *See* Courts.
Coal for enemy warships: supply by British ships chartered to Neutrals, 6.
Commercial Domicil. *See* Domicil.
Companies: position of enemy shareholders, 1-3.
Courts, Extra-territorial: access of alien enemy, 4-6.
Creditor, enemy: assignment of debts. *See* Debts.

D.

Debts due to enemy creditors: assignment to Neutrals, 6-8.
Deportation of Prisoners. *See* Prisoners.
Domicil, Anglo-Chinese (Anglo-Oriental), 5, 6.
" Commercial, in Extra-territorial States, 4-6.
Du Belloix v. Lord Waterpark, 8.

E.

Enemy: access to Extra-territorial Court. *See* Courts.
" creditors: assignments of debts by. *See* Debts.
" *See also* Trading with the Enemy.
Extradition Order in Council. *See* Order in Council.
Extra-territorial Jurisdiction. *See* Jurisdiction.

FOR—PRO.

F.

Foreign Enlistment Act, and vessels under charter. *See* Vessels.

G.

Groz, T., and Sons, 6.

H.

Horst, Wolmar, 7.

J.

Jurisdiction, Extra-territorial, Courts. *See* Courts.
" " " effect on Domicil. *See* Domicil.
" " " Order in Council. *See* Order in Council.

M.

Mayer v. Reed, 8.

N.

Neutrality. *See* Debts.
" *See* Vessels.

O.

Order in Council: Deportation of Prisoners under 12, 13.
" " : Extradition (White Slave Traffic: Germany), 8-10.
" " : Muscat, 12, 13.
" " : Persian Coast and Islands (Slave Trade Jurisdiction), 13-15.

P.

Prisoners: Deportation under Order in Council, 12, 13.
Proclamations: Trading with the Enemy, 2, 3, 6-8.



1914

iv

ALPHABETICAL INDEX.—(Names and Subjects.)

SAN—TRA.

S.

Sandys, W., and Co., 7.
Schaffhausen Bank: operations with debts due to enemy creditors, 6-8.
Shareholders, Enemy. *See* Trading with the Enemy.
Slave Trade Jurisdiction. *See* Order in Council.

T.

Tootal's Trusts (In re), 5.
Trading with the enemy: Proclamations, 2, 3, 6-8.
" " : assignment to neutrals of debts due to enemy creditors, 6-8.
" " : position of enemy shareholders in companies, 1-3.
" " : effect of domicile in Extra-territorial States, 4-6.

VES—WHI.

V.

Vessels: unneutral use by charterers, 6, 11.
" " " " avoids the charter, 6.
" : transport of troops on British neutral vessel chartered by belligerent; bearing of Foreign Enlistment Act, 11.

W.

Walker, Messrs., 6.
White Slave Traffic. *See* Order in Council.

Printed for the use of the Foreign Office. March 1915.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1914.

GENERAL.

No. 14.

[Treasury.]

[43773]

[August 24, 1914.]

Case for the Opinion of the Law Officers of the Crown.

Minute.

1. I THINK it should be pointed out that alien enemies who are resident in this country or in allied or neutral countries should for all the purposes to which this letter relates be treated in the same way as British subjects. Any question that may arise can only be as to alien enemies resident in hostile countries.

2. As regards the last class of alien enemies, I think that both transfers from them into the names of others and transfers from others into their names should be registered if the actual sale in pursuance of which the transfer is lodged took place before the outbreak of war, that is, 11 P.M. on the 4th August or, in the case of Austria, 12 P.M. on the 12th August. It would probably be impossible for the company to enquire in every case at what date the contract took place. They might perhaps be advised, as a practical measure, to register all transfers lodged before a certain date to be fixed with reference to the probability that the contracts must have been made before the outbreak of war.

3. As regards the position of alien enemies resident in a hostile country who are registered as shareholders, payment of dividends to them is not, in my opinion, prohibited by the proclamation, and is, therefore, expressly authorised by it; their right to sue is suspended by the war, but will revive on peace being made; payment of such dividends is not entering into any new contract or obligation, but is merely giving effect to rights accruing under an existing contract or obligation. Similarly with regard to the delivery of certificates and the right of such shareholders to vote; apart from any special provisions in the constitution of the company, I do not see why they have not this right; but I think that it is perhaps hardly for the Government to advise the company on this matter. It is not likely that any alien enemies will be able to exercise this right except those who are resident in this country under licence from the Crown.

A. H. D.

The Treasury Solicitor has been furnished through the Committee on Trading with the Enemy with copies of the subjoined extracts of correspondence between the Attorney-General and the secretary of the English company:—

Letter from Secretary of an English Company to Attorney-General.

Sir,

I am instructed to ask for direction in the following circumstances, in view of the fact that this country is at war with Germany:—

This company is about to pay a dividend. We have on our books a number of shareholders with German names and German addresses; we have, again, shareholders whose names appear to be German, but who have English addresses, or from whom we

[228]

B



GENERAL.

have instructions to pay banks in England. What is the company's position with regard to these shareholders? Are we to hold back their dividends on the ground that they are alien enemies, or should the amounts be paid? Do you discriminate between those who have German addresses and those who give English addresses, or instructions to pay English banks or German banks who have London offices?

Reply of the Attorney-General.

I have your letter of the 14th August. It seems to me that you should not transmit dividends to shareholders who have a German or Austrian address; shareholders with English addresses, whether their names are English or foreign, should be paid. English people who are residing in Germany should for this purpose be treated in the same way as Germans residing in Germany. Of course, the dividends still belong to them, but they are not payable while the war lasts and ought not to be paid; presumably you will pay the amounts into a bank in trust for such of your shareholders as are alien enemies in this sense. I think this is the right rule to follow, even although you have instructions from an alien enemy to pay his dividend into an English bank or into the London office of a German bank; for these instructions are rendered inoperative by the outbreak of war.

The Law Officers are referred to the proclamation prohibiting certain tradings with the enemy, dated the 5th August, 1914, p. 6184 of the "London Gazette." The payment of dividends to alien enemies might well be a dealing with such enemies contrary to the common law, but it does not seem to be prohibited by the proclamation, which, so far as relevant, is confined to the entry into new commercial, financial, or other contracts or obligations. It would seem that on the construction of the proclamation payment of the dividends, at all events to those who were shareholders before the outbreak of the war, is expressly permitted by the proclamation. The same observations would appear to apply to the registration of transfers to or from alien enemies on contracts entered into before the outbreak of war.

It may perhaps be mentioned that it was the intention of Lord Desart's Committee on Trading with the Enemy, on whose advice the proclamation was framed, that dividends should be paid to enemy shareholders. (See p. 14 of their report.)

It is, of course, clear that enemy shareholders cannot, during the war, enforce the right to payment of a dividend, and it is also clear that their right, so far as it arises out of shares which they held before the war, is suspended and not extinguished by the war. It may be nevertheless open for English companies if they think fit to pay these shareholders, and it appears from the report of Lord Desart's Committee that some commercial and financial interests in the city were in favour of discharging obligations to alien enemies on the ground of the general effect on British credit of failure to do so. This was particularly the case with insurance companies.

The question therefore may become one of policy whether the payments, although not enforceable, are lawful and should be made, or whether it is better policy to take advantage of the fact that they cannot be enforced and to decline to make them during the war.

The Law Officers of the Crown are requested to advise the Treasury on the following points:—

1. Whether the payment of dividends on shares held by alien enemies as above defined is permissible by law.
 2. Whether transfers to or from alien enemies of shares in English companies can or must be registered by the company:—
 - (a.) When made on contracts for sale entered into before the outbreak of war.
 - (b.) When made on contracts for sale entered into after the outbreak of war.
 3. Generally on the question of policy, and otherwise on the case.
- See printed extract from "Times" of the 22nd August, paragraph 4.

GENERAL.

(Extract.)

TRADING WITH THE ENEMY.

Official Guidance for British Firms.

The following official announcement was issued by the Treasury last night:—

Some doubts having arisen as to the meaning and application of the proclamation against trading with the enemy, the Government authorise the following explanation to be published:—

1. For the purpose of deciding what transactions with foreign traders are permitted, the important thing is to consider where the foreign trader resides and carries on business, and not the nationality of the foreign trader.

2. Consequently, there is, as a rule, no objection to British firms trading with German or Austrian firms established in neutral or British territory. What is prohibited is trade with any firms established in hostile territory.

3. If a firm with headquarters in hostile territory has a branch in neutral or British territory, trade with the branch is (apart from prohibitions in special cases) permissible as long as the trade is *bonâ fide* with the branch, and no transaction with the head office is involved.

4. Commercial contracts entered into before war broke out with firms established in hostile territory cannot be performed during the war, and payments under them ought not to be made to such firms during the war. Where, however, nothing remains to be done save to pay for goods already delivered, or for services already rendered, there is no objection to making the payment. Whether contracts entered into before war are suspended or terminated is a question of law which may depend on circumstances, and in cases of doubt British firms must consult their own legal advisers.

This explanation is issued in order to promote confidence and certainty in British commercial transactions; but it must be understood that, in case of need, the Government will still be free to impose stricter regulations or special prohibitions in the national interest.

August 22, 1914.

Opinion of the Law Officers of the Crown.

1. We do not think dividends declared after war broke out ought to be paid to shareholders resident in hostile territory; we think they should be dealt with as suggested in the Attorney-General's letter above set out. This is the common law rule, and even if the King's proclamation could vary the common law rule (which seems doubtful), we are not satisfied on the language of the proclamation (which is difficult to construe) that such payments are authorised. As regards dividends declared and made payable before the outbreak of war, payment cannot be compelled during war, but inasmuch as payment ought to have been made before war began, we should have thought immediate payment might be permitted.

2. (a.) Yes; this seems proper, for registration in such circumstances is a purely ministerial act—but registration during war could not be compelled.

(b.) No.

3. It is rather unfortunate that a number of conflicting opinions should have been promulgated on this point, and we would suggest that all the departments concerned should be notified of the present opinion if the Treasury decide to act on it. The Attorney-General before sending his letter on the subject took steps to ascertain whether it was in a form consistent with the practice of the Committee on Trading with the Enemy, and understood that, as finally settled, it expressed the general view.

JOHN SIMON.

STANLEY O. BUCKMASTER.

August 24, 1914.



1914

4

GENERAL

[49058]

No. 1.

[File No. 37751/1914.]

[October 6, 1914.]

Telegram: British Consul-General (Shanghai) No. 7, September 13, 1914,
to Foreign Office.

Commercial
domicil in
extra-terri-
torial States.

YOUR telegram No. 6.

I have told British subjects hitherto that ordinary business transactions completed in China are not prohibited, but that "commercial domicil" is modified by extra-territoriality, one effect of which is to close to enemy suitors the Courts which have exclusive jurisdiction over belligerent residents; and so contracts are suspended or extinguished on outbreak of war. There is no means during war of enforcing new contracts, and enemy goods except in neutral bottoms are at sea liable to capture and confiscation. I have declined to protest against bills of exchange for enemy banks. Our banks in their own interest insist on bills of exchange for shipments being drawn on British subjects, but they release cargo hypothecated to them, as it is paid for by enemy firms. Our shipping companies will not carry enemy goods by sea, and will not accept guarantee of enemy bank for release of import cargo for which bills of lading have not been produced.

Transactions with local branches of enemy firms here are almost always on account and for benefit of firms in enemy country and concern imports and exports by sea by and to enemy subjects. May transfers of shares in our companies registered in Hong Kong, other Colonies, and in England be registered as usual here?

Repeated to Peking.

Minute by Mr. Malkin.

I confess that I have serious doubts whether the view expressed in the first paragraph of this telegram is right, but I have met it in various quarters.

I assume that these Germans have a commercial domicil in Shanghai. We have been carefully explaining to everyone (see the back papers) that it is permissible for British subjects to trade with such persons, because they are "resident or carrying on business" in a neutral country—viz., China. We must therefore take it that commercial domicil is not "modified by extra-territoriality" so far as trading is concerned. Is it so modified in connection with the right to sue in a British Court? I cannot see why it should be; the British Consular Court has to apply the principles of English law; according to English law an enemy subject resident in a neutral country can sue in an English Court. Therefore, to justify Sir E. Fraser's statement, it is necessary to say that a German resident at Shanghai is not resident in a neutral country, and this seems to involve the proposition that a German resident in Shanghai is, because of his ex-territorial rights, really resident in German territory. I cannot believe that this is right. It might be possible to argue in support of the proposition if the German were resident, e.g., at Hankow, where I believe the Germans regard their concession as German territory, but this does not apply at Shanghai.

It seems to me that if Sir E. Fraser's view is accepted it knocks a large hole in the permission to trade, because a German is unlikely to enter into a contract if he knows that he cannot enforce it in the British Consular Court. On the other hand, we do not know what view the German Consular Court will take; it is probable that it would adopt the principle of nationality and exclude all English plaintiffs. There is thus a question of policy involved, and it will be noted that Sir E. Fraser seems to think that most transactions with German firms in Shanghai are transactions with firms whose head office is in Germany. Such transactions we presumably do not want to encourage, but it would depend on the circumstances of each case whether the German would be regarded as resident, for this purpose, in Germany or at Shanghai.

H. W. M.

Foreign Office, September 17, 1914.

GENERAL

5

Minute by Sir E. Davidson.

(1.)

The general rule is that in time of war the question whether a person is or is not to be considered for the purposes of trade and commerce an alien enemy is to be determined by reference not to his nationality or allegiance but to his trading residence, or, as it is called, his "commercial domicil." Speaking generally, then, a German resident and trading in a neutral State is to be regarded as for commercial purposes a neutral, even though Germany be at war with England.

Does the fact that the particular neutral State involved is an oriental State, in which both Germany and Great Britain possess extra-territorial jurisdiction, materially affect the question?

If "commercial domicil" were identical in every respect with ordinary civil domicil I think it would affect the problem, for the better opinion since the decision in the case of *Abdul Messih v. Farra* (Appeal Cases XIII, 431) seems to be that an Anglo-Oriental domicil is inconsistent with membership of an extra-territorial seceded community (see Hall, "Foreign Jurisdiction of the British Crown," pp. 183-184), such as the German and British communities in Turkey or in China.

But, as Dicey points out ("Conflict of Laws," 2nd edition, p. 745), a person may concurrently have a civil domicil in one country and a "commercial domicil" in another; whereas, as is well known, so far as civil domicil is concerned, a person can at each moment of his life have one, and only one, domicil.

The fact that a person can have at one and the same time a "commercial domicil" as well as a civil domicil is not inconsistent with the rule that he cannot at the same time have more than one civil domicil. It merely illustrates, as Dicey again points out, that residence is different from (civil) domicil, and that a person while civilly domiciled in one country may in fact reside and carry on business in another.

In the present case, assuming (*exempli gratia*) that the civil domicil of these persons is German, and that they were permanently residing in Sweden for the purpose of carrying on business, they would without doubt have their "commercial domicil" in Sweden, which "commercial domicil" would be neutral.

As they are carrying on business within the Chinese Republic in analogous circumstances there seems to be no reason for holding that they cannot possess a Chinese commercial domicil. They are not carrying on business within the seceded German extra-territorial community in China but in China itself, which is the country of their trade residence.

This point is much the more important of the two which are raised in the first sentence of Mr. Fraser's telegram. For the reasons given I have come to the same conclusion as Mr. Malkin about it. It is, however, a matter of great practical importance, as well as of some theoretical difficulty, and I think that the Attorney-General should see these papers and be asked to be good enough to give his opinion on them.

(2.)

With regard to the second question, viz., the right of the German to have access to the British extra-territorial Court, I think that this depends in principle, so far as English law is concerned, on whether his "commercial domicil" in respect of the transactions in dispute is neutral or hostile; but if Germany, in the converse case, would apply the test of nationality and not the test of residence for purposes of trade a British plaintiff would not get reciprocity in the German Court, and a question of policy would then arise.

W. E. D.

Foreign Office, September 30, 1914.

Opinion of the Attorney-General.

I agree with the view expressed by Sir Edward Davidson and Mr. Malkin.

The effect of residence by an Englishman in China on his civil domicil was fully considered by Chitty, J., in *In re Tootal's Trusts*, 23 Ch., D. 532. There it was contended that the jurisdiction of the English Courts and England's other treaty

[228]

C



rights resulted in such residence conferring an "Anglo-Chinese" domicile. Chitty, J., held that these extra-territorial privileges did not affect the question of domicile, as the sovereignty over the soil at Shanghai remained vested in the Emperor of China. That decision was expressly approved in *Abd-ul-Messih v. Farra*, 13 A.C., 431.

There is no authority for the suggestion that these extra-territorial rights affect commercial domicile any more than they do civil domicile. So to hold would be to introduce a new distinction between civil and commercial domicile which has never been suggested by any authority.

JOHN SIMON.

October 6, 1914.

[75854]

No. 1B.

[Admiralty.]

[November 4, 1914.]

Opinion of Attorney-General.

Unneutral use of British ship by charterer, the subject of a neutral Power, avoids the charter.

IF the Admiralty have good grounds for thinking that Messrs. Walker's ships are being used by their American charterers to supply coal to German cruisers, they will doubtless require Messrs. Walker to resume control of their ships at once, whatever the legal consequences.

But, assuming the fact to be as suspected, Messrs. Walker appear to be entitled to treat the chartering as at an end. For the charter-party almost certainly contains the terms "to be employed on any lawful trade," i.e., lawful for a ship of its flag, and even if it does not, this is implied. A charterer is not entitled to expose the ship to condemnation in our Prize Courts. An intention so to use the ship, as evidenced by past user, is inconsistent with lawful use under the charter, and therefore avoids it forthwith.

J. A. S.

*The Attorney-General's Chambers,
4, Brick Court, Temple, London, E.C.,
November 4, 1914.*

[73594]

No. 1C.

[Treasury.]

[November 12, 1914.]

Case for the Opinion of the Law Officers of the Crown.

Assignments by enemy creditors to neutrals of debts due from firms in this country.

THE Treasury Solicitor has been requested by the Lords Commissioners of His Majesty's Treasury to obtain the opinion of the Law Officers upon the questions whether (1) the payment to a Swiss bank of debts due from firms in this country to firms established in enemy countries and purchased by the bank is prohibited by the "Trading with the Enemy Proclamation No. 2," or is otherwise contrary to law, or (2), the payment of such debts may in any event be enforced at law by the assignee bank.

The questions have arisen in the following circumstances:—

In September last the "Bank in Schaffhausen," Switzerland, wrote to a firm in Leicester informing them that they were charged by Messrs. Theodor Groz and Sons (a German firm) for collection of their outstanding credit, amounting to about 1,700 marks. They asked that the equivalent to this sum should be remitted to the Swiss Bankverein for their account and they would afterwards credit Messrs. Theodor Groz and Sons with the proceeds. The British firm replied that they could not comply with the request, firstly because they thought it would be illegal for them to do so, and secondly, that before they could pay third parties anything on account of Messrs. T. Groz and Sons they would require to have the instructions of that firm; and the British firm submitted a copy of the correspondence to the Board of Trade.

It would appear that the Bank in Schaffhausen, whether or not in consequence of this or other similar efforts on their part it is impossible to say, has given up the

attempt to collect debts in this country expressly on behalf of German creditors, and has purported to take assignments of such debts from the German creditors, and is now attempting to collect the debts in its own name.

Several firms established in this country have communicated with Government departments in respect of requests received by them from the Bank in Schaffhausen towards the end of October last for the payment of debts so assigned; and the Home Office has recently forwarded to the Treasury a batch of nineteen letters from the same Bank to various British firms, which letters have been stopped by the Censor.

All these letters are in similar terms; and, for the information of the Law Officers, it is proposed to quote one of these letters as showing exactly the course of procedure followed.

In the instance selected the letter from the Bank is dated the 14th October last, and is to the following effect:—

"Messrs. W. Sandys and Co.,
"Leicester,
"England.

"We herewith beg to inform you that, as per enclosed letter, Messrs. Balh, Blickles, and W^{re}, in Tailfingen, who are our clients, have sold to us the amount you owe them (68L 18s. 2d.). We shall, therefore, be obliged by your remitting the amount due to the Crédit Lyonnais, London, for our account.

"Yours truly,
"Bank in Schaffhausen."
[Initials illegible.]

Enclosed with this letter are (a) a statement of account showing the amount of 68L 18s. 2d. due from Messrs. Sandys and Co. to the German firm, and (b) a letter from the German firm, dated the 9th September last, addressed to Messrs. Sandys and Co., to the following effect:—

"I herewith beg to inform you that I have sold all my claims against you, as shown on the enclosed Statement, to the Bank in Schaffhausen, Swiss.
"Please direct this amount to be paid to the above-named bank."

In forwarding these letters to the Treasury, the Home Office remarked that they were doubtful whether an action brought by the Swiss bank for recovery would not succeed, and added that the Secretary of State would suggest the desirability of obtaining the decision of the Law Officers on this point. The Home Office further stated that it seemed to the Secretary of State clearly necessary to prevent payment of debts due to German firms in the way indicated, and in the event of the Law Officers holding that such payment is prohibited, Mr. McKenna thought that a public announcement on the subject would be desirable with a view to making clear the position of British traders in the matter.

The Law Officers may be interested to know that in one of the instances which have been brought to the notice of the authorities the letter from the German creditor announcing the assignment to the Bank in Schaffhausen goes on to add that "private information *re* business can be made through the Bank of Schaffhausen, Switzerland, or through Mr. Wolmar Horst, Tools and Materials, Copenhagen."

It is submitted that there is grave reason to suspect that the assignments in question are not *bonâ fide* and absolute assignments, but have merely been entered into as an easy method by which the German firms may perhaps collect debts due to them in this country. If this is so, payment to the bank would seem to be a payment "for the benefit of an enemy," and so prohibited by the express terms of the "Trading with the Enemy Proclamation, No. 2," of the 9th September last (copy herewith*).

Moreover, it would seem to the Treasury Solicitor that the Swiss bank is not entitled legally to enforce payment of the debts so assigned to it. Assignments of debts can only take place, subject to all equities existing as between the assignor and the debtor up to the date of notification of the assignment to the debtor. Here the assignments themselves were presumably some considerable time after the outbreak of hostilities between this country and Germany, the effect of which was to suspend all remedies on the part of German creditors in respect to payment so long as the war lasts, and—under the "Trading with the Enemy Proclamation No. 2"—to make it illegal for the English debtors to remit any payments to the German firms. And so



long as the war lasts, payment of interest even on debts otherwise carrying interest is suspended (see "*Du Belloix v. Lord Waterpark*," 1822, 1 Dowl and R. 16, and "*Mayer v. Reed*," 1867, 37 Ga. 482).

It would seem clear that an enemy by assignment of a bill of exchange after the commencement of the war cannot give a good title to a neutral, inasmuch as the neutral must take the bill with notice of defect in title of his assignor (see sec. 29 (1) of the Bills of Exchange Act, and Schuster, "*The Effect of War and Moratorium on Commercial Transactions*," 2nd ed., at p. 36.)

It would be strange if the assignee of an ordinary debt were in a more favourable position than the assignee of a negotiable instrument.

The Law Officers are requested to advise the Lords Commissioners of the Treasury generally on the questions discussed in the case.

Opinion of the Law Officers of the Crown.

The case put is that of a claim against a British debtor by the neutral assignee of a debt which would be due from the British debtor to an enemy assignor if war did not exist. It is clear that the enemy assignor could not, during hostilities, enforce payment of such a debt, and inasmuch as an assignee cannot have better rights than his assignor, it follows that the neutral assignee is in no better position. We, of course, are assuming that the assignment is after war began.

The transfer of rights arising under a negotiable instrument is not necessarily governed by the same rule, for an assignee of a negotiable instrument who is a "*bonâ fide* holder for value" may in some cases have better rights than his assignor. But this is very doubtful where the assignor's remedy is barred by war, and it is under consideration whether it should not be provided by Statute that negotiable instruments in the hands of a neutral who has acquired them after war from an enemy are not capable of collection during war.

JOHN SIMON.
STANLEY O. BUCKMASTER.

Law Officers' Department,
November 12, 1914.

GERMANY.

No. 2.

[13064]

[March 23, 1914.]

[File 1675/14.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, December 22, 1913.

Extradition
Order in
Council
(Germany:
White Slave
Traffic Con-
vention),
1914.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith a draft Order in Council which has been prepared in consultation with the Home Office, Colonial Office, and the India Office, in order to give effect in the case of Germany to the extradition provisions of the White Slave Traffic Convention of the 4th May, 1910, a copy of which is also enclosed.

I am to request that you will take this draft into your consideration and favour the Secretary of State with your opinion whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

Sir Edward Grey would at the same time be glad to be favoured with any observations of a general nature which you may consider it desirable to offer on the papers now submitted to you.

I have, &c.
RALPH PAGET.

Report.

The terms of the draft Order in Council which we have initialled are, in our opinion, fit and proper for submission to the King in Council for His Majesty's approval.

It is a somewhat intricate problem whether the offences with which the Order in Council is intended to deal are within the Extradition Acts: but, inasmuch as "*The Extradition Act, 1873*," includes among extraditable offences not only any indictable offence under the "*Offences against the Person Act, 1861*," but any indictable offence under "any Act amending or substituted for the same," we are disposed to agree that the view which we understand has been adopted by those who drafted the Order in Council is correct, viz., that procuration under the statutes of 1885 and 1912 (which take the place of section 49 of the Act of 1861) is one of the crimes within the existing law as to extradition.

JOHN SIMON.
STANLEY O. BUCKMASTER.

Law Officers' Department, March 23, 1914.

Annex.

Draft Order in Council.

WHEREAS by the Extradition Acts, 1870 to 1906, it was amongst other things enacted that, where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, His Majesty may, by Order in Council, direct that the said Acts shall apply in the case of such foreign State; and that His Majesty may, by the same or any subsequent Order, limit the operation of the Order, and restrict the same to fugitive criminals who are in or suspected of being in the part of His Majesty's dominions specified in the Order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient:

And whereas a Treaty was concluded on the fourteenth day of May, one thousand eight hundred and seventy-two, between Her late Majesty Queen Victoria and His late Majesty the German Emperor for the mutual extradition of fugitive criminals, in the case of which Treaty the Extradition Act, 1870, was applied by Order in Council of the twenty-fifth day of June, one thousand eight hundred and seventy-two:

And whereas a further Treaty was concluded on the fifth day of May, one thousand eight hundred and ninety-four, between Her late Majesty Queen Victoria and His Majesty the German Emperor for the mutual extradition of fugitive offenders, in the case of which Treaty the Extradition Acts, 1870 and 1873, were applied by Order in Council of the second day of February, one thousand eight hundred and ninety-five:

And whereas a Convention was concluded between His Majesty and other Powers and States enumerated therein, one of whom was His Majesty the German Emperor, on the fourth day of May, one thousand nine hundred and ten, for the suppression of the white slave traffic, which contains Articles in the terms following:—

"ARTICLE 1".

"Doit être puni quiconque, pour satisfaire les passions d'autrui, a embauché, entraîné ou détourné, même avec son consentement, une femme ou fille mineure, en vue de la débauche, alors même que les divers actes qui sont les éléments constitutifs de l'infraction auraient été accomplis dans des pays différents.

"ARTICLE 2.

"Doit être aussi puni quiconque, pour satisfaire les passions d'autrui, a, par fraude ou à l'aide de violences, menaces, abus d'autorité, ou tout autre moyen de contrainte, embauché, entraîné ou détourné une femme ou fille majeure en vue de la débauche, alors même que les divers actes qui sont les éléments constitutifs de l'infraction auraient été accomplis dans des pays différents.



GERMANY.

"ARTICLE 5.

"Les infractions prévues par les articles 1^{er} et 2 seront, à partir du jour de l'entrée en vigueur de la présente Convention, réputées être inscrites de plein droit au nombre des infractions donnant lieu à extradition d'après les Conventions déjà existantes entre les Parties contractantes.

"Dans les cas où la stipulation qui précède ne pourrait recevoir effet sans modifier la législation existante, les Parties contractantes s'engagent à prendre ou à proposer à leurs législatures respectives les mesures nécessaires.

* * * * *

"ARTICLE 11.

"Si un État contractant désire la mise en vigueur de la présente Convention dans une ou plusieurs de ses colonies, possessions ou circonscriptions consulaires judiciaires, il notifiera son intention à cet effet par un acte qui sera déposé dans les archives du Gouvernement de la République française. Celui-ci en enverra, par la voie diplomatique, copie certifiée conforme à chacun des États contractants et les avisera en même temps de la date du dépôt.

* * * * *

"Six mois après la date du dépôt de l'acte de notification, la Convention entrera en vigueur dans les colonies, possessions ou circonscriptions consulaires judiciaires visées dans l'acte de notification."

* * * * *

And whereas His Majesty's Ratification of this Convention on behalf of the United Kingdom of Great Britain and Ireland was deposited at Paris on the eighth day of August, one thousand nine hundred and twelve:

And whereas His Majesty's Government have acceded to the Convention in respect of the following British Possessions on the dates respectively mentioned:—

Canada	August 25, 1913.
Union of South Africa	September 19, 1913.
New Zealand	October 1, 1913.
Newfoundland	October 1, 1913.
Australia (including Papua and Norfolk Island)	February 18, 1914.

Now therefore His Majesty, by and with the advice of his Privy Council, and in virtue of the authority committed to him by the Extradition Acts, 1870 to 1906, doth order, and it is hereby ordered, that the said Acts shall apply in the case of Germany under and in accordance with the said Treaties as supplemented by the said Convention above set forth.

This Order shall come into operation in the United Kingdom from and after the* In the above-mentioned British Possessions heretofore acceded in respect of which His Majesty's Government have acceded to the Convention in accordance with Article 11 thereof, or in other British Possessions in respect of which His Majesty's Government may in future accede thereto, it shall in each case come into operation respectively on a date six months after the respective date of such accession†:

Provided always that the operation of the said Acts shall be and remain suspended within the Dominion of Canada so long as an Act of the Parliament of Canada, being Part I of chapter 155 of the Revised Statutes of Canada, 1906, and entitled "An Act respecting the Extradition of Fugitive Criminals," shall continue in force there, and no longer.

J. A. S.
S. O. B.

* Date to be inserted by Council Office, and to be a date ten days after publication in "London Gazette."
† The alterations in this paragraph shown by italics and erased type were made by the Law Officers. Since the draft Order in Council was approved by the Law Officers, the following words, which appear in the Order as submitted to the King in Council, have been added to this passage, or from and after the* whichever shall be the later date."

MEXICO

[20653]

No. 3.

[File 17968/14.]

[May 7, 1914.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 24, 1914.

I HAVE the honour, by direction of Secretary Sir E. Grey, to ask that you will take into your consideration the following questions which have arisen in connexion with the state of relations now prevailing between the United States of America and Mexico, and that you will favour him with your advice with regard to them.

Certain owners of vessels sailing under the British flag have informed the Secretary of State that they have received offers from the United States Government to charter some of their ships, with the option of purchase, for the purpose, it is understood, of transporting troops of the United States to Mexico if the need therefor should arise.

In the cases of such of these vessels as are now outside the limits of His Majesty's dominions and are likely so to continue up to the time of the proposed chartering, Sir E. Grey desires to be advised whether, assuming a state of war to be in existence, an offence against section 8 (4) of "The Foreign Enlistment Act, 1870" (Annex A), would be committed if the vessels were so chartered, and whether, in the circumstances, it would be the duty of the Secretary of State to warn the shipowners in question that by entering into such charters they would render themselves liable to the penalties provided by that Act. The Secretary of State understands that it is proposed to place American crews on board the vessels; in this case presumably no question of any infraction of the provisions of section 4 of the said Act would arise.

As regards those vessels which are now within His Majesty's dominions, or may come within those dominions before the dates on which their charters were entered into, Sir E. Grey would be glad to be favoured with your opinion whether, acting still upon the assumption that a state of war exists, an offence against section 8 (4) of the Act referred to would arise out of their despatch from His Majesty's dominions with a view to the employment specified above, and whether, in the circumstances, instructions should be issued by the Secretary of State for the detention of the vessels concerned.

I am, in conclusion, to recall to your attention the fact that the provisions of section 8 of the said Act go considerably beyond the international obligations assumed by His Majesty's Government under article 8 of The Hague Convention concerning the rights and duties of neutral Powers in maritime war (Annex B), and to remind you that a Bill which will, if passed, materially limit the scope of that section of the Act is now under consideration.

As urgent enquiries are being received on this subject, the Secretary of State would be very grateful to receive your opinion at your earliest possible convenience.

I have, &c.

RALPH PAGET.

Report.

The question is whether section 8, sub-section (4), of "The Foreign Enlistment Act, 1870," has any application to cases in which the ship is not within His Majesty's dominions.

We are of opinion that the sub-section, upon its true construction, applies equally wherever the ship is: if a shipowner does any act within His Majesty's dominions which causes his ship to be despatched in the circumstances defined in the sub-section, he commits an offence even though his ship is not in British territory. On the other hand, inasmuch as the prohibitions of section 8 go considerably beyond what international law requires, it cannot be said to be a matter of international obligation to insist upon such prohibition in a case where the duties of a neutral state are not involved.

JOHN SIMON.

STANLEY O. BUCKMASTER.

Law Officers' Department,
May 7, 1914.

Chartering of British vessels for transport of United States troops to Mexico: bearing of Foreign Enlistment Act.



MUSCAT.

[30005]

No. 4.

[File No. 993/14.]

[July 2, 1914.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

*Foreign Office, June 10, 1914.*Muscat
Order in
Council,
1915.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you herewith the draft of an Order in Council, to be entitled "The Muscat Order in Council, 1914," which has been prepared in consultation with the India Office.

The accompanying Order has been drafted to meet the requirements of the present day, as the Muscat Order in Council of 1867 is of an obsolete character and the amendments to The Persian Coast and Islands Order in Council and the introduction of "The Bahrein Order in Council, 1913," render it expedient that the Muscat Order should be brought into line with modern requirements.

I am to request that you will take the draft Order into your consideration and favour Sir Edward Grey at your early convenience with your opinion whether it may fitly and properly be submitted to His Majesty in Council for His Majesty's approval.

I have, &c.

EYRE A. CROWE.

Report.

We observe that Article 21 (1) of this draft Order contains extensive provisions for deportation without trial; that these provisions do not include any right on the part of the prisoner deported to be heard; and that an appeal against the Order is expressly excluded. We apprehend that we are not called upon to express any opinion as to the expediency of these provisions, and therefore confine ourselves to the question of their efficacy. We are of opinion that their form is apt for the purpose they are designed to secure.

JOHN SIMON.
STANLEY O. BUCKMASTER.

*Law Officers' Department,
July 2, 1914.*

[NOTE.—The text of the Order in Council, dated the 3rd February, 1915, will be found in the "London Gazette" of the 12th February, 1915 (Confidential, No. 10592*).

The text of Article 21, to the first paragraph of which the Law Officers refer in their Report, is as follows:—

"21.—(1.) Where it is shown by evidence on oath, to the satisfaction of the District Court, that any British subject has committed, or is about to commit, an offence against this Order, or is otherwise conducting himself so as to be dangerous to peace and good order, or is endeavouring to excite enmity between the people of Muscat and His Majesty, or is intriguing within the limits of this Order against His Majesty's power and authority, the Court may, if it thinks fit, by order under its seal, prohibit that person from being within the limits of this Order, during any time therein specified, not exceeding two years.

"(2.) The Court, by order in writing under its seal, may vary any order of prohibition (not extending the duration thereof), and may revoke any order of prohibition or removal.

"(3.) The Court shall forthwith report the order and the grounds thereof to the Chief Court, which shall forthwith report to the Governor-General of India in Council every order made under this Article, and the grounds thereof, and the proceedings thereunder."

This Article is identical with, and is founded upon, a similar Article (No. 21) in "The Bahrein Order in Council, 1913," of which the draft was submitted to and

MUSCAT—PERSIA.

approved by the then Law Officers (Sir Rufus Isaacs and Sir John Simon) on the 30th April, 1913. It was therefore thought unnecessary to call the special attention of the Law Officers to it on this occasion. Article 17 (1) of "The Persian Coast and Islands Order in Council, 1907," also contains provisions similar to those of Article 21 (1) of the present draft Order]

PERSIA.

[17465]

No. 5.

[File 10854/14.]

[April 20, 1914.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 1, 1914.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you herewith the draft of an Order in Council to be entitled "The Persian Coast and Islands (Slave Trade Jurisdiction) Order in Council, 1914," which has been prepared in consultation with the India Office. The object of the draft Order is to bring the existing Slave Trade Treaty with Persia within the operation of "The Slave Trade (East African Courts) Act, 1873," and to confer jurisdiction thereunder upon the Court established under "The Persian Coast and Islands Order in Council, 1907."

Persian
Coast and
Islands
(Slave
Trade Juris-
diction)
Order in
Council,
1914.

I am to request that you will take the draft Order into your consideration and favour Sir Edward Grey at your early convenience with your opinion as to whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

I have, &c.

EYRE A. CROWE.

Report.

In our opinion, this draft Order, as initialled by us, may properly be submitted to the King for the approval of His Majesty in Council.

JOHN SIMON.
STANLEY O. BUCKMASTER.

*Law Officers' Department,
April 20, 1914.*

ANNEX.

Draft Persian Coast and Islands (Slave Trade Jurisdiction) Order in Council, 1914.

WHEREAS by Treaty, grant, usage, sufferance, and other lawful means, His Majesty the King has jurisdiction in that portion of the coast and islands of the Persian Gulf and Gulf of Oman which is within the dominions of His Majesty the Shah of Persia;

And whereas by an Order in Council made on the 7th day of May, 1907, and cited as "The Persian Coast and Islands Order in Council, 1907," provision was made for the exercise of such jurisdiction by a Court held by the person for the time being holding the office of His Majesty's Consul-General for Fars and the coasts and islands of the Persian Gulf, and of Political Resident in the Persian Gulf, or by the Judicial Assistant;

And whereas by an Act passed in the 37th year of the reign of Her late Majesty Queen Victoria, intituled "The Slave Trade (East African Courts) Act, 1873," it was, amongst other things, provided that—

"Where any Treaty in relation to the Slave Trade is made after the passing of this Act, by or on behalf of Her Majesty, with any foreign State in Arabia, or on the



"East Coast of Africa, or on the shores of the Persian Gulf, or in any island lying off Arabia or off such coast or shores, including the islands of Zanzibar and Madagascar, and the Comoro Islands, Her Majesty may, by Order in Council, direct that as from such date, not being earlier than the date of the Treaty, as may be specified in the Order, such Treaty shall be deemed, and thereupon (as from the said date, or if no date is specified, as from the date of such Order) such Treaty shall be deemed to be an existing East African Slave Trade Treaty within the meaning of this Act, and the provisions of this Act shall apply and be construed accordingly."

And it was further provided that—

"Her Majesty may by such Order, or any subsequent Order referring to the same Treaty, direct that any Court, Consul, or person authorised by or in pursuance of an Order in Council to exercise within the dominions of the foreign State with whom the Treaty is made jurisdiction in matters relating to the Slave Trade shall, subject to the conditions, exceptions, and limitations, if any, contained in the Order, exercise all the jurisdiction conferred by this Act on the East African Courts; and such Court, Consul, or person, when exercising such jurisdiction, shall be deemed to be one of the East African Courts within the meaning of this Act;"

And whereas on the 2nd day of March, 1882, a Treaty or Convention was concluded between Her late Majesty and His Majesty the Shah of Persia for the suppression of the Slave Trade, in the following terms, that is to say:—

"In the Name of God, the Almighty, all Merciful.

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, and His Majesty the Shah of Persia, being mutually animated by a sincere desire to co-operate for the extinction of the barbarous Traffic in Slaves, have resolved to conclude a Convention for the purpose of attaining this object, and have named as their Plenipotentiaries, that is to say:—

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, Ronald Ferguson Thomson, Esquire, Her Envoy Extraordinary and Minister Plenipotentiary at the Court of Persia;

"And His Majesty the Shah of Persia, his Excellency Mirza Saeed Khan, his Minister for Foreign Affairs;

"Who, after having communicated to each other their full powers, found in good and due form, have agreed upon and concluded the following Articles:—

"ARTICLE I.

"In order to prevent the chance of negro slaves, male and female, being imported into Persia, British cruisers shall be permitted to visit and detain merchant-vessels under the Persian flag, or belonging to Persian subjects, which may be engaged in, or which there may be reasonable grounds for suspecting to be or to have been engaged during the voyage on which they are met, in carrying slaves; and if any such slaves are found on board such merchant-vessels, the vessel, with all on board, shall be taken before the nearest Persian authorities for trial. But no person whatsoever who, being furnished with a Government passport, countersigned by a British resident or consul, may have gone from Persia to visit the places of pilgrimage shall, when returning, be interfered with, provided such person be not accompanied by more negroes, either male or female, than the number mentioned in his original pass. The presence of any such additional negro or negroes shall be *prima facie* evidence of an attempted Traffic in Slaves.

"ARTICLE II.

"If any merchant-vessel under the Persian flag be captured by a British cruiser and taken into a Persian port for adjudication, it shall be the officer of the British cruiser making the capture, or some duly authorized officer of the British Government who shall be present at such adjudication.

"In the event of the captured merchant-vessel being condemned and sold the proceeds of such sale shall go to the Persian Government, and all slaves found on board such vessel shall be handed over to the British authorities.

"ARTICLE III.

"His Majesty the Shah of Persia agrees to punish severely all Persian subjects or foreigners amenable to Persian jurisdiction who may be found engaging in Slave Traffic by sea, and to manumit and guarantee the safety and proper treatment of all slaves illegally imported, that is to say, imported by sea into His Majesty's dominions after the signature of the present Convention.

"ARTICLE IV.

"The present Convention shall come into operation on the first of May, one thousand eight hundred and eighty-two. After the Convention shall so have been brought into operation Article XIII of the Treaty between Great Britain and Persia, signed at Paris on the fourth of March, one thousand eight hundred and fifty-seven, by which the agreement entered into by Great Britain and Persia in August, one thousand eight hundred and fifty-one, was renewed, shall be considered as cancelled except as to any proceeding that may have already been taken or commenced in virtue thereof.

"ARTICLE V.

"The ratifications of the present Convention shall be exchanged at Tehran within five months or sooner, if practicable.

"Done at Tehran in quadruplicate, this second day of the month of March, in the year of our Lord one thousand eight hundred and eighty-two.

"(L.S.) RONALD F. THOMSON.
"(L.S.) MIRZA SAEED KHAN."

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf as aforesaid, and by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise, in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

1. The said Treaty or Convention hereinbefore recited shall, from the 1st day of August, 1914, be deemed to be an existing East African Slave Trade Treaty within the meaning of "The Slave Trade (East African Courts) Act, 1873."

2. Subject to the provisions of this Order, it shall be lawful for the Court established under "The Persian Coast and Islands Order in Council, 1907," to exercise jurisdiction in matters relating to the Slave Trade.

3. Subject to the provisions of this Order, the Court established under "The Persian Coast and Islands Order in Council, 1907," shall exercise all the jurisdiction conferred by "The Slave Trade (East African Courts) Act, 1873," on the East African Courts, and the said Court, when exercising such jurisdiction, shall be deemed to be one of the East African Courts within the meaning of the said Act.

4. This Order shall be published in the "Gazette of India" within such time after the passing thereof as the Secretary of State may prescribe, and shall come into force on the 1st day of August, 1914.

5. This Order may be cited as "The Persian Coast and Islands (Slave Trade Jurisdiction) Order in Council, 1914," and shall be read as one with "The Persian Coast and Islands Order in Council, 1907."

And the Most Honourable the Marquess of Crewe, K.G., and the Right Honourable Sir Edward Grey, Baronet, K.G., two of His Majesty's Principal Secretaries of State, are to give the necessary directions herein as to them may respectively appertain.

J. A. S.
S. O. B.



1915

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. March 1916.

CONFIDENTIAL.

(10708.)

LAST COPY.

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1915.



LIST OF REPORTS.

(Arranged according to Countries.)

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 2^a, &c.

BORNEO.

No.		Date.	SUBJECT.	Page.
1	Law Officers ..	Oct. 1, 1915	North Borneo Order in Council, providing for the Exercise of British Consular Jurisdiction under Merchant Shipping Acts: approving Draft with suggested amendment	1

CHINA.

2	Solicitor-General	Oct. 25, 1915	China (Companies) Order in Council, 1915: approving Draft	3
---	-------------------	---------------	---	---

FRANCE.

2 ^a	Law Officers to Treasury	June 4, 1915	French Government's purchase of Army Boots in England. Charges against Messrs. Cassell and Beaman: Treasury Solicitor should not act for French Government, which has no <i>locus standi</i>	4
----------------	--------------------------	--------------	--	---

GENERAL.

2 ^b	Attorney-General to Oversea Prize Disposal Committee	Jan. 16, 1915	Detained Enemy Ships: utilisation in Trade by Requisition or by Temporary Requisition	5
3	Law Officers ..	Mar. 31,	Censorship of letters passing through British territory from one neutral to country another is justifiable. The operation of the Universal Postal Convention is affected by a state of war.	6
3 ^a	Law Officers to Treasury	July 2,	Prize Funds: power of the Crown to make grants out of (a) droits of the Crown, (b) droits of Admiralty	8
3 ^b	Law Officers to Treasury	July 2,	Prize Courts: no jurisdiction to award costs to or against the Crown	9

GENERAL.

..	Law Officers ..	Nov. 22, 1915	Messrs. Paul Scheerer and Co., Trinidad: Compulsory liquidation (Interim Report). [See Law Officers' Report of the 14th January, 1916]	
----	-----------------	---------------	--	--

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1915.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

ATK—MIR.

A.

Atkinson v. Queen's Proctor, 10.

B.

Beaman, Mr., 4.

"Belvidere," 8.

Boots, Army: Lawsuit arising from French Government purchases, 4.

C.

Carter v. Carter, 10.

Cassell, Mr., 4.

Censorship of letters passing from Neutral to Neutral via Belligerent territory, 6, 7.

Companies in China. See Order in Council.

Correspondence, Censorship See Censorship.

D.

Debenham, E., 4.

Droits of Admiralty. See Prize.

Droits of the Crown. See Prize.

"Duke of Sussex," 11.*Dyke v. Barton*, 10.

G.

"Gauntlet," 10.

J.

Jurisdiction Order in Council. See Order in Council.

"Leda," 10, 11.*"Leucade,"* 10.

M.

"Mentor," 10.*"Miramichi,"* 10.

ORD—VES.

O.

Order in Council: China (Companies), 3.

" " : North Borneo (Consular Jurisdiction), 1, 2.

"Ostsee," 10.

P.

Penton, Mr., 4.

Postal Censorship. See Censorship.

" Convention. See Treaty.

Prize: Droits of Admiralty, 8, 9.

" : Droits of the Crown, 8, 9.

" Cases: costs to or against the Crown, 9–11.

" Funds: power of Crown to make grants, 8, 9.

R.

Reg. v. Beadle, 10.

Requisition of Vessels. See Vessels.

Ree v. Johnson, 10.

S.

"Schneefels," 5.*"Swallow,"* 11.

T.

Tobin v. Reg., 11.

Treasury Solicitor not to act for French Government in slander action, 4.

Treaty. Universal Postal Convention: operation affected by a state of war, 6, 7.

V.

Vessels, Detained Enemy: utilisation in trade, 5, 6.

" Permanent and Temporary requisition, 5, 6.

" requisitioned: become Government ships, 6.

" to which twenty-four hours' rule applies, 6.



1915

Printed for the use of the Foreign Office. February 1916.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1915.

BORNEO.

[142647]

No. 1.

[File 27433/15.]

[October 1, 1915.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 24, 1915.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit herewith the draft of an Order in Council providing for the exercise by the District Officer, Tawao, North Borneo, of consular powers under the Merchant Shipping Acts, in accordance with the provisions of section 737 of the "Merchant Shipping Act, 1894." The enclosed draft has been approved by the Colonial Office, who have been in communication on the subject with the British North Borneo Company and the Board of Trade.

North
Borneo
(Consular
Jurisdiction
under
Merchant
Shipping
Acts) Order
in Council,
1916.

I am to request that you will take the draft Order into consideration, and that you will favour Sir E. Grey with your opinion whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

I have, &c.
A. LAW.

Report.

The terms of the accompanying draft Order are, subject to the observation in the margin thereof, in our opinion, fit and proper for submission to the King for the approval of His Majesty in Council.

EDWARD CARSON.
F. E. SMITH.

*Law Officers' Department,
October 1, 1915.*

[ANNEX.]

B

[252]



Annex.

Draft Order in Council providing for the Exercise of British Consular Jurisdiction under the Merchant Shipping Acts, 1894 to 1914, in the State of North Borneo.

WHEREAS by section 737 of the "Merchant Shipping Act, 1894," it is provided that where, under that Act, anything is authorised to be done by, to, or before a British consular officer, and in any place outside His Majesty's dominions in which His Majesty has jurisdiction there is no such officer, such thing may be done in that place by, to, or before such officer as His Majesty in Council may direct;

And whereas the "Merchant Shipping Act, 1894," has been amended by the following Acts, namely, the "Merchant Shipping Act, 1897," the "Merchant Shipping (Exemption from Pilotage) Act, 1897," the "Merchant Shipping (Liability of Shipowners) Act, 1898," the "Merchant Shipping (Mercantile Marine Fund) Act, 1898," the "Merchant Shipping (Liability of Shipowners and others) Act, 1900," the "Merchant Shipping Act, 1906," the "Merchant Shipping Act, 1907,"* the "Merchant Shipping (Certificates) Act, 1914," and the "Merchant Shipping (Conventions) Act, 1914," which Acts are to be construed as one with the "Merchant Shipping Act, 1894";

And whereas the "Merchant Shipping (Seamen's Allotment) Act, 1911," was passed to remove doubts as to the true interpretation of section 142 of the "Merchant Shipping Act, 1894," and section 62 of the "Merchant Shipping Act, 1906";

And whereas all the before-mentioned Acts, together with any Act amending the same, are hereinafter referred to as the Merchant Shipping Acts;

And whereas the State of North Borneo is a place outside His Majesty's dominions in which His Majesty has jurisdiction, but in which there is no consular officer;

And whereas it has been made to appear to His Majesty that it is expedient that the officer hereinafter named should exercise and perform in the said State the powers and duties of a British consular officer under the Merchant Shipping Acts;

Now, therefore, His Majesty in Council, by virtue of the power vested in him by section 737 of the "Merchant Shipping Act, 1894," is pleased to direct that anything which is, under the Merchant Shipping Acts, authorised to be done by, to, or before a British consular officer may be done in the State of North Borneo by, to, or before the officer for the time being acting as District Officer, Tawao, North Borneo.

F. C.
F. E. S.

We think the Merchant Shipping Act of 1911 should be included, unless there is some reason to the contrary of which we are unaware.

E. C.
F. E. S.

* In the Order, as passed, the words "the Merchant Shipping Act, 1911," appear in this place.

CHINA.

[158880]

No. 2.

[File 19196/15.]

[October 25, 1915.]

Foreign Office to the Law Officers of the Crown.

Gentlemen.

Foreign Office, August 21, 1915.

I HAVE the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith a draft of an Order in Council (Paper A) to be entitled "The China (Companies) Order in Council, 1915."

The object of the Order is, on the one hand, to provide for the registration at Shanghai of Companies incorporated under the law of Hong Kong and for the exercise of jurisdiction over such Companies by His Majesty's Court in China; and, on the other hand, to supply more effective means of controlling the operations of British Companies in China than those already existing.

The history of this question is fully explained in the two memoranda (Papers B and C) which are enclosed herewith.

I am to explain that it is probable that the passing of the draft Order in Council would have been postponed until after the war were it not for the fact that its provisions are considered by His Majesty's Consular Officers in China to be urgently required in connection with the new regulations prohibiting trading with enemy subjects in that country.

The necessary legislation to be passed in Hong Kong is already drafted, and it is proposed to pass it as nearly as possible simultaneously with the Order in Council.

I am, therefore, to request that you will take the draft Order into your consideration, and that you will favour Sir E. Grey with your opinion whether its terms are fit and proper for submission to the King in Council for His Majesty's approval.

It is desirable that the Order should be passed with as little delay as possible, and Sir E. Grey would accordingly be grateful if he could be favoured with an expression of your opinion at your early convenience.

I have, &c.
ALGERNON LAW.

List of Papers.

- (A.) Draft China (Companies) Order in Council, 1915.
- (B.) Library Memorandum, August 18, 1915.
- (C.) " " May 16, 1911. (Confidential No. 9859).

Report by the Solicitor-General.

In my opinion this draft Order,* as initialled by me, may properly be submitted to the King for the approval of His Majesty in Council.

F. E. SMITH.

*Law Officers' Department,
October 25, 1915.*

* The text of the Order in Council is contained in the "London Gazette" of November 30, 1915. (Confidential, No. 10674*).



(4)

FRANCE.

[74314]

No. 2^A.

[Treasury.]

[File 46107/15.]

[June 4, 1915.]

Case for the Opinion of the Law Officers of the Crown.

Herewith are sent : copy correspondence and memoranda.

THE Secretary of State for Foreign Affairs desires the advice of the Law Officers upon the following facts:—

French Government's purchase of Army Boots in England. Charges against Messrs. Cassell and Beaman: Treasury Solicitor should not act for French Government.

Mr. Penton is the official adviser to the French delegates on the Commission internationale de Ravitaillement in connection with the purchase in England of 2,000,000 pairs of army boots. Mr. Ernest Debenham, of Messrs. Debenham and Freebody, boot manufacturers, has stated that a Mr. Cassell and a Mr. Beaman called upon him, and Mr. Cassell stated that they were in a position to control large contracts with the French Government, and suggested that he (Mr. Cassell) should be authorised to obtain orders for Messrs. Debenham and Freebody, the procedure being that he (Mr. Cassell) should be given a commission note, his own commission being about 5 per cent., and that the goods should be invoiced to the French Government at a price which would include his commission and also a commission to the French Government representative. He added that, no matter how reasonable the price quoted, no order would be placed by the representative of the French Government unless a large commission for himself (the representative), or himself and his colleagues, was included. Further, by way of a specific instance, he stated that 1,000,000 pairs of boots had been delivered by a manufacturer in England at 10s. 9d. per pair plus Mr. Penton's 1 per cent., and charged to the French Government at 18 fr. per pair. Mr. Cassell appears to have added that this was the only way business could be done.

These statements were reported by Mr. Debenham to the Commission and came to the knowledge of Mr. Penton, who desires to take proceedings against Messrs. Cassell and Beaman for slander. The French Ambassador feels that some intervention or other steps may become necessary on the part of the French Government or the French members of the Commission in view of the general nature and serious character of the allegations made, and the French Ambassador has consulted the Secretary of State for Foreign Affairs as to the course to be adopted in the circumstances, and the Ambassador being unable to consult his legal adviser, who is at the front, has suggested that he should be authorised to consult the Treasury Solicitor. It has not been thought necessary to furnish the Law Officers with copies of the forms of contract or inspection note referred to in the memorandum of the facts sent herewith, as the merits of the case are not now under consideration: but as the Law Officers will see from the correspondence between the Treasury Solicitor and Mr. Tilley of the Foreign Office the question is whether in the circumstances it is advisable that the Treasury Solicitor should be instructed to advise and act for the French Government in the matter, or whether it should be referred to a private solicitor: and the opinion of the Law Officers is desired as to the answer which should be made to the French Ambassador.

Opinion of the Law Officers of the Crown.

We do not think that the Treasury Solicitor should act for the French Government herein. Any action would have to be brought by some individual person who should be represented by a private solicitor. The French Government would have no *locus standi*.

EDWARD CARSON.
F. E. SMITH.

Law Officers' Department,
June 4, 1915.

(5)

GENERAL.

[9573]

No. 2^B.

[Oversea Prize Disposal Committee.]

[File 993/15.]

[January 16, 1915.]

Memorandum as to proposed Utilization of detained Enemy Ships in Trade, with the Opinion of the Attorney-General annexed.

THE Oversea Prize Disposal Committee, in view of the great scarcity of tonnage, has recommended the utilization of the enemy ships which have been sentenced to detention during the war, in accordance with Articles 2 or 3 of The Hague Convention No. VI. The view of the effect of those articles which has so far been adopted is that, provided the ships are returned to their owners at the end of the war in reasonably good condition, the owners are not concerned with what is done with them during the war, and have no claim for any money which they may earn in the course of it. The Foreign Office have recently proposed that these ships should be insured and that ship-keepers should be provided, it being hoped that the cost of these measures can be recovered from the enemy Government as part of the terms of peace.

The method proposed for making use of these ships is that they should be requisitioned by the Admiralty under Order 29, Rule 4 (a) or 4 (b), and should then be chartered to British shipowners on time charter. It will be also necessary for them to be given a British register as Government ships under section 80 of "The Merchant Shipping Act, 1906," and the Order in Council of the 22nd March, 1911. It is conceived that this procedure is in harmony with the provisions of the Convention No. VI above referred to, and that no difficulty will arise in restoring the ship to the owner at the end of the war in lieu of paying him her value.

The question on which it is desired to obtain the opinion of the Attorney-General is whether it would be safe to allow ships which have been dealt with in this manner to enter a neutral port. It appears that there are two possible risks:—

1. An attempt might be made by the original owners to claim these ships as their property by action in the local Courts.
2. A neutral Government might conceivably claim to regard them as public ships and to submit them to such disabilities as, for instance, the twenty-four hours' rule.

As to 1, it is conceived that any Court would recognize the transfer of title which has been effected in the manner above described, but there may be some possibility of a vexatious delay being caused by proceedings in the Court of a neutral.

As to 2, it may be worth while to mention that in the case of the "Schneefels," a German ship which has been condemned, but which is being allowed to complete her voyage to the United States before sale, and discharge her cargo there, His Majesty's Government have intimated semi-officially to the United States' Government that they do not expect this ship to be treated as a public ship. In this case it was, however, arranged that the ship should be registered in the name of an individual. The Committee would be very grateful if the Attorney-General would indicate whether, in his opinion, either of the above risks is sufficiently serious to render it necessary that a stipulation should be made when chartering these vessels that they should only trade with ports in the British Empire or with allied countries. They would also be glad to know whether, in the opinion of the Attorney-General, there is in this connection any difference between the position of a ship which has been permanently requisitioned under Order 29, Rule 1 or 4 (a), and of one which has been temporarily requisitioned under Order 29, Rule 4 (b); and, further, whether the position is affected if an undertaking in writing is given to the Court instead of the appraised value of the ship being paid into Court, under Order 29, Rule 4 (a); and in view of the case of the "Schneefels," which has been mentioned above, they would be grateful to be informed whether there is any

[252]

C



G difference in this connection in the position of a ship which has been registered under the Order in Council of 1911 as a Government ship and that of one which has been registered in the name of an individual.

Opinion of the Attorney-General.

I have had the advantage of talking these points over with Mr. Malkin. I deal with them *seriatim* as lettered in the margin:—

A. If the Admiralty requisitions (*i.e.*, permanently requisitions) an enemy merchantman, the ship becomes a "Government ship" within section 80 of "The Merchant Shipping Act, 1906," and can be registered accordingly. If the ship is within Article 2 of Convention VI, the late owner would be entitled (in the absence of arrangement to retransfer) to money compensation in lieu of the ship.

B. After such a requisition, a foreign Court ought to recognize the Government title, and if the ship's papers are in due order would, I think, do so.

C. It seems to me that such a vessel when engaged in commerce is not a "public ship" in the relevant sense, for the twenty-four hours' rule really applies to vessels (whether actually owned by the Government or not) acting with or forming part of naval forces.

D. I therefore think these risks are not so serious as to require this limitation to be insisted on, though, of course, some risk of raising litigations or diplomatic questions would be run. However, if the neutral Court or Government takes the right view, I think the result would be in our favour.

E. "Temporary" requisition certainly raises more difficulty, for it would be impossible to insist that the title had finally and irrevocably passed. Still, the ship, while so requisitioned, would presumably be capable of registration as a British Government ship. But it would be prudent to avoid "temporary" requisition in the case of ships visiting neutral ports.

F. I do not see any real difference between the position when payment has been deposited and when an undertaking satisfactory to the Prize Court is given. The title passes by requisition, not by deposit of payment.

G. I see no real difference, but since the ship's papers would in the latter case show an individual as owner, it might make the position clearer for a neutral tribunal if the Government which requisitions is registered as owner.

JOHN SIMON.

January 16, 1915.

[38118]

No. 3.

[File 16768/1915.]

[March 31, 1915.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, February 19, 1915.

I HAVE the honour, by direction of Secretary Sir E. Grey, to enclose, for your consideration, copies of four notes from the Swiss Minister (Papers (A), (B), (C), and (D)), and a Memorandum from the Italian Ambassador (Paper (E)), relative to the opening in Singapore of letters from Switzerland and Italy in transit, through the local British postal administration, to destinations in neutral territory.

It will be seen that M. Carlin and the Marquis Imperiali question the right of His Majesty's Government to submit to censorship correspondence in transit from and addressed to neutral countries, basing their contention on the Universal Postal Convention, 1906, Article 4, sub-section (1), which provides that "The right of transit is guaranteed throughout the entire territory of the Union." The Italian Ambassador also cites Article 1 of The Hague Convention No. 11, 1907, which declares that, with certain irrelevant exceptions, "The postal correspondence of neutrals or belligerents, whatever its official or private character, found at sea on board a neutral or enemy ship is inviolable."

The question of the rights of censorship possessed by His Majesty's Government,

Censorship of letters passing through British territory from one neutral country to another.

in the circumstances already described, forms the subject matter of a note from the Director of Military Operations (Paper (F)) and of a letter from the Secretary of the War Office (Paper (G)), copies of which are enclosed herewith. You will observe that the Director of Military Operations proposes to submit to censorship neutral correspondence from America of the kind which the Swiss Minister and the Italian Ambassador consider to be immune from interference under the provisions of international Agreements ratified by His Majesty's Government, and that the letter from Sir R. Brade (Paper (G)) contests the meaning placed upon the Article of the Universal Postal Convention cited by the Swiss Minister, and quotes Articles 2 and 16 of the same Convention in support of the views held by the Army Council.

A similar question arose during the Boer War. In pursuance of the Martial Law Regulations which were in force in Cape Colony, the military authorities were in the habit of opening correspondence in transit to German South-West Africa. The German Government objected to the practice, and the question whether it was consistent with the Postal Convention then in force was submitted to the Law Officers. Copies of the note received from the German Ambassador on the 5th March, 1902 (Paper (H)), and a note submitted by the Dutch Minister on the 18th March, 1902 (Paper (I)), which were submitted to the Law Officers, are enclosed herewith. Your predecessors reported on the 31st March, 1902, that letters transmitted under the Convention were liable to examination in the same way as other letters, and that the provisions of the Convention must be regarded as applicable to a state of peace. A copy of the opinion is enclosed for convenience of reference (Paper (J)).

Since that date the Postal Convention of 1906 has replaced the previous Convention, but the provisions relating to this question have not undergone material change.

In view of the opinions now expressed by the Italian Ambassador and the Swiss Minister, and the importance of the principle at stake, Sir E. Grey would be glad if you will take the enclosed papers into consideration and favour him with your opinion whether His Majesty's Government possess the right to submit to censorship correspondence passing in transit between neutral countries through British postal administrations.

Sir E. Grey would also be glad to be favoured with any observations of a general nature which you may be good enough to offer.

I have, &c.

EYRE A. CROWE.

List of Papers.

- (A.) Swiss Minister, January 12, 1915. (File 7018/15.)
- (B.) Swiss Minister, January 28, 1915. (File 7018/15.)
- (C.) Swiss Minister, February 8, 1915. (File 7018/15.)
- (D.) Swiss Minister, February 13, 1915. (File 7018/15.)
- (E.) Italian Embassy (Memorandum), January 30, 1915. (File 7018/15.)
- (F.) Director of Military Operations, January 18, 1915. (File 8184/15.)
- (G.) War Office, February 2, 1915. (File 7018/15.)
- (H.) German Embassy (Memorandum), March 5, 1902.
- (I.) Netherlands Minister, March 18, 1902.
- (J.) Law Officers, March 31, 1902.

Report.

WE are of opinion that His Majesty's Government is justified in censoring letters which in the course of transit from one neutral country to another passed through British territory. We agree with the view expressed by our predecessors on the 31st March, 1902, when reporting on a similar question. It is obvious that a state of war suspends the application of Article 4 (1) of the Universal Postal Convention as between the belligerents themselves, and this shows that it is one of those Agreements which are only intended to operate in their entirety during a state of peace. It would indeed be a ridiculous construction of the Convention to suppose that it bound a belligerent State to make itself the conduit-pipe for communications intended to defeat its own measures of war.

JOHN SIMON.

STANLEY O. BUCKMASTER.

*Law Officers' Department,
March 31, 1915.*



[90700]

No. 3^a.

[Treasury.]

[File 77/15.]

[July 2, 1915.]

Case for the Opinion of the Law Officers of the Crown.

Power of
the Crown
to make
grants out
of Prize
Funds.

AS the Law Officers will observe from the copy minutes herewith,* the question has arisen as to the power of the Crown to make grants out of prize proceeds to meet claims recommended for payment by the Prize Claims Committee, or payments to officers and men of the naval service by way of bounty in lieu of prize money along the lines announced, namely, not as rewards to the actual captors, but as a general bounty to be distributed rateably throughout the service.

The Law Officers are requested to refer generally to the copy minutes and, in particular, to the argument contained in the minute of the solicitor to the Treasury, dated the 26th February, 1915 (see page 4 *et seq.*), which the remarks in this case are intended to some extent to supplement.

It seems that all prize is to be regarded as constituting either droits of the Crown or droits of Admiralty. Such droits of the Crown are in the main those which in former wars have almost without exception been granted to the actual captors by proclamation issued after the declaration of war. The droits of Admiralty constituted the perquisites of the Lord High Admiral, and, since that office has fallen into abeyance, have passed to the Crown in right of the office of Admiralty. No general grant of these rights has ever been made similar to that of droits of the Crown, but it appears to have been the practice of the Crown, out of its bounty, to make grants of a varying proportion of the proceeds of these droits of Admiralty to persons who had been in any way material in securing the property to the Crown, and in the case of the "Belvidere" (1 Dods. 353; 2 E.P.C. 183) Lord Stowell referred to a practice to give to English merchants from the bounty of the Crown the expenses incurred in the outfit of a vessel immediately before seizure. At that time droits of the Crown and droits of the Admiralty formed part of the hereditary revenue passing to the Crown, to be dealt with by the Crown without any material restriction in this respect, but, at any rate, by the Act of 1 Vic., cap. 2, these hereditary revenues were surrendered by the Sovereign, and were to be carried to the Consolidated Fund, and as pointed out in the Solicitor's minute referred to, under section 12, there was reserved to the Crown only the power to grant any droits of Admiralty or droits of the Crown or part or proportion of such droits respectively as a reward or remuneration to any officer or officers or other person or persons seizing or taking the same or giving any information relating thereto.

Although not perhaps as clear as might be, it would seem that the subsequent Civil List Acts of 1 Edward VII, cap. 4 (sections 1 and 9 (2)), and 10 Edward VII and 1 George V, cap. 28 (sections 1 and 9 (2)), have left the position in this respect the same.

During the Crimean War the only grants that were made of prize proceeds were the usual grant to captors of droits of the Crown, and certain limited grants out of the droits of Admiralty to those who had been instrumental in seizing the property, or had given information resulting in the seizure. These cases, therefore, fell expressly within section 12 of the Civil List Act, 1837.

The payments which it is now suggested should be made out of prize proceeds would not appear to fall within the express wording of this section. Payments to mortgagees or necessary men, and payments by way of bounty to the whole of the personnel of the navy can scarcely be regarded as rewards to persons seizing or taking the property or giving information in relation thereto, and the question arises whether prize proceeds to meet such payments can be held back, or whether the proceeds must not pass to the Consolidated Fund pursuant to the Civil List Acts, in which case apparently money to meet the proposed payments will as matters stand have to be voted by Parliament.

Moreover, as regards at any rate the "detained" ships there may be no funds arising from any particular vessel from which claims could be met. These ships were all seized under circumstances in which, if condemned, they would have been "droits of Admiralty"; presumably, therefore, the lesser rights now existing in such vessels are also "droits of Admiralty," and any profits realised from the user of such of these vessels as have been requisitioned also constitute such droits.

* Not printed.

Special grants out of droits of Admiralty or droits of the Crown were, at the time of the Napoleonic wars, effected by means of a warrant to the Registrar of the Admiralty Court signed by three of the Lords of the Treasury and under the Royal Sign Manual, on which an order of the Court was made for payment out to the grantee. A similar procedure was followed after the Crimean War, except that only two Lords signed the warrant (see 12 & 13 Vic., cap. 89).

The Law Officers are requested to advise the Treasury generally on the questions discussed in the minutes and in this case.

Opinion of the Law Officers of the Crown.

1. We think that (a) enemy ships captured by the commissioned vessels of the Crown or driven in by them are droits of the Crown; (b) enemy ships captured in harbour, &c., by other means are droits of Admiralty.

2. The old practice was to treat these droits on an entirely separate footing. Droits of Admiralty were dealt with by the Treasury. The proceeds, subject to rewards to the captors in the nature of salvage, belonged to the King in his office of Admiralty. Droits of the Crown, so far as concerns naval prize, were dealt with by the Admiralty, and the proceeds distributed as prize money.

3. Since 1830, when these rights were surrendered by William IV (1 Will. IV, cap. 25) the rights of the Crown have been limited to those set out in section 12 of that Act, which we think is still in force, having regard to section 12 of the statute 1 Vic., cap. 2, and section 9 (2) of the statutes 1 Edw. VII, cap. 4, and 1 Geo. V, cap. 28.

4. It follows, therefore, that Parliamentary sanction is necessary for any application of the proceeds of such droits which is not warranted by the old practice.

5. We think it is doubtful whether the Crown has a right to distribute the proceeds of naval prize among the officers and crews of the Royal Navy generally, and if the old practice is departed from we think the distribution should be regulated by Act of Parliament.

6. We think that the proceeds of neither of these droits are available, without Parliamentary sanction, to make any *ex gratia* payments, e.g., claims recommended for consideration by the Prize Committee.

EDWARD CARSON.
F. E. SMITH.

Law Officers' Department,
July 2, 1915.

[93396]

No. 3^b.

[Treasury.]

[File 77/1915.]

[July 2, 1915.]

Case for the Opinion of the Law Officers of the Crown.

A TELEGRAM was sent to the Colonial Secretary on the 28th November by the Governor of Hong Kong asking whether any decision had been arrived at as to whether the Prize Court could give costs and damages against the Crown; if not, the sender would be glad to learn the opinion of the Law Officers. The telegram ends: "Telegraph reply with least possible delay.—MAY."

Mr. Secretary Harcourt replied, after consulting the Procurator-General, as follows:—

"Ordinary rule applies prize cases. Crown neither pays nor receives costs. Damages cannot be ordered against Crown, since they could only be awarded in respect of tortious acts.—HARCOURT."

The Procurator-General agreed to this telegram as representing what apparently is the state of the law at this moment. In view, however, of the fact that there has been no judicial decision in regard to the general question, he did not think that the point could be regarded as free from doubt. It is desired now that the Law Officers should consider the question primarily in order that their opinion may be sent to Hong Kong for the guidance of the Governor.

With regard to this difficult question it is unnecessary for the writer of this to cite

Questions
of costs in
Prize cases.



cases or to discuss them, for a full citation, with comments, will be found in Robertson, p. 613 and following. The matter is also dealt with fully in its relation to the Prize Court by Mr. Bentwich in the opinion which accompanies these papers. The matter is not carried any further by the "Miramichi" judgment, except in so far as there was a public assertion by the Attorney-General of the general principle. The President, however, left the matter undecided, merely saying that, if he had power to award costs against the Crown, this was a case in which he should not do so. It would seem that the only difficulty arises from the Prize Court Rules, Order XVIII, Rule 1 of which says that the costs of and incident to all prize proceedings shall, except when otherwise provided by any agreement or by statute, be in the discretion of the Judge. These words are, however, general, and it will be for the Law Officers to consider what their effect is. The Prize Court Rules have statutory authority—see on this section 3 of "The Prize Court Act, 1894," which provides that Her Majesty the Queen in Council may make Rules of Court, and that every Rule so made shall take effect at the time therein mentioned. This would invest the Rules with statutory power, for all the conditions were no doubt fulfilled, they having been authorised by the King in Council on the 5th August, 1914, and the other formalities necessary no doubt complied with.

Will the Law Officers please advise as to what is the position of the Crown in prize cases with regard to costs.

Herewith are sent:—

Transcript of the judgment in the case of the "Miramichi."*
Opinion of Mr. Bentwich on the matter.

Opinion of Mr. Bentwich.

Damages and Costs against the Crown in Prize Cases.

Previously to the Statute 18 & 19 Vict., cap. 90 (Crown Suits Act), the Common Law Courts had no power to condemn the Crown in costs. Under that Statute it has been held that the Crown is only liable to pay costs in suits in which the Attorney-General or the Lord Advocate are parties, and not when the suit is by the King in his office of Admiralty (*The Leda*, 32 L.J., Adm., p. 58). In that case, however, Dr. Lushington pointed out that there was a conflict of authority on the point, the Privy Council having awarded costs against the Crown in an ecclesiastical appeal (*Dyke v. Barton*, 10 Moo. P.C., 458) where the Crown, through the Procurator-General, had made an unsuccessful appeal against a decision of the Prerogative Court, while the Court of Queen's Bench, in *Reg. v. Beadle* (7 E. and B., 492), had held reluctantly that the Statute authorised costs to be given against the Crown only where the party to the action was the Attorney-General or the Lord Advocate. In the later case of *Atkinson v. Queen's Proctor* (L.R., 2 P. and M., 255) it was held that there was no jurisdiction to condemn the Queen's Proctor in the costs of unsuccessful litigation in a probate suit, and this decision may be taken to overrule *Dyke v. Barton*. It may be noted here that when the King's Proctor makes an unsuccessful intervention in a divorce suit he may be ordered to pay costs (*Carter v. Carter*, 1910, p. 51); but the King's Proctor intervenes on behalf of the public and not of the Crown, and a special Statute authorises an order for costs against him. In the case of *The Gauntlet* (L.R., 4 P.C., 185) it was left uncertain by the Court of Appeal whether costs could be awarded against the Crown in the case of an unsuccessful suit following an unjustifiable seizure of a vessel under "The Foreign Enlistment Act, 1870." The Judge of the Admiralty Court (Sir R. Phillimore) had condemned the Crown in costs on deciding that the seizure was not justified, but the question of costs was not apparently argued before him (L.R., 3 A. and E., 381, at p. 394). The question cannot be considered to be definitely settled; and in the most recent case where the right to give costs against the Crown was considered (*Rex v. Johnson*, L.R. 1904, A.C., 810) the Privy Council laid down that in exceptional cases they could mulct the Crown in costs. In the absence of special circumstances, however, showing unreasonable action on the part of the Crown, it is probable that costs would not be awarded in a Prize Court against its representatives. On the other hand, it is clear that costs may be awarded in a Prize Court against the officer of a public ship who has, without sufficient cause, brought in a neutral vessel as prize (see *The Ostsee*, 2 E.P.C., 432, at pp. 451, 454; *The Leucade*, *ibid.*, 473; *The Mentor*,

* Copy of judgment is kept in Foreign Office Library (Confidential, No. 10566*).

1 E.P.C., 96). And in the case of *The Leda* Dr. Lushington pointed out that costs were given by him in the Admiralty Court against an officer of a public ship who was responsible for a collision (*The Swallow*, Sw., 30).

It was suggested, however, in *The Leucade*, at p. 476, that the Prize Court would not award costs against captors except with damages for wrongful seizure; and it may be therefore that in any interlocutory proceeding costs would not be awarded against captors, but would be reserved till the decision on the principal question, when they would be added to the damages by way of restitution.

Where the Crown appears in the Prize Court to apply for condemnation of enemy or neutral property and restitution is ordered, it is submitted that the Crown cannot be directed to pay costs to the successful claimants, even if the seizure is held to have been unjustifiable; but the claimants would be entitled in the Prize Court to apply for the joinder in the action of the actual captors so as to obtain a decree against them. The Crown would doubtless indemnify the captors against any such decree. The general principle that the Crown is not liable for the wrongful acts of its public officers would be applicable to a claim for costs and damages against it (*Tobin v. R.*, 16 C.B., N.S., 310). The fact that there is no reported case of costs and damages being given against the Crown, though not conclusive because of the old practice by which the captors were joined regularly in the suit, is some evidence in favour of the immunity of the Crown; and the analogy of the practice under the Slave Trade Acts, under which a claim for damages for wrongful seizure must be brought against the captor, and not against the Crown by petition of right supports this position (see Robertson, "Civil Proceedings," &c., at p. 520). It appears from Order 5 of the new Prize Court Rules that claimants can obtain an order against the captors for damages and costs where the captors fail to take proceedings in the Prize Court after seizure, or, in other words, where the Crown does not proceed. Although nothing is said explicitly in the Rules, it would seem to follow that where proceedings are taken by the Crown and fail, the claimants would be entitled, as they were under the old practice, to proceed directly against the captors for damages and costs, and it would be no answer for the captors to say that they had not brought the suit against the captured property. The capture was made at their peril, and they were legally liable for the loss caused to the claimants if the property was captured without justification. The Crown may doubtless choose of its grace to pay costs in order to avoid action being taken against the individual captors; but it is submitted that the legal position in prize, as in other Admiralty cases, is that the Crown neither gives nor receives costs (see as to the Crown receiving costs, *The Duke of Sussex*, 1 W. Rob., 274).

N. B.

Opinion of the Law Officers of the Crown.

In our opinion there is no jurisdiction to award costs in prize cases to or against the Crown.

EDWARD CARSON.
F. E. SMITH.

Law Officers' Department,
July 2, 1915.



1916

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. March 1917.

005

CONFIDENTIAL.

(10828.)

LAST COPY.

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1916.



1916

LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked *I^a*, &c.

PRIZE LAW.

(Arranged in order of Date.)

No.		Date.	SUBJECT.	Page.
<i>I^a</i>	Law Officers and Mr. R. A. Wright [Procurator-General]	Feb. 2, 1916	Gold shipments on steamships "Noordam" and "Rotterdam" from United States to Netherlands: question of liability to seizure and to condemnation	1
1	Law Officers ..	Apr. 12,	Status of goods seized by His Majesty's ships and stored, under agreement, in neutral country of destination. Case of steamship "Arkansas" ..	3
<i>I^b</i>	Law Officers and Mr. R. A. Wright [Procurator-General]	26,	Securities: liability to stoppage and detention ..	5
<i>I^c</i>	Law Officers .. [Colonial Office]	May 27,	Status of enemy small craft (tugs, &c.) employed at date of outbreak of war in British Colonial territorial waters	7
<i>I^d</i>	Law Officers .. [Colonial Office]	June 29,	Ditto ditto	9
2	Law Officers ..	July 4,	Cargoes consigned to neutral Government Departments or Commissions: right of His Majesty's Government to require information or guarantee of ultimate destination. Case of steamship "Liguria"	10
<i>2^a</i>	Law Officers and Mr. R. A. Wright [Procurator-General]	July 4,	Certificates and attestations of destruction of securities: liability to stoppage and Prize Court proceedings as within definition of negotiable securities	11
<i>2^b</i>	Law Officers and Mr. R. A. Wright [Procurator-General]	July 26,	Order in Council, March 11, 1915: interpretation of word "enemy." Case of steamship "Constantinos": question of appeal	12

VARIOUS.

(Arranged according to Countries.)

AFRICA.

3	Law Officers ..	Jan. 6, 1916	Enemy vessels on Niger and enemy subjects in Nigeria: conventional rights and rights under international law	16
---	-----------------	--------------	--	----

BULGARIA.

<i>3^a</i>	Law Officers, Mr. Austen-Cartmell, and Mr. Branson [Treasury]	June 9, 1916	Securities in England the property of the King of Bulgaria: liability to confiscation	17
----------------------	--	--------------	---	----

(iii)

GENERAL.

No.		Date.	SUBJECT.	Page.
4	Law Officers ..	Nov. 22, 1915 Jan. 14, 1916	Exclusion from Trinidad of an American citizen of German extraction, Mr. Paul Scheerer, and compulsory liquidation of his business	21
5	Attorney-General Solicitor-General Lord Chancellor	Feb. 8, Feb. 8, Apr. 11,	Mr. L. Ch. d'Arcis: national status in virtue of letters of denization granted to his paternal grandfather. Question of creation of hereditary status of British subject	25
6	Law Officers ..	Apr. 11,	Annexation of Cyprus: classes of persons who thereby acquire British nationality	29
7	Lord Chancellor	June 28	Proclamation of Neutrality—revised British form.	32 A



(iv)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1916.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

ALE—DIA.

A.

"Alexander," 9.
Alma Tadema, Sir L.: letters of denization, 28.
Annexation: effect on Nationality (Cyprus), 29-32.
"Arkansas," steamship, 3-5.
Attorney-General v. Wheeden, 18.

B.

"Belgia," steamship, 13.
Berlin Act: immunities of enemy subjects in Nigeria, 16, 17.
": immunities of enemy vessels on Niger, 16, 17.
Blockade. *See* Cargoes. Claims. Reprisals.
Boissevain and Co., 1.
Brünger, Mr., 16, 17.
Bulgaria (King of): as to confiscation of his securities in England, 17-20.

C.

Cargoes consigned to Neutral Government Departments, &c.: as to guarantee, &c., of ultimate destination, 10, 11.
Cargoes released under Storage Agreements with Shipping Companies: status as Prize, 3-5.
Claims arising from exercise of belligerent rights at sea: His Majesty's Government prefers them to be dealt with in Prize Court, 4, 5.
Colonial Bank v. Eady, 5.
"Commercen," 3.
"Constantinos," steamship, 12-15.
Contraband. *See* Gold. Securities.
Cyprus, Annexation: consequent acquisitions of British Nationality, 29-32.

D.

d'Arcis, L. Ch.: national status, 25-29.
De Geer v. Stone, 26.
Denization, Letter of: inclusion of heirs of grantee, 25-29.
Destination (Ultimate). *See* Cargoes.
"Diana," steamship, 16.

ENE—NOO.

E.

Enemy (definition of word). *See* Reprisals Order.
Enemy business: compulsory liquidation, 21-25.
Enemy sovereign: as to confiscation of his securities, 17-20.
"Eperos," steamship, 12, 14.
"Eretria," steamship, 12, 14.
Expulsion of P. Scheerer. *See* Trinidad.

F.

Fletcher v. Birkenhead Corporation, 13.

G.

Gold consigned to neutrals: as Conditional Contraband, 1-3.
Goldman, Sachs, and Co., 1.

H.

Hague Convention (No. VI of 1907): meaning of "navire de commerce," 7, 8.
Hague Convention (No. XI of 1907): interpretation of article 3, 8-10.

K.

Kocher, P., 21-25.

L.

"Liguria," steamship, 10, 11.

M.

"Michael," 9.
Musgrave v. Chun Teong Toy, 25.

N.

Nationality: Effect of Annexation. *See* Cyprus.
See also Denization.
Naturalisation. *See* Denization.
Netherlands Oversea Trust, 1.
Neutral subject of enemy origin and sympathy: expulsion and dissolution of business, 21-25.
Niger: immunities of enemy vessels under Berlin Act, &c., 16, 17.
Nigeria: immunities of enemy subjects under Berlin Act, &c., 16, 17.
"Noordam," steamship: gold shipments, 1-3.

Neutrality *See* Proclamation of Neutrality

(v)

ORD—SEC.

O.

Order in Council (March 11, 1915). *See* Reprisals Order.

P.

Porter v. Freudenberg, 18.
Powell v. Kempton Park Racecourse Company, 13.
"Prinz Adalbert," steamship, 13.
Prize. *See* Cargoes (released). Reprisals Order. Securities.
Prize Court. *See also* Claims.
" (Alexandria): steamship "Constantinos", question of appeal, 12-15.

Proclamation of Neutrality - British form 32A
R.

R. v. Albany Street Police Superintendent, 26.
Reprisals Decree (French), March 13, 1915, 12.
Reprisals Order (March 11, 1915): interpretation of words "enemy origin" and "enemy," 5, 6, 12-15.
": as affecting securities, 5-7.
": as affecting certificates, &c., of destruction of securities, 11.
Rhine Convention (1868): effect on neutral status of Port of Rotterdam, 3.
Rotterdam, Port of: neutral status, 3.
"Rotterdam," steamship: gold shipments, 1-3.
Rotterdamsche Bank Vereeniging, 1.
"Roumanian," steamship, 18.

S.

Scheerer, P., 21-25.
Scheerer (Paul) and Co., 21-25.
Securities: as Contraband and Prize, 5-7.
": and Reprisals Order, 5-7.

SEC—ZAM.

Securities: Certificates, &c., of Destruction, and the Reprisals Order, 11.

" : Certificates, &c., of Destruction as Prize, 11.

" of King of Bulgaria: question of confiscation, 17-20.

Shipping Companies' Storage Agreements. *See* Cargoes.

"Simba," 9.

Storage Agreements. *See* Cargoes.

Swedish Government Victualling Commission, 10, 11.

T.

Tadema, Sir L. A. *See* Alma Tadema.

Treaty. *See* Berlin Act. Hague Convention No. VI (1907). Hague Convention No. XI (1907). Rhine Convention.

Trinidad: expulsion of P. Scheerer and dissolution of business, 21-25.

U.

United Steamship Company, Copenhagen, 3-5.

V.

Vessels: "merchant ship," definition, 8.

" : "navire de commerce," definition, 8.

" (enemy). *See also* Niger.

" : small craft in British territorial waters; status, 7-10.

W.

Willoughby, Re, 26.

Z.

"Zamora," steamship, 12, 14.



Printed for the use of the Foreign Office. February 1917.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1916.

PRIZE LAW.

[22184]

No. 1^A.

[Procurator-General.]

[File No. 566/16.]

[February 2, 1916.]

Case for the Opinion of the Law Officers and Mr. R. A. Wright.

S.S. "NOORDAM" and S.S. "ROTTERDAM."

THE following documents are sent herewith:—

1. Minutes of the Contraband Committee.
2. Telegrams passing between the parties.
3. Memorandum from the French War Office.
4. Notes from the Netherlands Oversea Trust.
5. Various Memoranda.
6. Memorandum entitled "Case for Prize Court."
7. Copy of Agreement with the N.O.T.
8. Note by Mr. E. Pollock, K.C.

Two shipments of gold from America to Holland in the above vessels have been under consideration for some time past by the Contraband Committee, namely, 500,000 dollars in gold shipped by Boissevain and Co., New York, to Boissevain and Co., Amsterdam, in the steamship "Rotterdam," and 1,000,000 dollars in gold shipped by Goldman, Sachs, and Co., New York, to the Rotterdamsche Bank Vereeniging, of Amsterdam, on the steamship "Noordam."

In accordance with the policy pursued under the agreement with the N.O.T., these shipments were allowed to go forward to Holland, but the N.O.T. have been requested to return them to this country in order that they may both be placed in the Prize Court.

The N.O.T. have raised certain difficulties against complying with the request of His Majesty's Government, partly based on the contention that there is nothing to justify the suspicion that the gold is destined for Germany, and partly on the ground that such cases are not covered by their agreement with His Majesty's Government.

It is thought desirable, therefore, before insisting upon the return of these shipments, to take the opinion of the Law Officers as to whether, on the facts laid before them, there is a reasonable expectation that proceedings against these two consignments in the Prize Court can be prosecuted to a successful conclusion.

Both the shippers are notorious for their co-operation with German banks and German trade. The telegrams submitted show that they have been engaged in the sufficiently well-known enormous sales in America of American securities for German account.



No gold is known to be shipped direct from America to Germany, and the proceeds, therefore, of the sales of such securities would appear necessarily to be intended either for the payment in America of the large surplus over the normal imports into the neutral countries adjacent to Germany—which are obviously intended to find their way to that country—or for shipment to the neutral countries themselves to pay in those countries for the surplus over the home needs of those countries which finds its way to Germany.

In the absence of any definite information as to the true nature of the transaction, there is another consideration which is of importance. There is no doubt that for some time past Holland has been purchasing from America more than she has been exporting to that country, and as the current of trade is flowing from America to Holland, one would have expected the flow of gold to have been from Holland to America, where the credit for carrying out purchases would be required.

On the other hand, it is probable that Germany is purchasing from Holland more than Holland is purchasing from Germany, and it would therefore be an advantage to Germany to have a credit in Holland available for further purchases of goods. There would, therefore, appear to be no reason why, in the prevailing trade conditions, the deposit of gold should be required in Holland to enable the Dutch to make purchases, whereas there is every reason why such a deposit would be of value to the Germans, who require to make purchases in Holland.

There would appear in this case to be no evidence that the gold was intended to be actually forwarded to Germany, but there is good ground for the contention that it was to be utilised in Holland either for the opening of credit for future sales by Holland to Germany or for the payment of debts incurred by past transactions of this sort.

It is to be observed that gold and silver in coin or bullion have been on the conditional contraband list since the 5th August, 1914, and presumably, therefore, the special destination prescribed by articles 33 and 34 of the Declaration of London has to be proved before condemnation can be secured, subject to this qualification that it is not open to an Enemy Department of State, to whom it may be proved to be destined, to show that the gold, in fact, cannot be used for the purpose of the war in progress. It seems hardly probable that the evidence available will be sufficient to establish the actual destination of the gold in Germany, and the most that the Court can reasonably be asked to infer would seem to be that it was intended to be deposited in Holland for German account, and that the credit resulting from it would be at the disposal of persons in Germany, and possibly the German Government.

Assuming that the Court was prepared to draw this inference, it would still remain a legal question whether a decree of condemnation could be made. It would certainly appear to be a novel extension of the doctrine of contraband to ask the Court to decree condemnation of goods of contraband character upon proof of destination in a neutral country for the benefit of the enemies. So far as is known, there is no case which supports this view.

It may be argued that a result of the present mercantile usage is that the important point with regard to bullion is not the actual destination of the bullion itself, but of the credit which that bullion supports. From this it may follow that, in the same way that a bill of lading may form constructive delivery of the merchandise with which it deals, so possession of credit based on bullion may be construed as possession of the bullion on which the credit is based.

The question is one of extreme difficulty, and it is proposed to ask the Law Officers and Mr. Wright to fix a consultation, when the matter can be discussed in greater detail; and it is hoped that Mr. Pollock, K.C., the chairman of the Contraband Committee, will be able to attend and express his views upon the matter, to which he has given considerable attention.

The Law Officers are requested to advise whether there is sufficient expectation that the condemnation of this gold could be obtained in the Prize Court to justify insisting on the return of the gold in view of the position taken up by the N.O.T.

Joint Opinion of the Law Officers of the Crown and Mr. R. A. Wright.

We think that, though the questions of law and fact involved are not free from doubt and difficulty, there is such a *prima facie* ground for proceedings in the Prize Court for condemnation of the gold as to justify its seizure.

The question of law involved is whether it is essential in a claim for condemnation of gold as conditional contraband to prove an actual intention that the gold as a physical object should be carried into Germany. Though the point is not precisely covered by authority, we think that it is not necessary. In our opinion it is enough that the gold is consigned to or for an agent of the German Government. The peculiarity of gold is that it can be used by the German Government as a part of its gold reserve and as a basis of credit without ever reaching German territory. (See the note to article 33 in the General Report on the Declaration of London.) We may refer to the American case of the "Commercen" (1 Wheat, 382), in which cargo destined for the British army was condemned though the port of destination was a neutral port.

We may point out that, by reason of the Rhine Convention of the 17th October, 1868, ratified on the 17th April, 1869, it is arguable that Rotterdam, for purposes of contraband questions, is not strictly a neutral port.

On the question of fact—i.e., whether the gold was destined to the agents of and for the use of the German Government—we think that the intercepted cables, the conditions of business actually done, and the arguments adduced in the Contraband Committee's notes and the French memorandum constitute a sufficient *prima facie* case for initiating proceedings, on the ground that the Dutch banks to which the gold was consigned were in truth agents for the German Government, either directly or through the mediation of the German banks, which are under German Government control and are practically German Government Departments.

It is, of course, impossible for us at this early stage of the evidence (which will require careful and immediate investigation) to say that the above conclusions are certain to be established. We think, however, that the materials before us and the inherent probabilities of the case are such as to justify taking the risks of stopping the gold and putting it into the Prize Court, and we accordingly advise that that course should be adopted.

F. S.
G. C.
R. A. WRIGHT.

Temple,
February 2, 1916.

[73614]

No. 1.

[File 127/1916]

[April 12, 1916.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 14, 1916.

I HAVE the honour, by direction of Secretary Sir Edward Grey, to transmit to you the papers noted in the accompanying list relative to the status of goods which, under arrangements made between His Majesty's Government and certain neutral shipping companies, are stored in the country of destination instead of being returned to this country in order to be made the subject of proceedings in the Prize Court.

The particular case which has brought the question up is that of certain goods *ex* "Arkansas," as to which the American Ambassador has addressed an enquiry to the Secretary of State (Paper A), but the point raised is one which applies equally to all goods treated in this way, and as it is one of considerable importance, Sir Edward Grey would be glad to receive your views as to the position.

A copy of the Agreement with the United Steamship Company of Copenhagen, under which these goods were dealt with (which Agreement takes the form of the record of a conversation with the Managing Director of the Company), is enclosed herewith (Paper B). You will observe that under it in certain cases goods are allowed to proceed to Denmark on the undertaking of the Company that they will be returned to this country in order that they may be placed in the Prize Court; but it is also provided that in order to avoid the necessity of returning such goods they may, in certain cases, be stored in Denmark until the end of the war, instead of being returned to this country. Agreements of a similar nature have been made with several other shipping companies. The goods *ex* "Arkansas" were dealt with under the terms of the Agreement with the United Steamship Company, instructions being given that

Steamship
"Arkansas."
Status of
goods
seized by
His
Majesty's
ships, and
stored,
under
agreement,
in neutral
country of
destination.



they should either be stored or returned to this country, and it appears that the Shipping Company elected to store rather than return them.

In order to enable the Shipping Company to carry out their obligations under this Agreement, a special clause is inserted in their bills of lading which will be found set out in Paper C. It will be noticed that the provisions of this clause only apply "in case of seizure of the within goods by belligerent nations."

The points which now arise will be found fully described in the minutes, a copy of which is enclosed herewith (Paper C). The important point is whether it is necessary or advisable in these cases that proceedings should be instituted by the Crown in the Prize Court here, in spite of the fact that the goods are stored in the country of destination.

The present enquiry of the United States Ambassador is merely as to the status of goods at present detained in Denmark, but if the facts are explained to his Excellency, a further note will probably be received in due course, in which the propriety of the action of His Majesty's Government will be questioned, and in which it is by no means impossible that a claim for compensation will be put forward on behalf of the shipper of the goods.

It has for some time past been the policy of His Majesty's Government to try and secure that claims for compensation arising out of the exercise of belligerent rights at sea should be dealt with in the Prize Court, and not through the diplomatic channel. If the direction of the Shipping Company to store the goods should be regarded as an exercise of belligerent rights from which a claim for compensation might arise, it would presumably be open to the claimant to initiate proceedings in the Prize Court claiming such compensation irrespective of the locality of the goods detained.

I am therefore to request that you will take the papers enclosed herewith into your consideration, and favour Sir Edward Grey at your earliest convenience with your opinion:—

1. Whether an agreement of the nature described between His Majesty's Government and a shipping company, coupled with a provision in the company's bills of lading enabling them to carry out their obligations under the Agreement, constitute a sufficient answer in cases where the goods are stored in the country of destination, to any representations by a foreign Power that the case ought to be brought before the Prize Court.

2. Whether the institution of prize proceedings in such cases would place His Majesty's Government in a stronger position in the event of claims for compensation being put forward on behalf of the shippers of such goods by any foreign Power.

3. If you are of opinion that prize proceedings should be instituted in these cases, whether it would be possible or desirable to institute proceedings in this country while the goods remain stored in the country of destination.

4. Whether, in that case, it would be necessary to ascertain that any order which the Court might make in respect of such goods could be enforced.

5. Whether any modification (if possible) is desirable in the terms of the clause in the bills of lading at present employed by the United Shipping Company, and if so, what the terms of such amendment should be.

Sir Edward Grey would also be glad to be furnished with any observations of a general character which you may be good enough to offer upon the papers now submitted to you.

I have, &c.
MAURICE DE BUNSEN.

List of Papers.

- (A.) Note from the American Ambassador, February 16, 1916, with enclosure.
- (B.) Copy of Agreement of May 20, 1915, between His Majesty's Government and the United Shipping Company.
- (C.) Copy of Minutes by the Contraband Committee, Mr. Malkin, Mr. Hurst, Sir Eyre Crowe, and Lord Robert Cecil on Paper 31312.

Report.

1. We answer this question in the affirmative. The Shipping Company, being aware of all the circumstances, preferred the advantages of the Agreement of the 20th May, 1915, to a decision in the Prize Court. They relinquished by their

Agreement their right to demand that the goods seized should be brought before the Court (paragraphs 1 and 2). The shippers equally agreed (see the clause stamped upon the bill of lading) that as between themselves and the shipowners the shipowners should be entitled to carry out their Agreement of the 20th May with the British authorities. That is to say, the shippers, equally with the shipowners, waived with full knowledge of the facts whatever right they may have possessed that the goods should be dealt with in Prize. The true view probably is that the goods have been conditionally released in conformity with an agreement to which all concerned assented, and which came into operation upon the happening of the contingency contemplated.

2. No; we do not think that His Majesty's Government are in any event called upon to institute prize proceedings.

3 and 4. Do not arise.

5. No modification in the terms of the clause of the bill of lading is desirable during the pendency of this controversy; but, if and when it is adjusted, we think that the condition should be made applicable not only to cases of actual seizure, but also to cases of threatened seizure of goods.

6. Generally. If the American Government is not satisfied with a reply based upon the considerations suggested in our first answer, the British Government may (should they deem it politic) reply that if the shippers consider that they have any cause of complaint against His Majesty's Government they are at liberty to claim in the Prize Court, and that the Government will grant facilities for the hearing of such a claim.

The institution of such proceedings would admit the jurisdiction in spite of the situation of the goods. But the matter is one of policy rather than of law, and we express no further opinion upon it.

FREDERICK SMITH.
GEO. CAVE.

Law Officers' Department, April 12, 1916.

No. 1^B.

[Procurator General.]

[File 95640/1916]

[April 26, 1916.]

Opinion of the Law Officers of the Crown and Mr. R. A. Wright.

NEGOTIABLE securities have been declared absolute contraband; The Hague Convention on Land Warfare (No. 4 of 1907) recognises by article 53 that realisable securities if property of the enemy State may be the subject of seizure on land. We therefore think that negotiable securities may in proper cases be the subject of prize and hence may reasonably be treated as coming within the scope of the Reprisals Order of the 11th March, 1915, though it is obviously a question of some doubt and difficulty whether they are within its precise terms.

Registered securities are not negotiable (*Colonial Bank v. Eady*, 15 A.C., 267), and may stand on a different footing. In any case, however, we think there is reasonable ground for the view that the pieces of paper which constitute or embody the negotiable or registered security may be within the terms "goods" or "commodities" under the Reprisals Order, and may accordingly be seized and detained. The above points are obviously novel, and it is impossible to advise on them with certainty.

What effect the seizure and detention will have on the *chose in action* as contrasted with the paper is a matter of some doubt and difficulty; but we understand that it is not intended to sell the securities but merely to detain them.

We have considered the list of classes of securities submitted to us, a copy of which is annexed, and are of opinion that in each case there is some *prima facie* evidence or case of suspicion such as to render it possible to allege that the seizure was not without reasonable and probable cause. Whether any particular securities will be condemned must obviously depend on the facts of the particular case.

Some questions of considerable difficulty will arise on the meaning of the words "enemy origin" in the Reprisals Order; we think it can fairly be contended that securities come within that term if they bear on their face (as by enemy rubber or revenue stamps) proof of enemy ownership since the Reprisals Order was issued. We also think there is good reason to consider that securities which came from



PRIZE LAW.

Germany in order to be shipped for realisation in America and which only passed through Dutch banks on their way to America and for purposes of transit fall within the Reprisals Order, even though the Dutch banker and shipper became the legal owner of the securities.

The above questions are of great importance in view of the probability that the Dutch and other neutral claimants will adduce contracts to establish that they became actual purchasers of the securities and dealt in them as speculators, and not as brokers for German owners.

It will be desirable at as early a date as possible to obtain evidence as to the conditions and extent of the shipment of securities of probable German origin to America, and to compare those conditions and extent with what prevailed in normal and pre-war times.

It is obvious that the various classes in the attached lists involve very varying degrees of suspicion, but while we must point out that the questions connected with the stoppage and detention of securities necessarily involve great difficulties from the view of Prize Court proceedings both of fact and of law, we think that the *prima facie* evidence set out in the lists may fairly be acted upon in carrying out the policy of stopping and detaining securities.

FREDERICK SMITH.
GEO. CAVE.
R. A. WRIGHT.

Law Officers' Department,
April 26, 1916.

Annex.

PRIZE COURT.

Primâ facie Evidence regarding Securities from Mails taken from Neutral Ships.

("Enemy" includes Belgian and Neutral Subject in Enemy Country.)

Parcels containing securities from enemies or neutrals:—

(a.) Bearing out or inside:—

1. Enemy seals.
2. Enemy stamps (postage or rubber).

(b.) Alluded to in:—

1. Enemy letters or bordereaux.
2. Neutral letters or bordereaux on account of enemies.

(c.) Containing securities:—

1. In enemy names.
2. With enemy revenue stamps.
3. With enemy rubber stamps (dividend or other).
4. With numbers of enemy issue of loan.

(d.) Addressed by enemy or neutral to enemy banks in neutral country.

(e.) Containing no covering letter indicating neutral sender (mere outside stamp or seal not sufficient).

(f.) Mixed parcels (*i.e.*, part enemy as above and part doubtful).

(g.) Parcels to or from suspect neutral subject to list from T.C.H.

(h.) Parcels from Switzerland "via Holland"—presumably to escape French censorship, and to avoid giving the declaration necessary to secure immunity from seizure by French authorities.

PRIZE LAW.

Note by the Trade Clearing House on the Censorship and Seizure of Securities.

The banks in the United States of America who are the largest buyers of enemy-owned securities are those who are also the largest buyers of neutral—and for that matter British and French—owned securities, and consignment to such banks therefore raises little or no presumption of enemy origin.

Apart from these, I think I would detain and prize-court on suspicion all securities addressed to:—

Amsinck and Co.
Hallgarten.
Kuhn, Loeb.
Banco Alemán.
Deutsche Sulomen Kanische.
Banco Holandés.
Knauth, Nachod, and Kuhne, New York.
Lippmann, Rosenthal, and Co., New York.
Zimmermann and Forshay, New York.
Speyer and Co., New York.
Goldman, Sachs, and Co., New York.
Boissevain and Co., New York.
Hugo Schmidt, New York, who is resident director of Deutsche Bank.
Heidelbach, Ickleheimer, and Co., New York.
E. Tornqvist and Co., Buenos Aires.
Texeira de Mattos, Amsterdam.
Lippmann, Rosenthal, and Co., Rotterdam.
Boissevain and Co., Amsterdam.
Rotterdamsche Bank.
Amsterdamsche Bank.
Incasso Bank of Amsterdam.
Hirsch, Lilienthal, and Co., New York.
Louis Korijn, Amsterdam.

[204222]

No. 1^c.

[Colonial Office.]

[File 121/1916.]

[May 27, 1916.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, April 19, 1916.

I AM directed by Mr. Secretary Bonar Law to request that you will favour him with your opinion on certain points which have arisen in connection with certain tugs, lighters, and other small craft belonging to persons of enemy nationality and employed by them at the outbreak of war in the territorial waters of various British colonies and protectorates. A list of these vessels is given in the enclosed statement, which must not, however, be taken as complete.

2. So far as Mr. Bonar Law is aware, these vessels are in no case registered as British ships, nor do they fly any flag, and, with the possible exception of some of the vessels at Hong Kong, it would seem that the owners must in all cases be regarded as having their commercial domicile in enemy territory.

3. Mr. Bonar Law is advised that such of these vessels as belong to owners commercially domiciled in enemy territory or to enemy subjects domiciled in China, Siam, or any other country in which their State possesses extra-territorial rights could properly be made the subject of prize proceedings. The question arises, however, whether the vessels must be held entitled to the benefit of The Hague Convention No. VI of 1907. It may with much probability be assumed that they were in all cases actually in British ports at the outbreak of war, and it may also be assumed that for some considerable time after the outbreak of war no steps were taken to prevent them leaving British waters had they wished to do so.

4. If the vessels must be held entitled to the benefit of The Hague Convention No. VI, Mr. Bonar Law is unwilling to cause prize proceedings to be instituted, for

* Not printed.

Status of enemy small craft in British territorial waters at the outbreak of war.



1916

the reason that in the cases of all these vessels the local branch of the owning firm or company has been, or is being, liquidated by the local Government under special legislation. Some of the vessels in question have actually been sold in these liquidations, and all could be so sold, the proceeds of the sale being used for the payment of non-enemy creditors of the liquidated firms or, in the case of a surplus of assets, being held by the Government pending the conclusion of hostilities. If these vessels must be held entitled to the benefit of The Hague Convention, Mr. Bonar Law would prefer that prize proceedings should not be instituted against them, but that they should be treated as part of the assets of the local establishments of the owning firms.

5. In this connection I am to enclose, for your information, a copy of an opinion* of Mr. Pearce Higgins on the position of vessels of this kind under The Hague Convention No. VI of 1907.

6. If it is considered that these vessels are liable to condemnation by the Prize Court, the further question arises whether the proceeds of sale of such of them as have in fact already been sold by the liquidators of the enemy firms to which they belonged would be liable to condemnation by the Prize Court.

7. I am, therefore, to request that you will take the accompanying papers into your consideration and advise—

- (1.) Whether in your opinion the vessels now in question are or are not entitled to the benefit of The Hague Convention No. VI of 1907, assuming that they were in all cases found in British ports at the outbreak of war; and
- (2.) Whether your answer to question (1) would be affected, and, if so, in what manner, should it prove to be the case (a) that no steps were taken to prevent these vessels leaving enemy territory for some weeks after the outbreak of war, or (b) that steps were taken to prevent them leaving British territory immediately on the outbreak of war.
- (3.) If your answer to (1) is in the negative, whether, in a case where a vessel which has been sold by the official liquidator of the owning firm or company would have been liable to condemnation by a Prize Court, the proceeds of sale of that vessel are liable to condemnation; and
- (4.) If your answer to (3) is in the affirmative, whether any, and what, action by way of transferring the proceeds of sale to the account of the Marshal of the Prize Court or otherwise would be necessary before prize proceedings could properly be instituted against the proceeds of sale.

I am, &c.
G. GRINDLE.

Report.

1. We do not, on the whole, think that these small craft fall within The Hague Convention No. VI of 1907. The French word "navire," standing alone, would appear to denote a sea-going vessel, and the expression "navire de commerce" used in the Convention is more appropriate to sea-going vessels carrying merchandise from one port to another than to tugs and lighters employed at a particular port.

The English term "merchant ship" is also unsuitable to these small craft. The definition of "ship" in the Merchant Shipping Acts does not appear to us to affect the matter.

3. We are disposed to think that the craft in question were exempt from capture under article 3 of Convention No. XI of 1907 as "small boats employed in local trade." If so, some of them have been properly dealt with as assets of the enemy firm to which they belonged, and neither the proceeds of boats sold nor the boats which remain are liable to condemnation.

2 and 4. Upon the above view these questions do not arise.

FREDERICK SMITH.
GEO. CAVE.

Law Officers' Department, May 27, 1916.

* Not printed.

[204222]

No. 1^p.

[Colonial Office.]

[File 121/1916]

[June 29, 1916.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, June 7, 1916.

WITH reference to your report of the 27th May, relative to the status of enemy small craft in the territorial waters of British Colonies and Protectorates, I am directed by Mr. Secretary Bonar Law to say that he would be obliged if you could furnish him with a further exposition of your views with regard to the application to these vessels of Article 3 of Hague Convention No. XI of 1907.

Status of
enemy
small craft
in British
territorial
waters at
the out-
break of
war.

2. The Secretary of State had already had occasion to consider this question in connection with a steam launch and three lighters, the property of the Hamburg-Amerika Steamship Company, which were seized in Jamaica on the outbreak of war. He was advised that these vessels, since they belonged to a large shipping company which employed them in connection with its business in the Colony, could not be held to be "exclusivement affectés à des services de petite navigation locale" within the meaning of the Third Article of the Convention; moreover, he was advised that it was doubtful whether that Article of the Convention could be held to apply to vessels employed within the jurisdiction of the capturing belligerent. Further support for these conclusions was derived from the decision of the Prize Court at Zanzibar in the case of the lighter "Simba," a printed report of which is enclosed for your information, and from the Japanese cases of the "Michael" and the "Alexander" to which reference was made by Sir Samuel Evans in his judgment in the case of the sailing vessel "Berlin."

3. Having regard, however, to the views expressed in paragraph 3 of your report under reference, Mr. Bonar Law is now in some doubt how far the conclusions referred to in the preceding paragraph can be regarded as valid, and, if so regarded, how far they are applicable to the various vessels particulars of which were given in the statement enclosed in the letter from this Department of the 19th April. In this connection I am to inform you that, of the firms referred to in the said statement, all except the Woermann Linie and the Hamburg-Amerika Linie (which are, of course, large shipping companies) are mercantile firms of varying importance carrying on import and export businesses from the territory in which they are established. Mr. Bonar Law assumes that the lighters alleged to belong to these mercantile firms were used by them for loading and unloading from ocean steamers cargoes in which they were interested, and that the various launches and other small craft owned by them were employed directly or indirectly in the same service.

4. Mr. Bonar Law would be obliged if you would take the preceding paragraphs of this letter into consideration, and would advise him (a) whether, assuming the facts to be as stated in paragraph 3 and in the enclosure to the Colonial Office letter of the 19th April, you consider that any and which of the vessels referred to in the last-mentioned document must be regarded as exempt from capture under Article 3 of Hague Convention No. XI of 1907; and (b) generally as to the principles to be applied in the interpretation of the said Article.

I am, &c.
G. GRINDLE.

Report.

We have reconsidered our answer to question 3 in the reference of the 19th April, 1916.

There is no doubt a good deal to be said for the view that Article 3 of Convention XI of 1907 is confined to vessels engaged in small coastal voyages, and that tugs, lighters, &c., which are used in connection with ocean-going vessels, are neither within the protection of that Article nor entitled to the exemption which is given in practice to enemy property on land. Accordingly, while the question is not free from doubt, we think (on further reflection) that such of these vessels as belong to owners commercially domiciled in enemy territory may be made the subject of prize proceedings with a reasonable prospect of success.

The above conclusion seems to apply to all the vessels mentioned in the statement enclosed in the letter of the 19th April, 1916, though some of them may not be worth

[318]

D



1916

10

PRIZE LAW.

seizing as prize. The conclusion, however, does not apply to the proceeds of sale of vessels which have been sold by liquidators. The right of capture may be waived, and if a vessel has been lawfully sold before seizure there is no right to seize as prize the proceeds of sale.

FREDERICK SMITH.
GEO. CAVE.

Law Officers' Department.
June 29, 1916.

[131254]

No. 2.

[File 26701/16.]

[July 4, 1916.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, June 21, 1916.

Cargoes
consigned to
neutral
Government
Depart-
ments or
Commis-
sions:
Particulars
or
Guarantee
of ultimate
destination.
Case of
steamship
"Liguria."

I HAVE the honour, by direction of Lord Robert Cecil, to request that you will take into consideration the accompanying copies of correspondence with the Swedish Minister and with His Majesty's Ambassador in Paris, as shown in the annexed Schedule, relative to the claim of the Swedish Government that His Majesty's Government have no right to be informed of the names of the intended recipients of goods imported by that (the Swedish) Government or by a Government Commission, and admittedly destined for distribution among private persons, or to receive any guarantees that such goods will not be re-exported to an enemy country in any form.

In a telegram (Marked A) of the 13th May, His Majesty's Customs at Stornoway, reported that the Swedish steamship "Liguria" was detained at that port with a cargo of cotton-seed oil, oleo stock, oleo oil, and lard, consigned to the Royal Swedish Government Victualling Commission. In a note of the 27th May (Marked B), the Swedish Minister was requested to furnish His Majesty's Government either with precise information as to the real destination and consignees of the consignments on board this vessel, or with a guarantee that the goods would not be re-exported from Sweden in any form. In his reply of the 2nd June (Marked C), Count Wrangel stated that the Swedish Government did not consider themselves bound either to give the names of persons for whom the goods were ultimately destined, or to give any guarantee beyond what lay in the fact itself, that import would take place under the control of the Commission, who, it was stated, take precautions to see that goods imported through them are exclusively consumed in Sweden. In a further note to the Swedish Minister (Marked D), Lord Robert Cecil gave at some length the reasons for which His Majesty's Government considered themselves entitled to insist on receiving either the information or the guarantees for which they had asked. A statement of what is known of the constitution and functions of the Swedish Victualling Commission, as well as of the reasons of policy on which the action of the Foreign Office is based, are explained in a despatch to His Majesty's Ambassador in Paris, dated the 21st June (Marked E).

Lord Robert Cecil is impressed with the difficulty which may arise in carrying out the present policy of His Majesty's Government of intercepting all commerce on its way to or from the enemy country, if the Governments of neutral countries adjacent to the enemy adopt the practice of importing goods themselves which are really intended for private parties, and I am to request that you will be good enough to favour him with your opinion generally as to the best line to adopt in meeting any complaints put forward by or on behalf of such neutral Governments if goods so consigned are detained for Prize Court proceedings. In particular he would be glad to receive your opinion whether consignments to a Government Department, or Commission, or other Government institution which does not itself intend to use the goods can be treated (a) as exposing the vessel to condemnation on the ground that it renders the papers false, or (b) as throwing on the claimant the onus of proving the absence of hostile destination, because the ship's papers fail to show the real consignee of the goods, or (c) as justifying the detention of the ship on the grounds that the papers conceal, or fail to provide, information which the belligerent is entitled to look to the ship's papers to provide, and to detain the ship until it is provided.

I have, &c.

EYRE A. CROWE.

PRIZE LAW.

11

List of Papers.

- (A.) Telegram from Customs, Stornoway, May 13, 1916.
- (B.) Sir E. Grey to Swedish Minister, May 27, 1916.
- (C.) Swedish Minister to Sir E. Grey, June 2, 1916.
- (D.) Sir E. Grey to Swedish Minister, June 17, 1916.
- (E.) Sir E. Grey to Lord Bertie, June 21, 1916.

Report.

1. In our opinion no neutral Government is entitled to extend its protection over its own commerce in such a way as to defeat belligerent rights. The Victualling Commission is not engaged in supplying the Swedish Government, and cannot rely upon its position as a Government Department to enable private merchants to escape from the belligerent rights of this country. The objection is in principle the objection which prevailed against the claim formerly put forward by neutral Governments to protect the ships of their nationals from visit and search by the convoy of public vessels.

2.—(a.) Unless the Commission is a mere cloak to cover the operations of the real importer the papers are not false.

(b.) The onus would be on the claimants.

(c.) Detention cannot be justified except during the pendency of Prize Court proceedings, or for the purpose of reasonable preliminary enquiries. Information having now been definitely refused, we do not think that further detention without Prize Court proceedings could be justified. As the onus is upon the claimants, the Prize Court would make the appropriate Order unless the claimants discharged that onus. It would depend upon the facts of each case whether the Order would be confiscation or detention and sale under the Retaliatory Order.

FREDERICK SMITH.
GEO. CAVE.

Law Officers' Department,
July 4, 1916.

[130952]

No. 2^d.

[Procurator-General.]

[File 1030/16.]

[July 4, 1916.]

Opinion of the Law Officers of the Crown and Mr. R. A. Wright.

WE think that the certificates and attestations as to the destruction of securities should be stopped and brought into the Prize Court as coming within the definition of negotiable securities.

It may be that this course involves some straining of the language of the Contraband Order, but on the other hand the case is one of a flagrant attempt to evade the contraband policy of the British Government in regard to the transmission of enemy securities. The certificates in question are simply substitutes for negotiable securities, and may on that ground be treated in Prize in the same way as the negotiable securities which they represent for purposes of the sea voyage. Further, the certificates are in fact documents capable of being realised in the sense, not perhaps of being directly turned into money, but of being turned into the paper equivalent of money, and so may be treated in the Prize Courts as realisable securities. They have, in fact, a distinct resemblance to share warrants to bearer, which can be converted into registered securities.

We recognise that the question raised is not free from doubt and difficulty, but, for the reasons stated above, we think these documents should be seized and treated either under the Order in Council of the 11th March, 1915, or as contraband, at all events until it be held (if it ever is) by the Prize Court or Privy Council that they do not come within the Order or the Contraband declaration.

FREDERICK SMITH.
GEO. CAVE.
R. A. WRIGHT.

Law Officers' Department,
July 4, 1916.

Naval Prize:
Certificates
and Attestations
as to the destruc-
tion of
Securities.



[148574]

No. 2^B.

[Procurator-General.]

[File No. 1821/16.]

[July 26, 1916.]

Case for the Opinion of the Law Officers of the Crown and Counsel.

On appeal to His Majesty's Privy Council from the Supreme Court of Egypt,
sitting at Alexandria.

S.S. "Constantinos."

HEREWITH are sent:—

1. Print of the Judgment of the President of the Alexandrian Court in the case of the steamship "Constantinos," 16th March, 1916.
2. Print of the Judgment of the Privy Council in the matter of part cargo *ex* steamship "Zamora," 7th April, 1916.
3. Reports of the cases of the steamship "Eperos" and the steamship "Eretria" before the Prize Court at Malta.
4. Memorandum containing the retaliatory Order issued by the French Government against Germany, dated the 13th March, 1915.

Interpreta-
tion of
word
"enemy" in
articles 3,
4, and 6 of
Order in
Council of
March 11,
1915.
Case of
S.S. "Con-
stantinos":
question of
appeal.

The opinion of the Law Officers of the Crown and Counsel is desired with regard to the advisability of prosecuting the appeal which is now pending from the decision of Cator P. in the case of the steamship "Constantinos," which involves the question whether the Order in Council of the 11th March, 1915, is applicable to German trade only, or to the trade of the Allies of Germany as well.

The facts of the particular case under appeal are as follows:—

The steamship "Constantinos" (a Greek steamer carrying a cargo of rice and other foodstuffs) was on a voyage from a Greek port to Smyrna. She was intercepted and brought into Mudros for examination, and she and her cargo seized as prize. The main ground of appeal which has been alleged, and on which it is proposed to rely, is that her cargo is liable to detention under the Order in Council of the 11th March, 1915, by reason of her carrying goods with an enemy destination. The President, as will be seen from the report of the Judgment which is sent herewith, held that the Order in Council applies to reprisals to be taken against Germany alone; that the word "enemy," as used in article 3, refers only to Germany, and that a decree under the Order in Council could therefore not be made.

Attention is called to the terms of the Order in Council of the 11th March, 1915, which was published in the issue of the "London Gazette" of the 16th March, 1915, and may be found in the third supplement to the "Manual of Emergency Legislation," p. 513 (where a title is added, namely, "Reprisals Restricting German Commerce," "Order in Council framing reprisals for restricting further the commerce of Germany.")

The Order begins with a recital that a case for reprisals has arisen against Germany by reason of her disregard of international law and the laws of humanity. Following on the recitals, four cases are set out in which vessels may be detained and their cargoes discharged. The first two cases deal with commerce to and from a German port; the third and fourth cases, however, refer to vessels carrying goods with an enemy destination, or which are enemy property or of enemy origin. It is upon the construction which should be applied to the adjective "enemy" as used in articles 3 and 4 that the opinion of the Law Officers and Counsel is desired.

The Foreign Office have pronounced that the object with which the word "German" was used in the first two articles and the terms "enemy destination," &c., in articles 3 and 4 was, because, at the time of the preparation of the Order, His Majesty's Government had decided to cut off all direct trade to and from Germany, but to what extent they had decided to go beyond that, was uncertain.

It is to be noted that the corresponding French Decree of the 13th March, 1915, a copy of which is sent herewith, is limited in terms to *German* commerce.

The question whether the word "enemy" refers to the allies of Germany as well as to Germany herself is primarily one of construction, though a further matter may have to be considered, namely, how far the judgment of the Privy Council in the case of the steamship "Zamora" would permit of any but a strict construction being placed on the word for the purpose of preserving the validity of the Order in Council as a whole.

First then, with regard to the point of construction. It may be convenient if some of the arguments are noted for the two contrary contentions which may be urged.

(a.) In favour of the view that the word "enemy" refers to Germany alone, reference may in the first place be made to the reasons put forward by Cator P., in his judgment in the case of the steamship "Constantinos." In addition to these arguments it may be contended that the preamble may, and in case of ambiguity should, be looked at to ascertain the meaning of the operative part of the Order (cf. in the case of the construction of an Act of Parliament, *Powell v. Kempton Park Racecourse Company*, 1899 A.C., at pp. 185 and 193, *Fletcher v. Birkenhead Corporation*, 1907, 1 K.B., at p. 218). A preamble is an integral part of a statute, and may afford useful light as to what the statute intends to reach—"a key to open the meaning of the makers of the Act, and the mischief it was intended to remedy," 4 Coke Inst. 330. The recitals to the Order in Council clearly set out as its foundation a case for retaliatory measures against Germany. In the third recital the word "enemy" obviously refers to Germany alone. It may be observed that Evans P. has referred to the preambles of The Hague Conventions in construing the meaning of their provisions. Thus, in the case of the steamship "Belgia" (British and Colonial Prize Cases, vol. i, at p. 307) he referred to the preamble to the Sixth Convention; as he also did in the case of the steamship "Prinz Adalbert," 1916, P., at p. 87, where he condemned a German ship which was in a British port on the outbreak of war, on the ground that the master was not using the port as contemplated in the preamble to the Convention, though the vessel was, strictly speaking, within the protection literally given by the terms of the first article of the Convention.

So far as can be gathered from the terms of the Order in Council itself, Great Britain has no enemy other than Germany, and no reference is to be found anywhere to Germany's Allies, though the Allies of Great Britain are named. The last recital names Germany as the country which commodities are to be prevented from reaching and leaving. In view of the sole reference to Germany in the recitals and in the first two articles of the Order, it is contended that when one comes to articles 3 and 4 the adjective "enemy" can be no more than a synonym for "German." Article 3, in particular, is an application of the doctrine of continuous voyage, or continuous transport, of goods of a non-contraband character, and should therefore be regarded as aimed at goods with a German destination and goods which are German property only. Moreover, the last article appears strictly to limit the application of the measures to be taken to Germany, for it provides that "nothing in this Order shall prevent the relaxation of the provisions of this Order in respect of the merchant vessels of any country which declares that no commerce intended for or originating in *Germany* or belonging to *German* subjects shall enjoy the protection of its flag."

The case of Bulgaria, too, requires consideration. Bulgaria did not enter the war on the side of the enemy until seven months after the issue of the Order in Council; and it is thus difficult to contend that the intention was to include this Power among those against whom the Order was directed.

(b.) On the other hand the following points may be urged against the narrow view that the word "enemy" refers only to Germany. Too much weight it may be contended should not be given to the Recitals, and the natural and ordinary construction should be given to the word "enemy." It is not unreasonable to find the word "German" in the Recitals, as it was notorious that the German Government in fact controlled its allies and the military operations in Europe and Asia. It was also notorious that, owing to her geographical position, foreign supplies of goods—whether for herself or her allies—would come mainly through Scandinavian and Baltic ports. Accordingly the phrase "German ports" is specifically mentioned in the first two articles of the Order. An exception to the detention of the commerce to be stopped is expressly made in favour of neutral property; that is to say, not merely no *German* property but no *enemy* property (that is, Austrian, Ottoman, or Bulgarian) can go forward. The distinction here is implicit between "neutral" and "enemy." In article 3 the phrase "enemy property" is found: the very phrase which was necessarily implied in article 2. Nothing but "enemy property" is stopped: here, again, the distinction is implicit between "neutral" and "enemy." In article 4, both expressions "enemy property" and "neutral property" are found, and the distinction which was implicit in articles 2 and 3 is now explicit. "Neutral" property is exempted: "enemy" property is not. Austrian, Turkish, or Bulgarian



property is not neutral, and so is not exempted. In article 6 there is again found the explicit antithesis between "neutral" and "enemy"—which is the ordinary antithesis in international law.

Moreover, as the Order in Council treats only of enemy goods and neutral goods, no provision is to be found affecting Austrian or other enemy goods, should the narrower construction be adopted. Unless, therefore, it is possible to invent a third category, viz., goods which are not dealt with by the Order in Council at all, Austrian, Turkish, and Bulgarian goods, and goods destined for those countries must go free.

With regard to the difficulty of reading the word "enemy" as including Bulgaria, there is no greater objection to the use of the word as connoting those who shall adhere, than there is to its connoting those who have adhered, to the main unit of the hostile combination.

In addition to the above arguments, it appears material to consider to what extent, if any, the question of the true construction to be placed upon the Order in Council is affected by the judgment of the Privy Council in the case of the steamship "Zamora." A print of the Judgment in that case is sent herewith, and a report of it will be found in 32 "Times" L.R. at p. 436.

It may be suggested that the effect of this decision is that in so far as the Order in Council prescribes a legitimate method of reprisals against an enemy it is valid by international law; while in so far as those methods cannot be said to be reasonably taken in retaliation against an enemy it cannot be supported.

In considering the present question it is submitted that discrimination may have to be made between German commerce and the commerce of Austria-Hungary, Turkey, and Bulgaria; that the judgment of the Judicial Committee, in laying stress on the Recitals to the Order in Council, points the necessity of having full regard to the Recitals in construing the meaning to be placed on the operative part of the Order, and that in so far as the Order may only be valid as a retaliatory measure, it affects no enemy other than that particular nation, against whom the right to take reprisals is declared to exist. Considerable difficulty may be felt in contending that measures can be taken against (A) for the illegal acts of (B). But on the other hand, the Central Powers are so closely connected and inter-organised in the conduct of the war, in the maintenance of their commercial enterprises and the support of their non-combatant population, that in addition to being largely ineffectual it would be impracticable to retaliate against one Power only.

In the case of the steamship "Eperos," a print of which is sent herewith, the Judge of the Prize Court sitting at Malta held that goods carried on a Greek steamer bound for Salonika were intended for the enemy, and therefore the case fell within article 3 of the Order in Council. The point, however, as to whether Turkey was an "enemy" within the meaning of the Order was not raised or argued, and the decision cannot therefore be considered as carrying much weight.

In the case of the steamship "Eretria" the same Court had a similar point before it, when the question was raised and argued; but no actual decision upon the point appears to have been given, as the orders which were made in the case appear to have been rather in the nature of consent orders than otherwise.

The argument to be adduced on the present appeal (the steamship "Constantinos") will be primarily with reference to the true construction to be placed upon the Order in Council. If the Order in Council be construed as affecting German commerce only, the question of the validity of the Order would not come in question. On the other hand if the word "enemy" be construed as including Turkey, then it is conceived there would be involved the determination by the Privy Council of the general question whether the Order in Council as a whole is valid. On the hearing of this appeal it may be difficult to detach the general question of validity from the narrow point of construction; and in this connection the Foreign Office have intimated that if the presentation of the appeal involves opening up this general question it should be considered whether the enforcement of the Order in Council in respect of Turkey is of sufficient importance to justify the incurring of the risk of a decision by the Privy Council that the Order is inconsistent with international law.

The advice of the Law Officers of the Crown and Counsel is therefore sought whether in these circumstances it is expedient that the Appeal should be prosecuted further. The point of construction whether Turkey is affected by the Order in Council is no longer of any materiality, because the Mediterranean coasts of Turkey are now blockaded.

The larger question, however—whether the Order in Council is valid *jure gentium*

—is one of such importance, that a further case directed solely to this question is in course of preparation for placing before the Law Officers of the Crown and Counsel, as it is thought that the matter should be presented for their consideration detached from the special circumstances applying in the case of the present appeal.

The opinion of the Law Officers of the Crown and Counsel is therefore desired upon the following questions:—

1. Whether the word "enemy" in articles 3 and 4 of the Order in Council of the 11th March, 1915, refers to Germany only, or refers to Germany and her allies
2. Whether the appeal in the case of the steamship "Constantinos" from the decision of Cator P., dated the 16th March, 1916, should be proceeded with.
3. Generally.

Opinion of the Law Officers of the Crown and Mr. R. A. Wright.

1. The arguments on both sides in regard to this question are very fully presented in the case laid before us. On the one hand there is considerable force in the contention that it cannot have been intended to limit in articles 1 and 2 the prohibition of direct maritime commerce to German ports, and yet in articles 3 and 4 to extend the prohibition of continuous commerce to all enemy destinations or origins. Reliance will certainly be placed also on the recitals (which may be referred to if the operative clauses are ambiguous), and particularly on the fact that the reprisals are founded on German breaches of the usages of war, and are expressly threatened against Germany alone; and the different treatment accorded under the Fifth Hague Convention to Austrian vessels may be emphasised. In view of the final recital, the fact that the French Order is directed against Germany only is significant. Further, it may be doubted whether, on the facts stated in the recital, the Order if extending to all enemy countries would be valid; and this consideration would have great weight on the question of construction.

On the other hand, the use of the word enemy in the operative articles 3 and 4, as distinguished from the use of the word German in articles 1 and 2, is very marked, and the Court might regard that distinction as intentional, especially in view of the fact that Germany controls its allies and the disposition of their resources from the North Sea to Mesopotamia. If it is an essential part of British policy that goods should be prevented from going into or out of Germany to America, Scandinavia, Spain, or Greece, it may be considered to be equally essential that they should be prevented from entering or leaving the allied countries which form a continuous territory. The word enemy in article 6 seems to have the wider meaning.

The respective arguments are closely balanced, but we think there is grave risk that the arguments in favour of the narrower construction of the order would prevail, and it would be held that the word "enemy" in articles 3 and 4 means "German."

2. For the above reasons we are of opinion that it will be better not to proceed with the appeal against the judgment of Judge Cator, but if it is desired to argue the point to wait until it arises (if at all) in the Prize Court of the United Kingdom.

FREDERICK SMITH.
GEO. CAVE.
R. A. WRIGHT.

Law Officers' Department, July 26, 1916.



(16)

AFRICA.

No. 3.

[File 3810/16]

[January 6, 1916.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 4, 1915.

Enemy
ships on
Niger and
enemy
subjects in
Nigeria:
Con-
ventional
rights and
rights under
inter-
national
law.

I HAVE the honour, by direction of Secretary Sir E. Grey, to enclose for your consideration copy of a note (Paper A) from the United States Ambassador in London covering a copy of a letter from a Mr. Brünner, a German subject, and a note from the German Government complaining of certain acts of the Government of Nigeria, which constitute, it is alleged, an infringement of articles 30 and 33 of the Berlin Act of the 26th February, 1885, guaranteeing the free navigation of the Niger by ships of all nations and the protection of merchants of all nationalities in the protectorate in time of war as in time of peace. The obligations imposed on His Majesty's Government towards the German Empire by these articles were confirmed by article 6 of the Anglo-German Convention of the 15th November, 1893, respecting boundaries in Africa. Copies of these two instruments are enclosed (Papers B and C).

The treatment actually accorded to German subjects and merchant ships in the protectorate after the outbreak of war is described in a telegram of the 15th August, 1914, from the deputy of the Governor-General of Nigeria to the Secretary of State for the Colonies and in a despatch of the 14th May last from the Governor-General, copies of which are enclosed (Papers D and E). A copy of the instructions from the Secretary of State for the Colonies, to which the Governor-General states that he conformed in the case of the German steamship "Diana" forms Enclosure F in this letter.

Copies of the correspondence which has passed between the Colonial Office and this Department on the subject are also enclosed.* It will be observed that Sir E. Grey feels some doubt, which the Secretary of State for the Colonies, however, does not share, as to whether the action of the local authorities can be entirely justified in view of the terms of the conventional provisions relating to the matter.

In these circumstances Sir E. Grey would be glad if you would take the enclosed papers into your consideration and would favour him with your opinion whether the action taken by the authorities in the protectorate as described in Enclosures D and E involve any breach of international law as contained in the Berlin Act or otherwise, and as to the terms of the reply which should, in your opinion, be addressed to the United States Ambassador.

He would also be glad to be favoured with any observations on the subject of a general nature which you may be good enough to offer.

I have, &c.
W. LANGLEY.

List of Papers.

- (A.) United States Embassy to Foreign Office, March 10, 1915.
- (B.) General Act of the Conference of Berlin, February 26, 1885.
- (C.) Agreement between Great Britain and Germany respecting boundaries in Africa, November 15, 1893.
- (D.) Deputy of the Governor-General of Nigeria to the Colonial Office, Telegram, August 15, 1914.
- (E.) Governor-General of Nigeria to the Colonial Office, May 14, 1915.
- (F.) Colonial Office Circular Telegram, August 7, 1914.
- (*) Papers registered under Nos. 35087/14, 29026/15, 47843/15, and 69034/15.

Report.

We deal first with the arrests. It appears that all the persons arrested were German reservists, with the exception of one man who was offered his liberty, but preferred to be interned with his fellow subjects. Some of the arrested persons, including Brünner (who had been treated with much consideration), were guilty of

AFRICA.

17

suspicious conduct, and a rising in the country behind Warri was attributed to German intrigue. We do not think that the provisions of the Berlin Act in question, which relate exclusively to the freedom of the navigation of the Niger, can be construed as limiting or derogating from the right to arrest and intern or deport enemy subjects in British territory when such a course is for military reasons expedient, whether on the ground that enemy subjects are reservists or are fomenting risings or otherwise.

Next as to the ships. It may perhaps be doubted whether articles 30 and 33 of the Niger clauses in the Act of Berlin were intended to give to the vessels of enemy subjects using the Niger (including vessels in British Niger ports) absolute immunity from seizure in time of war. But however that may be, it does not appear to us that there has been any breach of those articles by the authorities of the protectorate. On the outbreak of war permission was given to Mr. Brünner's company to continue its operations on terms which were accepted by him; but on the arrest of the employees of the company it was no longer possible for the company to continue trading as before, and provision had to be made for the custody of its vessels. Some of these have been kept under guardianship or handed over to the care of the receiver of enemy property. Others have been used for State purposes, the obligation of paying to the receiver fair compensation for their use being fully recognised. No question of freedom of navigation or of the usages of commerce has since arisen; and it is difficult to see what other course could have been followed having regard to the arrest of all the members of the company's staff.

In the above circumstances it does not appear to us that the action taken by the authorities of the protectorate as described in papers D and E involves any breach of international law as contained in the Berlin Act or otherwise.

We think that a reply should be sent to the American Ambassador in the above sense.

FREDERICK SMITH.
GEO. CAVE.

Law Officers' Department,
January 6, 1916.

BULGARIA.

[192790]

No. 3^d.

[Treasury.]

[File 125143/1916]

[June 9, 1916.]

Case for the Opinion of the Law Officers of the Crown, Mr. Austen-Cartmell and Mr. Branson.

HEREWITH is sent—

Copy inter-departmental minutes and letters. The only available copy print of the Constitution of Bulgaria (obtained from the Foreign Office library) accompanies the Attorney-General's papers.

1. An opinion is desired on the question whether the private property situate in this country, including securities of foreign obligations and belonging to an enemy Sovereign, can be confiscated by the Crown under international law.

It appears that the Czar of the Bulgarians has certain securities, British and foreign, which Messrs. Coutts hold as bankers on his behalf.

From the copy of the return dated the 8th November, 1915 (which will be found in papers herewith), made by Messrs. Coutts to the Public Trustee, it seems that most of the securities are bearer bonds or securities presumably held in the name of the Czar of the Bulgarians. There are, however, a few which are held in the joint names of other persons and one which is held in the name of Messrs. Coutts.

If it should be considered that the right to confiscate is, if not unwarranted, at any rate doubtful, the question arises whether a vesting order and an order for sale should be obtained under the Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. V, cap. 105, sec. 4).

[318]

F

Securities
in England
belonging
to the King
of Bulgaria
are liable to
confiscation.



If such orders were obtained, would such proceeding prejudice or preclude the Government from subsequently contending that the property was lawfully liable to confiscation?

2. It will be seen from the copies of official minutes herewith that, on the suggestion of the Treasury Solicitor, the matter was referred by the Treasury to the Foreign Office for consideration, and that it was considered by the Legal Adviser of the Foreign Office that this property stood on the same footing as that of an individual private enemy, and Sir Edward Grey decided that the property should be kept in reserve until the end of the war. Apparently his view is that, as a matter of policy, it would be a mistake to confiscate King Ferdinand's private property here. It may be noted that, although it is stated that this is King Ferdinand's private property, it is just possible that this is public property of the Bulgarian Government put in the name of the King for the express purpose of evading confiscation; but the Treasury Solicitor has no information in confirmation of this suggestion. When the matter came back to the Treasury, Mr. Montagu, in a minute to the Chancellor of the Exchequer, expressed a preference for confiscation if it were possible, and as a result the Treasury Solicitor was instructed to obtain the opinion of the Law Officers on the general question whether such property is liable to confiscation as well as on the particular question what steps should be taken with regard to vesting the property in the Custodian.

3. The legal position is stated in the judgment of the full Court of Appeal in *Porter v. Freudenberg*—(1915) 1 K.B., at pages 869-970—which seems to establish that the legal right of confiscating private enemy property still exists, but that it has, as a matter of practice, ceased to be exercised. The property of the enemy Government, on the other hand, is still confiscated in practice. It is not necessary to deal with this subject in this case at any length; it will be sufficient to refer the Law Officers and Counsel to Pitt Cobbett's "Leading Cases on International Law" (3rd Ed., 1913, Part 2, pages 52 to 62), and Westlake's "International Law" (Part 2, Edition 1913, pages 41 to 48 and page 51), where the whole subject is completely dealt with. The point is also referred to in the judgment of the Judicial Committee in the "Roumanian" (Treher's Prize Cases, page 545). Lord Parker in his judgment uses the expression, "No one will now contend that the property of enemy subjects found within the realm at the commencement of a war can be seized and appropriated by the Crown;" but that appears to be quoted by him as part of an argument, and not to be put forward as his own statement. The statement of the Judicial Committee on the subject is a little lower down on the same page: it is that the Crown has ceased to exercise its ancient rights of seizing, &c., the goods of enemy subjects on land, because the advantage to be thus gained has been small compared with the injury thereby entailed on private individuals, and in order to ensure similar treatment of British goods on enemy territory. See also A.-G. v. Wheeden (1699), Parker 267. The last case of confiscation of private property generally given is that of 1793, at the outbreak of war between Great Britain and France. Oppenheim treats the rule of confiscation of private property as now non-existent, and affirms that there is a customary rule of international law in existence prohibiting the confiscation of private enemy property and the annulment of enemy debts on the territory of a belligerent ("International Law" II, section 102). Hall does not go so far, and says that, "although seizure would always now be looked upon with extreme disfavour, it would be unsafe to declare that it is not generally within the bare rights of war" ("International Law," 6th Ed., page 431). Oppenheim, however, adds that the rule does not prevent a belligerent from seizing public enemy property on his territory, such as funds, ammunition, &c. Hall also (page 435) says: "For the present, therefore, it cannot be said that a belligerent does a distinctly illegal act in confiscating such personal property of his enemies existing within his jurisdiction as is not secured upon the public faith." These last words have reference to the rule given by Westlake that "neither the principal nor the interest of a State debt can be confiscated or sequestrated because the individuals to whom it is due are enemy subjects" ("War," page 41).

See also Ferguson, "Manual of International Law," The Hague, 1894, Vol. II, page 284, a Dutch work: "All public property of the enemy State is *per se* hostile, but private property, i.e., property of private individuals, is only rendered hostile by the acts of its owner, by the circumstances of its use or dispositions with relation to the war, or by the interdiction mentioned in the preceding paragraph" (i.e., as regards prohibition of continued residence in enemy State).

The subject is treated at length in Manning's "Law of Nations" (Ed. S. Amos,

1875), pages 170-175; see also Woolsey's "International Law" (6th Ed., 1888), section 124.

It seems to have been considered by the Foreign Office in this case that the private property of the King of Bulgaria stood in the same position as that of any other private enemy individual. The Treasury, however, seem to question this, and it may be pointed out that none of the authorities who state the establishment of the modern practice (which appears to be only a little more than a century old) with respect to private property of individuals have ever applied this case to the property of a belligerent Sovereign; nor does there seem to be any precedent in point for such a case. It may well be contended—if it is thought wise policy to do so—that the position of a belligerent Sovereign like the King of Bulgaria may be distinguished from that of a private enemy individual. So far as the exemption of the latter depends on the modern conception that war is carried on, not as against the individuals of the belligerent State, but as against the Government and authority of the same, the belligerent Sovereign can hardly fail to be identified with the Government. Whatever may be the written Constitution of Bulgaria, the view may reasonably be taken that the King of Bulgaria is in substance the controlling power of that State. If the rule of exemption depends on hardship to individuals—who are not supposed to be personally responsible for the policy of their State—that can hardly apply to the belligerent Sovereign, who is himself personally responsible for his State taking part in the war. So far as the question of reprisals or of pressure on the belligerent Government is concerned, it is clear that that can be much more effectively exercised by confiscation, or a threat of confiscation, of the property of the belligerent Sovereign, who can himself control the policy of his Government, than upon that of any private individual, however powerful. It may therefore be contended that the law of comity or of international law, so called, should not be extended beyond the class of cases to which it has been hitherto applied, and that in this case the British Government would be infringing no recognised rule of international law if, at the end of the war, they thought fit to confiscate this property. It is suggested, therefore, for the consideration of the Law Officers that, although it may not be desirable, and it is not the wish of Sir Edward Grey, that any definite step should be taken at the present moment, the property should be seized in such a way as to distinguish it from the property of private enemy individuals, and not be subjected to the ordinary procedure of vesting in the Public Trustee, which might be held to indicate that it is to be dealt with in the same way as the property of enemy individuals. It is suggested that it is desirable to put a special mark on this property, and show clearly to the world that the British Government are not prepared to commit themselves to the view that the property of the belligerent Sovereign is to be treated on the same footing as that of any private enemy individual. There can be no question as to the legal right of the Government to sequester this property, and of course they are not bound to follow the procedure of the Trading with the Enemy Acts. The mere sequestration of property clearly contravenes no principal of international law.

4. Counsel may perhaps not think it material to consider the nature of the Constitution of Bulgaria in this connection, but a print of the Constitution established in 1911 is with the Attorney-General's papers.

The Kingdom of Bulgaria is declared to be an hereditary monarchy with a National Assembly. (Article 1.)

The King is the supreme representative and Chief of the State. The legislative power belongs to the King and to the Representative Assembly. (Articles 9 and 10.)

The King is the head of all the military forces, and has the executive power, Articles 11 and 12, and by Article 17 represents the State in all foreign relations, but it seems that perhaps at all events a very large class of treaties cannot be concluded without the vote of the National Assembly.

Laws have to be presented for the sanction of the King after being passed by the National Assembly (see Articles 43, &c.).

Articles 51 and 53 are important, because they show that the public property of the State is not under the control of the King, and therefore must be considered separate from his private property.

Article 152. Ministers are nominated and dismissed by the King, but appear to be responsible to the King and to the National Assembly. (Article 153.)

It is stated in Dicey's "Peasant State," written in 1894, that under the former Constitution the Prince had an income of 24,000*l.* a year guaranteed him by the Constitution, but there is nothing about that in the present Constitution.

5. As regards the procedure to be followed, the position of the Public Trustee as



1916

the Custodian is defined by the Trading with the Enemy (Amendment) Act, 1914, which concerns the property of enemies, by reference to the definition contained in proclamations for the time being (see Section 14 (2)). The Trading with the Enemy Proclamation No. 2, of the 9th September, 1914 (page 378 of the "Manual of Emergency Legislation," Part I), is well known to Counsel, and although the definition of "enemy" there, including any persons resident or carrying on business in the enemy country, does of course in so many words extend to the Sovereign of the country, it is doubtful whether the Trading with the Enemy Act, 1914, does not by its whole scope indicate that what is intended to be dealt with is the private property of individual enemies rather than the property of the Sovereign. It is true that under section 5 of the Act the Custodian is to hold the property after the war in such manner as may be directed by Order in Council; but the same section contains a provision enabling the Court to provide for the debts of the enemy being paid out of the property held by the Custodian. The legislation in regard to the Custodian has been amended by the Trading with Enemy Act, 1915, and by the further Act of 1916, which, by section 4, gives power to the Board of Trade to vest in the Custodian property of this description. It may be felt, however, that if this property were dealt with under this Statute it would in a sense be ear-marked as falling into the same category as ordinary private property of individuals, and for that reason it might be preferable for the Crown simply to require Messrs. Coutts to hand over the securities to them (which it is not to be supposed they will refuse to do), or perhaps to undertake to hold them on behalf of the Government, together with the dividends accruing.

Attention is called to the Minute of the Parliamentary Counsel of the 6th April, 1916.

There are questions of detail as regards the nature of some of the securities and as regards the receipt of dividends thereon, with which it is not considered necessary to trouble the Law Officers and Counsel at the present moment.

The Law Officers and Counsel are requested to advise:—

1. Whether the securities referred to are properly liable to confiscation.
2. Whether the obtaining of orders vesting them in the Public Trustee would be in order and non-prejudicial to the position of the Government in subsequently raising such contention as they may be advised.
3. Generally on the case.

*Opinion of the Law Officers of the Crown, Mr. J. Austen-Cartmell and
Mr. G. A. H. Branson.*

1. In our opinion the presumption is that the King of Bulgaria is identified with the State; and the provisions of the Constitution do not displace that presumption. Perhaps, they even support it.

However this may be, the reasoning which has led in universal practice to the confiscation of enemy State property applies to the property of an enemy Sovereign, and the reasoning which has led to the discontinuance of the practice in dealing with the private property of enemy individuals does not apply to the property of an enemy Sovereign.

We therefore think that the securities in question may properly be confiscated. Whether such confiscation should take place at once or not is a matter of policy on which we offer no opinion.

2. We think it desirable as a matter of legal policy to draw a distinction between the treatment of these securities, and of securities or property which are not claimed as confiscable. Holding this view, we need not consider whether in law the obtaining of Orders vesting these securities in the Public Trustee would or might prejudice the position of the Government hereafter.

We recommend that Messrs. Coutts be required to hand over the securities to a nominee of the Crown to be dealt with as His Majesty may hereafter direct.

FREDERICK SMITH.
GEO. CAVE.
J. AUSTEN-CARTMELL.
G. A. H. BRANSON.

Law Officers' Department, June 9, 1916.

GENERAL.

No. 4.

[176682]

[File No. 13860/15.]

[November 22, 1915.]

[42083]

[File No. 1683/16.]

[January 14, 1916.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, October 30, 1915.

I HAVE the honour by direction of Secretary Sir E. Grey to transmit to you herewith the papers shown in the schedule hereto on the subject of the claim of Mr. Paul Scheerer, an American citizen of German extraction, until lately carrying on business in Trinidad.

Mr. Paul
Scheerer:
Exclusion
from
Trinidad,
and
compulsory
liquidation
of his
business.

The facts of the case are set out, on the whole accurately, in two pamphlets (see enclosures in paper No. 14) prepared by Mr. Scheerer's American lawyer, and submitted to the Department of State. They may, for convenience sake, be shortly summarised as follows:—

Mr. Scheerer, who was born in Germany in 1868, went to the United States in 1889, and was naturalised in 1894. In 1896 he went to Trinidad and engaged in business there as a clerk. In 1897 he commenced business on his own account under the name of Paul H. Scheerer and Co. in partnership with a Mr. Benlisa, a resident of Trinidad. The partnership was dissolved in 1900, and from that date until the 1st July, 1912, the business was conducted alone by Mr. Scheerer under the same name.

On the 1st July, 1912, Mr. Scheerer admitted one Paul Kocher to partnership in the business. Mr. Kocher, who had been a clerk of Mr. Scheerer's for ten years, and had married his stepdaughter, was, and is, a German subject. The managing clerk and other members of the staff were also German subjects. The partnership agreement will be found on p. 27 of the first of the above-mentioned pamphlets (paper No. 14), but, according to Mr. Scheerer's statement, it was supplemented by a parol agreement, the alleged effect of which will be found stated on pp. 2 and 3 of the same pamphlet.

According to Mr. Scheerer's statement, which there is in this respect no reason to disbelieve, the business was exceptionally prosperous, and became one of the largest in the island.

In May 1914 Mr. Scheerer left Trinidad and proceeded to Germany in order, according to his statement, to have a surgical operation performed upon himself. At the outbreak of the war he was still in Germany, but returned to New York in November. During his absence his partner was in charge of the business.

On the 31st October, 1914, in accordance with instructions issued by the Colonial Office (paper No. 1), a proclamation was issued by the Governor of Trinidad prohibiting the carrying on of business in the colony by persons of German or Austrian nationality, and providing for the winding up by a liquidating committee of businesses carried on by, for, or on behalf of any alien enemy. The proclamation will be found on pp. 38 and 39 of the second pamphlet (paper No. 14). On the 7th November Mr. Kocher and the German managing clerk were both interned as alien enemies. On the 20th November an ordinance was passed amplifying the above proclamation. This ordinance will be found on pp. 12 to 17 in the second pamphlet (paper No. 14). The Liquidating Committee provided for by the proclamation and ordinance at once commenced operations, and all businesses of alien enemies were taken in hand. It appears that there was at first some uncertainty as to whether the business of Paul Scheerer and Co. ought to be dealt with under the terms of the proclamation and ordinance; but the Liquidating Committee strongly represented that it should be so dealt with, and after reference to the Colonial Office the business was closed down, and a manager was appointed to wind up the business. Mr. Scheerer's own property, as distinct from that of his firm, was not interfered with.

The Governor of Trinidad raised objections to Mr. Scheerer's being allowed to return to the island, and he accordingly employed a Mr. Edwards, a New York lawyer,

[318]

G



to proceed to Trinidad and represent his interests. In January 1915, in consequence of representations made by Mr. Edwards, Mr. Scheerer was allowed to return to the island temporarily to arrange his business, but he was not allowed to remain permanently, and the liquidation of the business is proceeding. Mr. Scheerer is stated by the Governor to be thoroughly pro-German in his views.

Various allegations as to the conduct of the liquidation are made by Mr. Scheerer in the two pamphlets, but it appears unnecessary to go into them in detail. It should be noted, however, that Mr. Scheerer alleges that the liquidation of his business was due to the machinations of his business rivals, and the action of the Colonial authorities was not *bonâ fide*. It does not appear that there is any foundation for these allegations. It is, however, stated by the Governor that before the liquidation of the business the firm under the direction of Mr. Kocher had made several attempts to trade with the enemy, and that Mr. Scheerer during his absence from Trinidad aided and abetted the firm in so doing. The Governor of Trinidad has been asked to supply details in support of this assertion.

It appears that at a later stage the Trinidad authorities felt some doubt as to whether the business of Paul Scheerer & Co. came properly within the definition of "enemy business" in the November ordinance, and in consequence an ordinance was passed in March 1915 providing, *inter alia*, that "the specific directions given by the Governor under the provisions of the principal ordinance for a business to be dealt with as an enemy business, whether given before or after the commencement of this ordinance, shall be conclusive evidence in all Courts and for all purposes that such business as aforesaid is or was an enemy business."

The American consul protested against the passing of this ordinance in his letter of the 9th March, 1915.

It should also be noted that section 4 (1) of the November ordinance provides that, "in and for the purpose of carrying out the powers and duties conferred or imposed by this ordinance, the Liquidating Committee may sue in the name of the chairman, but may not be sued."

Mr. Scheerer has now through Mr. Edwards laid his case before the State Department, and the American Ambassador has made various representations on the subject (papers Nos. 5, 14, 15, 16, and 24). Mr. Edwards' contentions will be found summarised in a note of an interview which was accorded him at the request of Dr. Page at the Foreign Office. (Paper No. 28.)

Mr. Scheerer is making a claim for upwards of 2,000,000 dollars; and as the case also raises some important questions of law, it is desired to obtain the opinion of the Law Officers, both as to the method in which this particular case should be dealt with and as to the various legal questions involved in it.

Sir E. Grey is advised that, as Mr. Scheerer contends that his business did not fall within the scope of the local legislation on the subject of enemy businesses, his proper course was and is to apply to the local Courts for a declaration to that effect, appealing if necessary to the Privy Council. If this line can be adopted it will have the great advantage of enabling His Majesty's Government to reply to the representations of the United States Government that Mr. Scheerer has not exhausted his legal remedies, and that until he has done so the case is not one for diplomatic intervention. The difficulty in the way of adopting this course lies, however, in the above-quoted provision of the March ordinance, and it therefore appears necessary that the Government of Trinidad should be instructed to repeal that provision. Sir E. Grey is advised that the provision in the November ordinance preventing the Liquidating Committee from being sued would not hinder the bringing of an action for the purpose of establishing that a particular case did not fall within the ordinance at all. If this is so, it can at any rate be contended that Mr. Scheerer was at liberty to apply to the Courts at any time between November and March.

If the course proposed above should, in your opinion, be adopted, it will be very desirable to give the Trinidad authorities all the assistance possible in order that the lines on which the case is defended in the Trinidad Courts may be such as you would approve and such as could properly be maintained in the event of the case going to the Privy Council, or eventually to arbitration. The case is an important one, and as it appears likely that the United States Government will continue to press it, Sir E. Grey is extremely anxious to obtain your opinion on all the points which it raises, and as to the lines on which it should be conducted.

Similar cases have arisen in other parts of the Empire where similar legislation has been passed, and Sir E. Grey is advised that it can properly be maintained that if a particular business comes within the category of enemy businesses as defined by the

local legislation, such business may properly be treated in the manner prescribed by such legislation, although the interests in it may be to a large extent neutral. The question whether a particular business does fall within the scope of such legislation is a matter to be decided by the local Courts, and if they hold that such a business is an enemy business within the terms of such local legislation, the Government of the neutral concern has no right to protest against such legislation being applied to it. Sir E. Grey would, however, be grateful for a definite ruling from you on this point. It should be stated that the definition of enemy business is in some cases very wide; for instance, in the Indian legislation on the subject any business in which enemy subjects are employed comes within the scope of the definition.

Apart from the general question, this particular case raises certain subsidiary points which will be found set out in the pamphlets and protests prepared by Mr. Edwards, and are dealt with in the letter from the Colonial Office to the Foreign Office of the 24th August (paper No. 17).

The point on which Mr. Edwards relies particularly is that the partnership between Mr. Scheerer and Mr. Kocher was dissolved either on the outbreak of the war or the passing of the Trinidad legislation on the subject of enemy businesses, and that under the parol partnership agreement the whole of the assets thereupon became vested in Mr. Scheerer. So far as can be ascertained from the papers, however, this contention was never put forward until February, and no steps were taken before that date, either by Mr. Scheerer or by Mr. Kocher, which indicated that they regarded the partnership as dissolved.

It is somewhat remarkable that Mr. Scheerer, whose solicitor was informed before the 11th January, 1915, that Mr. Scheerer's private property was not to be interfered with, should not at once have set up that the entire partnership assets became, on its alleged dissolution, Mr. Scheerer's private property, and therefore not liable to be treated as enemy property.

It is even more remarkable that the American consul who, still later, made representations on behalf of Mr. Scheerer, stated in his letter of the 9th March, 1915, that the latter had a "paramount interest," approximately five-sixths, in the business, and made no claim on his behalf to the whole of the assets as his private property under the alleged parol partnership agreement.

I am therefore to request that you will take these papers into your consideration, and will favour Sir E. Grey with your opinion on the following points:—

1. Whether the course proposed of repealing section 2 of the March ordinance, and informing the United States Government that Mr. Scheerer must seek his remedy in the local Courts, and contend there that the November ordinance should not have been applied to his business, is the proper one.
2. Whether, if this is done, section 4 (1) of the November ordinance would prevent Mr. Scheerer from obtaining any remedy to which he might otherwise be entitled in the local Courts.
3. Whether His Majesty's Government can successfully maintain the principle indicated above, that if a particular business comes within the definition of an enemy business given in the local legislation, the business may properly be dealt with under such legislation, irrespective of any neutral interests in such business and of the amount of such interests.
4. Whether the partnership between Mr. Scheerer and Mr. Kocher was dissolved (a) under international law; (b) under Trinidad law; or (c) under the alleged parol partnership agreement at any time after the outbreak of war, and, if so, when.
5. Generally, with regard to the position and the rights of Mr. Scheerer: (a) if the partnership was dissolved before the liquidation; and (b) if it were not so dissolved.
6. Whether the refusal to allow Mr. Scheerer to return to Trinidad and carry on business there can be justified and maintained.
7. Generally, on the contentions made by Mr. Edwards, as shown in paper No. 28.

Sir E. Grey would also be grateful for any further observations of a general nature which you may be good enough to offer.

The American Ambassador is pressing this case, and it is extremely desirable to decide as soon as possible on the line to be adopted in regard to it. Sir E. Grey would therefore be grateful to receive your report at your earliest convenience.

I have, &c.

ALGERNON LAW.



1916

List of Papers.

1. Colonial Office to Foreign Office	..	..	November	5, 1914.
2. Foreign Office to Colonial Office	..	..	"	18, "
3. Foreign Office to Colonial Office	..	..	"	20, "
4. " " " "	..	..	"	25, "
5. United States Ambassador to Foreign Office	..	..	February	4, 1915.
6. Nil.				
7. Colonial Office to Foreign Office	..	..	"	18, "
8. Foreign Office to United States Ambassador	..	..	March	3, "
9. Nil.				
10. Colonial Office to Foreign Office	..	..	"	11, "
11. " " " "	..	..	April	20, "
12. " " " "	..	..	June	23, "
13. Sworn declaration by Mr. Scheerer	..	..	July	17, "
14. United States Ambassador to Foreign Office	..	..	August	12, "
15. Nil.				
16. United States Ambassador to Foreign Office	..	..	"	20, "
17. Colonial Office to Foreign Office	..	..	"	24, "
18. " " " "	..	..	"	26, "
19. Foreign Office to United States Ambassador	..	..	"	31, "
20. Nil.				
21. Foreign Office to United States Ambassador	..	..	September	1, "
22. Foreign Office to Colonial Office	..	..	"	2, "
23. Colonial Office to Foreign Office	..	..	"	11, "
24. United States Ambassador to Foreign Office	..	..	"	11, "
25. Colonial Office to Foreign Office	..	..	"	18, "
26. Minute by Mr. Hurst recording Mr. Edwards' interview at Foreign Office	..	..	"	21, "
27. Colonial Office to Foreign Office	..	..	"	30, "
28. Foreign Office to United States Ambassador	..	..	October	6, "

Opinion of the Law Officers of the Crown upon the first two Questions submitted in the Foreign Office Reference of October 30, 1915.

We answer the first two questions, as we are informed that the matters therein dealt with are urgent.

We are of opinion:—

1. That the March ordinance bars Scheerer's remedies, and ought not to have been passed in view of the active steps he was taking to assert his alleged rights.

We therefore recommend its repeal. Scheerer would thereupon recover his right of action, and the United States authorities can then be informed that a legal remedy is available.

2. The section only applies to the Committee.

Scheerer would have his remedy against—

(a.) The Attorney-General for a declaration.

(b.) The persons who (as he alleges) have converted his goods and trespassed on his property.

We therefore answer the first question in the affirmative, and the second in the negative.

FREDERICK SMITH.
GEORGE CAVE.

Law Officers' Department,
November 22, 1915.

[189165]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, December 17, 1915.

WITH reference to the letter from this Department of the 30th October, relative to the liquidation of the business of Messrs. Paul Scheerer and Co., of Trinidad, I have the honour, by direction of Secretary Sir E. Grey, to transmit to you herewith a copy of a letter from the Colonial Office,* with enclosures in original, covering a

* Colonial Office to Foreign Office, December 10, 1915.

copy of a further despatch on the subject, which has been received from the officer administering the Government at Trinidad.

Sir E. Grey would be obliged if you could take these papers into your consideration in making your final report on the case.

It is requested that the original enclosures in this letter may eventually be returned to this Department with your reply.

I have, &c
ALGERNON LAW.

Report—

1 and 2. We have already replied to these questions in our interim Report of the 22nd November, 1915.

3. In our opinion this position can be successfully maintained.

4. The partnership between Mr. Scheerer and Mr. Kocher was not dissolved either at the outbreak of the war or at any time before possession was taken of the business under the ordinance of the 20th November, 1914. As to (a), there was no dissolution by international law, both parties being ordinarily resident and carrying on business in Trinidad. (b) Nor was the partnership automatically dissolved under Trinidad law, although proceedings for dissolution might have been successfully taken by Mr. Scheerer under section 37 of ordinance No. 30 of 1913. (c.) The alleged parcel agreement is probably a fiction. But even if it were not, Kocher, according to his own affidavit, continued a partner until the business was taken over under the proclamation of the 31st October, 1914. It is, therefore, clear that, at the time the liquidation commenced, Kocher had not ceased to be a partner under the alleged agreement.

5. The partnership not having been dissolved before the liquidation, we think that the proclamation of the 31st October, 1914, and the ordinance of the 20th November, 1914, applied to the partnership business (which was being carried on "on behalf of" both parties), and that it is being properly wound up; but Mr. Scheerer is entitled to have his share of the proceeds ascertained and paid over to him.

6. Mr. Scheerer has no legal right to return to Trinidad; but the refusal to readmit him, if without reasonable cause, may properly be made the subject of diplomatic remonstrance on the part of the United States Government (*Musgrave v. Chun Teeong Toy*, L.R., 1891, A.C., p. 282). That Government may, however, consider that Mr. Scheerer's German origin and pro-German sympathies, and his activity in Germany after the outbreak of war, are sufficient reasons for not readmitting him to British territory.

7. We have dealt incidentally with Mr. Edwards' contentions in his letter of the 12th August, 1915. It is certainly desirable that Mr. Scheerer's money claims should be dealt with by the Trinidad Court.

FREDERICK SMITH.
GEORGE CAVE.

Law Officers' Department,
January 14, 1916.

No. 5.

[File No. 5439/1916.]

[February 8, 1916.]

[April 11, 1916.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, October 25, 1915.

I HAVE the honour, by direction of Secretary Sir E. Grey, to request that you will take into your consideration, and favour him with your opinion upon, the question whether Mr. L. Ch. d'Arcis, the name of whose paternal grandfather was included with those of various other individuals in letters of denization granted in the year 1840 is, on that account merely, entitled to be considered a British subject in contemplation of English law.

A certified copy of the letters patent is enclosed herewith, together with a typewritten extract therefrom for more easy reference.

[318]

H

Letters of denization: as to creation of hereditary status of British subject. Case of Mr. L. Ch. d'Arcis.



It will be seen that the terms of the grant are of the widest nature, providing as they do that the persons named in the letters patent shall *as well as their heirs* in all things be treated, held, reputed, and governed as liege-subjects born within the United Kingdom.

The Secretary of State, however, entertains some doubt, which is shared by His Majesty's Secretary of State for the Home Department, in the first place as to whether the letters patent are to be interpreted as granting the status of British subjects not merely to the persons named therein but also to persons described as the "heirs" of the named persons who (1) were neither ascertained nor ascertainable at the date of grant; and (2) may be both aliens at common law by reason of birth out of His Majesty's allegiance, and also persons not included in the privileged classes of the children and grandchildren born abroad of natural born British subjects created by the Statutes 4 Geo. II, cap. 21 and 13 Geo. III, cap. 21; and secondly, as to whether if such be the correct interpretation of the letters patent it is within the prerogative of the Sovereign thus to create a kind of hereditary status of British subjects descendible as if it were a freehold estate, irrespective of the place of birth of the persons entitled, and that at a time when aliens were incapable of inheriting land in this country.

Sir Edward Grey will be glad at the same time to receive any observations of a general nature which you may be good enough to offer on the papers now submitted to you.

A copy of a memorandum by the Legal Adviser to the Secretary of State* dealing with the various points raised is also enclosed herewith, and may prove to be useful in considering the questions at issue. I am to request that the certified copy of the letters of denization may be returned to this Office when no longer required.

I have, &c.

W. LANGLEY.

Report of Attorney-General.

It is with reluctance that I differ in a very difficult matter from the opinion of the Solicitor-General, but after careful consideration I am unable to accept his conclusions.

In my view, it is within the prerogative to confer upon the grantee under letters of denization the full rights of a natural-born British subject, including the rights of children and grandchildren under "The Foreign Protestants Naturalization Act, 1708" (7 Anne, c. 5), section 53, as explained and enlarged by "The British Naturalization Act, 1731" (4 Geo. II, c. 21), and "The British Nationality Act, 1772" (13 Geo. III, c. 21).

I am, on the whole, of opinion that the letters patent in question had this effect.

On the particular facts of Mr. d'Arcis' case, I think that his father and grandfather must both be regarded as having been natural-born British subjects. This conclusion is subject to the proviso that the former had not been born at the date of the grant, for heirs cannot mean "children already born," and such grants are not retrospective.

FREDERICK SMITH.

Report of Solicitor-General.

In my opinion the letters patent cannot be treated as conferring the status of a British subject upon the unborn heirs of the persons named therein, including those born out of the King's allegiance. The status of British nationality is not transmissible, but must be acquired by, or conferred upon, the individual (*De Geer v. Stone*, L.R. 22, Ch. D. 243; *re Willoughby*, L.R. 30, Ch. D. 324; *R. v. Albany Street Police Superintendent*, L.R. 1915, 3 K.B. 716). The child or grandchild of a natural-born British subject may acquire this status by birth within the allegiance, or (if born elsewhere) under the Statutes of 1730 and 1772. But the issue born out of the allegiance of a British subject who is a denizen are not within those statutes, nor can they be brought within them by any expressions contained in the letters of denization. Those letters are intended only to confer a privilege on the persons to whom they are granted, and not to take effect as a law regulating the status of their

* See Annex.

unborn descendants. Indeed, if they were expressed to have that effect, they would, in my view, be to that extent void as in excess of the prerogative. "The British Nationality and Status of Aliens Act, 1914," section 1, proceeds (as regards the future) upon the above view of the law.

For the above reasons I am of opinion that L. Ch. d'Arcis is not a British subject unless he or his father was born within the King's allegiance.

The case is one of difficulty; and I need hardly add that, as the Attorney-General takes a different view, my conclusions must be regarded as open to doubt.

GEO. CAVE.

Law Officers' Department, February 8, 1916.

[As the Law Officers of the Crown differed in opinion, it was decided, with the approval of the Secretary of State for the Home Department, to refer the matter to the Lord Chancellor.]

Sir Edward Grey to the Lord Chancellor.

Sir Edward Grey presents his compliments to the Lord Chancellor and would be much obliged if his Lordship would be good enough to take into his consideration the enclosed papers dealing with the question of the national status of Mr. L. Ch. d'Arcis, the name of whose paternal grandfather was included with those of various other individuals in letters of denization granted in the year 1840.

It will be seen from the reply which the Law Officers of the Crown have returned to the reference which was submitted to them for their consideration that they differ in their views, the Attorney-General being unable to share the opinion of his colleague that Mr. d'Arcis is not to be regarded as being a British subject.

In these circumstances Sir E. Grey would be greatly obliged if the Lord Chancellor would be so good as to favour him with his opinion upon the question and with any observations of a general nature which his Lordship may be good enough to offer in connection with it.

Foreign Office, March 16, 1916.

Report of the Lord Chancellor.

The Lord Chancellor presents his compliments to Sir Edward Grey, and upon the matter referred to him for consideration, relating to the national status of Mr. L. Ch. d'Arcis he begs to report as follows:—

Letters of denization cannot, in the Lord Chancellor's opinion, be granted so as to confer the status of a British subject upon a class of unnamed and unknown persons included under the description "Heirs." The history of denization is very old. It may be found as far back as the reign of Edward IV., and the form of the letters then granted is a literal Latin rendering of the corresponding portion of the letters in the present case. It is impossible to ascertain how this formula has so long been preserved, or what was its origin. To the Lord Chancellor's mind it was due to a mistake in assuming that a status or quality of citizenship could be limited according to the limitations well known in relation to real estate. When once a man had been himself naturalised under letters of denization granted to him direct, his offspring would be in exactly the same position as those of an ordinary British citizen, and that is the whole effect of the grant. To read it in the manner suggested by the learned Attorney-General would be to provide that a man not born at the time of the grant, and not even a direct descendant of the man to whom the letters were granted, who might be in fact a German citizen, was by virtue of this grant a naturalised Englishman. The peculiarity of this result is emphasised when it is remembered that if seven sons were born to a person receiving letters of denization under conditions that would make them the naturalised subjects of a foreign country, it would only be that would make them the naturalised subjects of a foreign country; while if, on the other hand, the family had consisted of seven daughters, all of them would be British subjects.



1916

The result is so unreasonable as to emphasise what has already been said. The use of the word "Heirs" in connection with letters of denization is entirely inappropriate—is indeed incapable of any sensible legal construction, and should, in the Lord Chancellor's opinion, be wholly disregarded.

April 11, 1916.

Annex.

Memorandum by Sir Edward Davidson.

This document—the letters of denization—is rather ancient history, as it was issued in 1840, four years before the first general Naturalization Act of 1844. In those days the only way of becoming naturalized was by means of a private Act of Parliament. Since the passing of general Naturalization Acts, letters of denization have been seldom resorted to, and I think have only been granted in very special circumstances (such as the case of Mr. Alma Tadema, R.A., to which I will further advert presently). Letters of denization cost much more than a certificate of naturalization. (I believe the fee is about 120*l*, which is however less than that of a private Act of Parliament, but five years previous residence is not a condition precedent, as it is under the general Naturalization Acts.)

"The right to create denizens by letters patent is a prerogative of the Crown, which though fallen into desuetude is expressly preserved by 'The Naturalization Act, 1870.'"

"Letters of denization, the grant of which is at the absolute discretion of the Crown, are obtainable upon petition to the Crown through the Home Office, and the petition must set out the circumstances which make it impossible or impracticable for the applicant to comply with the conditions of 'The Naturalization Act, 1870.' The grant may be temporary or conditional, and may either express the privileges conferred or confer all the rights of a natural-born subject, except those specifically excluded by its provisions or withheld by law."

"The grant is not retrospective, consequently the children of a denizen born out of the King's Dominions before the issuing of the letters patent do not acquire British nationality,* unless expressly included in the terms of the grant. The taking of the oath of allegiance is a condition precedent to the grant." (Halsbury's "The Laws of England," sub. tit. "Alien," Part III, § 687.)

The most recent occasion of a grant of letters of denization† with which I am personally acquainted (the Home Office will know if there are later ones) is the grant to Sir Laurence Alma Tadema when he was elected a Royal Academician. No one but a British subject can be admitted to full membership of the Royal Academy, and as at the time Sir Laurence had only resided in this country for two or three years (certainly much under five years), he was not eligible for naturalization under the general Act. He might have been naturalized by special Act of Parliament, but this would have cost more, and probably letters of denization were considered preferable. The letters were personal to himself and did not include his existing children by name so that they were excluded—a matter which subsequently caused Miss Alma Tadema a great deal of annoyance.

These letters were issued by the Home Office and until the present letters of 1840 granted to Mr. d'Arcis and others came to my notice, I was not aware that letters of denization had—even in the early part of Queen Victoria's reign—been issued by any Department other than the Home Office. The present letters appear to have been actually issued from the Privy Seal Office, and the official who affixed the seal was Mr. Edmunds.‡

These letters do things in a rather wholesale manner and include sixteen separate and apparently unrelated individuals of whom the majority, judging from their names, were German or Polish Jews. The letters grant not only to the sixteen persons who are mentioned *nominatim* but to "their and each of their heirs," that they shall and may be free denizens and liege-subjects of Us (Victoria R.) our heirs and successors, and that they as well as their heirs may in all things be treated, reputed, held and governed as our faithful liege-subjects born within our United Kingdom of Great Britain and Ireland.

I have examined the Form of Petition for Letters Patent of Denization, which is given in the "Encyclopædia of Forms," vol. ix, p. 43 (published by Messrs. Butterworth in 1905 under the editorship of Mr. Underhill), and find that the precedent therein given follows very much the wording of the actual form now under consideration. Very probably it was based on some other actual form issued by the Home Office. The words "and that they as well as their heirs may in all things be treated, reputed, held, and governed as our faithful liege-subjects born within our United Kingdom of Great Britain and Ireland."

* This is so also with regard to a private Act of Parliament.

† It is stated in Henriques' "Treatise on the Law of Aliens" (1906), p. 18, that there is no instance of letters of denization having been granted since the year 1872.

‡ I have since made further enquiry, and find that Mr. L. Edmunds was in 1840 Clerk of the Crown in Chancery and Clerk of the Letters Patent (see "Royal Calendar for 1841," pp. 221 and 222), and Mr. Thomas Plasket was the Chief Clerk of the Home Office.

The Clerk of the Crown sees to the affixing of the Great Seal to documents, and I suppose that these letters must have been under the Great Seal.

Mr. Plasket certified merely to the copy as a true copy.—W.E.D.

"Kingdom of Great Britain and Ireland" are so very wide that if they had been used in an Act of Parliament such as a special Naturalization Act, they would, I think, have covered all the "heirs" (according to the meaning of that expression in English Law) of the original donees. Such wide words, however, so far as I can discover, have never been used in private Acts of Parliament conferring naturalization on individual alien donees. It seems to me at least doubtful whether the King by Letters Patent merely can grant the status of British subjects to persons who are not entitled to it at common law and who are not included in the privileged classes specified in the Acts of George II and George III which by implication exclude all persons other than those specially mentioned.

It would I think require an Act of Parliament to do that, and in so far as the letters patent purport to go beyond it, by the grant as to the "heirs" of the original donees, it seems arguable that this grant is inoperative.

There is no doubt, I think, that in law the word "heirs" *simpliciter* goes far beyond the statutory provisions on the subject. The word "heir" means the person born or begotten in wedlock, of human shape, in allegiance to the Crown, who, according to the English canons of descent, is entitled to the undivided freehold estates of inheritance in England of a deceased person. If words of limitation, such as "of the body," are added, then the direct line of descent only is included, but even then a great grandson of the donee would come within the expression "heirs of the body," while the expression "heirs," without any words of limitation, would or might include collaterals to a remote degree, and not merely the direct descendants born out of England for two generations.

Mr. de Candolle was quite right to refer this matter home before giving Mr. d'Arcis a British passport. It is a very unusual case and raises questions of considerable difficulty.

It must, of course, go to the Home Office for their observations, and very likely they will be able to offer explanations of the form of the letters patent of denization which are not apparent to one who like myself approaches the matter without previous knowledge beyond that which can be picked up from ordinary text-books.

I have thought it better, however, to say how the matter strikes me on the first impression, before we refer to the Home Office, as we must certainly do.

W. E. D.

April 19, 1915.

[80542]

No. 6.

[File 4533/1916]

[April 11, 1916.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, October 20, 1915.

I HAVE the honour, by direction of Secretary Sir E. Grey, to request that you will take into consideration the accompanying copies of correspondence between this Department and the Colonial Office, as shown in the annexed schedule, as to what persons or classes of persons should be held to have acquired British nationality through and by reason of the annexation of Cyprus by His Majesty.

In his letter of the 30th October last (marked (A)), Mr. Secretary Harcourt expressed the opinion that: (1) all Ottoman subjects domiciled in Cyprus; and (2) all Ottoman subjects born in Cyprus and domiciled on British territory, should be treated as British subjects; but that difficulties arose with regard to the status of (3) Ottoman subjects born in Cyprus, but domiciled in neutral or allied States; (4) Ottoman subjects born in Cyprus but domiciled in Turkey; and (5) Ottoman subjects domiciled in Cyprus who might not desire to become British subjects.

As will be seen from the letter from this Department of the 3rd November (marked (B)) and the draft telegram to the High Commissioner of Cyprus therein referred to (marked (C)), Sir E. Grey concurred in thinking that it would be sufficient, for the moment, to declare all Ottoman subjects born in Cyprus and resident there to be British subjects, whilst giving resident Ottoman subjects not born there the opportunity of withdrawing from the island. The telegram in question was sent off on the 1st November, and instructed the High Commissioner to publish, simultaneously with the Order in Council of annexation, a proclamation stating that all Ottoman subjects resident in Cyprus, except those who were not born there and preferred to withdraw within a fixed time limit, would become British subjects.

A memorandum (marked (D)) prepared in this Department bearing on the status of Cypriots before annexation and citing various precedents for giving to the inhabitants of ceded districts the right of choosing their nationality, has also been included with the enclosures to this letter; and the report of the then Law Officers, dated the 25th June, 1901, throws further light on this question.

[31.]

Annexation of Cyprus: classes of persons who thereby acquire British nationality.



The Colonial Office letter of the 5th December (marked (E)) contains a copy of the proclamation of the 5th November (marked (F)), together with Mr. Harcourt's suggestions for a new proclamation, with a view to avoiding the inconvenience arising from the fact that, under the first proclamation, Ottoman subjects not born in Cyprus could not become British subjects until a whole year after the annexation had elapsed. It was proposed that:—

1. All Ottoman subjects resident in Cyprus at the time of the annexation should be declared to have become British subjects by virtue of the annexation; and that
2. Any such Ottoman subject not born in Cyprus should have the option of resuming his Ottoman nationality within a month from the date of the proclamation.

In his reply (marked (G)), dated the 12th January, Sir E. Grey suggested:—

1. That this power of option should be extended to all resident Ottoman subjects, whether born in the island or not; and that
2. It should be made clear that the proclamation did not grant British nationality to Ottoman subjects not domiciled in Cyprus.

In both these suggestions the Colonial Office concurred by their letter of the 22nd January (marked (H)), whilst renewing their request that the questions with regard to the status of those Ottoman subjects born in Cyprus but not domiciled there should be submitted to you for your opinion and report.

The despatch from Galatz of the 17th March last (marked (I)) calls attention to the difficulties arising in neutral countries by reason of the uncertainty as to the national status of Cypriots, and a copy of a circular telegram, dated the 9th November (marked (J)), is annexed in order to show the temporary arrangements referred to with regard to the issue of passports to such persons.

A letter from the Colonial Office, dated the 19th June (marked (K)), covering a despatch with enclosures from the High Commissioner of Cyprus, is also annexed. The memorandum by the King's advocate of that island forwarded therein raises questions as to the interpretation of the word "resident" in the proclamations of the 5th November and 4th March, and, whilst proposing that this word should be taken to mean "who were in," suggests that facilities should be afforded to Ottoman subjects born in Cyprus and resident elsewhere to acquire British nationality. The Colonial Office, on the other hand, considered that the word "resident" should be held to be equivalent to "domiciled," so that the proclamations should affect Ottoman subjects born in Cyprus only if they were domiciled there, without regard being had to their actual place of residence, as distinguished from their domicile, at the time of annexation.

As you will see from the annexed copy of his reply to the above letter, dated the 6th August (marked (M)), Sir E. Grey is disposed to consider that the proclamation of the 4th March provided only for the case of those persons who, being Ottoman subjects on the 5th November, were actually in Cyprus at the time of annexation, and that residence, not domicile, was made the determining factor (1) because it was essential that the status of residents should be regulated without delay, and (2) because it was a comparatively simple matter to determine who were the persons to whom the term "resident" applied.

A reply, a copy of which forms enclosure (N) to this letter, has, however, been received from the Colonial Office, asking that you should be consulted upon two points, namely (1) as to the interpretation of the words "resident in" in the proclamation of the 4th March; and (2) as to what should be the test of nationality—domicil, residence, or some other, and what, criterion.

I am consequently to request that Sir E. Grey may be favoured with your opinion as to:—

- (a.) Whether domicile, residence, or some other test, ought to be applied in determining who is, or is not, a Cypriot by reason of birth of Ottoman parentage in the island of Cyprus; and, if residence is the test, how that word should be defined.
- (b.) Whether the words "resident in," occurring in the proclamation of the 4th March, should be interpreted as meaning merely "who were in," or "who were ordinarily resident in"; and, whichever of these alternatives be adopted,
- (c.) What is the national status of each of the following categories of persons

who were either absent from, or—if the second alternative be adopted—not ordinarily resident in, Cyprus on the 5th November, 1914, and have consequently not been affected by the proclamation of the 4th March:—

I.—If domicile is held to be the test of national status.

1. Those who, by birth in Cyprus, were Ottoman subjects at that date, but were domiciled in a neutral or allied State.
2. Those, of similar birth, who were domiciled at that date in other parts of the Ottoman dominions.
3. Those, of similar birth, who on the date in question were domiciled in enemy States other than the Ottoman dominions.
4. Those, of similar birth, who on the 5th November were domiciled in the British dominions.
5. Those, of similar birth, who on that date were domiciled in any British protectorate or protected States, including Cyprus or Egypt.

II.—If residence is held to be test of nationality.

1. Those who, by birth in Cyprus, were Ottoman subjects on the 5th November, but were resident in a neutral or allied State.
2. Those, of similar birth, who were resident at that date in other parts of the Ottoman dominions.
3. Those of similar birth, who on the date in question were resident in enemy States other than the Ottoman dominions.
4. Those, of similar birth, who on the 5th November were resident in the British dominions.
5. Those, of similar birth, who on that date were resident in any British protectorate or protected State, including Cyprus or Egypt.

Finally, I am to inquire whether, in your opinion, further legislation is advisable with regard to any of the above points; and I am to add that Sir E. Grey would be glad to be favoured with any observations of a general nature which you may consider it desirable to offer on the papers now submitted to you.

I have, &c.
W. LANGLEY.

List of Papers.

- (A.)—Colonial Office, October 30, 1914.
- (B.)—Foreign Office to Colonial Office, November 3, 1914.
- (C.)—Draft telegram to High Commissioner, Cyprus (enclosure in Colonial Office letter of October 30, 1914).
- (D.)—Foreign Office memorandum, November 3, 1914.
- (E.)—Colonial Office, December 5, 1914.
- (F.)—Proclamation of High Commissioner, November 5, 1914.
- (G.)—Foreign Office to Colonial Office, January 12, 1915.
- (H.)—Colonial Office, January 22, 1915.
- (I.)—Major Baldwin, No. 16, of March 17, 1915.
- (J.)—Foreign Office circular telegram, November 9, 1914.
- (K.)—Colonial Office, June 19, 1915.
- (L.)—Proclamation of High Commissioner, March 4, 1915.
- (M.)—Foreign Office to Colonial Office, August 6, 1915.
- (N.)—Colonial Office, August 23, 1915.

Report—

(a.) In our opinion the test to be applied is that of ordinary residence, which is less strict than that of domicile, but is not satisfied by a temporary stay. Persons who are temporarily in the island are not so identified with the conquered territory that their nationality ought to be considered as changed by the fact of conquest.

(b.) The words "resident in" occurring in the proclamation of the 3rd March, 1915, should be interpreted as meaning "who were ordinarily resident in."

(c.) In the light of the above conclusions, none of the persons described under the headings (1) to (5) have a legal right to be recognised as British subjects, but there is no legal reason why the status of British nationality should not be offered to any or all of them. For instance, a proclamation might properly be issued declaring that Ottoman subjects born in Cyprus who on the 5th November, 1914, were resident



1916

in the British dominions or in any British protectorate or protected State (including Egypt) are British subjects, but giving such persons an option to retain their Ottoman nationality on giving within a limited time notice of their election so to do; and the same proclamation might (if so desired) give to Ottoman subjects born in Cyprus who on the 5th November, 1914, were resident in a neutral or allied State power by a like notice to elect to become British subjects. The proclamation might of course impose conditions as to coming to reside in the island or taking the oath of allegiance within a specified time. Whether such a proclamation or a proclamation in some other sense should be issued, is a question of policy to be determined by His Majesty's Government.

It does not appear to us that any legislation is necessary or advisable.

FREDERICK SMITH.
GEO. CAVE.

Law Officers' Department, April 11, 1916.



1917

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. June 1918.

CONFIDENTIAL.

(10980.)

035

LAST COPY.

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1917.



LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked *I^a*, &c.

PRIZE LAW.

No.		Date.	SUBJECT.	Page.
<i>I^a</i>	Law Officers .. [Procurator-General]	July 19, 1917	Detention of neutral ships in British ports: recovery of damages by neutral shipowners	1

VARIOUS.

(Arranged according to Countries.)

CHINA.

1	Law Officers ..	Mar. 1, 1917	Draft China (War Powers) Order in Council, 1917	3
---	-----------------	--------------	---	---

FRANCE.

2	Law Officers ..	Nov. 20, 1917	Anglo-French Declaration of 1904: interpretation of provisions respecting Egypt	6
---	-----------------	---------------	---	---

GENERAL.

3	Law Officers ..	Mar. 22, 1917	Effect of outbreak of war upon the validity of multilateral treaties	8
4	Lord Chancellor ..	23,	Commercial and industrial policy during transitional period after the war: bearing of commercial treaty obligations on the recommendations of Lord Balfour of Burleigh's Committee	10
<i>4^a</i>	Law Officers .. [War Office]	Apr. 2,	Hospital ships: provisions of the Geneva (1906) and The Hague (1907) Conventions respecting the carrying of sick and wounded of land forces, medical personnel, and medical supplies. . .	14
<i>4^a</i>	Law Officers and Mr. Branson [Board of Trade]	Aug. 8,	Mining properties abroad owned by British subjects: measures to control transfer to foreigners. .	16
<i>4^c</i>	Law Officers .. [Treasury]	16,	Allied troops in Great Britain: measures to subject them to jurisdiction of their own military authorities	20

UNITED STATES.

5	Law Officers ..	Nov. 28, 1917	Convention with United States under the Military Service (Convention with Allied States) Act: American draft and proposed draft article concerning Canada	23
---	-----------------	---------------	---	----

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1917.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

APO—JUR.

A.

"Apollo," 1-3.
Army: Allied troops in Great Britain, discipline, 20-23.
Army. *See also* Military Service (Conventions with Allied States) Act.

B.

Boedes Lust, 2.

C.

Canada. *See* Military Service (Conventions with Allied States) Act.
China (War Powers) draft Order in Council, 3-5.

D.

Defence of the Realm Acts: scope of, 19.
Deportation from China, 3-5.
Detention of Vessels. *See* Vessels.

E.

Egypt: Anglo-French Declaration of April 8, 1904, French rights in view of alteration of status of Egypt, 6-7.
"Ester," 1-3.
Exports: restrictions on, and treaty obligations, 10-13.

F.

Feather v. Reg., 3.
France: rights in Egypt. *See* Egypt.
"Fylla," 1-3.

G.

Geneva Convention, 1906, 14-15.

H.

Hague Convention (No. X), 1907, 14-15.
"Helga," 1-3.
Hospital ships: use for land as well as naval forces, 14-15.

J.

Jurisdiction in China: war powers, 3-5.
"offences by Allied troops in Great Britain, 20-23.

LAU—WAL.

L.

"Laura," 1-3.
Lauritzen, J., 1-3.

M.

"Marie," 1-3.
Metals. *See* Mines.
Military Service (Conventions with Allied States) Act, 1916: draft Convention with United States and exclusion of Canadians from Convention, 23-26.
Mines: control of transfer of British interests to foreigners, 16-19.

O.

"Olga," 1-3.
Order in Council. *See* China (War Powers).

P.

Property, transfer of. *See* Mines: control of transfer.

S.

"Stella," 1-3.

T.

"Thyra," 1-3.
Trade restrictions after the war, 10-13.
Treaties: effect of war on multilateral treaties, 8-10.
"with enemy States: terminated by war, 12.
"containing most-favoured-nation clauses; and trade restrictions after the war, 10-13.

U.

United States. *See* Military Service (Conventions with Allied States) Act.

V.

Vessels: detention of neutral vessels in British ports, recovery of damages by neutral shipowners, 1-3.

W.

Walker v. Baird, 3.



1917

Printed for the use of the Foreign Office. June 1918.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1917.

PRIZE LAW.

[157975]

No. 1^A.

[Procurator-General.]

[File 36128/1917.]

[July 19, 1917.]

Case for the Opinion of the Law Officers of the Crown.

THE following documents are sent herewith:—

1. Copy of a letter, dated the 23rd April, 1917, from Sir Eyre A. Crowe, with its enclosures.
2. Copy of a letter, dated the 28th May, 1917, from Sir W. Langley, with its enclosures.
3. Memorandum by Dr. A. Pearce Higgins.
4. Memorandum by Mr. J. Wylie.

Detention of
Neutral
Ships in
British
Ports:
Recovery of
Damages by
Neutral
Shipowners.

The opinion of the Law Officers of the Crown is desired on the question whether the neutral owner of ships which have been detained in British ports at the instance of His Majesty's Government have a remedy in the Courts of this country for such loss as he has sustained.

The facts upon which this question arises are as follows:—

At the inception of the intensified German submarine campaign on the 1st February, 1917, the owners of Danish and other neutral steamships announced their intention of discontinuing, and did in fact discontinue, their sailings to ports in Great Britain. The Danish shipowners' action in this respect was taken with the concurrence of their Government.

At this time a number of Danish vessels were with other neutral vessels in British ports, and with a view to bringing pressure to bear on the Danish Government and on the shipowners to resume sailings to this country, and to ensure the continuance of transport between Denmark and Great Britain and her Allies, instructions were issued by His Majesty's Government that the Danish vessels in British ports should be detained. In pursuance of this policy, the Danish vessels here were refused clearance, until the arrival of a corresponding number of Danish vessels from Denmark. Danish vessels with cargoes from America and overseas bound for Danish ports and calling at British ports for examination were likewise refused clearance until traffic between Denmark and the United Kingdom was resumed. The question is one of great importance because similar action was taken in all ports throughout the Empire in which neutral ships were found at the time, and a great number of claims aggregating a very large sum of money may result.

A claim by a Danish shipowner has already been received, as appears from the documents sent herewith. The claimant is Mr. J. Lauritzen, of Copenhagen, who claims compensation for loss sustained by reason of the detention of seven steamers



which he owns, namely, the steamships "Ester," "Thyra," and "Fylla" at Leith; the steamships "Stella," "Laura," and "Marie" at Sunderland; and the steamship "Helga" at Hull. For their detention during the month of February he claims the sum of 17,435*l.*; calculating demurrage at the rate of 50*s.* per ton, deadweight. At the end of the month of March 1917 he put forward a further claim for compensation in respect of the detention of these vessels and the steamship "Olga" at Goole, during that month, calculated as above, amounting to 27,087*l.* 10*s.* The claimant's vessels were at the time of their detention engaged in trading between Scandinavian ports and ports in the United Kingdom and France, and had come into British ports voluntarily.

There are no treaties in existence between Great Britain and Denmark germane to the matter in question.

A similar question arises in connection with the detention at Calcutta of the steamship "Apolo," a vessel flying the Spanish flag, and owned by a Spanish company. This vessel was detained on the 13th, 14th, and 15th February, 1917, in pursuance of the policy, above mentioned; the detention being effected in a similar manner, namely, by the Port Officer refusing the master clearance.

It is not considered to be a material question whether the vessels were actually detained by force or threat of force, or indirectly by refusal to give clearance, or refusal to supply a pilot. Whichever was the method adopted in carrying out the policy which His Majesty's Government had determined to pursue, it may be conceded that for some period of time the vessels were in fact detained by the Executive.

It is the intention of His Majesty's Government to deal with all claims of this character through the diplomatic channel, and it is desired to contest liability should it be raised in a Court of Law. The question therefore arises whether there would be a good defence to a claim for compensation which a neutral shipowner may seek to enforce (a) in the Prize Court against the proper officer of the Crown or the persons actually responsible for the detention of his vessel, or (b) by proceedings in a Municipal Court against the Customs or Port Officer responsible for the detention.

Memoranda by Dr. A. Pearce Higgins and by Mr. Wylie, relative to the matters in question, are sent herewith for the consideration of the Law Officers.

(a.) As regards proceedings in the Prize Court, it is submitted that the Court would take cognizance of the embargo which His Majesty's Government have put on the sailing of neutral steamers, and would give no relief to the applicant (the *Boedes Lust*, 1 E.P.C., p. 460).

In regard, moreover, to proceedings which might conceivably be instituted against the Procurator-General, it is submitted that in the absence of statutory enactment one person cannot be rendered liable for the wrongful act of another, except on the principle of *Respondet superior*. The persons concerned in the detention of the vessels were not the servants or agents of the Procurator-General, nor were any orders or directions issued by him in regard to the detention. The Privy Council, however, in the case of the steamship *Zamora* ((1916), 2 A.C. 77), appear to have regarded the Procurator-General as the proper respondent answerable to claim for damages for wrongful prize seizures.

(b.) In regard to proceedings in the Common Law Courts against the person or persons actually concerned in the seizure, however, the matter seems more doubtful. The Law Officers are referred to the cases of the *Gertruyda* ((1799), 2 C. Rob. 211); the *Boedes Lust* ((1804), 5 C. Rob. 233, 1 E.P.C. 459), from which it is submitted that no Court, be it sitting in Prize or a Court of Common Law, would determine a question of fact, or give judgment upon issues, which were at the moment the subject-matter of negotiations between His Majesty's Government and the Government of a friendly State, on the result of which a declaration of war was depending. It is submitted that so long as such negotiations were in progress the Court should refuse jurisdiction.

It may further be contended that the defendant could plead act of State by way of defence (see *Buron v. Denman* (1848), 2 Exch. 167; *Elphinstone v. Bedreechund* (1830), 1 Knapp 316; *Musgrave v. Pulido*, 5 A.C. 102; *West Rand Mining Co. v. Rex* (1905), 2 K.B. 391; *Salaman v. Secretary of State for India* (1906), 1 K.B. 613; *A.-G. for Canada v. Cain* (1906), A.C., p. 546).

That the act in question is an act of State seems clear; but it might be contended that as the act was an act committed within the jurisdiction the defence is not made out. The Civil Courts of this country are open, and are exercising their jurisdiction, c.f. *ex. p. Marais* ((1902), A.C. 109). It would seem on principle that the act of State would furnish no answer to a wrong committed within the jurisdic-

tion, unless the act was one done under the prerogative for the defence of the realm. It is nevertheless open to question whether the claimant in the present case should be included in the category of those resident within the protection of the King and his Courts, to whose complaint "act of State" would furnish no answer; for it may be contended that Mr. Lauritzen was not residing in temporary allegiance under the protection of English law by reason of the mere fact that he sent his property here.

The Law Officers of the Crown are accordingly requested to advise: Whether proceedings by the neutral shipowner to recover damages by way of compensation for the loss he has sustained by reason of his ships being detained as above mentioned could be successfully maintained against the Procurator-General, and/or against the Customs or Port Officer, or other person actually concerned in the detention (a) in the Prize Court, or (b) in a Municipal Court of Law.

Opinion of the Law Officers of the Crown.

In our opinion the question submitted to us should, in both its parts, be answered in the negative. We do not think that the Prize Court has any jurisdiction in the matter, inasmuch as the detention of the vessels was not in exercise of the right of visit and search or with a view to seizure of the vessels or cargoes as prize. As to proceedings in the Municipal Courts, we find it difficult to conceive a stronger case of an act of State which, so far as foreigners are concerned, can afford no ground for legal proceedings. The fact that the act was within the jurisdiction is, we think, immaterial. The question is whether the person complaining is a British subject or a person who, because he resides in British territory, and therefore owes temporary allegiance, has in this respect the rights of a British subject (see *Feather v. Reg.*, 6 B. and S., at p. 296; *Walker v. Baird* (1892), A.C. 491).

FREDERICK SMITH.
GORDON HEWART.

Law Officers' Department,
July 19, 1917.

CHINA.

[55845]

No. 1.

[File 1220/1917.]

[March 1, 1917.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, February 22, 1917.

I AM directed by Mr. Secretary Balfour to inform you that His Majesty's Minister at Peking has represented to him the extreme necessity of conferring on the British authorities in China certain powers over British subjects analogous to those possessed by the executive in this country under the Defence of the Realm Act, for the purpose of dealing more effectually than is at present possible with the persons, mainly of Indian origin, whose treasonable activities at Shanghai and elsewhere in China are so detrimental to the interests of this country at the present time. Mr. Balfour is satisfied as to the necessity of such action, and I am to enclose for your consideration the draft of an Order in Council under the Foreign Jurisdiction Act, which has been prepared in consultation with the India Office for the purpose of taking the necessary powers. Mr. Balfour is advised that the decision of the Court of Appeal in *R. v. Earl of Crewe (ex parte Sekgome)* (1910) 2 K.B. 576, establishes that an Order of this nature can lawfully be made under the Foreign Jurisdiction Act.

The power which it is most necessary to obtain is that of deportation without the necessity for conviction. Sir John Jordan originally proposed that His Majesty's Minister should be given power to order deportation without reference to His Majesty's Supreme Court for China. You will observe, however, that the draft Order provides in Article 4 that the Supreme Court may make such an order upon a certificate under

China (War Powers) Order in Council, 1917.



the hand and seal of His Majesty's Minister. The reason for this alteration is that Section 8 of the Foreign Jurisdiction Act only applies in cases where the order for deportation is made by the Court, and it would, therefore, appear that if the order were made by the Minister as originally proposed, the prisoner would not be in legal custody while on his way from China to the place of deportation. In view of the likelihood that persons whom it is desired to deport may be able to command the necessary financial and legal assistance to take any point of this nature which may be open to them, Mr. Balfour is of opinion that the risk ought not to be run, and it therefore appears necessary that the order should be made by the Court. He has not, however, thought it possible to deprive the Court of any discretion as to making the order upon the certificate of the Minister, but he would propose to instruct His Majesty's representative in China to communicate privately with the Judge of the Supreme Court before issuing his certificate in any case, and to inform him of the reasons which render the deportation of the individual desirable; and he hopes that in this manner, as the Order in Council is only to remain in force during the war, the necessary order may be obtained in all cases where it is required without serious difficulty. It seems, however, advisable to make some provision for a case in which the Court declines to make the order, and with this object Article 2 (d) has been inserted. Internment as distinct from imprisonment is, for practical reasons, not possible in China, but Mr. Balfour proposes to instruct His Majesty's representative, in the event of the Order being passed, that the powers given by Article 2 (d) are only to be used in cases where the Court has declined to make an order for deportation; and as His Majesty's representative may be trusted not to issue his certificate except in a proper case, Mr. Balfour is of opinion that the imprisonment without trial of the person affected may in such circumstances be justified.

Mr. Balfour is reluctant to trouble you with the draft in the present press of urgent business, but he feels that he would not be justified in submitting it to His Majesty in Council without your approval, in view of the possibility that its validity may be tested on an appeal to the Privy Council, or that its issue may give rise to discussion in Parliament. He would, therefore, be glad if you would take the draft Order into consideration and favour him with your opinion as to whether it is fit and proper to be submitted to the King in Council for His Majesty's approval. A telegram recently received from His Majesty's Chargé d'Affaires at Peking indicates that the powers conferred by the Order in Council are urgently required, and Mr. Balfour would therefore be grateful to be favoured with your opinion at your very earliest convenience.

I have, &c.
VICTOR WELLESLEY.

Report.

As altered* and initialled by us the draft Order is, in our opinion, fit and proper to be submitted to the King for the approval of His Majesty in Council.

FREDERICK SMITH.
GORDON HEWART.

Law Officers' Department,
March 1, 1917.

Annex.

Draft China (War Powers) Order in Council, 1917.

WHEREAS by treaty, grant, usage, sufferance, and other lawful means His Majesty the King has jurisdiction in China:

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested,

* Since the date of this Report the Law Officers have approved the draft Order in the form in which it was submitted to them.

is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered as follows:—

1. This Order may be cited as "The China (War Powers) Order in Council, 1917," and shall be read as one with the "China Order in Council, 1904" (hereinafter called the "Principal Order"), and with any Order amending the same.

2. Where in the opinion of the Minister there are reasonable grounds for believing that any British subject has acted, is acting, or is about to act, in a manner prejudicial to the public safety, or to the defence, peace, or security of His Majesty's dominions or of any part of them, the Minister may by order in writing direct that such person—

- (a.) Shall not enter, reside, or remain in any area specified in the Order;
- (b.) Shall reside or remain in any area so specified;
- (c.) Shall conduct himself in such manner, or abstain from such acts, or take such order with any property in his possession or under his control, as may be specified in such Order;
- (d.) Shall be detained in custody in such place as may be specified in the Order; and the person so detained shall be deemed for all purposes to be in legal custody.

3. If any person in respect of whom an Order is made under paragraph (a), (b), or (c) of the preceding article fails to comply with any of the provisions of the Order, he shall be guilty of an offence against this Order, and shall be liable on conviction by the Court to imprisonment, with or without hard labour, for a term not exceeding three years; provided, however, that nothing in this article shall be deemed to empower a Provincial Court to award any sentence greater than is authorised by Article 59 (2) of the Principal Order.

4. Where in the opinion of the Minister it is expedient that any person, in respect of whom the provisions of Article 2 of this Order apply, should be deported from China to some place in His Majesty's dominions, he shall send to the Supreme Court a certificate under his hand and seal to that effect, and the Supreme Court may thereupon order that such person shall be deported from China to the place specified in such certificate. The provisions of the Principal Order, and of any Order amending the same, relative to deportation shall, subject to the provisions of this Order, apply to any deportation effected under this article.

5. If any person deported under this Order returns to China without permission in writing of the Minister (which permission the Minister may give) he shall (without prejudice to any liability under Article 83 (11) of the Principal Order) be guilty of an offence against this Order, and shall be liable on conviction by the Court to imprisonment, with or without hard labour, for a term not exceeding three years; provided, however, that nothing in this article shall be deemed to empower a Provincial Court to award any sentence greater than is authorised by Article 59 (2) of the Principal Order.

6. This Order shall take effect on the day on which the text thereof is first exhibited in the public office of the Supreme Court at Shanghai, along with a certificate under the hand of the Minister stating that he has been informed by telegraph by the Secretary of State that the Order has been passed in the form annexed to the certificate; and shall remain in force only during the continuance of the present war.

And the Right Honourable Arthur James Balfour, one of our Principal Secretaries of State, is to give the necessary directions herein.

F. S.
G. H.



1917

(6)

FRANCE.

[222594]

No. 2.

[File 134659/1917.]

[November 20, 1917.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, November 15, 1917.

Anglo-French Declaration of 1904: Interpretation of provisions respecting Egypt.

I HAVE the honour, by direction of Mr. Secretary Balfour, to request your opinion as to whether the French Government are still entitled to the benefit of certain provisions relating to Egypt in article 1 of the Anglo-French Declaration of 1904.

Conversations have been taking place, and will shortly be resumed, between representatives of the British and French Governments for the purpose of determining the future position of the two countries in Morocco and Egypt respectively.

In Morocco Great Britain still maintains her extra-territorial rights, though in 1914 His Majesty's Government adhered to the Franco-Moorish Treaty of 1912, which in effect creates a French protectorate in the French zone in Morocco.

In Egypt, France maintains her extra-territorial rights, though she has recognised the protectorate which His Majesty's Government declared of that country soon after the entry of Turkey into the present war on the 5th November, 1914.

Since 1904, when Great Britain and France entered into a series of arrangements for settling the numerous difficulties which had existed between the two countries up till then, recognition by France of the predominant position of His Majesty's Government in Egypt has been regarded as the counterpart of the recognition by His Majesty's Government of the predominant position of France in Morocco.

Among the agreements entered into in 1904 was the Anglo-French Declaration which dealt with the interests of the two countries in Egypt and Morocco respectively. The position in Morocco, however, has been greatly modified by the intrusion of Germany, and the determination she displayed not to allow her interests to be ignored. The result was the Act of Algeciras of 1906, and at a later date the Franco-German Agreement of 1911.

Both the British and French Governments realise that the time is now ripe for terminating the system of extra-territorial jurisdiction in Morocco as well as in Egypt. In Morocco French courts are already in existence, and codes on modern lines have been introduced. In Egypt similar arrangements are in course of preparation.

The desire of the French Government in Morocco is to get rid of the Act of Algeciras and the Agreement of 1911, and to return both as to Egypt and as to Morocco to the position established by the Anglo-French Declaration of 1904. So far as regards Morocco, no difficulty arises with regard to the interpretation of that instrument, but with regard to Egypt Mr. Balfour is anxious to obtain your opinion as to whether in the events that have happened the French Government are entitled to maintain a claim to the directorship of the Department of Antiquities, and to the privileged position of their schools in Egypt as laid down in the last two paragraphs of article 1.

The Declaration of 1904 (Paper A) consisted of two parts: the published articles and the secret articles; the latter were not made public until 1911. The published articles are nine in number, and in Nos. 1 and 2 His Majesty's Government and the French Government declare that "they have no intention of altering the political status" of Egypt and Morocco respectively. The secret article 1 provides that in the event of either Government finding themselves constrained by the force of circumstances "to modify their policy" as to Egypt or Morocco, Nos. 4, 6, and 7 of the published articles are to stand. It would seem to follow that if the secret article 1 comes into play, the published article 1, not being among those for the maintenance of which special provision is made, is not to stand. If that is so, the provisions in the last two paragraphs of published article 1 would disappear. It is important therefore to know whether the Declaration of the British

FRANCE.

7

protectorate in 1914 (now accepted by France) constitutes a "modification of policy" in respect of Egypt, calculated to bring secret article 1 into force. On this point, I am to enclose a memorandum (Paper B) which has been prepared in the library of this Department giving such information as is afforded by the record of the negotiations as to the meaning of the article.

I am also to enclose an extract from the "Gazette" containing the announcement of the British protectorate (Paper C); a copy of a circular telegram to the Powers, dated the 18th December, 1914 (Paper D); and a rescript addressed to the new Sultan of Egypt, dated the 19th December, 1914 (Paper E).

I am to request that you will favour Mr. Balfour with your opinion whether in the events that have happened the French Government are still entitled to claim the benefit of the last two paragraphs of article 1 of the Anglo-French Declaration of 1904.

Mr. Balfour would at the same time be glad to receive any observations of a general character which you may be good enough to offer.

As the conversations are to be resumed very shortly, Mr. Balfour would be glad to receive your report at an early date.

I have, &c.

MAURICE DE BUNSEN.

List of Papers.

- (A.) Declaration between the United Kingdom and France respecting Egypt and Morocco, April 8, 1904.
- (B.) Library Memorandum, November 9, 1917.
- (C.) "London Gazette" of December 15, 1914 (3rd Supplement, December 18, 1914).
- (D.) Circular telegram of December 18, 1914.
- (E.) Rescript addressed to Sultan of Egypt December 19, 1914. ("Recueil des documents relatifs à la guerre," vol. 1, p. 191, Foreign Office Library, 8vo, 9235.)

Report.

In our opinion the words "modify their policy in respect of Egypt" in article 1 of the secret articles of the Anglo-French Declaration of 1904 refer to the policy declared in article 1 of the published articles of the same date, namely, that His Majesty's Government had no intention of altering the political status of Egypt.

We are therefore of opinion that the action of His Majesty's Government, as stated in the notice of the 18th December, 1914, placing Egypt under the protection of His Majesty and declaring Egypt to be a British protectorate, is an alteration of the status of Egypt, and therefore a modification of policy in respect of Egypt, within the meaning of article 1 of the secret articles of 1904.

We are further of opinion that the whole of the provisions of the published articles of the Declaration of 1904 were conditional on the political status of Egypt remaining unaltered, and that upon an alteration in the political status of Egypt taking place the published articles are (except as otherwise preserved) no longer binding. In our opinion this effect is recognised by article 1 of the secret articles which provides that, in the event of the status of Egypt being altered, articles 4, 6, and 7 of the published articles are to remain intact. On any other view this provision would have been unnecessary. The same conclusion is reached by applying the general rule of construction that what is expressed excludes what otherwise might be implied. The express confirmation in secret article 1, of articles 4, 6, and 7 of the published articles, excludes in our view the continuance of the other articles not so confirmed.

It follows that in our opinion the French Government are not entitled to claim the benefit of any of the published articles other than articles 4, 6, and 7, and consequently are not entitled to claim the benefit of the last two paragraphs of article 1, of the Anglo-French Declaration of 1904.

FREDERICK SMITH.
GORDON HEWART.* Law Officers' Department,
November 20, 1917.



1917

(8)

GENERAL.

[61321]

No. 3.

[File 11829/17.]

[March 22, 1917.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

*Foreign Office, March 17, 1917.*Effect of
outbreak
of war on
validity of
multilateral
treaties.

I HAVE the honour, by direction of Mr. Secretary Balfour, to transmit to you the papers noted in the accompanying list and to request that you will take into your consideration the following observations as to the extent to which the validity of multilateral treaty arrangements is affected by the outbreak of war between certain of the Signatory Powers.

As will be seen from the list appended to the memorandum prepared by the Librarian of this Office (Paper (A)), these treaties vary greatly as regards importance and subject-matter; and whatever effect a state of war might technically be held to have on their validity, there can be little doubt that at the conclusion of peace such of them will be revived or re-enacted as deal with questions of a humanitarian or otherwise generally useful nature and are manifestly to the advantage of all the Contracting Parties. As examples of arrangements belonging to this category may be cited the Conventions regarding seamen, labour conditions, the "white slave traffic," and public health.

The question of the policy to be adopted in respect of undertakings not included within the category indicated gives rise, however, to considerable doubt and difficulty, and the views of accepted authorities on International Law are somewhat conflicting and afford no sure guidance.

From Paper (A), which contains a summary of the views held by leading authorities as regards the effect of war upon the validity of treaties, it will be observed that, according to Professor Oppenheim, the majority of writers have abandoned the doctrine formerly more largely held, to the effect that the outbreak of war *ipso facto* cancels all treaties previously concluded between the belligerents, excepting only such as have been especially concluded for the case of war. Such authorities as Phillimore ((III), 3rd edition, 1885, § 530, p. 793) and Twiss (I, 252) are, however, cited as maintaining the former doctrine, in contradistinction to the writer himself, to Hall (6th edition, 1909, pp. 378 *et seq.*), and, it may be added, to Wheaton (see "Wheaton," chapter 2 of Boyd's English edition, 1889).

There is a still more recent authority, viz., Dr. Coleman Phillipson's "Termination of War and Treaties of Peace," 1916, which could not, of course, be cited by Dr. Oppenheim, but which is dealt with at some length by Sir Algernon Law in his memorandum annexed.

After remarking on the lack of unanimity which exists as to what treaties are or are not cancelled by war and the absence of any uniformity of actual practice in this respect, Professor Oppenheim, however, proceeds to state that a majority of writers are agreed that multilateral treaties generally are not cancelled by the outbreak of hostilities, but that belligerents may suspend them, as far as they themselves are concerned, in case the necessities of war compel them to do so. This contention was adopted by your predecessors in office as the basis of the opinion which they furnished to the Board of Trade on the 8th April, 1916, in connection with the Industrial Property Convention (Paper (B)), and Westlake (part 2, p. 34) and Hall (p. 331) are therein cited in support of it.

While Mr. Balfour cannot but recognise that these views must carry great weight, he desires me to put forward for your consideration the following alternative, which, if it can be asserted with any degree of certainty from the legal point of view, would greatly simplify and facilitate the institution of the measures to be adopted by His Majesty's Government at the end of the war, in some cases in concert with the Allied Powers.

The alternative suggested is that every multilateral treaty arrangement should be regarded as being in effect a set of bilateral arrangements fashioned into one whole for general convenience, and that it should be maintained as the natural corollary that, as a bilateral treaty expires on the outbreak of war, so also would that part of a multilateral treaty expire which concerns the belligerents.

GENERAL.

9

In a memorandum, of which copy is enclosed (Paper (C)), Sir Algernon Law, the late Controller of Commercial and Consular Affairs of this Office, has adduced cogent arguments in favour of this suggestion, the adoption of which would enable His Majesty's Government to regard themselves as free from any obligation after the war towards their present enemies, even though such obligation was imposed by a multilateral treaty and though the latter itself continues in force as between this country and the other Contracting Parties, neutral or Allied. The disentanglement of former obligations towards an enemy State from those towards other parties might be difficult in some cases, e.g., that of the Copyright Convention, and in practice it might be expedient formally to revive such instruments.

From the point of view of convenience the suggested alternative has much to commend it, and its adoption, as you will readily appreciate, would greatly facilitate the carrying into effect of the resolutions of the Economic Conference of the Allies held at Paris in June 1916 (Paper (D)), which contemplated drastic changes in the relations between the Allied and the present enemy Powers after the war. These changes will entail variations in treaties in force before the war, not only with enemy, but also with neutral States.

I am to invite your attention in particular to the confidential declaration (second note (I)) that the provisions of the General Act of Berlin affecting commerce and navigation are at an end so far as enemy States are concerned.

The Legal Adviser to the Secretary of State (Sir Edward Davidson, K.C.) has indicated the possibility of adopting, if it should be necessary, a further alternative, which is that His Majesty's Government should formally announce their withdrawal from their *ante bellum* treaty obligations towards the States now at war with this country, and in this way secure freedom to enter into fresh obligations more suited to the altered circumstances.

Mr. Secretary Balfour will be glad if you will take the papers into your consideration and favour him with your opinion as to the course which should be adopted from the legal point of view by His Majesty's Government in regard to this question, and particularly as to whether the former of the alternatives suggested could be utilised as a practicable expedient and defended as such from the standpoint of International Law in discussion in this country or with foreign Powers.

The Secretary of State would also be grateful for any further observations of a general nature which you may be good enough to offer in this connection.

The matter is one of great urgency, as it will be discussed at the Imperial Conference which is about to meet.

I have, &c.
W. LANGLEY.

List of Papers.

- (A.) Memorandum by the Librarian of the Foreign Office, December 9, 1915. (Confidential No. 10721.)
- (B.) Opinions of the Law Officers on questions raised by the Board of Trade in regard to Copyright and Industrial Property, April 8, 1916.
- (C.) Memorandum by the late Controller of Commercial and Consular Affairs, March 7, 1917.
- (D.) Resolutions of the Paris Economic Conference.

Report.

Whatever may be the true view as to the extent to which treaties between belligerents are annulled or suspended by war, it is apparent that the victor may impose whatever terms he thinks fit as a condition of peace. It follows that, in the case of those multilateral treaties to which the only parties are belligerents in the present war, there is no difficulty, in concert with such Allied Powers as may be concerned, in refusing to continue or to revive the treaty or in making variations or imposing new terms as a condition of revival.

The difficulty arises in the case of treaties to which neutral States are parties. It is, in our opinion, substantially though not completely accurate to say that every multilateral treaty is "in effect a set of bilateral arrangements fashioned into one whole for general convenience." But it does not, we think, always or necessarily follow that such a treaty can be annulled with respect to one or more parties without impairing the rights and obligations subsisting between other parties. The whole is

[399]

D



something more than the sum of the parts. The relationships concerned are joint as well as several. So, for example, the international instrument which guaranteed the neutrality of Belgium could hardly have been annulled as between France and Germany after the war of 1870 without a violation of the rights of Great Britain.

There are, no doubt, many treaties which may be annulled as between some of the parties without injury to the rights and obligations of the other parties as between themselves. In the case of treaties falling within this category it appears to us that there is no objection to the course suggested by the Secretary of State. Neutrals cannot have ground of complaint where their rights under the treaty in question are *ex hypothesi* unaffected. But, if it is desired to annul or vary any treaties to which neutrals are parties falling within the other category (that is to say, treaties whose annulment or variation as between belligerents will affect the rights of neutrals), we are of opinion that the assent of such neutrals is necessary to the new arrangement so to the cancellation of the treaty, as the case may be.

It does not appear to us that there would be, for this purpose, any legal usefulness in an announcement that Great Britain withdraws from her *ante bellum* obligations towards the States now at war with her. So far as neutrals are concerned, the announcement would in the light of our opinion be inoperative. So far as this country is concerned, there is already complete freedom to deal as is thought fit with *ante bellum* obligations affecting only enemy States.

We do not examine in detail the views stated in document (C). Much of the argument therein urged is familiar, but the line of reasoning, and the conclusions apparently recommended, would lead to consequences to which it seems to us highly inexpedient that the Government of this country should be committed.

FREDERICK SMITH.
GORDON HEWART.

Law Officers' Department,
March 22, 1917.

[63293]

No. 4.

[File 386/1917.]

[March 23, 1917.]

The Secretary of State for Foreign Affairs to the Lord Chancellor.

Commercial
and
industrial
policy
during
transitional
period after
the war:
As to
conflict of
recom-
mendations
of Com-
mittee with
His
Majesty's
Govern-
ment's
obligations
under
Commercial
Treaties.

THE Secretary of State for Foreign Affairs presents his compliments to the Lord Chancellor and would be much obliged if his Lordship would be so good as to favour him with his opinion on the following matter:—

Some time ago a committee under the chairmanship of Lord Balfour of Burleigh was set up to consider and report on the commercial and industrial policy which should be followed by this country after the war.

This committee has presented a secret interim report containing recommendations that for a period after the war the control of the exports of certain commodities from the United Kingdom should be continued. The method of control would be that of the prohibition of export except under licence, and the commodities to which the system would be applied would be those of which the enemy countries are practically dependent upon the Allies for their supplies. The chief object in view in maintaining after the conclusion of peace this control over the export of these commodities is to ensure that during the transitional period after the war the enemy countries shall not obtain an unfair trade advantage over the British Empire and the Allies, and also to guard against the risk of shortage in the Allied countries. A copy of the report is enclosed (Paper A). The essential element of the scheme is that supplies of these commodities will be allowed to go to our present Allies in preference to countries which have remained neutral.

A letter has now been received from the Board of Trade (Paper B) raising certain points which must be settled before His Majesty's Government can decide whether or not the recommendations of the committee should be approved.

Many of the commercial treaties to which Great Britain is at present a party contain a clause to the effect that no prohibitions shall be imposed on the exportation of any article from the territory of either of the High Contracting Parties to the territory of the other which shall not equally extend to the exportation of the like article to any other foreign country.

The provisions in the various treaties are not all identical in their language, but they all embody the same idea. A list of the treaties containing such an article will be found in Paper C, and the text of the various treaties will be found in the accompanying "Handbook of Commercial Treaties."

The first question on which the Lord Chancellor is asked to advise is whether the recommendations in the report of Lord Balfour's Committee can be carried out without infringing the above provisions of the commercial treaties.

Inasmuch as prohibition would be general in form, discrimination would in fact be exercised, not by the prohibition as such, but by the administration of the prohibition. Licences for export would be given more freely to Allied countries than to countries which have remained neutral, or they might be withheld altogether.

In connection with this question it may be convenient to explain that whilst His Majesty's Government have during the war established prohibitions of exportation to certain specified destinations, they have felt justified in doing so in spite of the obligations imposed by commercial treaties, seeing that such discrimination has been adopted solely in the interests of the blockade, and has been aimed at preventing the goods reaching enemy countries, whilst by means of licensing combined with rationing exports to the neutral countries concerned of goods for their own needs have been interfered with as little as possible. Prohibitions of importation have in form affected all foreign countries alike, but the goods from certain Allied countries have received preferential treatment in regard to licensing.

From time to time the Swiss Government have raised objections on treaty grounds to the exclusion from this country of goods of Swiss manufacture under a prohibition of importation which, though general in form, was not enforced against the Allies; but no reasoned reply has been returned by the Foreign Office to these representations.

The precise ground on which prohibitions of this kind should be justified has not been determined, but the Secretary of State has been advised that the action of His Majesty's Government might be defended (a) on the ground that the commercial treaties were conventions which are only intended to operate in their entirety in a state of peace, or (b) under the principle of *salus reipublice suprema lex*.

With regard to (a) a similar line has been taken, on the advice of the Law Officers of the Crown (see Papers (D) and (E), Opinions of the 31st March, 1902, and the 31st March, 1915), with regard to the opening of closed mails in transit across British territory from one neutral country to another, despite the provisions in the Postal Convention guaranteeing the right of transit throughout the entire territory of the Union.

Returning to the question of the maintenance of prohibition after the war, Mr. Balfour has been advised that, if military reasons justify the imposition of a prohibition of export or import conflicting with a commercial treaty at all, there is no reason why the period during which such reasons operate should be exactly coincident with the war or should necessarily terminate with the conclusion of peace, and that a prohibition imposed for the purpose of conserving stocks in order to repair the ravages of war, or to guard against a shortage directly due to the war, could be defended as a legitimate measure of self-defence, even if it conflicted with a commercial treaty. If the Lord Chancellor considers that any such contention is well-founded, it would seem to cover the recommendations contained in this report of Lord Balfour's Committee.

In the event of the Lord Chancellor being of opinion that the recommendations of the Committee could not be carried into effect without infringing the commercial treaties, the question would arise as to whether it would be judicious to give notice to determine such treaties in the event of His Majesty's Government deciding to adopt the recommendations.

The Lord Chancellor will observe that there are twelve treaties enumerated in the list (Paper C). Of these, two treaties, Argentine, 1825, and Venezuela, 1825, contain no provision for their determination. In the case of Bolivia, 1911, and Honduras, 1910, no power to denounce arises before 1922 and 1924 respectively. In the remaining eight cases the treaty can be determined on giving twelve months' notice.

The question whether it would in any case be expedient to give such notice is open to doubt. Some alarm has already been expressed in neutral countries that the resolutions of the Paris Conference implied an intention to prolong the economic war after the conclusion of peace, and that any such action would be prejudicial to neutral interests. An idea of this kind would be accentuated by notice of determination of the treaty being given for the avowed purpose of enabling prohibitions of export to neutral countries to be imposed and maintained without affecting exports to Allied countries. The United States in particular have tolerated many restrictions on their trade with



other countries as war measures, but they would almost certainly protest against any measures which appeared to foreshadow unfair discrimination against their trade after the war is over. As a matter of tactics, therefore, it might be better if the recommendations of Lord Balfour's Committee are adopted, and are inconsistent with the provisions of the commercial treaties, that the neutrals should not be approached by His Majesty's Government, but should be left to raise the point themselves and to establish their case that a violation of the commercial treaty had taken place.

A further point which must be borne in mind is that denunciation would not in any case become operative in less than twelve months, and it might conceivably be desired to enforce these proposed prohibitions before that time.

Mr. Balfour would be grateful if the Lord Chancellor would advise (a) whether the recommendations of Lord Balfour's Committee can be carried out consistently with the obligations of the commercial treaties as to prohibition of export; and (b) if the answer to the above is in the negative, whether notice to determine the Conventions in question should, where possible, be given. Mr. Balfour would also be grateful for any observations of a general nature which the Lord Chancellor may be good enough to offer.

March 10, 1917.

List of Papers.

- (A.) Report of Lord Balfour of Burleigh's Committee, dated December 14, 1916.
- (B.) Letter from the Board of Trade, February 5, 1917.
- (C.) List of Commercial Treaties containing Export Prohibition Provisions.
- (D.) Opinion of the Law Officers, March 31, 1902.
- (E.) Opinion of the Law Officers, March 31, 1915.
- (F.) Handbook of Commercial Treaties, &c.

PAPER (C)—Treaty Provisions.

Country.	Date.	Article.	Reference in Handbook. Page.	Power to Denounce.
Argentina	1825	4	4	None.
Bolivia	1911	3	40	None before 1922.
Colombia	1866	4	219	In twelve months.
Greece	1886	3	450	" "
Honduras	1910	7	None	None before 1924.
Mexico	1888	3	526	In one year.
Nicaragua	1905	4	638	" "
Paraguay	1884	3	652	" "
Sweden	1826	9	928	In twelve months.
Switzerland	1855	8	938	" "
United States	1815	2	980	" "
Venezuela	1825	4	1,030	None.

The Lord Chancellor to the Secretary of State for Foreign Affairs.

The Lord Chancellor presents his compliments to the Secretary of State for Foreign Affairs, and in answer to the observations sent to him under date 10th instant has the honour to submit the following:—

In considering whether the recommendations of Lord Balfour's Committee can be carried out consistently with Commercial Treaties as to prohibition of export, &c., no attention need be paid to treaties with the countries at present at war with His Majesty's Government, as these treaties would be determined by the war, and the terms of peace will be such as to make it plain that they are not to be treated as renewed.

As regards other countries, the recommendation is that exports should take place only under licence, and that discrimination should be exercised between different countries by permitting exports to some and not to others. This would certainly amount to an infringement of treaties containing most-favoured-nation clauses, such as those to which I have been referred.

The object in view might, however, so far as the prevention of exports to the present enemy countries is concerned, be achieved to a considerable extent without any infraction of such treaty obligations. If the licence for export were granted only in the case of consignments to countries from which re-export of the goods imported to them under licence from this country is prevented, the danger of their finding their way to the enemy countries would be obviated. If there were any reason to believe that re-export was being permitted, licences in respect of consignments to persons in such neutral countries might be refused, and this would probably prove an effectual sanction. There would be equal treatment all round, as the licences would be granted in respect of all countries on the same terms. I assume that the Allied countries would be ready to acquiesce in a proposal of this nature.

It might, however, be desirable for a short time after the termination of the war, in the case of certain articles, to forbid their exportation altogether, except to such countries as (say) France and Belgium, on the ground that all that we could export would be absolutely necessary to enable these countries to repair the ravages of war. If British merchants can be induced to abstain from making sales of the articles in question to persons in any countries other than those where such supplies are imperatively necessary to repair the damage of war, no difficulty with regard to the most-favoured-nation clause would arise. Our whole available exports of such articles would go to (say) France and Belgium by the action of the sellers. But if it were found necessary, owing to the impossibility of securing such action on the part of British merchants, to forbid exports to countries other than such Allied countries as imperatively need supplies of these articles, there would be the strongest possible moral justification for taking this course, as "no claim can be conceived stronger than that which our Allies in war would have upon us for the provision of the means to enable them to make good the damage which hostile operations have occasioned to their bridges, roads, railways, machinery, &c." I do not think that this moral obligation would amount in point of strict law to an answer to a claim founded on a treaty containing a most-favoured-nation clause. But a treaty cannot be dealt with as if it were merely a bargain between two merchants enforceable by municipal law. Our moral obligations to (say) France and Belgium may well, looking at the matter broadly, be held to outweigh our obligation as measured by the strict terms of these treaties. The higher obligation may prevail over the lower, especially as such a state of circumstances cannot be supposed to have been in contemplation of the parties to the treaty at the time it was made.

From the practical point of view, the entry of the United States into the war as our Allies may profoundly modify the situation from many points of view.

It appears to me that it would not be politic to determine the treaties at present. Such a wholesale denunciation of treaties with the most-favoured-nation clause might conceivably have a bad effect in the United States, as well as in the other countries affected.

I have no further observations of a general nature to make beyond those already submitted.

House of Lords, March 23, 1917.

FINLAY.



(14)

No. 4.

[War Office.]

[April 2, 1917.]

Case for the Opinion of the Law Officers of the Crown.

THE following papers are sent herewith :—

- Copy of Memorandum by Dr. A. Pearce Higgins, December 7, 1916.
- Copy of War Office Memorandum, January 3, 1917.
- Copy of Letter from Admiralty to War Office, February 2, 1917.
- Copy of War Office Note in reply to Admiralty contention, February 1917.
- Copy of further Memorandum by Dr. A. Pearce Higgins, February 24, 1917.
- Copy of War Office Minutes.
- Copy of Correspondence.
- Print of Correspondence respecting Peace Conference, 1899 (C.-9534).

Hospital
ships:
Provision
of the
Geneva
(1906) and
The Hague
(1907) Con-
ventions
respecting
the carry-
ing of sick
and
wounded of
land forces,
medical
personnel
and
supplies.

In this case the opinion of the Law Officers is requested on the question whether it is legitimate, in view of the Geneva Convention and the Xth Hague Convention of 1907, to convey on hospital ships medical personnel not forming part of their own staff and medical supplies not required for the service of the particular ship conveying them.

The relevant facts and arguments which have been advanced for and against the legitimacy of conveying such personnel and supplies on hospital ships appear from the correspondence, memoranda, and minutes sent herewith.

Apart from the suggestion made by the War Office that ships conveying personnel and supplies intended for land hospitals or conveying soldiers who have been wounded on land should be treated as distinct from hospital ships under the Xth Hague Convention and as analogous to mobile medical units or convoys of evacuation under the Geneva Convention, the Law Officers are requested to consider whether such use of hospital ships is not to be justified under the express terms of the Xth Hague Convention. In this connection attention is particularly called to—

1. The definition of "bâtiments hôpitaux militaires" in Article I of the Convention and the commentary on those words quoted by Dr. Pearce Higgins in his second Memorandum.

2. The reference to members of the land forces in Articles 11 and 17 of the Convention.

3. The use of the words "de porter secours aux blessés, malades et naufragés," in Article I, which, it may be contended, are applicable to the giving of assistance by bringing personnel and supplies to the place where they are needed, as well as to rendering medical aid on board the ship itself.

4. The provisions of Articles 4 and 8 of the Convention, which prohibit the use of hospital ships for military purposes and for committing acts harmful to the enemy. The nature of the acts which it is intended to prohibit is indicated in the commentary in "Correspondence respecting the Peace Conference, 1899 (Miscellaneous, No. 1 (1899), C.-9534)," pp. 69 and 71, where the following passages occur :—

P. 69. "L'idée essentielle est que les bâtiments auront un caractère exclusif-
ment hospitalier, par suite ne pourront rien porter qui ne soit pas destiné aux
blessés ou malades et à ceux qui les soignent, qui puisse être utilisé pour des actes
hostiles."

* * * * *

"Il va sans dire que l'affectation hospitalière donnée à un navire et com-
muniée à l'adversaire ne pourra être modifiée pendant la durée de la guerre.
Autrement des abus seraient possibles; on donnerait le caractère hospitalier à un
navire pour le faire parvenir en sécurité à un endroit déterminé et là on le trans-
formerait en bâtiment destiné à des opérations hostiles."

P. 71. "Il faut qu'il soit bien entendu que ces navires ne serviront à aucun
autre but, qu'ils ne pourront, sous aucun prétexte, être directement ou indirecte-
ment utilisés pour une opération militaire quelconque; informations à recueillir,
dépêches à transmettre, combattants, armes ou munitions à transporter."

The Law Officers will also consider whether the title of the Xth Hague Convention
"pour l'adaptation à la guerre maritime des principes de la Convention de Genève"

GENERAL.

15

implies that the main object of the Convention is to give assistance to those who suffer in naval warfare, or whether the title is sufficiently explained on the ground that the main object of the Convention is to confer upon hospital ships immunity from capture and other incidents of naval warfare.

The Law Officers are requested to advise :—

1. Whether, having regard to the Geneva Convention of 1906 and to the Xth Hague Convention of 1907 and to the principles of International Law, it is legitimate to convey on a hospital ship protected by the provisions of the Xth Hague Convention—

- (a.) Sick and wounded who belong to the land forces and have become casualties on land;
- (b.) Persons not belonging to the staff of the hospital ship, but belonging to the Army Medical Service, and intended to form, or to form part of, the staff of land hospitals;
- (c.) Persons not belonging to the staff of the hospital ship, but intended to be conveyed as reliefs to the staff of other hospital ships;
- (d.) Medical supplies, such as drugs, which are of a kind capable of use both at sea and on land, but intended, in fact, for use either upon other hospital ships or in hospitals and medical units on land;
- (e.) Medical supplies, such as ambulances or equipment for land hospitals, capable of being used only on land.

2. Whether, having regard to the Geneva Convention of 1906 and to the Xth Hague Convention of 1907 and to the principles of International Law, there is authority for recognising a class of hospital ships distinct from those protected by the Xth Hague Convention and analogous to mobile medical units and convoys of evacuation; and, if so, whether it would be legitimate to carry on such hospital ships the persons and supplies mentioned in (a), (b), (d), and (e) of the preceding question.

3. Generally upon the case.

Opinion of the Law Officers of the Crown.

1. We are of opinion that the first question in all its parts should be answered affirmatively. Article I of The Hague Convention, 1907, clearly defines military hospital ships, and so long as a ship falls within that definition—so long, that is, as it is constructed or adapted by the State specially and solely with a view to carrying aid to the wounded, sick, or shipwrecked, and provided that no provision of the Convention is violated (e.g., by the use of the ship for military purposes, contrary to Article 4)—we think that the ship is entitled to the protection conferred by the Convention. In our opinion the Convention applies to the sick and wounded of the land forces as well as to the sick and wounded of the naval forces. The title, "Convention for the Adaptation to Maritime War of the Principles of the Convention of Geneva," seems to us to import that all ships, &c., which are exclusively employed in the amelioration of the condition of the wounded, &c., are to be immune from capture and other incidents of naval warfare.

2. It does not appear to us that there is authority for the view that there are two classes of hospital ships—one class protected by The Hague Convention and the other by the Geneva Convention. We refer to our answer to the first question.

3. The matter seems to be one of expediency, the question being whether the inconvenience and risk of carrying R.A.M.C. personnel and supplies by ordinary transports are outweighed by the risk that if hospital ships are used for the purpose the enemy may refuse to recognise the status of hospital ships. Upon this question we only observe that, if Germany thinks it will be to her advantage to refuse recognition to hospital ships, she is likely to act without reference to the question whether they are used for the purposes under consideration.

FREDERICK SMITH.
GORDON HEWART.

Law Officers' Department,
April 2, 1917.



[169752]

No. 4^B.

[Board of Trade.]

[File 148846/17.]

[August 8, 1917.]

Case for the Opinion of the Law Officers of the Crown and Mr. Branson.

THE following is copy of a Memorandum prepared in the Board of Trade, with copy of the draft Defence of the Realm Regulation referred to therein:—

Control of
transfer of
British
interests in
mines to
foreigners.

1. The Board of Trade have considered the Memorandum of the Foreign Trade Department circulated by Lord Robert Cecil, pointing out the danger that valuable mining properties abroad, at present owned by British subjects, may pass under alien and even enemy control, and suggesting the advisability of securing by law that the approval of His Majesty's Government must be obtained for the transfer to foreigners of the controlling interests in such property wherever situated.

2. The matters dealt with in the Memorandum have already engaged the consideration of the Board of Trade, who concur generally in the observations contained therein. The attention of the Board has hitherto been specially directed to steps for counteracting the activities of German organisations in the manner indicated in the last two paragraphs of the Memorandum, viz., by the establishment of one or more British commercial organisations within the Empire, in close touch with similar organisations in Allied countries. They have, however, also considered the question of legislation for the purpose indicated above.

3. The Board of Trade, however, are convinced that such legislation would present great difficulties, and would be regarded as very controversial in view of the vast extent of the British interest in foreign countries which would be in danger of reprisals if a permanent policy of restricting control of mineral properties to British subjects were embarked upon. In any case, it would be impracticable to enact such legislation at the present time before the investigations of such Committees as the Balfour of Burleigh Committee on Industrial Policy after the War have been received. (As a matter of fact, the Board of Trade understand that this Committee is distinctly unfavourable to such a policy.)

4. The practical question, therefore, narrows itself down to the possibility of dealing with the matter provisionally during the war period by a Defence of the Realm Regulation. Such a Regulation, confined, however, to certain classes of mineral property within the United Kingdom, is already in force. (Copy annexed.) It would be a simple matter to extend this Regulation to mineral properties wherever situated. If, therefore, the War Cabinet approve, I should propose that a Regulation should be made for this purpose.

5. The question remains as to the extent to which the proposed Regulation would in practice be capable of enforcement. In the case of the existing Regulation, the Stock Exchange require a declaration as a condition of transfer of mining interests that such transfer is not for the benefit of foreigners (similar to a declaration already required by the Stock Exchange respecting transfers of shares of all kinds to or for the benefit of enemies). If the Regulation were extended as proposed, the transferee would of course be frequently out of the British jurisdiction, and it would not be possible to enforce on him any penalty for a false declaration, and it would depend upon the law of the country in which the property is situated whether a transfer obtained by means contrary to British law would be invalid.

6. Notwithstanding these difficulties, the Board of Trade are advised by a broker possessing special experience in mining transfers, whom they have consulted confidentially, that the suggested Regulation would operate as a considerable deterrent to transfers of mining interests to or for the benefit of aliens; while, if confined to the war period, it would not interfere seriously with legitimate business, provided that hard cases were dealt with by the Board of Trade power of licensing.

7. The present Regulation is confined to certain classes of mines, but it would appear worth consideration whether it ought not to be extended to oil properties.

8. It is not to be denied that difficult questions of policy are likely to arise under the extended Regulation. If the British owner of an interest in a mine in South America has a tempting offer from an American Company, and the Board of Trade refuse a licence, he is likely to demand that we should compensate him or take over his interest. If the restriction were a permanent one this demand would probably be irresistible. His Majesty's Government would therefore have to be prepared either to acquire mineral interests abroad on a large scale, or to consent to licence transfers to

aliens—by which in some case they would no doubt incur considerable odium. On the other hand, the price at which they could acquire any particular interest would of course tend to be appreciably lower if the Regulation were made, than if, as at present, they had to compete on equal terms with the foreign bidder.

As the Regulation will operate only during the war period it is possible that the demand for compensation or State purchase could be resisted, but it is not certain that such resistance would be successful.

9. The Board of Trade would be glad of early instruction from the War Cabinet as to whether the present Regulation shall be extended, as above suggested, to certain classes of mines and oilfields wherever situated.

REGULATION 30 BB.

A person shall not, without the consent of the Board of Trade, transfer, or agree to transfer, to or for the benefit of an alien or a foreign-controlled company, any interest in any mine to which this Regulation applies, or any share, stock, debenture, or other security issued by any company owning such a mine, or accept or agree to accept such a transfer.

If a person acts in contravention of this Regulation he shall be guilty of a summary offence against these Regulations.

For the purposes of this Regulation the expression "foreign-controlled company" means any corporation—

- (a.) Where the majority of the directors, or persons occupying the position of directors, by whatever names called, are not British subjects; or
- (b.) Where the majority of the voting power is in the hands of persons who are not British subjects, or who exercise their voting powers directly or indirectly on behalf of persons who are not British subjects; or
- (c.) Where the control is by any other means whatever in the hands of persons who are not British subjects; or
- (d.) Where the executive is a foreign-controlled company, or where the majority of the executive are appointed by a foreign-controlled company.

The mines to which this Regulation applies are mines situated in the United Kingdom from which any ores of the following metals are extracted, that is to say, copper, lead, tin, tungsten, zinc, or any other metal which may hereafter be added by order of the Board of Trade.

The following is a copy of the Memorandum of the Foreign Trade Department circulated by Lord Robert Cecil, which is mentioned in the Board of Trade Memorandum:—

Base Metals.

There is a danger of valuable mining properties at present in British ownership in neutral countries passing under the control of American groups whose interests are in reality centred in Germany through their affiliation to the great German Metal Combine.

At present no powers exist to prevent British companies from selling their interests in such properties to any neutral.

In view of the importance of conserving as far as possible such interests as we do at present possess in the world's resources of base metals, and of the avowed intention of the Germans to make good, by the purchase of mining properties in neutral countries, the loss of the raw materials for which they were formerly dependent on the British Empire, it is desirable that some control over the sale by the British companies of their mining properties abroad should, if possible, be established.

An account of the present situation with concrete instances of transactions which it is desirable to check will be found in the accompanying Memorandum.

The sanction of the War Cabinet is asked for the preparation of a measure giving His Majesty's Government power to prohibit the alienation to foreigners of mining properties abroad owned by British subjects unless the consent of His Majesty's Government has first been obtained.



The war has made public property a fact which, prior to 1914, was only perhaps realised by those directly connected with mining and smelting businesses, i.e., that German mining and smelting combines, chiefly with their seat at Frankfurt, have gradually secured such a chain of organisations in various countries that they practically dominate the base-metal industry of the world. The war appears to have scarcely affected this control with the exception, perhaps, of Australia, where stringent legislation has freed the metal industries of the Commonwealth from German domination. It appears incredible that, under present-day conditions, German companies are still in a position to acquire and control British-owned properties, but they are still attempting to do so (and in some cases no doubt have succeeded) through the German-American companies in the United States, with which they are closely affiliated, in which they hold capital, and are represented in many cases through interlocking directorates.

The accompanying chart,* which has been extracted from the "Report on Co-operation in American Export Trade," published in 1916 by the United States Government, shows very graphically the close connection existing between the Frankfurt companies and the German-American metal organisations of the United States.

The American Metal Company, with a capital of 700,000*l.*, is closely affiliated, as the chart shows, with the Metall-Gesellschaft of Frankfurt, with a capital of 900,000*l.*, and also with the Metallbank und Metallurgische Gesellschaft, also of Frankfurt, capital 2,000,000*l.*

It is said that a large part of the stock of the American Metal Company is held by the two German companies, and these latter are therefore understood to have a direct voice, if not a control, in its management.

There are other large German metal combines, such as Beer, Sondheimer, Aron Hirsch and Sohn, which have extensive ramifications in the United States, and it may be said, therefore, that the German metal companies, in spite of the state of war existing to-day, are free to pursue their endeavours, under the shelter of their affiliated American groups, to capture important British and other mining properties throughout the world.

The American Metal Company has been and is very actively engaged in buying up mining companies in the American Continent, and two cases have recently come to the notice of His Majesty's Government in which British owners have asked the Foreign Trade Department if there was any objection to their accepting favourable offers which they had received for their properties from the American Company. One of these properties was in Chile, of relatively small importance, but the other, situated in Mexico, was of greater value. It belongs to the Mazapil Copper Company (Limited), an English company with a capital of 500,000*l.*, and the offer received from the American Company amounted to some 1,300,000*l.* Both the properties in question consist of copper mines which it is of great importance to keep under British control owing to the comparatively poor resources of the British Empire as regards this metal. With regard to the offer received by the Mazapil Copper Company, His Majesty's Ambassador at Washington reported that the sale should be prevented by every available means, as by its acquisition the American Metal Company would practically complete their hold on the production of base metals in the northern districts of Mexico.

A letter lately intercepted by the Censor states that recent German activities in Mexican mines have as an object "to replace into German hands those metals which they were getting before the war from the British and their Colonies."

In order effectively to counter the schemes of the German organisations to dominate the world's base metal supply, it would appear to be necessary to oppose it by a similar combination of the large base metal interests throughout the Empire, and it is understood that the Board of Trade is at present considering the steps to be taken to secure such a fusion of interests. With such a combination it would not only be possible to check the German activities, but a British combine of the magnitude contemplated would have sufficient power in capital and output to compete successfully with the American organisations, and would be in a position to offer at least equal prices for the acquisition of important new properties, and be able to keep a staff of engineers in different parts of the world reporting on opportunities for the investment of the capital resources of the combine. It is only by such an organisation that Great Britain and her Colonies will be able to check and defeat what threatens to become a

* Not reproduced.

German domination and the consequent fixing of prices of the world's base metal supply.

In the meantime it is obviously of the greatest importance to prevent British-owned properties passing out of British control into that of the German-American and other groups. His Majesty's Government, however, do not at present possess powers under which such sales can be prevented, and in the two cases cited above, all the action it was possible to take was necessarily confined to an urgent request to the directors not to accept, on patriotic grounds, what to them were undoubtedly very favourable offers.

It is certainly a matter of extreme urgency that this unsatisfactory situation should be remedied, with a view to creating a powerful British organisation for the future, and therefore that steps may be taken with the least possible delay to give His Majesty's Government the necessary power to secure by law that the approval of His Majesty's Government must be obtained for the sale or alienation to foreigners of any British-owned mining property or of the controlling interest in such property, wherever situated.

The Board of Trade desire to have the views of the Law Officers upon the above Memorandum of the Board of Trade.

The Law Officers and Mr. Branson are requested to consider same and advise if they find themselves in agreement with the views of the Board of Trade as expressed in the Memorandum, and whether the best course of dealing with the situation will be by a Defence of the Realm Regulation as suggested, and, if so, to be good enough to outline the scope of the Regulation.

Opinion of the Law Officers of the Crown and Mr. G. A. H. Branson.

We perfectly understand the object which the Board of Trade desires to attain, but we are of opinion that it cannot be attained by making a Regulation. The main difficulty, in our opinion, is that the rule making power conferred upon His Majesty in Council by the Defence of the Realm Acts is limited to legislating for the defence of the Realm. Regulations, therefore, are only valid if and as far as they are directed to this end. Regulation 30 BB as it stands would, in our opinion, be difficult, if not impossible, to bring within the powers of the Act, for it prevents the transfer of an interest even to an alien who is an ally. A Regulation designed not for assisting in the prosecution of the present war, but to prevent the acquisition by Germans of control of mines which they could exercise to our detriment only after the conclusion of peace would, in our opinion, be clearly *ultra vires*. If, however, it can be quite clearly shown that there is a present and substantial danger of mining interests getting into enemy control through sales to aliens (Allies or neutrals) and of their being used during the war to stop or hamper our supplies of metal for war purposes, then, in our opinion, a Regulation to prevent such sales may be justified; and, if so, Regulation 30 BB should be amended by making the last paragraph read "mines wherever situated" instead of "mines situated in the United Kingdom."

It should be borne in mind that the power to make Regulations is for exercise in the United Kingdom only (except in reference to navigation), and the Regulation would not make it an offence for anyone in any other part of the Empire to sell his interest to an alien.

(Signed) FREDERICK SMITH.
GORDON HEWART.
G. A. H. BRANSON.

*Law Officers' Department,
August 8, 1917.*



[—]

No. 4^c.

[Treasury.]

[August 16, 1917.]

Case for the Opinion of the Law Officers of the Crown.

Offences by
Allied
Troops in
Great
Britain:
Jurisdiction.

THE Treasury Solicitor has received the following minute from the Director of Personal Services (War Office):—

“Treasury Solicitor (through C2).

“The position with regard to the maintenance of discipline among American troops now in this country urgently requires consideration, and it is desired that the matter should be referred to the Law Officers for their opinion at the earliest possible date. The American military authorities are pressing for a definite decision as to the position, which might at any time become one of some difficulty.

“The facts are simple, viz., that there is now in this country a considerable number of American soldiers, under the command of their own officers, all of them subject to American military law. They are not, of course, subject to our military law, and could not therefore, it is presumed, be arrested by our military police nor tried by our military Courts, even if it were desirable to do so. In any case, it may, we think, be accepted that the American authorities could not dispense with the administration of their own military law by their own Courts and personnel.

“The question therefore arises how far any arrest or trial of such soldiers by American military authorities, or any retention of them in confinement, if found guilty by an American military Court, can be justified, as the law of this country now stands; and if they cannot be so justified, what steps should be taken in order, as *quickly as possible*, to legalise any such action, either by a regulation under the Defence of the Realm Acts or, if necessary, by legislation.

“In considering this question, perhaps, the Law Officers would also consider the position of individual American officers and soldiers who may be in this country, but may not for the time being form part of an organised body of troops, and also the case of individual officers and soldiers of the Allied forces generally who may find themselves in this country, either on duty or on leave, who may commit offences either against their own military code or against the civil law of this country.

“In particular, it is desired to know whether in such cases the civil or military authorities in this country, in whose custody such individual American or Allied officers or soldiers may be, would be justified in handing them over to their respective military authorities, and whether such authorities could hold them in custody in this country, and try them before a Court legally constituted under their military law.

“In this connection we refer to the conventions which have been entered into between this country and France and Belgium respectively, copies of which are enclosed* and marked 1A and 1B.

“We are anxious to obtain the opinion of the Law Officers with regard to the American troops in this country at the earliest possible moment, and if the further questions as to individual officers and men raise questions which would require longer consideration, we should be glad to receive an opinion on the main question first, and that the other questions should be answered in due course.

“In the event of a regulation under the Defence of the Realm Act being considered to be necessary, we understand that a meeting of the Council will be held on the 22nd instant, and that there will probably not be another for several weeks thereafter; we hope therefore that it would be possible to lay any necessary regulation before that meeting.

“A. M. HENDERSON SCOTT, Lieutenant-Colonel,
“(for D.P.S.)”

August 8, 1917.

* Not printed.

Observations by Treasury Solicitor.

Copies in the original French of the conventions with the French and Belgian Governments referred to in the minute are herewith.

The question may be a different one as regards, in the first place, organised bodies of troops or armies in this country; and, in the second place, sporadic individuals who may be here on leave or otherwise. So far the only experience we have had in this country has been with regard to the latter class, and although it has been recognised that the deficiencies of the law might create difficulties, no difficulty has, in fact, arisen.

The first state of things has, of course, arisen with regard to the British army in France and Belgium. There is not at present any large organised body of American troops in this country, but there are some such organised bodies undergoing training, and it is possible that a very much larger number, amounting perhaps to 60,000, may be present later on.

It would be clearly impossible for the American officers properly to train their troops if they have no power of exercising over them their own military law, and it seems to be necessary therefore, if the English law does not permit of it, that legislation should be passed for the purpose.

The substance of what is required would appear to be that the American officers should have full powers of discipline in accordance with their own military law over their men, not only in their own camps but wherever they may be in this country. It may not be possible for them to carry out their military law to the full in this country; for instance, regular sentences of imprisonment could not be carried out here, the men would have to be sent back to the United States, but such powers of discipline as can be exercised here appear to be necessary. It would also seem to be necessary, in order to deal with individual officers and soldiers who may from time to time be absent from their command, whether as deserters or on leave or otherwise, that the English military authorities and also the civil police should have certain auxiliary powers limited to the arrest and detention of American officers and soldiers so far only as may be necessary for the purpose of handing them over to their own military authorities.

The details of these matters would be best settled by arrangement between the British and American authorities, and it may be thought desirable that whatever legislation is proposed should leave a certain elasticity for the purpose of dealing with detail. It may also be desirable that if legislation is necessary, as appears to be the case, it should also apply to any individual officers or soldiers of the Allied forces who may, for the time being, be in this country, whether they form part of an organised force or not.

It is understood that one such case at least has arisen where it was thought desirable to hand back an Allied officer to his own authorities in his own country rather than deal with him here.

At the same time, the general scheme of what is proposed would, it is imagined, not go so far as to exempt American officers and soldiers from the ordinary civil law of this country. It will be left as a matter of discretion to the civil authorities whether they would not hand the officer or soldier over to his own military authority rather than deal with him by civil law, and there is, of course, a question whether an organised foreign force, invited to a friendly country in war time for the purposes of war, whether it be for defending the country, as in the case of the English army in France, or for training purposes with a view to taking part in the war, as will be the case with the American troops, has certain extraterritorial rights and is entitled to exercise those rights independently of the sovereignty of the country in which it happens to be. Up to a certain extent common sense requires this to be so, but the exact limits will be hard to define, and precedents or authority of a legal character have not been discovered by the Treasury Solicitor.

It is therefore suggested that, in order to put the matter beyond question, legislation of some kind is desirable. This might take the form either of an Act of Parliament setting out the conventions with the various Allied Governments or stating in general terms the purposes of the proposed legislation, leaving the matter to be elaborated in detail by Order in Council. But this may involve delay, and the military authorities particularly wish to be advised whether, as an emergency measure, provision for the purpose desired cannot be made by a Defence of the Realm Regulation, which could delegate to the Army Council, for instance, the power of making orders for the purpose of giving detailed effect to the regulation. The regulation might, for example, provide that the Army Council should have power to make orders



1917

22

GENERAL.

for the purpose of subjecting foreign Allied troops in this country to their own systems of military discipline, and for arresting and handing them over to their own military authorities for that purpose (including a power to send them out of this country for that purpose).

It may be, perhaps, added that the position of American troops under training in this country cannot be distinguished from that of our own troops, who, as the Law Officers are aware, are considered to be on active service, and indeed are subject to be called upon for actual fighting at any moment in case, *e.g.*, of an invasion or an air raid; there would also appear to be no distinction whatever between American troops in this country under training and British troops who are under training at the base in France, of whom there are large numbers.

The Law Officers are requested to advise the War Department as to the power of the American military authorities to enforce discipline over their officers and men in this country, and whether any, and what, legislation is necessary or desirable for that purpose, and generally on the case.

Dear Attorney-General,

Treasury, August 14, 1917.

On my return after a few days absence I find that a case has been submitted to the Law Officers on the subject of the maintenance of discipline among American troops in England. It occurs to me that possibly a reference to the American view, as stated in Winthrop's "Military Law," may possibly be of assistance.

Colonel Winthrop was Deputy Judge Advocate-General in the United States Army, and the book was published in 1886.

At page 96 he writes in regard to the principle of extra-territoriality:—

"Such jurisdiction extends also to offences committed by our officers or soldiers within the lines or in the neighbourhood of our armies, when in the transit, by the permission of its Government, through the domain of a foreign nation with which we are at peace. Thus, on the principle of international law known as 'extra-territoriality,' under which, when the armies of one nation are privileged to enter or pass through the territory of another friendly nation, the laws of the former are deemed to continue to apply to its forces equally as if the same were within their own country. Such, for example, would be the legal status of our troops when permitted by the Government of Mexico to cross the frontier in carrying on hostilities against Indians."

At (3) a note is appended as follows:—

"This privilege is extended to armies in their permitted transit through foreign territory, and includes the right of exercising military discipline on the officers and soldiers. . . . When the transit of troops is allowed it is apt to be specially guarded by treaties." (Woolsey, International Law, 64; Vattel, III 7 sec. 130. And see "The Exchange," 7 Cranch 139; Coleman v. Tennessee, 97 U.S. 515.)

The note to the preceding paragraph on the same page is as follows:—

"Wherever our army or navy may go beyond our territorial limits neither can go beyond the authority of the President or the legislation of Congress. (Chase C.J. in *Ex Parte Milligan*, 4 Wallace 141. And see V. Opinions, Attorney-General 58; Coleman v. Tennessee, 97 U.S., 515, 516.) In the latter case the law was applied to offences committed by soldiers of our army when in occupation of insurrectionary districts during the late war, and it was held that (as in the case of any army lawfully marching through the territory of a foreign country—see *post*) our army was then exempt from amenability to the local courts, and subject only to the jurisdiction of its own military tribunals."

The author has evidently made an exhaustive study of and refers extensively to English authorities, but there is nothing to indicate that he has found anything in them inconsistent with his statement as given above.

Yours very truly,
J. P. MELLOR.

GENERAL.

23

P.S.—I do not of course suggest that the above extracts are directly in point on the question whether the municipal law admits the operation of the rule in this country.

J. P. M.

The Right Hon. the Attorney-General, K.C., M.P.,
4, Elm Court, Temple, E.C. 4.

Opinion of the Law Officers of the Crown.

The questions involved in this case raise issues upon which it is not possible to cite judicial decision. But upon principle we are of opinion that the matter stands as follows: Organised bodies of American troops in this country are, by the doctrine of extraterritoriality, within the limits of the quarters occupied by them, subject to their own system of discipline and their own laws, and may be dealt with by their own military authorities and be arrested, tried, and punished accordingly. Outside the limits of their quarters they are liable to be dealt with by the English criminal courts for any offences against the English criminal law, but could not be apprehended for any purely military offence such as desertion, absence without leave, &c., either by their own or the English military police, or by the ordinary police, nor could they in any case legally be handed over to their own military authorities to be dealt with. This observation applies to officers and soldiers forming part of an organised body of troops while outside the limits of their quarters, as well as to individual officers and soldiers not forming part of an organised body in this country.

In our opinion legislation of some kind is necessary, and the principal question appears to be whether what is desired can be effected by a Regulation under the Defence of the Realm Acts, or whether a special Act of Parliament is necessary. We think that it can be effected by a Regulation. The matters to be dealt with arise from the existence of a state of war, and are connected with the public safety and the defence of the realm, and the necessary provisions are essentially of a temporary kind.

It appears to us that the best way of dealing with the matter would be to make a Regulation giving power to the Army Council in wide and general terms to make and revoke or vary Orders from time to time for subjecting Allied troops in this country to their own systems of military discipline, and for arresting and handing them over to their own military authorities either in this country or abroad, in case of any alleged military or criminal offences, whether such offences are contrary to English law or not. The Army Council could then make the necessary Orders after consultation and in agreement with the authorities concerned.

FREDERICK SMITH.
GORDON HEWART.

Law Officers' Department, August 16, 1917.

UNITED STATES.

[228064]

No. 5.

[File 12268/1917.]

[November 28, 1917.]

Foreign Office to the Law Officers of the Crown.

THE Under-Secretary of State for Foreign Affairs presents his compliments to the Law Officers of the Crown, and has the honour to state that Mr. Balfour would be greatly obliged if he could be favoured with their opinion on the questions raised in the enclosed memorandum. The matter is one of considerable urgency, as the United States Government are anxious that the Convention in question should be signed if possible by the end of the month.

Foreign Office, November 26, 1917.

Convention
with the
United
States under
the Military
Service
(Conven-
tions with
Allied
States) Act.

[399]

H



UNITED STATES.

Memorandum.

A Convention under the Military Service (Conventions with Allied States) Act is under negotiation with the Government of the United States. The draft of the Convention as proposed by the United States, which it is hoped His Majesty's Government will be able to accept subject to a few minor alterations with which it is unnecessary to trouble the Law Officers, is enclosed. It will be seen that the Convention applies to all British subjects in the United States, and its effect would be that under Proviso A of section 1 of the Act above referred to, British subjects who are not domiciled in the United States, and before proceeding there were ordinarily resident in some part of the Empire other than Great Britain, would be entitled to receive certificates of exemption.

Since this United States draft was received the Government of Canada, who are about to introduce legislation rendering liable to military service the subjects of Allied Powers resident in Canada, have intimated their desire to conclude an arrangement with the United States imposing mutual liabilities to military service on United States citizens in Canada and Canadians in the United States. They propose that the negotiations should be conducted at Washington through His Majesty's Ambassador in consultation with the Canadian authorities.

The proposed arrangement seems eminently desirable, as unless some such arrangement is made a large proportion of the Canadians in the United States would receive certificates of exemption and escape military service. But in order to carry it out it appears to be necessary that Canadians in the United States should be excluded from the operation of the proposed Convention under the Act above referred to. The question however arises whether in view of Proviso A of section 1 of the Act Canadians can be so excluded from the Convention. The draft of an article which it is desired to insert in the Convention with this object is enclosed. It should be explained that the persons whom the Canadian Government suggest should be covered by the special arrangement between them and the United States Government are persons born or ordinarily resident in Canada; but it appears necessary that persons who though born in Canada are ordinarily resident in some part of the British Empire where compulsory military service is not in force (such as Ireland) should be dealt with under the Convention, and thus be entitled to obtain exemption in accordance with the provisions of the Act, and the proposed article has been drafted accordingly.

The Law Officers are therefore requested to advise as to (1) whether in view of the terms of Proviso A of section 1 of the Military Service (Conventions with Allied States) Act, a provision can be inserted in the proposed Convention excluding Canadians from its operation; and (2) whether the proposed draft article is apt for the purpose.

A somewhat similar point arises in connection with article 4 of the draft Convention. Under the law of the United States providing for compulsory military service, foreigners who have taken the first step to become naturalised United States citizens are liable to military service as if they were already naturalised. It is therefore necessary that they should be excluded from the operation of the agreement, since their liability to serve depends not on any agreement between His Majesty's Government and the United States Government, but on the laws of the country in which they are. It is conceived that in these circumstances the terms of the Act cannot be regarded as preventing His Majesty's Government from assenting to this provision.

The Law Officers are requested to advise whether this provision can be accepted by His Majesty's Government.

Under the draft Convention, British subjects in the United States, who though within the limits of age for military service in this country are above or below the corresponding limits under United States law, will not be liable for military service. The United States Government have intimated that they are not prepared to render such persons liable for service, but suggest that they might be deported to this country. It appears, however, doubtful whether even if provision were made for the granting of certificates of exemption in cases where such persons were entitled to them under the terms of the Military Service (Conventions with Allied States) Act, such a procedure would be consistent with the Act.

The Law Officers are requested to advise whether in view of the terms of the Act it would be possible to adopt some procedure for deportation in such cases, if an arrangement to that effect could be made with the United States Government.

UNITED STATES.

Draft Convention.

1. All male subjects of Great Britain in the United States and all male citizens of the United States in Great Britain who at any time after the date on which this agreement comes into operation are within the age limits for the time being specified for compulsory military service under the laws of the United States or Great Britain respectively shall, unless they return to Great Britain or the United States respectively within the periods laid down in this agreement for the purpose of military service in their own country, be subject to military service, and entitled to exemption therefrom under the laws of the country in which they are, in all respects as if they were citizens or subjects thereof.

2. Citizens of the United States in Great Britain and subjects of Great Britain in the United States who are subject to military service in accordance with article 1 and who desire to enter the military service of their own country must make application to enter such service in such manner, if any, as may be prescribed by the laws of the country in which they are, and must leave Great Britain or the United States as the case may be for the purpose of military service in their own country within sixty days from the date of the exchange of ratifications of this agreement, or within sixty days from the date of attaining military age under the laws of their respective countries, or within sixty days from the date on which any certificate of exemption issued under article 3 becomes inoperative (unless sooner renewed) or within sixty days from the date on which any application for such certificate of exemption is refused (unless sooner allowed) as the case may be.

3. The Government of the United States and His Britannic Majesty's Government may through their respective diplomatic representatives grant certificates of exemption from military service to citizens of the United States in Great Britain and subjects of Great Britain in the United States respectively upon application, or otherwise, within sixty days from the date of the exchange of ratifications of this agreement, or within sixty days from the date when such citizens or subjects attain military age under the laws of their respective countries. Persons holding such certificates shall, so long as the certificate is in force, not be liable to military service in the country in which they are. Such certificate may be special or general, temporary or conditional, modified, renewed or revoked, in the discretion of the Government concerned.

4. Subjects of Great Britain in the United States who have declared or shall during the life of this agreement declare their intention to become citizens of the United States and who being within the age limits specified for compulsory military service under the laws of the United States are liable for military service in the United States are excluded from the operation of this agreement.

5. Persons who possess both British and American nationality shall be regarded for the purpose of this agreement as possessing exclusively the nationality of the country in which they are resident at the date of the exchange of ratifications of this agreement.

6. His Britannic Majesty's Government and the Government of the United States will respectively, so far as possible, facilitate the return of citizens of the United States and subjects of Great Britain who may desire to return to their own country for military service, but shall not be responsible for providing transport or the cost of transport for such persons.

7. No citizen or subject of either country who under the provisions of this agreement enters the military service of the other shall by reason of such service be considered after this agreement expires or after his discharge to be under any allegiance to the United States or to His Majesty the King of Great Britain and Ireland as the case may be.

8. This agreement shall come into operation on the date on which ratifications thereof are exchanged, and shall remain in force until either country shall cease to be a co-belligerent in the present war, whereupon any citizen or subject of such country entered into military service hereunder shall be immediately discharged from such service.

Proposed Draft Article.

A special arrangement being in contemplation as to British subjects born in or ordinarily resident in the Dominion of Canada, this Convention will not apply to British subjects in the United States ordinarily resident in Canada, nor to British subjects in the United States born in Canada, unless they are ordinarily resident in some part of the British Empire other than Great Britain or Canada.



UNITED STATES.

Opinion of the Law Officers of the Crown.

A (1.) We do not see any objection to a provision excluding Canadians from the operation of the Convention with a view to their being dealt with under an arrangement between the United States and the Canadian Government. The Act does not, in our opinion, require that the Convention should apply to all British subjects in the United States. Such exceptions from the operation of the Convention may be made as may seem desirable to the contracting Governments.

(2.) The proposed draft article is in our opinion apt for the purpose.

B. We do not see any objection to the acceptance by His Majesty's Government of article 4 of the draft Convention.

C. We think it doubtful whether any arrangement for deportation would secure the desired result without fresh legislation. How far deportation from the United States is or may be made legal depends on American law or American legislation, and not on any arrangement between the two Governments. The difficulty is that the Military Service Act 1916 (section 2) applies only to persons who, since the 14th August, 1915, have been or for the time being are ordinarily resident in Great Britain, and we incline to the view that persons sent here with the object of rendering them liable to military service would not be ordinarily resident here within the meaning of the Act.

F. S.
G. H.

*Law Officers' Department,
November 28, 1917.*



1918

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office. May 1919.

CONFIDENTIAL.

(11230.)

LAST COPY.

004

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1918.



LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked *I^a*, &c.

PRIZE LAW.

No.		Date.	SUBJECT.	Page.
<i>I^a</i>	Law Officers and Mr. A. Pearce Higgins [Procurator-General]	Feb. 27, 1918	Goods stored in Copenhagen under the terms of the agreement between His Majesty's Government and the United Steamship Company, dated May 20, 1915	1
<i>I^b</i>	Law Officers and Mr. A. Pearce Higgins [Procurator-General]	Mar. 16,	Ditto	5
2	Law Officers..	Oct. 4,	German "safe-conducts" to neutral vessels sailing outside the "barred zone"	6

VARIOUS.

(Arranged according to Countries.)

CHINA.

3	Law Officers..	Sep. 28, 1918	Leasehold property held by enemy subjects in British concessions in China	9
---	----------------	---------------	---	---

UNITED STATES.

4	Law Officers..	July 1, 1918	Convention with the United States under the Military Service (Conventions with Allied States) Act, ..	12
---	----------------	--------------	---	----

URUGUAY.

5	Law Officers..	Nov. 19, 1918	Dispute between the Rambla Company of Montevideo (Limited) and the Government of Uruguay ..	15
---	----------------	---------------	---	----

GENERAL.

<i>5^a</i>	Law Officers.. [War Office]	May 15, 1918	Question of the treatment of interned enemy civilians, and whether they can be regarded as "prisoners of war"	20
----------------------	--------------------------------	--------------	---	----

(iii

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1918.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

APP—LIE.

A.

"Appam," 2.
Army. *See* Military Service (Conventions with Allied States) Act, 1916.
"Aurora," 7.

B.

Blockade, "barred zone." *See* Vessels.

C.

Cargoes released under Storage Agreements with Shipping Companies: status as Prize, question of sale, 1-6.
China, enemy leases in British concessions. *See* Jurisdiction in China.
Colonies: position in United States of Colonial subjects under Military Service (Conventions with Allied States) Act, 1916, 12-14.

E.

Enemy civilians. *See* Prisoners of war.
Enemy property. *See* Jurisdiction in China.

H.

"Hellig Olav," 2.
Hiram, 7.
Hudson v. Guestier, 3.

I.

Indian Foreigners Ordinance No. III of 1914, 20-22.

J.

"Julia," 7.
Jurisdiction in Clûna: enemy leases in British Concessions, 9-12.

L.

"Leonora," 8.
Liebmann, 20.

MIL—ZAV.

M.

Military Service (Conventions with Allied States) Act, 1916: exemption of Colonial subjects in the United States, 12-14.
"Morso," 3.

P.

Prisoners of war: status of interned enemy civilians, 20-22.

R.

Rambla Company of Montevideo (Limited), 15-19.
Robinson v. Metcalfe, 21.

S.

Safe-conducts. *See* Vessels.
Schofenius v. Goldberg, 20.
Storage Agreements. *See* Cargoes.

U.

United States. *See* Military Service (Conventions with Allied States) Act, 1916.
United Steamship Company, Copenhagen, 1-6.

V.

Vessels, neutral, outside "barred zone": German "safe-conducts," 6-9.

W.

Weimann & Company, 2.

Z.

"Zamora," 7.
Zavalla, The, 3.



Printed for the use of the Foreign Office. May 1919.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1918.

PRIZE LAW.

[40668]

No. 1^A.

[Procurator-General.]

[File 3703/18.]

[February 27, 1918.]

Case for the Opinion of the Law Officers of the Crown and Counsel.

HEREWITH are sent:—

1. Copy of the agreement between His Majesty's Government and Captain Cold, the representative of the United Steamship Company of Copenhagen, dated the 20th May, 1915.
2. Copy of Sir Maurice de Bunsen's letter of the 14th March, and the report of the Law Officers of the Crown, dated the 12th April, 1916.
3. Memorandum by Dr. Pearce Higgins, dated the 1st January, 1916.

Goods stored in Copenhagen under the terms of the agreement between His Majesty's Government and the United Steamship Company, dated May 20, 1915.

The opinion of the Law Officers of the Crown and Counsel is desired upon the question whether goods which have been seized in vessels owned by the United Steamship Company, and then permitted to be carried to Copenhagen to be dealt with in accordance with the terms of the agreement made by the company with His Majesty's Government, dated the 20th May, 1915, may be sold in Copenhagen without the consent of the consignor or consignee, and the proceeds remitted to this country for the purpose of proceedings being taken against the proceeds in the Prize Court.

The question was before the Law Officers of the Crown when asked to advise on certain matters submitted by the Under-Secretary of State for Foreign Affairs in March 1916, but in view of the answers returned to previous questions the present question did not then arise. A copy of Sir Maurice de Bunsen's letter and of the Law Officers' report is sent herewith.

The object of the agreement with the United Steamship Company was to avoid the necessity of discharging in this country large cargo vessels and liners belonging to the company, which entailed immense delay to the vessels and consequent loss to their owners. It was accordingly arranged that instead of the vessels being sent to a port of discharge in this country they should be allowed to proceed to Copenhagen, the United Steamship Company undertaking to retain possession of any goods to which His Majesty's Government took exception, and to return them to the United Kingdom upon demand. There are certain special provisions with regard to the goods consigned to Denmark with reference to guarantees against export.

[1311]

B



To enable the agreement with His Majesty's Government to be carried out, a clause was added to the bill of lading under which the United Steamship Company accepted the goods for carriage, which provides as follows:—

"In case of seizure of the within goods by a belligerent nation the shipowners or the master shall be entitled, but not obliged, to enter into an agreement with the Governmental authorities who have seized the goods, to the effect that the goods after reaching a subsequent port or the port of destination shall be returned to the place of seizure or elsewhere, or shall be stored at the port of destination or elsewhere, as directed by or arranged with the Governmental authorities; and further to be dealt with in such manner as the said authorities may direct or as may be arranged with them without any restriction at the risk and expense of the owners of the goods; thereafter neither the shipper, the owner of the goods, nor consignee shall have any right to demand delivery of the goods from the shipowners, nor shall they have any claim of any kind against the ship or her owner on account of the said goods or on account of anything which may be done by the shipowners in pursuance of any such agreement. In every such case the liability and obligations of the shipowners according to bill of lading shall cease at the port of seizure, the shipowners having a lien on such goods for the freight as per bill of lading, and for all expenses incurred, including the additional freight from the port whence the goods were forwarded to a port in a belligerent country or elsewhere as above described."

The contention, which is put forward on behalf of the British Government, is that in all cases in which goods are stored under this agreement, the Crown is the captor and as such entitled to exercise all rights resulting from the capture.

Under the above agreement large quantities of goods have for a long time been stored in Copenhagen, but owing to the restricted shipping facilities and to reasons of policy resulting from German naval activity, it is found impracticable for the goods to be returned to this country at the present time, and if the Prize Fund is to secure the benefit of the valuable consignments lying in Copenhagen, it is very desirable that they should be sold, and the proceeds returned to this country to be lodged in the Prize Court.

In a considerable number of cases the consignees of the goods (or the present holders of the shipping documents which have been freely transferred), have consented to the sale of the goods in Copenhagen and to the deposit of the proceeds, but in many other cases, especially in those where condemnation is probable, the consignees (or the shippers) will not consent to the goods being sold, and the question thus arises whether they can be sold, notwithstanding the owners' refusal to consent.

It will be appreciated that it is not practicable to institute proceedings while the goods are lying in Copenhagen, as the British Government has consistently during the present war maintained the view that a prize of war cannot be condemned while lying in a neutral port. This view was represented in the case of the "Appam," which was taken by a German prize crew from the "Moewe" into a port of the United States, and successfully upheld in the United States Courts.

It is essential, therefore, before Prize Court proceedings can be instituted, that either the goods or the money representing them shall be brought within the jurisdiction of the Prize Court: and the question arises how this can best be done. The value of the goods is very great, and in many cases condemnation is assured, if the jurisdiction of the Prize Court is once established.

It is material in this connection to observe that the effect of the agreement between the British Government and the United Steamship Company has been considered recently by the Danish Courts in two cases in which the United Steamship Company was sued by the consignees for delivery of cargoes discharged from their vessels in Copenhagen and withheld under the terms of the agreement. In one case—*E. L. Weimann and Co.*—the consignees of certain cases of pork shipped to them in the steamship "Hellig Olav," sued the United Steamship Company for delivery of the goods or compensation therefor. Judgment was given with costs in favour of the Company by the Court of First Instance, and this judgment was affirmed on appeal by the Supreme Court in the following terms:—

"It is unnecessary in this case to determine whether the legality of the seizure and withholding of the goods referred to in this appeal has been proved in respect of the law of warfare at present in force. According to the facts cited in the present case, the defendant shipping company, in accordance with ordinary

principles of the laws of property, as well as according to the rules of the Maritime Code, especially paragraphs 54 and 57, was entitled in the interests of all concerned to make the agreement cited in the case (between His Majesty's Government and the United Shipping Company). As accordingly the fact that the goods, in accordance with this agreement, were brought to Denmark cannot give the plaintiff any legal claim against the company to have the goods delivered, the judgment is to be upheld in accordance with the company's contentions."

In the second case, *Axel Boden's Handels A/B*, of Stockholm, the consignees of certain bags of cocoa beans shipped to them in the steamship "Morsø," sued the United Steamship Company for the delivery of the consignment. In giving judgment against the plaintiffs, the Commercial and Maritime Court of Copenhagen held that it was not within its jurisdiction to determine whether the policy of His Majesty's Government agreed or did not agree with the principles of international law. The goods were *de facto* seized and must be considered so, notwithstanding that His Majesty's Government released them temporarily for return later to the United Kingdom. It was further found that the Danish judicial authorities could in no wise prevent the defendants from carrying out to the full the terms of their agreement with His Majesty's Government. On appeal to the Supreme Court judgment was again given in favour of the United Steamship Company in terms similar to those quoted above.

From these decisions it will be seen that the Danish Courts regard the goods as seized as prize, and His Majesty's Government as being in the position of captors.

It is not anticipated that the Danish Government will raise any difficulty in regard to the course suggested, as they have taken no objection hitherto to the arrangements made with the United Steamship Company; and the sale of the goods locally would be of great advantage to the Danish consumers, and relieve the shortage of commodities existing in Denmark.

It is submitted that in storing the goods in Denmark the United Steamship Company are acting as agents of His Majesty's Government, and by reason of their position as captors His Majesty's Government are entitled to exercise full control over the disposal of the goods within the limits defined by international law, subject to the right of any party aggrieved to apply for redress in the Prize Court. Prizes carried to neutral ports, and remaining there, are still deemed to be under the control of the captor, whose possession is considered as that of his Sovereign (*cf. Hudson v. Guestier*, 4 Cranch 293). The sale of the goods before condemnation, moreover, by one acting under the possession of the captor, would not divest the Prize Court of jurisdiction (*cf. The Zavalla* (1862), Blatchford P.C., 173). It is suggested therefore that His Majesty's Government may direct the Steamship Company to sell the goods which they have stored, and give the company instructions as to the manner in which the sale shall take place, and the persons to whom sales shall be effected, and generally determine the conditions of sale, and that in doing so the Crown would be exercising the rights and powers of a captor, and in no way infringing international law or Danish neutrality. No doubt as a matter of form the sale could be carried out by the United Steamship Company without the interposition of His Majesty's Government being openly disclosed.

The Law Officers of the Crown and Counsel are referred to the passage in Halleck's "International Law," Vol. II, p. 437, where it is stated:—

"There are cases where from the existing circumstances the captor may be excused from the duty of bringing the prize within the jurisdiction of the Prize Court, and may sell or otherwise dispose of the property before condemnation. Where the commander of a ship of war cannot spare a sufficient prize crew to man the captured vessel, or where the orders of his Government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a Court of the United States."

If therefore there is cargo seized as prize, which is in a condition that it cannot be sent to the port of the Prize Court, it is submitted as law that the cargo may be sold in the nearest port, and the proceeds remitted to the Prize Court.

"If neutral goods are not in a condition to be taken to the port of adjudication, they may be sold or destroyed, as the case may be." (Oppenheim, "International Law," Vol. II, p. 242.)



PRIZE LAW.

It is submitted that this rule is not restricted to the sale of perishable goods, but is applicable in any case where there are physical disabilities, at whatever stage supervening, to bringing in the goods to a port of the Prize Court.

The Law Officers of the Crown and Counsel are therefore requested to advise on the following questions in regard to the disposal of goods which have been seized as prize in vessels owned by the United Steamship Company and permitted to be carried to Copenhagen, and which are now stored there under the terms of the agreement of the 20th May, 1915 :—

- 1. Can His Majesty's Government direct the Steamship Company to sell the goods, and if so to sell them in such a manner and to such persons as His Majesty's Government approve? Is the company bound to conform to such directions?
2. If the answer to the preceding question is in the negative, can the goods be sold by the company and His Majesty's Government jointly?
3. Can such sale be made without the consent of the consignee or owner?
4. In the event of the United Steamship Company requiring the delivery of the bills of lading or an indemnity against claims by the holders as a condition for the delivery of goods stored under the agreement with His Majesty's Government, would His Majesty's Government be justified in giving such an indemnity in view of the decision of the Danish Court that the consignees in Denmark cannot compel the United Steamship Company to give delivery of the goods to them.
5. Generally.

Opinion of the Law Officers of the Crown and Mr. A Pearce Higgins.

Before answering the questions on which our opinion is asked we may first state our view as to the position of the goods referred to under the agreement of the 20th May, 1915, and the bills of lading which contain the clause, copy of which is set forth in the case submitted to us.

The agreement of the 20th May, 1915, makes no provision for the sale of the goods in the place where they are stored, and without a new agreement we do not think that this can legally be done. But if the shipping company is willing to modify the agreement of the 20th May, 1915, by undertaking, if called upon by His Majesty's Government, to sell the goods on such terms as shall be agreed on in lieu of storing or returning them to this country, we think there would be no objection to this course. The sale would not be effected by the shipping company as agent for His Majesty's Government, and His Majesty's Government would only have a right of action against the company if the latter failed to comply with their request.

We do not think such a course would be a violation of the principles contended for by His Majesty's Government in the "Appam" case; the goods have been carried forward for the convenience of the shipowner, and are sold for his convenience and for that of the neutral State. Adequate guarantees must be required that the proceeds of the sale shall be remitted to England, and that none of the goods sold shall be exported from Denmark or be used to release an equivalent amount of goods of a similar character for export.

We answer the questions submitted to us as follows :—

Question 1.—Can His Majesty's Government direct the steamship company to sell the goods; and if so, to sell them in such a manner and to such persons as His Majesty's Government approve? Is the company bound to conform to such directions?

Answer 1.—No; but by making an agreement with the shipping company on the terms laid down above the sale can be effected by the latter in such manner and to such persons as His Majesty's Government approve.

Question 2.—If the answer to the preceding question is in the negative, can the goods be sold by the company and His Majesty's Government jointly?

Answer 2.—No.

Question 3.—Can such sale be made without the consent of the consignee or owner?

Answer 3.—The consent of the owner or consignee of the goods is necessary unless some such agreement as indicated above is reached.

PRIZE LAW.

Question 4.—In the event of the United Steamship Company requiring the delivery of the bills of lading or an indemnity against claims by the holders as a condition for the delivery of goods stored under the agreement with His Majesty's Government, would His Majesty's Government be justified in giving such an indemnity in view of the decision of the Danish Court that the consignees in Denmark cannot compel the United Steamship Company to give delivery of the goods to them?

Answer 4.—We are unable to give an opinion of the question which may arise in Danish law in relation to the sale of the goods, but the decisions of the Danish Courts set forth in the case, relating however not to sale but non-delivery, suggest a doubt.

Question 5.—Generally?

Answer 5.—Generally. We think that the agreement of the 20th May, 1915, is defective in its character, and we advise that the supplementary agreement should be carefully drawn and signed by the shipping company before any steps are taken in regard to the proposed sales. It would also be well to take the opinion of the legal adviser to His Britannic Majesty's Legation at Copenhagen in reference to the fourth question, and as to the legal position in Danish law of buyers from the shipping company in relation to the owners or shippers of the goods.

FREDERICK SMITH.
GORDON HEWART.
A. PEARCE HIGGINS.

Law Officers' Department,
February 27, 1918.

[49541]

No. 1^B.

[Procurator-General.]

[File 3703/18.]

[March 16, 1918.]

Supplemental Case for the Opinion of the Law Officers of the Crown and Counsel.

HEREWITH are sent :—

Case for the opinion of the Law Officers and Counsel, dated the 14th February, and the opinion of the Law Officers of the Crown and Counsel thereon, dated the 27th February, 1918.

Since this matter was before the Law Officers of the Crown and Counsel it has been ascertained that there are still considerable quantities of goods stored in Copenhagen under the terms of the agreement between His Majesty's Government and the United Steamship Company which were seized in the company's vessels in the year 1915 and permitted to be carried to Copenhagen to be dealt with in accordance with the terms of the agreement.

An examination of the bills of lading in use during that period show that the special clause in the bill of lading then in use by the Steamship Company was less wide in its terms than those contained in the bills of lading used in the year 1916 and onwards, which was set out in the previous case.

The clause in the bill of lading in use in the year 1915 contained a special clause in the following terms :—

"Consignees of the within goods are under the obligation to furnish Det Forenede Dampskibs Selskab at Copenhagen promptly and on demand a written declaration, together with, if required, a banker's guarantee for double the value, such declaration to certify that the within goods are for consumption in country of destination shown in this bill of lading, and will not be re-exported. Failure to provide such a declaration or banker's guarantee gives the shipowner the right to withhold delivery of the goods or discharge them at any place, whereupon each and every liability of the shipowner shall cease. For goods to Denmark these declarations must be provided with guarantee given by the Merchants' Guild or the Danish Chamber of Manufacturers in Copenhagen."

[1311]

C

Goods stored in Copenhagen under the terms of the agreement between His Majesty's Government and the United Steamship Company, dated May 20, 1915.



PRIZE LAW.

It will thus be seen that the power contained in the later bills of lading enabling the company to deal with the goods "in such manner as the authorities may direct or as may be arranged with them without restriction" is not found in the bill of lading of 1915, and as it is considered that this omission may affect the basis upon which the opinion of the 27th February, 1918, was given, it is thought that the questions previously put should be resubmitted in specific relation to goods seized and carried in the year 1915.

The Law Officers and Counsel are therefore requested to advise whether the answers returned to the questions put in the previous case are applicable to goods which were carried to and stored in Copenhagen in the year 1915 under the terms set out in the bill of lading above mentioned, or if not, whether any steps can be taken to enable His Majesty's Government to arrange for their sale without the consent of the owners.

Opinion of the Law Officers of the Crown and Mr. A. Pearce Higgins.

We are of opinion that by international law, if the shipping company sell the goods in Copenhagen and transmit the proceeds to this country, proceedings in prize can be taken in respect thereof. We therefore answer the question submitted to us in the affirmative.

We have, however, already advised that it is a question of Danish law whether the shipowner can sell in Denmark so as to give a good title.

Whether it will be practicable to make such a new agreement between His Majesty's Government and the shipping company as suggested in our former opinion will depend on the opinion of the Danish adviser to His Majesty's Government at Copenhagen, which we have already advised should be taken.

His opinion if thought desirable can be communicated to us.

FREDERICK SMITH.
GORDON HEWART.
A. PEARCE HIGGINS.

Law Officers' Department.
March 16, 1918.

[197245]

No. 2.

[File 35656/1918]

[October 4, 1918.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, September 28, 1918.

I HAVE the honour, by direction of the Minister of Blockade, to transmit to you herewith the papers detailed in the accompanying list, and to request that you will favour him with your opinion on the following point:—

German
"safe-
conducts" to
neutral
vessels sailing
outside the
"barred
zone."

The German Government have recently adopted a system of issuing so-called "safe-conducts" to neutral vessels sailing outside the "barred zone," i.e., the area within which all shipping is liable to be sunk without warning. The issue of such safe-conducts appears, in part at any rate, to have been adopted in consequence of the issue on 24th April last, of a new German Prize Regulation, providing that a neutral vessel is to be regarded as sailing in the interest of the enemy belligerent, and therefore to be treated as an enemy vessel, when the State whose flag the ship is entitled to fly has concluded an agreement with an enemy State for the cession of tonnage, or when the bulk of the neutral State's mercantile fleet engaged in trading sails for the benefit of the enemy. This regulation will be found at the end of Paper (A), which includes also some earlier amendments to the Prize Regulations, for convenience of reference.

In existing circumstances this regulation would apply to Norwegian, Danish, Swedish, and Dutch shipping, and it would appear from a statement issued by the Dutch Minister for Foreign Affairs (Paper (B)) that one object of the issue of these safe-conducts was to protect neutral vessels which would otherwise be liable to destruction or condemnation under the regulation above referred to, subject to certain conditions being accepted. In addition to this, however, it would appear that the effect of the

PRIZE LAW.

safe-conduct is to guarantee a free passage to the vessel carrying it, subject to the conditions being complied with, and therefore to free it from the risk of being sent into port for examination or sunk at sea if visited by a German submarine. Inasmuch as the safe-conducts are only granted in respect of voyages outside the so-called "barred zone," and it is only within that zone that, in theory at any rate, neutral vessels are liable to be sunk at sight, it does not appear that the safe-conduct can be described as a protection against being sunk without visit and search, though it is no doubt possible that neutral shipowners may regard it in that light. The text of two forms of safe-conduct, which are the only ones at present in the possession of His Majesty's Government, will be found at pages 6 and 7 of the "German-Norwegian Safe-Conduct Agreement" (Paper C).

The conditions attached to the issue of such safe-conducts, so far as they are at present known to His Majesty's Government will be found in the following papers:—

Paper (C), Norway; (D), Holland; (E), (F), and (G), Denmark; (H), (J), and (K), Sweden. It is understood that certain Spanish ships are receiving safe-conducts, although the Spanish Government do not recognise the system, but it is not known on what conditions these safe-conducts are issued. It is, of course, possible that there may be other conditions attached which have not come to the knowledge of His Majesty's Government; but it will be seen that generally speaking the ostensible object of the conditions is to subject neutral shipping to much the same measures of control as His Majesty's Government have been able to apply by means of the Bunker conditions and similar measures. The distinction between the two cases would appear to be that while His Majesty's Government have been able to obtain control in return for facilities which they were perfectly at liberty to grant or refuse, the German Government propose to attain it by a threat, none the less effective though not openly made, of the illegal condemnation or destruction of the ship (not necessarily the destruction without warning) if their conditions are not accepted.

The attitude which the Allies have so far adopted towards these German measures will be seen from the communication (Paper (L)) which their representatives have been instructed to make to the neutral Governments concerned. I am to invite your attention to the sentence which states that: "The Associated Governments observe that enemy control through such a device, or otherwise, may operate to deprive vessels accepting the same of their neutral character, and the Associated Governments accordingly reserve the right to deal with any vessel which has subjected herself to enemy control as the circumstances in each case may warrant."

In these circumstances the Minister of Blockade desires to be advised as to the position under Prize Law, as administered in the British Prize Court, of neutral vessels sailing under an enemy safe-conduct in the circumstances above described. The French Government have issued a decree (Paper (M)) which renders such vessels liable to condemnation, but it is understood that this is only to be regarded as a weapon for use if required, and that at present it is not intended to act under it.

The Manual of Naval Prize Law by Mr. Godfrey Lushington which was issued in 1866 contains on p. 54 a statement that "The Commander will be justified in treating as an enemy vessel . . . (3) any vessel sailing under a licence of the enemy Government," and this statement has been repeated with only verbal alterations in all subsequent editions. In the original Manual the authorities given for this statement were the three American cases of the "Aurora" (8 Cranch 203), the "Hiram" (8 Cranch 444), and the "Julia" (1 Gall 594). A reference to these cases, however, will show that they do not support the proposition so far as it applies to neutral ships. They were all cases of American ships condemned by the American Prize Court for sailing under a British licence, and although there are statements in the decisions which, if taken apart from their context, may appear to have a wider application, it is quite clear that all three ships were condemned on the ground of trading with the enemy, and that the decisions only established that the acceptance of a licence from the enemy by a belligerent merchant ship amounts to trading with the enemy, and renders her liable to confiscation in the Prize Court of her own country. The question therefore is whether, apart from this statement in the Naval Prize Manual, a neutral vessel could be condemned in the British Prize Court on the ground that she carries (a) an enemy safe-conduct; (b) an enemy safe-conduct given on the conditions now attached by the German Government to their issue. On this point I am to invite your attention to two memoranda (Papers (N) and (O)) by Sir A. H. Dennis and Dr. Pearce Higgins. There is also the further question, if you should be of opinion that in the existing state of the law condemnation could not be obtained on the above



PRIZE LAW.

grounds, whether it would be possible to issue an Order in Council which would have this effect, based on the principle of reprisals, which would be considered by the Court to be in accordance with International Law under the doctrine laid down in the "Zamora." I am to invite particular attention to the observations in Sir A. H. Dennis's memorandum (Paper (N)) on this point; and you will, no doubt, consider whether it is possible to base a Reprisals Order in Council on the system of control which the German Government are endeavouring to establish by the issue of safe-conducts, in view of the fact that very similar control (so far as the published conditions go) is at present exercised by His Majesty's Government. It is also necessary to take into consideration the desirability of issuing such an Order in Council at the present time, especially in view of the fact that the legality of the Order in Council of the 16th February, 1917, which has been upheld by the Prize Court in the case of the "Leonora," will shortly come under the consideration of the Privy Council.

I am, therefore, to request that you will take the accompanying papers into your consideration, and will favour the Minister of Blockade with your opinion on the following points:—

1. Whether the mere fact of carrying a safe-conduct issued by the German Government is sufficient, in the existing state of the law, to render a neutral ship liable to condemnation in a British Prize Court.
2. Whether the fact of carrying a German self-conduct issued on the conditions (so far as these are at present known) attached to such safe-conducts would, in the existing state of the law, render a neutral ship liable to condemnation. In this connection I am to invite your special attention to the provisions against carrying passengers of Allied nationality, and I am to say that it is understood that in one instance the German authorities have objected to the carriage by a ship holding a safe-conduct of goods from the United States to Uruguay on the ground that the latter country had severed relations with Germany.
3. Whether (if your answer to the first and second questions is in the negative) an Order in Council based on the principle of reprisals rendering neutral ships liable to condemnation in such circumstances would be upheld by the Prize Court.
4. As to the acts of the enemy Government which could best be relied upon as justifying a retaliatory measure.
5. Whether in your opinion the issue of such Order in Council would be desirable at present, especially in view of the position of the Order in Council of the 16th February, 1917.
6. Whether there are any particular facts which it would be desirable to prove in a suit for the condemnation of such a neutral ship—(a) if an Order in Council is issued; (b) if it is not.

The Minister of Blockade would also be grateful for any observations of a general nature which you may be good enough to offer.

It may at any time be necessary to decide at short notice upon a course of action in relation to the carriage of safe-conducts by neutral vessels, and the Minister of Blockade would, therefore, be grateful if he could receive your opinion at an early date.

I have, &c.,

GERALD SPICER.

List of Papers.

- (A.) German Prize Regulations.
- (B.) Statement issued by Netherlands Minister for Foreign Affairs. [102341/T/18.]
- (C.) German-Norwegian Safe-Conduct Agreement. [140635/C & T/18.]
- (D.) Despatch from Sir W. Townley, No. 2223 Commercial, September 3, 1918. [155305/C & T/18.]
- (E.) Guarantee to be given by owners and masters of Danish ships. [99575/C & T/18.]
- (F.) Despatch from Sir R. Paget, No. 1236 Commercial, July 1, 1918. [119995/C & T/18.]
- (G.) Further guarantee to be given by owners and masters of Danish ships. [134957/C & T/18.]
- (H.) Two memoranda issued by Swedish Foreign Office. [136251/C & T/18.]
- (J.) Declaration to be given by Swedish consignees. [133250/C & T/18.]
- (K.) Aide-memoire by Swedish Minister for Foreign Affairs. [146867/C & T/18.]
- (L.) Communication by Associated Governments to Neutral Governments. [148379/C & T/18.]
- (M.) French Decree. [150039/C & T/18.]
- (N.) Memorandum by Sir A. H. Dennis. [147758/C & T/18.]
- (O.) Memorandum by Dr. Pearce Higgins. [147758/C & T/18.]

PRIZE LAW.

Report of the Law Officers of the Crown.

There is no clearly relevant authority upon the points submitted to us; but they would appear to be governed by admitted general principles.

We answer the questions put to us as follows:—

1. We do not think that the mere fact of carrying a safe-conduct issued by the German Government is sufficient, without reference to the circumstances under which and the conditions on which the safe-conduct is granted, to render a neutral ship liable to condemnation. But, in our opinion, the fact of carrying such a safe-conduct justifies seizure, and raises a presumption that the ship is acting in furtherance of the interests of the enemy State so as to render her liable to condemnation.

2. We think this question should be answered in the affirmative, on the ground that by accepting the safe-conduct, subject to the conditions disclosed in the case, the neutral has wrongfully, and to the prejudice of a belligerent, acquiesced in an encroachment upon his neutral duty, has virtually placed his ship under the control of the German Government in furtherance of German views and interests, and is directly aiding the Germans in their policy of indiscriminate terrorisation at sea.

3 to 5 do not arise, but we may observe in relation to both 3 and 5 that, on the whole, we prefer to rely upon the general principles of existing law rather than upon an Order in Council which would not, in our view, strengthen the position, and which is open to some tactical objection.

6 (a) does not arise.

6 (b). We cannot suggest any particular facts which it would be desirable to prove other than the circumstances under which and the conditions on which the safe-conducts were issued.

6 (c). We have nothing to add.

FREDERICK SMITH,
GORDON HEWART.

Law Officers' Department,
October 4, 1918.

CHINA.

[165171.]

No. 3.

[File 14/1918]

[September 28, 1918.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 30, 1918.

I HAVE the honour, by direction of the Assistant Secretary of State for Foreign Affairs, to transmit to you the accompanying papers as to the possibility of enacting legislation under the China Order in Council for the purpose of vesting in the custodian of enemy property leasehold property held by enemy subjects in the British concession at Canton. The point of difficulty is whether such action would exceed the limits of the jurisdiction conferred upon His Majesty by the treaties with China.

2. British jurisdiction in China is mainly derived from articles 15, 16, and 17 of the treaty of the 26th June, 1858 (Paper A): they give to the British authorities jurisdiction in all questions arising between British subjects; criminal jurisdiction over British subjects, and a kind of friendly jurisdiction in disputes between British and Chinese. Upon that foundation, modified no doubt by custom and usage, reposes the whole edifice of British extraterritorial jurisdiction in China.

3. The jurisdiction is exercised in accordance with the China Order in Council of 1904 (Paper B) and subsequent amending orders issued under "The Foreign Jurisdiction Act, 1890." The extent of the jurisdiction is set out in article 5 of the Order. By article 6 British jurisdiction in China is to be exercised in accordance with that Order and not otherwise.

[1311]

D

Leasehold property held by enemy subjects in British concessions in China.



4. The origin and nature of the British concession in China will be found explained in detail in the accompanying report (Paper C) on the foreign concession and settlements in the treaty ports of China. The concession at Canton, which is situated on an island known as Shameen, originated in a perpetual lease granted by the Chinese Government to the British Government, of which the text will be found at p. 23 of Paper C. Information with regard to the Shameen will be found on p. 13. The position in respect of this and many other similar concessions in China is that no rights other than bare sovereignty are reserved to the Chinese Government except the payment to the Chinese exchequer of a small annual sum, usually equivalent to the land tax originally due to that exchequer from the territorial authorities.

5. In a British concession the land leased by the Chinese Government to the Crown is granted out by way of sub-leases in suitable lots to British subjects. These Crown leases are the foundation of the title of the individual lotholder. A lotholder is, speaking broadly, in much the same position as the owner of leasehold residential or business premises in this country; the Crown being in the position of the ground landlord.

6. The fundamental idea of a foreign concession in China is that the land should be held by the subjects of the Power to which the area was granted and that the local regulations for its administration should be settled by that Power. In general, therefore, in a British concession the leases are not granted to persons other than British subjects, but by assignment or otherwise the property not infrequently gets into the hands of foreigners. Where, however, concession lots are transferred to foreigners the latter have to make a written declaration endorsed by their own authorities engaging to be bound by the regulations made or to be made under the sanction of the Government holding the concession. The Shameen Land Regulations of 1908 will be found in paper (D), and I am to draw your attention to section 2. The phraseology employed in the corresponding section of the Land Regulations of 1871 was slightly wider and stipulated that the lotholders should "obey all regulations . . . for the peace order and good government of the said settlement." (See Paper (E), section 16.)

7. Some of the lots on the Shameen were at the outbreak of the war held by enemy subjects, and it is as to the treatment of this property that the question now before you has arisen. Steps were taken at an early date by His Majesty's consul-general at Canton to place under drastic control the property so held by enemy subjects. A copy of these directions will be found in enclosure 1 of Paper (F). It will be seen that though the control prevents any injury of enemy action to British interests during the war, it does not in any way affect the continuance of the enemy ownership of the property or interfere in the relations between landlord (His Majesty's Government) and tenant (enemy subject). A strong feeling, however, exists at Hong Kong, and among British subjects in China, and has been reflected in the House of Commons, in favour of liquidating these enemy properties and thus eliminating German influence from the concession for all time.

8. The Assistant Secretary of State is disposed to think that such action is desirable if it can be taken. Before deciding, however, whether to authorise the liquidation of these properties he is desirous of ascertaining whether the action proposed is feasible.

9. By article 9 of "The China Order in Council, 1904," civil jurisdiction is to be exercised on the principles of and in conformity with English law for the time being in force. The British courts therefore apply in cases coming before them the English Trading with the Enemy Acts, subject to such modifications as may be necessitated by local circumstances (see article 31). In addition, Trading with the Enemy Regulations have been issued as King's Regulations under article 155 of the Order in Council. A copy of these Regulations is enclosed. (Paper G.)

10. Lord Robert Cecil is advised that if these enemy leases on the Shameen are to be liquidated the most appropriate method of procedure would be to apply by way of King's Regulations, and subject to any modifications which may be necessary for adapting it to the local circumstances, section 4 of "The Trading with the Enemy Amendment Act, 1916." This section enables the Board of Trade to vest in the custodian any property belonging to or held or managed for or on behalf of an enemy subject. No difficulty arises in cases where enemy property is held or managed by a British subject, as there can be no question as to the power to pass local legislation binding on British subjects. These enemy leases, however, are not held or managed by British subjects, and so far as regards property belonging to enemy subjects the proposal raises immediately the question whether the British powers of legislation

in China are wide enough to validate regulations as to property belonging to foreigners.

11. It is possible, that even though King's Regulations of the kind proposed would not be good as regards enemy property generally in China, they would be good if restricted to enemy property in British concessions. It may be urged that as these enemy landowners undertook before the land was transferred to them to obey the regulations for the settlement, regulations applicable only to the Shameen would be binding upon them and their property, and that the lotholders would come within article 5 (3) or (4) of "The China Order in Council, 1904."

12. I am to request that you will take the papers into your consideration and will favour the Assistant Secretary of State with your opinion whether King's Regulations under article 155 of the China Order for the purpose of vesting in the custodian with power of sale:—

(a.) Leasehold property belonging to enemy subjects—

- (1.) In China generally,
- (2.) In British concessions in China,
- (3.) In the Shameen,

(b.) Furniture and other effects owned by such enemy subjects in such leasehold property,

would be within the legislative powers of His Majesty.

Lord Robert Cecil would be glad to be favoured at the same time with any observations of a general nature which you may be good enough to offer.

I have, &c.

EYRE A. CROWE.

List of Papers.

- (A.) Treaty with China: Tientsin, June 26, 1858.
- (B.) China Order in Council, 1904, and Amending Orders.
- (C.) Report on Foreign Settlements in China. Confidential 8747.
- (D.) Shameen Land Regulations, 1908.
- (E.) Canton (Shameen) Land Regulations, 1871.
- (F.) Sir J. Jordan's No. 184 of April 29, 1918.
- (G.) Trading with the Enemy Regulations, 1917. King's Regulation No. 1 of 1917.

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, September 6, 1918.

With reference to my letter of the 30th August, relating to the property held by enemy subjects in the British Concession at Canton, I have the honour, by direction of the Assistant Secretary of State for Foreign Affairs, to transmit to you a copy of a legal opinion forwarded to this Department by Colonel Yate, M.P. It does not appear that this opinion is really of assistance in connection with the points submitted to you because it seems only to establish the undisputed fact that any action based on the ejection of the German tenants would have to be brought in the British Court, while the real difficulty in the case is the question whether it is possible to legislate in such a manner as to enable such action to be legally taken under the law applied by that Court; but Lord R. Cecil considers that you should have the opinion before you when considering the questions submitted to you.

I am to add that Lord R. Cecil would be grateful to receive your opinion at your early convenience.

I have, &c.

EYRE A. CROWE.

Opinion of the Law Officers of the Crown.

A.—1. In our opinion this question, as regards property in China generally, should be answered in the negative. Neither in the treaties with China nor in the Orders in Council does there seem to be anything to support the view that the Crown has power to legislate with regard to the property of enemy subjects in China generally, and it is not suggested that there is any usage under which such a power could be claimed.



2 and 3. As regards Shameen and other concessions where foreigners have made similar written declarations, we think that the question may be answered in the affirmative. From an international point of view we are of opinion that in the British concessions the Crown has power to exclude foreigners altogether or to legislate with regard to the terms on which they are to be admitted to the concession. By the Canton Land Regulations of 1871, article 16, no transfer of land to a foreigner is valid unless he previously undertakes in writing, with the official consent of his national authority, to obey all regulations by His Majesty's Minister for the peace, good order, and government of the settlement. The Shameen Land Regulations, 1908, contain a similar provision in article 2, the undertaking being to obey the Land Regulations, and all by-laws and rules thereunder, for the time being in force within the concession. By article 5 (3) of the Order in Council of 1904 the jurisdiction conferred by the Order extends to foreigners in the cases and according to the conditions specified in the Order and (4) to foreigners with respect to whom any Government, whose subjects they are, has, by treaty or otherwise, agreed with His Majesty for, or consents to the exercise of power or authority by His Majesty. And article 155 provides for regulations for the peace, order, and good government of British subjects in relation to matters not provided for by the Order, and to matters intended by the Order to be prescribed by regulation. We think that regulations for the purpose of eliminating German influence in British concessions such as those proposed are regulations for the peace, order, and good government of British subjects within the meaning of this article, and that they would be upheld by the British Courts, by whom any question as to their validity must be determined.

B. We do not see how regulations vesting in the custodian furniture and other effects owned by enemies can be justified. But we think that regulations providing that the effects shall be removed from the concession within a certain time, and, in default of such removal, be vested in the custodian and sold, would be valid.

FREDERICK SMITH.
GORDON HEWART.

*Law Officers' Department,
September 28, 1918.*

UNITED STATES.

No. 4.

[121250]

[File 136/1918.]

[July 4, 1918.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, July 1, 1918.

I have the honour, by direction of Mr. Secretary Balfour, to request the favour of your advice upon certain points arising under the Military Service Convention with the United States. I am to refer to your opinion of the 28th November last, a copy of which is enclosed for convenience of reference.

After the convention in its original form had been signed, certain amendments were introduced by the Senate, and a copy of the convention in the new form in which it has now been signed and approved by the Senate is enclosed. I am to invite your attention to the second and third provisos to article 1, the effect of which is to exclude from the operation of the convention British subjects who, before proceeding to the United States, were ordinarily resident in a place in the British Empire where compulsory military service does not exist, but brings such persons within the operation of the convention in the event of compulsory military service being established in the part of His Majesty's Dominions from which they came. You will observe that this proviso excludes from the operation of the convention all persons who would be entitled to exemption under Proviso (A) to section 1 of the Military Service (Conventions with Allied States) Act, if the part of His Majesty's Dominions, from which they came is one where compulsory military service does not exist.

Convention with the United States under the Military Service (Conventions with Allied States) Act.

Compulsory military service is understood to exist, outside Great Britain, in Canada, New Zealand, and Newfoundland. The case of Canada has been dealt with in a separate convention. Persons, however, who before proceeding to the United States were ordinarily resident in New Zealand or Newfoundland will come under the operation of the convention, and will be liable to military service unless they are exempted by Lord Reading, and the first point on which Mr. Balfour desires the benefit of your opinion is whether, in the event of the Government of New Zealand or Newfoundland desiring that such persons should be compelled to serve under the convention, the proviso to section 1 of the Act above referred to prevents this being done, or whether it renders it necessary that such persons, if not domiciled in the United States, should receive certificates of exemption from Lord Reading. Such persons would not be compelled to serve without the concurrence of the Dominion Government concerned, and Mr. Balfour finds it difficult to believe that the effect of an Imperial Statute can be to prevent a Dominion Government from taking advantage of the convention to render natives of the Dominion who are in the United States liable to serve.

A similar question will arise in the event of compulsory military service being subsequently introduced in other parts of the Empire. In the case of Ireland no difficulty would arise, owing to the provisions of section 5 of the Military Service No. 2 Act, 1918, and as regards other parts of the Empire Mr. Balfour conceives that your answer to the first question would cover this case also, unless you are of opinion that there is any distinction in this connection between the position of the self-governing Dominions and that of the Crown Colonies. A further point, however, arises under this head. British subjects who before going to the United States were ordinarily resident in some part of the Empire where compulsory military service does not at present exist will not be within the scope of the convention, and therefore, strictly speaking, need not be given certificates of exemption; but it will be on every ground convenient, if not essential, that they should be given such certificates, in order to make their position clear, as well as to comply strictly (in the case of persons not domiciled in the United States) with Proviso (A) to section 1 of the Military Service (Conventions with Allied States) Act, and Mr. Balfour therefore proposes to approve a proposal made by Lord Reading that this should be done. All certificates of exemption which will be issued under the convention will be expressly stated to be temporary, and liable to withdrawal at any time. Mr. Balfour desires to be advised whether, in view of the provision of the Military Service (Conventions with Allied States) Act above referred to, there would be any objection, in the event of some other Dominion or Colony enacting compulsory military service, and desiring it to be applied under the convention to British subjects ordinarily resident in such Dominion or Colony, to withdrawing such temporary certificates with this object.

A similar question may arise in Italy, as it is possible that an agreement may be made providing for the reciprocal liability to military service of Italians in Canada and Canadians in Italy. A certain number of Canadians have received certificates of exemption in Italy under the provisions of the Military Service (Conventions with Allied States) Act, which certificates are also expressed to be temporary and liable to withdrawal, and the question will arise whether, in the event of an agreement of the nature above referred to being entered into, these certificates can be withdrawn so as to make the holders liable to service under the agreement in question. It is also possible, though not likely, that a similar question may arise in France, where the certificates given have not been expressly stated to be temporary.

I have therefore to request that you will be good enough to take the enclosed papers into consideration, and to favour Mr. Balfour with your opinion on the following points:—

1. Whether there is any objection under Proviso (A) to section 1 of the Military Service (Conventions with Allied States) Act or otherwise to British subjects in the United States who before proceeding thither were ordinarily resident in New Zealand or Newfoundland being compelled to serve under the convention, should the Government of the Dominion from which they come desire this to be done, or whether the provision above referred to renders it necessary that such of them as are not domiciled in the United States should receive certificates of exemption from Lord Reading.

2. Whether the position is the same in the case of natives of (a) a Dominion, (b) a Crown Colony, which adopts compulsory military service after the convention has come into force.

3. Whether certificates of exemption, which have been granted to persons who are not at present within the convention, because before proceeding to the United States

[1311]

E



they were ordinarily resident in a Dominion or Colony where compulsory military service does not at present exist, can be withdrawn in the event of compulsory military service being subsequently enacted in the Dominion or Colony in question.

4. Whether certificates of exemption which have already been issued under Proviso (A) to section 1 of the Military Service (Conventions with Allied States) Act to Canadians can be withdrawn at the request of the Dominion Government (a) in Italy where such certificates are expressly stated to be temporary and liable to withdrawal at any time; (b) in France where they are not so stated.

Mr. Balfour would also be grateful for any observations of a general character which you may be good enough to offer.

It is necessary to send instructions to Lord Reading on the above points as soon as possible, as the convention is expected to come into force shortly, and Mr. Balfour would therefore be grateful to receive your opinion at your earliest convenience.

I have, &c.

LOUIS MALLETT.

List of Papers.

1. Opinion of the Law Officers of the Crown, November 28, 1917.
2. Convention with the United States, June 3, 1918.

Report.

1. We think that under section 1 (a) of the Military Service (Conventions with Allied States) Act (7 and 8 Geo. V., cap. 26) British subjects in the United States who, before proceeding thither, were ordinarily resident in New Zealand or Newfoundland, and who prove that they are not domiciled in the United States, are entitled to a grant of exemption from Lord Reading. The words of the proviso are clear . . . "such Ambassador or Minister shall grant such exemption in any case where a British subject proves that he is not domiciled in the contracting country, and that before proceeding to the contracting country he was ordinarily resident in some part of His Majesty's dominions other than Great Britain," and we do not think that it is possible to construe the proviso as being limited to parts of His Majesty's dominions in which compulsory military service does not exist. Our opinion is therefore that the provision referred to renders it necessary that such of the persons in question as are not domiciled in the United States should receive certificates of exemption from Lord Reading, even though the Government of the Dominion desire that they should be compelled to serve.

2. The position is, we think, the same in the case of either a Dominion or a Crown Colony which adopts compulsory military service after the convention has come into force.

3. We think not. The persons in question are, in our opinion, entitled to permanent exemption under section 1 (a), and this right can be taken away only by further Imperial legislation.

4. We think not. Any arrangement which may be made between Canada and Italy will be subject to the provisions of section 1 (a), and, in so far as it may be repugnant to such provisions will, in our opinion, be void.

FREDERICK SMITH.
GORDON HEWART.

*Law Officers' Department,
July 4, 1918.*

[211265]

No. 5.

[File 20844/1918.]

[November 19, 1918.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, November 6, 1918.

I HAVE the honour, by direction of Mr. Secretary Balfour, to transmit to you herewith the papers noted in the accompanying list, relative to the differences existing between the Rambla Company of Montevideo (Limited) and the Government of Uruguay.

Dispute between the Rambla Company of Montevideo (Limited) and the Government of Uruguay.

The company hold a contract with the Government for the construction of a sea embankment (referred to hereafter as the "Rambla") at Montevideo, and the dispute between the two parties arises on the question as to whether the Governments have been within their rights in requiring the company to make large alterations in the plans originally presented by the company without offering corresponding monetary compensation.

The case may be stated shortly as follows:—

The contract for the works was signed in September 1910 by representatives of the Uruguayan Government and of the late Lord Grimthorpe. The contract, as will be seen from the annexed translation thereof (Paper (A)) provides for the construction of the Rambla by the "Undertaking" (implying apparently the association or company to be formed for the purpose by Lord Grimthorpe). The main features of the structure are laid down, and the undertaking is required to present final plans within a specified period. To meet the cost of the work the Government undertake to give their guarantee to an issue of bonds amounting to 7,000,000 dollars; the sum, whatever it should be, by which the estimates for the work exceed 7,000,000 dollars, is to be covered by the undertaking itself, which is required to complete and pay for the proportion of the work corresponding thereto before applying the guaranteed bonds. Ultimately the entire cost is to be recovered by the sale of the land reclaimed from the sea by means of the Rambla, the surplus of the proceeds remaining after redemption of the guaranteed bonds to be shared between the Government and the undertaking.

The contract having been duly ratified by law, Lord Grimthorpe proceeded to form a company (the "Rambla Company") as authorised in the contract, and the company so formed entered into agreement with a firm of contractors for the execution of the work, and submitted plans to the Uruguayan Government.

With regard to the plans, Lord Grimthorpe's contract contained an article (article 3) providing that, "If the Executive Power does not accept the definitive plans which the undertaking has to submit for its approval, or introduces into it modifications which the latter will not accept, the contract shall lapse through this fact without any indemnity to the undertaking." Lord Grimthorpe had at first refused to accept this article, but had ultimately agreed to its insertion on verbal assurances being given to him by the Ministers of Finance and Public Works that the Government were benevolently disposed towards the enterprise, and would never make any but the most friendly and reasonable use of the right thus given to them. Lord Grimthorpe took note of these assurances in a letter to the President, which was verbally acknowledged with renewed assurances of good faith.

Relying, however, upon article 3 the executive authorities introduced a series of modifications in the plans. The company accepted a number of important changes, and presented the revised plans for approval. The estimate for these revised plans considerably exceeded 7,000,000 dollars, and the company proceeded to issue shares to cover this excess, for which they were responsible under the terms of the contract. This was done after they had first obtained an informal assurance from the Minister of Public Works that the plans would be accepted without further substantial alteration.

Nevertheless in October 1912 the President issued a decree accepting the plans but ordering fresh additions thereto of so extensive a nature that the excess portion of the cost, to be borne by the company was increased by 275 per cent.



The company had no means of raising this additional sum, and appealed to His Majesty's Government for assistance in view of the Uruguayan Government's action, which they characterised as a virtual repudiation of the contract.

The British and French Representatives at Montevideo, acting on instructions from their respective Governments, then presented a note to the Uruguayan Government (see Paper (B)) setting forth the company's grounds of complaint, and suggesting certain financial arrangements for meeting the situation in a manner satisfactory to both parties.

No answer was returned till September 1912, when the Minister for Foreign Affairs informed the two Representatives that the Uruguayan Government held themselves justified by their contract in insisting on modifications to any extent regardless of the financial consequences to the company. He pointed out that if the company did not acquiesce a means of settling the difference was provided for in article 15 of the contract itself, which runs as follows:—

"Any differences arising between the State and the company with regard to the interpretation of the contract shall be decided by arbitrators, of whom one shall be nominated by each party and the third selected by the company from among the members of the High Court of Justice (of Uruguay)."

The representatives replied by a further *aide-memoire* (see Paper (C)), in which they challenged the point of view maintained by the Minister for Foreign Affairs on various grounds, including—

- (1.) The assurances of goodwill given by the Government at the time of the making of the contract, and their promise to make none but a reasonable and friendly use of article 3;
- (2.) That "modifications" could not be interpreted as to meaning a complete transformation of the whole project, which was what the Government had demanded;
- (3.) That the theory implied in the Minister for Foreign Affairs' contention, namely, that the Uruguayan Government could demand from British and French shareholders the expenditure of unlimited sums of money, was inadmissible.

At a verbal discussion which ensued between the British and French representatives and the Uruguayan Ministers, the latter persisted in the argument that they had not exceeded their rights under article 3, and maintained that the modifications demanded by them had been of a reasonable nature. The record of the proceedings at this meeting will be found in Paper (D).

The arrangements for a settlement which had been proposed in the first communication from the British and French representatives to the Uruguayan Government having fallen through, the Government offered to submit the dispute to arbitration under article 15 of the contract. This proposal the company rejected, and in support of their attitude in the matter they communicated to the Foreign Office a copy of a joint opinion (Paper (E)), which they obtained from Sir R. Finlay and Mr. A. B. Hall, setting forth the view that—

- (1.) The Company had a right to demand compensation from the Uruguayan Government; and
- (2.) That the provisions of article 15 of the contract did not apply to the present dispute, and that, failing an amicable settlement, recourse should be had to arbitration by an independent tribunal.

The Foreign Office thereupon suggested to the company that an attempt should be made to persuade the Uruguayan Government to agree to arbitration by an international arbitrator, and, on the company assenting to this proposal, instructions were sent to His Majesty's Minister at Montevideo to address himself to the Uruguayan Government accordingly.

The Uruguayan Government, on learning that a proposal for international arbitration was about to be made, hastily presented a reply to the note which had been addressed to them in October 1912 by the two representatives. In it they took their stand upon the actual wording of the contract, and declined to admit that any verbal assurances by members of the Government, even if such had been given to Lord Grimthorpe, could invalidate the clear and precise stipulations of the various articles. They complained of the attitude adopted by Lord Grimthorpe himself, and gave their reasons for maintaining that the proper course for the company to pursue was

to submit their grievances to arbitration by a special tribunal constituted in accordance with article 15 of the contract. A translation of this communication will be found in Paper (F).

The British and French Ministers refrained from entering into a further discussion of the points raised by the Uruguayan Government in the above-mentioned note, but at once communicated to the Government the proposal that the whole dispute should be submitted to international arbitration.

The Uruguayan Government (who, being at that time engaged in negotiations for a European loan, had strong motives for adopting a conciliatory attitude) abandoned their previous standpoint, and concurred in the Ministers' proposal. They further suggested that the arbitrator should be the President of the United States of America.

A draft agreement for referring the dispute to President Wilson was drawn up by the Foreign Office, and after receiving the approval of the Rambla Company was presented to the Uruguayan Government (see Paper (G)). On a request from the latter, that the issue between the parties should be defined more specifically than had been done in this draft, a preamble to the draft was inserted by the company's firm of solicitors, Messrs. E. Salaman and Co., in which they set forth the company's complaints against the Government and the nature of their claim (Paper (H)).

A counter-draft was drawn up by the Uruguayan Government in June 1914, containing their own case as well as certain countercharges against the company (Paper (I)).

A lengthy exchange of correspondence then ensued upon the wording of the terms of reference and discussion on this point was still in progress when, in April 1918, a general Treaty of Arbitration was signed between Great Britain and Uruguay, a similar treaty being concluded between Uruguay and France. These treaties, which follow broadly the lines of similar international agreements, involve the treatment of Uruguay on the same footing as any other civilised sovereign State; that is to say, that the republic receives the benefit of the principle which obtains in the relations between civilised States, that there can be no recourse to diplomatic intervention in a dispute between the State and a foreign subject, unless the latter has already exhausted his legal remedies.

The Uruguayan Government made it clear before signing the treaty that they intended to apply this principle in connection with the Rambla claim by withdrawing from the agreement as to arbitration by President Wilson, which had been brought about through diplomatic action on the part of the British and French Governments.

The British and French Governments acquiesced, being deterred by important considerations of national interest from insisting on making the Rambla case an exception to the provisions of the treaty, and thereby imperilling the negotiations for the conclusion of the treaty itself.

Mr. Balfour thereupon caused Messrs. Salaman to be informed of the situation which had arisen, and of the causes which had impelled His Majesty's Government to enter into a treaty which deprived the Rambla Company of their right to have their case against the Uruguayan Government decided by President Wilson. It was explained to the company that in the altered circumstances satisfaction of their claim must be sought first by an appeal to such legal remedies as were open to them by Uruguayan law.

Messrs. Salaman have replied that their clients cannot consent to adopt this course, and demand that, notwithstanding the new treaty, their case should be made the subject of an international arbitration. In their letters on the subject (Papers (J), (K), and (L)), they reiterate the arguments advanced by them in 1913 in support of the contention that article 15 of the contract is not applicable to the present dispute, and they declare that the dispute lies outside the competence of the Uruguayan Courts, which, they submit, have no powers to decide a claim for breach of contract or other injury brought by the subject of a foreign Power against the local Government.

The matter has been discussed verbally between Mr. Salaman and the legal adviser to this Department, and the record of the conversation will be found in Paper (M). At the same time Mr. Balfour has ascertained, with regard to the alternative methods of settling the dispute by the means provided by Uruguayan law (viz., trial by the local Courts or submission to the special tribunal mentioned in article 15 of the contract), that the Uruguayan Government propose the adoption of the latter course.

In these circumstances it has become necessary to form an opinion as to whether the company have open to them legal remedies which must be exhausted before further diplomatic intervention can be exercised on their behalf, or whether, as contended by



Messrs. Salaman, there exists no proper provision for a local settlement of their claim.

Mr. Balfour would therefore be glad to be favoured with your opinion on the following two questions:—

1. Having regard to the circumstances out of which the dispute has arisen, can it be considered that the terms of article 15 of the contract between Lord Grimthorpe and the Uruguayan Government are too restricted to enable the company to put forward their whole case in submitting to arbitration as provided therein.
2. Are any grounds apparent on which His Majesty's Government would be justified in maintaining that the case is not within the competence of the Uruguayan Courts having in view the provisions of Uruguayan law, referred to and relied on by Messrs. Salaman, as to the necessity of contracts being carried out in good faith.

Mr. Balfour would be grateful, at the same time, to receive any other observations on the question of the Rambla Company's claim which you may be good enough to offer.

I have, &c.
(Signed)

LOUIS MALLET.

List of Papers.

- (A.) Messrs. Salaman to Foreign Office, September 2, 1918.
- (B.) Mr. O'Reilly to Foreign Office, June 20, 1912.
- (C.) Mr. O'Reilly to Foreign Office, October 17, 1912.
- (D.) Mr. O'Reilly to Foreign Office, November 19, 1912.
- (E.) Messrs. Salaman to Foreign Office, March 19, 1912.
- (F.) Mr. Robertson to Foreign Office, May 1, 1913.
- (G.) Foreign Office to Mr. Mitchell Innes, November 11, 1913.
- (H.) Messrs. Salaman to Foreign Office, February 4, 1914.
- (I.) Mr. Mitchell Innes to Foreign Office, June 4, 1914.
- (J.) Messrs. Salaman to Foreign Office, February 1, 1918.
- (K.) Messrs. Salaman to Foreign Office, April 5, 1918.
- (L.) Messrs. Salaman to Foreign Office, July 20, 1918.
- (M.) Foreign Office Memorandum, August 31, 1918.

Report.

In our opinion the dispute in question is a dispute as to the meaning of the contract, and is therefore a dispute which is covered by article 15 of the contract.

Even if this were not so it would appear to be covered by article 16, under which the dispute must be determined in the Courts of and according to the laws of Uruguay.

We are further of opinion that upon an arbitration under article 15 the whole of the matters which the company are entitled to urge can be put forward and dealt with. As the view we take differs from that expressed in the opinion given on the 18th March, 1913, by Sir Robert Finlay and Mr. Hall, we think it advisable to state the grounds which have led us to the conclusions indicated above.

The contract of November, 1910, was in the nature of a preliminary contract, which might or might not become finally binding on the parties.

We summarise the relevant provisions:—

Under Article 1.—The undertaking binds itself to construct a Rambla in accordance with the definite scheme which shall be presented for the approval of the Government within six months following the date of the contract.

Under Article 2.—The Government guaranteed 7,000,000 dollars, with a proviso that if this sum should be insufficient the undertaking would provide the necessary additional funds.

Article 3 provides that the undertaking shall deposit 100,000 dollars as a guarantee and a like sum on the definite plans being approved. The clause further provides that if the Executive Power shall not accept the definite plans to be submitted by the company, or introduce modifications which the company does not admit, the contract shall lapse, without any indemnity to the company but the deposit shall be returned.

Article 10 provides for the division of the proceeds of the surplus lands. Such surplus is to be applied:—

1. In repaying the Government the 7,000,000 dollars;
 2. In repaying the undertakers the cost of construction;
- but the Government is not to be liable to the company if the sales should not produce sufficient to cover the expenses (of constructions, &c.). The surplus (if any) is to be divided equally between the Government and the company, with a proviso that if the difference which the company have to meet under article 5 exceeds 1,000,000 dollars the Government's share of the surplus is to be one-sixth and not one-half.

The arbitration clause is as follows:—

"Article 15. Any disputes which may arise between the State and the undertaking by reason of the interpretation of the contract shall be decided by arbitrators; one to be appointed by each party and a third shall be chosen by the undertaking amongst the members of the High Court of Justice."

And by—

"Article 16. The undertaking submits itself in all respects to the laws of the country and to the decisions of the judicial authorities."

Having regard to these conditions, it is clear that the cost of the proposed work was never defined with any certainty, and that it was contemplated by all parties that it might exceed 7,000,000 dollars by at least a sum of more than 1,000,000 dollars. In other words, the cost was left at an indefinite figure. The contract further contemplated that the alterations, &c., in the plans which were to be submitted after the date of the contract, might be such that the undertakers would not accept them, and the undertakers were accordingly entitled to refuse to carry out the work, and, in that event, to repayment of the deposit.

It would therefore appear to be plain that, having regard to these provisions, very wide powers were given to the Government under the written terms of the contract. It cannot, in our view be established that the alterations made were in excess of these powers or were made *malá fide*.

In our opinion, the verbal assurances given to Lord Grimthorpe by the Ministers of Finance and Public Works are so vague as to be almost meaningless, and more over, the statements, such as they are, attributed to these Ministers are apparently denied by them.

We think, therefore, that the contract between the parties must be construed from the terms of the written agreement alone. So construed, it appears to us that the dispute is one as to the meaning and effect of the contract, and therefore a dispute which is within the arbitration clause of the contract.

We are therefore of opinion, for the reasons stated above, that there are no grounds on which His Majesty's Government would be justified in maintaining that the case is not within the competence of the tribunal mentioned in article 15 of the contract or of the Uruguayan law.

For the above reasons we answer the questions put to us as follows:—

1. No. But the arbitral tribunal cannot give redress. It can only declare the rights of the parties. It must be assumed that, as in any other civilised State, if the award is favourable to the company an action upon it would lie in the local Court.
2. No. But if the local Courts refused redress in the event of an award favourable to the company, the matter could and probably ought to be reconsidered by the Foreign Office.
3. Our general observations have been very fully made. We need only add that the Rambla Company have only themselves to blame if they made a bad bargain. The transaction was an ordinary commercial one and they were fully cognisant of all the facts.

FREDERICK SMITH.
GORDON HEWART.

Law Officers' Department,
November 19, 1918.



(20)

GENERAL

[98875]

No. 5^A.

[War Office.]

[File 13239/1918]

[May 15, 1918.]

Case for the Opinion of the Law Officers of the Crown.

HEREWITH are sent :—

1. Copy of correspondence and memoranda.
2. Copy of minutes.
3. Copy of Royal Warrant for the Maintenance of Discipline among Prisoners of War.
4. Copy of Act and Ordinance No. III of 1914.

Question of the treatment of interned enemy civilians and whether they can be regarded as "prisoners of war."

From the annexed correspondence, memoranda, and minutes the Law Officers will see that a question has arisen as to how interned enemy civilians can be treated and whether they may be regarded as "prisoners of war." The point was raised, as will be seen, by a telegram from the Indian Government of the 9th December, 1917, which asked whether civilian male enemy subjects of military age held in military charge under the Indian Foreigners Ordinance No. III of 1914 (a copy of which is herewith) are prisoners to whom the provisions of the annex to The Hague Convention No. IV of 1907 and the Royal Warrant for the Maintenance of Discipline among Prisoners of War are legally applicable. In particular the Indian Government desire guidance with regard to restrictions on correspondence (see telegram of the 4th January, 1918), and wish to be advised at an early date whether civilian prisoners of war include all enemy subjects whose profession was not that of arms at the time of their internment and include also those who, by reason of being of military age, were potential soldiers or sailors (see telegram of the 4th February, 1918).

In the bundle of correspondence and memoranda herewith will be found two memoranda prepared by the War Department, which summarise and discuss The Hague Convention and its annex. The first points out that that convention does not deal with the case of subjects of one belligerent resident in the territory of the other, and arrives at the conclusion that enemy male civilians of military age in this country are not technically prisoners of war within the meaning of the convention, and that whether they may be treated as such for certain purposes is a question not of law, but of policy. The second memorandum discusses possible restrictions upon and privileges of such persons, on the assumption that they are not covered by the convention, but must be treated "in accordance with the principles of customary international law," and arrives at the conclusion that they are entitled to at least the privileges of prisoners of war, but ought not to be interned, except for the public safety, and cannot be compelled to work. In the bundle of minutes, there will be found a discussion of the subject between the Judge Advocate-General and the Director of Special Intelligence. The Judge Advocate-General refers to *Rex v. the Superintendent of Vine Street Police Station, ex parte Liebmann* (1916), 1 K.B. 268, and suggests that, although The Hague Convention does not expressly deal with or provide for the case, the persons in question are entitled to be treated as prisoners of war, and that the provisions of The Hague Convention and the Royal Warrant, which was made pursuant to that convention, may legally be taken as a guide and applied so far as applicable to civilians; while the Director of Special Intelligence refers to *Schaffinius v. Goldberg* (1916), 1 K.B. 284 C.A., and suggests that the true view is that they are not prisoners of war in the sense of The Hague Convention; that only such measures may properly be taken in regard to them as are necessary to secure the public safety; that it is doubtful whether among enemy subjects any distinction can be made between enemy male civilians of military age and others, and that whether the former can be treated for all or particular purposes as prisoners of war is a matter of policy.

The Judge Advocate-General, as appears from his minute of the 17th January, 1918, in paragraph 2 (a), also desires to be advised with regard to regulation 14 (B) of the Defence of the Realm Regulations whether persons interned under that regulation (whether of enemy, neutral, or British nationality) can be dealt with for the purpose of

GENERAL

21

trial and punishment for offences under the Royal Warrant for the Maintenance of Discipline among Prisoners of War, in spite of the fact that it is expressly provided that an escape, or attempt to escape, or a breach of the rules is an offence against the regulations. In other words, are there these two alternative methods of dealing with them, or is it necessary to apply to them the more cumbrous procedure of trial under the regulations? This point is, of course, one of English law and is apart from the question of the manner in which enemy subjects can be treated under international law.

With regard to the general question, reference may be made to *Robinson v. Metcalfe* (1917), 33 Times L.R. 542, where the Court had before it the question whether a male British subject of military age who had been detained in Germany for some twelve hours on the 6th August, 1914, and then allowed to leave the country was "a prisoner of war, captured, or interned by the enemy" within section 8 of "The Military Services Act, 1916" (sess. 2). It was assumed in the judgment of the Lord Chief Justice that the man "when detained would have the status of a prisoner of war and not that of a civilian," and it was held that the temporary detention was merely for the purpose of determining whether he was to be made a prisoner of war, i.e., that he was only detained for enquiry. The question argued in the case was whether, on the words of the Act, there was only one class of person exempted—"prisoner of war captured or interned"—or three classes: a prisoner of war, a person captured, and a person interned. No question such as that now under discussion was before the Court, but the decision, so far as it goes, seems to show that the expression "prisoner of war" has not been regarded as a term of art, the definition of which is to be gathered solely from the terms of The Hague Convention.

It may be added to the considerations put forward in the minutes referred to that it is to be observed that by the preamble of Convention IV of 1907 the provisions of that convention were merely intended to serve as general rules of conduct for belligerents in their relations with each other and with their populations, and it was declared "that in cases not included in the regulations . . . populations and belligerents remain under the protection and the rule of the principles of the law of nations as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience," and that by article 1 the regulations annexed were intended as a guide to the instructions to be issued to armed land forces. The provision of article 2 requiring all the belligerents to be parties to the convention may, it is conceived, be treated as of no importance for the present purpose. The articles relative to prisoners of war seem clearly to be directed only to persons captured in actual hostilities by an army.

It will be seen that alternative forms have been suggested for the questions to be put to the Law Officers, and that it was finally agreed that the question should be in general terms, as is set out in question 1 hereunder; but the Law Officers will, no doubt, take into consideration in their answer the questions suggested by the Judge Advocate-General and the Director of Special Intelligence.

The Law Officers are requested to advise—

1. Whether (i) civilian enemy subjects or (ii) civilian male enemy subjects of military age interned under (a) regulation 14 (B) of the Defence of the Realm Regulations, (b) the Royal prerogative, and (c) Indian Ordinance No. III of 1914 are prisoners of war to whom the provisions of the annex to The Hague Convention No. IV of 1907 and the Royal Warrant for the Maintenance of Discipline among Prisoners of War are legally applicable.

2. Whether, as a matter of English law, persons interned under regulation 14 (B) of the Defence of the Realm Regulations can be dealt with, for the purpose of trial and punishment for offences, under the Royal Warrant for the Maintenance of Discipline among Prisoners of War as an alternative to dealing with them as guilty of offences under the regulation.

3. Whether (as is asked by the Indian Government in their telegram of the 4th February, 1918) civilian prisoners of war include all enemy subjects whose profession was not that of arms at the time of their internment and include those who, by reason of being of military age, were potential soldiers or sailors.

4. Generally on the case.

With reference to the case at present before the Law Officers on this point, further enquiry has been made as to what are the actual restrictions imposed on persons interned in India, with a view to ascertaining whether there was in India anything



corresponding to the English Warrant for the Maintenance of Discipline among Prisoners of War, a copy of which is before the Law Officers. The reply from the India Office is that that warrant applies to India; the India Office and the Government of India were consulted when it was drafted and it contains numerous references to India, and the warrant empowering the Commander-in-chief in India to convene and confirm military courts for the trial of prisoners (see Appendix (A) of the Royal Warrant) was sent direct to India by the War Office in September 1914.

Opinion of the Law Officers of the Crown.

1. In our opinion the provisions of the annex to The Hague Convention No. IV of 1907 do not, as a matter of international convention, apply to any interned civilians, but it is open to the Government to apply these or analogous provisions to civilian enemy subjects of any age interned either under the Royal prerogative or under the Indian Ordinance No. III of 1914 without any breach of international law. The Royal Warrant for the Maintenance of Discipline among Prisoners of War applies to all such interned enemy civilians as are subjects of nations which are parties to The Hague Convention. Persons interned under regulation 14 (B) are legally subject to the like restrictions and may be dealt with in like manner, except so far as the Secretary of State may relax such restrictions.

2. Persons interned under the regulation can be dealt with, for the purpose of trial and punishment for offences during internment, under the Royal Warrant for the Maintenance of Discipline among Prisoners of War, whether they are, as an alternative, liable to be dealt with as guilty of an offence under the regulation or not. Whether they are liable to be dealt with as guilty of an offence under the regulation appears to depend upon the question whether their offence constitutes failure to comply with some provision of the order of the Secretary of State.

3. We think that the expression "civilian prisoners of war" includes all interned enemy subjects whose profession was not that of arms at the time of their internment, although, being of military age, they may be potential soldiers or sailors. The words must, however, be construed with due regard to the context.

4. We do not think that we can usefully add anything further.

FREDERICK SMITH.
GORDON HEWART

Law Officers' Department, May 15, 1918.



1919

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office.

CONFIDENTIAL.

(11612)

LAST COPY.

3

Nothing mutilated or removed. Admin.

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1919.



1919

LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked *I^a*, &c

PRIZE LAW.

No.		Date.	SUBJECT.	Page.
<i>I^a</i>	Law Officers, Mr. Raeburn and Dr. Pearce Higgins [Procurator-General]	Apr., 1919	Valuation of ships placed in the Prize Court and requisitioned by the Crown	1
<i>I^b</i>	Law Officers .. [Admiralty]	Aug. 15,	Title to enemy ships in United States ports on the outbreak of the war	6
<i>I^c</i>	Law Officers, Mr. Raeburn and Dr. Pearce Higgins [Procurator-General]	Aug. 20,	Valuation of ships placed in the Prize Court and requisitioned by the Crown	7
1	Law Officers ..	June 12,	Disposal on conclusion of peace of parcels and letter mails detained by His Majesty's Government during the war	8

VARIOUS.

(Arranged according to Countries.)

AUSTRIA-HUNGARY.

2	Law Officers ..	Apr. 22, 1919	Disposal of war material by the Governments of Austria and Hungary	13
---	-----------------	---------------	--	----

CHINA.

3	Law Officers ..	Aug. 9, 1919	China (Companies) Amendment Order in Council, 1919	14
---	-----------------	--------------	--	----

GENERAL.

4	Law Officers ..	May 27, 1919	Question of revoking the safe-conduct granted to Captain Kiesewetter	15
5	Law Officers ..	Aug. 15,	Transportation of passengers of German nationality by the Royal Holland Lloyd Steamship Company's vessels	16
6	Law Officers ..	Aug. 19,	Restricted immigration of aliens into the United Kingdom. Question of compatibility with provisions of commercial treaties between Great Britain and other countries of measures on lines of article 22 (b) of Aliens Restriction Order	18

232—[3996]

a

(iii)

No.		Date.	SUBJECT.	Page.
6 ^a	Law Officers, Mr. Parr and Mr. Hills [Inland Revenue Department]	Sept. 19, 1919	Position of foreign sovereign Powers in relation to British income tax	20
7	Law Officers ..	Nov. 4,	Communication to His Majesty's Consul-General, Rotterdam, of list of German naval personalities to be surrendered under Treaty of Peace. Notification by foreign shipping companies of German adult male passengers outward bound from Europe	22

TURKEY.

8	Law Officers ..	Aug. 7, 1919	Trial and punishment of Turkish offenders ..	23
9	Law Officers ..	Dec. 23,	Administration of Justice at Constantinople ..	26



(iv)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1919.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

ALI—HUN.

A.

Aliens. *See* Immigration.
Austria: disposal of war material by, 13, 14.

B.

Banks: deposits of Siamese Government in London banks; liability to income tax, 20, 21.

C.

"*Chile*," 2.
China (Companies) Amendment Order in Council, 14.
Companies in China. *See* China (Companies).
Constantinople: administration of justice, 26-28.
" : Inter-Allied Courts, 26-28.
Consuls: communication to British Consul-General, Rotterdam, of list of German naval personalities to be surrendered under Treaty of Peace, 22.
Courts: British military, in Turkey; jurisdiction, 23-26.
" Inter-Allied, at Constantinople, 26-28.

D.

Deposits. *See* Banks.
Dominions, British: position in relation to British income tax, 20, 21.
" *Düsseldorf*," 1.

E.

Enemy vessels. *See* Vessels.

F.

"*Frederick VIII*," 10.

G.

"*Germania*," 3.
Germany: German male passengers outward bound from Europe; notification by foreign shipping companies of names, 22.
" : nationals; transportation on vessels of Royal Holland Lloyd Steamship Company, 16, 17, 22.
" : naval personalities to be surrendered under Peace Treaty; communication of list to British Consul-General, Rotterdam, 22.
Governments: foreign; position in relation to British income tax, 20, 21.

H.

Hague Convention VI: valuation of ships detained under, 1-8.
Hungary: disposal of war material by, 13, 14.

IMM—PRI.

I.

Immigration: into United Kingdom; compatibility of article 22 (b) of Aliens Restriction Order with provisions of commercial treaties, 18, 19.
Income tax, British: position of foreign Sovereigns and sovereign Powers, 20, 21.
" : position of British Dominions and Commonwealths, 20, 21.
" : liability of Siamese Government to income tax on interest on deposits in London banks, 20, 21.

J.

Jurisdiction: British military courts in Turkey, 23-26.
" : of Inter-Allied Courts at Constantinople, 26-28.
" : over Turkish offenders, 23-28.
Justice: administration of, at Constantinople, 26-28.
" : trial and punishment of offenders in Turkey, 23-26.

K.

Kiesewetter, Captain: revocation of safe-conduct, 15, 16.
" *Kristianiafjord*," 10.

L.

Letter mails. *See* Mails.

M.

Mails: parcel and letter mails detained during war; disposal, 8-13.
Military Courts. *See* Courts.
Munitions: disposal of, by Austria and Hungary, 13, 14.

N.

Navy, German: personalities to be surrendered under Treaty of Peace; communication of list to British Consul-General, Rotterdam, 22.

O.

Order in Council. *See* China (Companies).

P.

Parcel mails. *See* Mails.
Prize Court. *See* Vessels.

(v)

REQ—TUR.

R.

Requisitioned vessels. *See* Vessels.
Royal Holland Lloyd Steamship Company, 16, 17, 22.

S.

Safe-conduct: for Captain Kiesewetter; question of revocation, 15, 16.
Siam: liability of Government to income tax on interest on deposits in London banks, 20, 21.
Sovereigns: foreign; position in relation to British income tax, 20, 21.

T.

Treaties, commercial: compatibility of Aliens Restriction Order, article 22 (b), 18, 19.
Trial of Turkish offenders, 23-26.
Turkey: jurisdiction of British military courts, 23-26.
" : trial and punishment of offenders, 23-26.
" : administration of justice at Constantinople, 26-28.
" : proposed Inter-Allied court at Constantinople, 26-28.

UNI—WAR.

U.

United Kingdom: immigration into. *See* Immigration.
United States: enemy ships in United States ports at outbreak of war; title, 6.

V.

Valuation. *See* Vessels.
Vessels: placed in Prize Court and requisitioned by the Crown; valuation, 1-8.
" : enemy, in United States ports at outbreak of war; title, 6.
" : transportation of German nationals in Royal Holland Lloyd Steamship Company's vessels, 16, 17, 22.
" : notification by foreign shipping companies of names of German male passengers outward-bound from Europe, 22.

W.

War criminals. *See* Navy, German.
" : materials. *See* Munitions.



Printed for the use of the Foreign Office.

CONFIDENTIAL

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1919.

PRIZE LAW.

[70321]

No. 1⁴.

[Procurator-General.]

[File 9529/19.]

[April, 1919.]

Case for the Opinion of the Law Officers of the Crown and Counsel.

HEREWITH are sent:—

Print of the 7th Interim Report of the Oversea Prize Disposal Committee.

Letter from the Secretary of the Committee to the Procurator-General, dated the 8th November, 1918.

Transcript of proceedings in the Privy Council in the case of "Germania," "Tiberius," "Osnabrück," "Melbourne," "Sumatra," and "Berlin."

Print of Judgment.

Case laid before the Solicitor-General and Mr. Raeburn with opinion, dated the 25th February, 1918.

List of ships under requisition with particulars.

Printed list of detained ships prepared by the Oversea Prize Disposal Committee.

Valuation
of ships
placed in
the Prize
Court and
requisi-
tioned by
the Crown.

The question upon which counsel's advice is sought is as to the basis of the valuation to be applied to ships which were placed in the Prize Court and requisitioned by the Crown, and what date should be fixed for such valuations.

Shortly after the outbreak of war a number of German ships were captured either in port or on the high seas and were placed in the Prize Court.

As soon as the shortage of shipping was apparent, which was towards the end of 1914, applications were made to the Prize Court under order 29 of the Prize Court Rules to requisition ships in the custody of the Marshal. These ships were in two categories—

1. Ships seized as prize in respect of which a decree of condemnation would be asked for.
2. Ships in the custody of the Marshal in respect of which the "Chile" order either had been made or would be asked for.

With regard to—

1. This class of case may almost be disregarded, as nearly all the ships which were requisitioned before trial in the early days of the war have now been brought before the Court, and decrees of condemnation have been made.

In a recent case—steamship "Düsseldorf," a German ship captured off the coast of Norway—an order was made by the Registrar on the 12th September, 1918, giving



leave to requisition the vessel, which was to be appraised by the Marshal. A commission of appraisement was issued and the appraisers valued the vessel at 57,480*l.* as on the 18th September, 1918, the date on which the ship was taken over from the Marshal. Similarly the four German ships which were captured off the Dutch coast in July 1917 were all appraised as at the date they were taken over under the order giving leave to requisition them.

2. Ships under detention by virtue of decrees of the president made pursuant to The Hague Convention No. 6, *i.e.*, an order as in the "Chile."

The "Chile" order, as counsel will remember, is the form settled by the President as being the proper decree to be made where ships came within The Hague Convention No. 6, and were therefore, according to that convention, merely liable to be detained on condition of restoring them after the war. The form of order was not final, as it was thought better to preserve liberty to apply in case the enemy should not consider himself bound by this convention. The actual form of the order, which will be found at page 48 in vol. i in "Lloyd's Reports of Prize Cases," is as follows:—

"The President . . . pronounced the said sailing ship 'Chile' to have belonged at the time of seizure thereof to enemies of the Crown, and as such to have been lawfully seized by the officers of His Majesty's Customs at the port of Cardiff as good and lawful prize and as droits and perquisites of His Majesty in his office of Admiralty, and therefore, upon the application of Mr. Attorney-General for the Crown, ordered the said ship to be detained by the Marshal until further order is issued by the Court. All questions of costs reserved. Liberty to apply."

The Hague Convention No. 6, article 2, while stating that such a ship may not be confiscated, provides that the belligerent may merely detain it on condition of restoring it after the war without payment of compensation, or he may requisition it on condition of paying compensation. The French version of this article, which, as counsel is aware, is the authentic version, is as follows:—

"Le belligérant peut seulement le saisir moyennant l'obligation de le restituer après la guerre sans indemnité, ou le réquisitionner moyennant indemnité,"

a phrase somewhat inadequately translated by the words "paying compensation."

In requisitioning these ships the machinery provided by the rules of the Prize Court was followed.

The original rules which were in force from the beginning of the war until the 23rd March, 1915 (being the period during which most of the ships were requisitioned), only gave power to the Admiralty to requisition ships, but by the amendment which came into force on the 23rd March, 1915 ("Pulling's Manual," vol. iii, p. 510), power was given to requisition ships *on behalf of the Crown*.

Order 29 of the Prize Court Rules contemplates that whenever a ship is requisitioned she shall be appraised unless (Rule 3) it is made to appear to the judge on behalf of the Crown that the ship is required for the use of His Majesty's service forthwith, in which case the ship is forthwith released and delivered to the Admiralty without appraisement, and Rule 4 provides that where a ship has been requisitioned and whether or not an appraisement has been made, any party may apply to the Court to fix the amount to be paid in respect of the ship, and the sum so fixed shall be paid into the Court on behalf of the Crown.

Two new Rules 4 A and 4 B were added to Order 29 by Order in Council of the 30th September, 1914 ("Emergency Manual," vol. i, p. 366). Rule 4 A provided that in lieu of payment into Court the proper officer of the Crown may give an undertaking in writing to pay the appraised value of the ship or the amount fixed under Rule 4, and Rule 4 B, stated that a ship may be requisitioned temporarily.

The whole requisitioning Order was repealed and re-enacted with modifications by Order in Council of the 29th April, 1915, which came into force on the 23rd March, 1915 ("Emergency Manual," vol. iii, p. 508).

All the requisitioned ships which were subsequently condemned as prize became the absolute property of the Crown and are entirely outside the present case. The remaining ships, namely, those in respect of which a decree for detention had been made, were in most cases requisitioned temporarily under Order 29, Rule 4 B, but in a few cases were requisitioned permanently. In no case has any payment been made into Court by the Crown, but undertakings have been given under Rule 4 A. In a few cases the ships were appraised, the value taken being that of the value at the date of handing over, but in the majority of cases the requisition was under Rule 3 of the

Order, *i.e.*, the ship was requisitioned forthwith without appraisement, and in no case has the value of a ship been fixed as provided by Rule 4.

Council will see from the Seventh Interim Report of the Oversea Prize Disposal Committee, which is dated the 30th September, 1918, that the Committee wishes to requisition permanently the ships now under temporary requisition, and also that the value of the ships shall be fixed by the Court under Order 29, Rule 4. It is very desirable that this should be done before peace is signed.

It is suggested that these applications, which will be made to the Registrar on notice to the parties (if any) still on the record shall be supported by a valuation given by a ship valuer of standing in London who can make a valuation without necessarily inspecting the ship from the particulars given in Lloyd's Register and in other accessible records. The date taken by the valuer should presumably be the date of the order giving leave to requisition, or the date of handing over, or possibly the date of capture or seizure.

It does not necessarily follow that the value fixed by the Prize Court on requisition is the value of the ship for all purposes. The Prize Court is only concerned to fix the value of a ship with the possession of which it is parting, and it will presumably therefore take the value of the day of delivery to the Crown.

The rights of the owners of the ship are not, however, to be determined by reference to the Prize Court Rules, but by reference to The Hague Convention, and it may well be that the value of the ship which they are entitled to receive under that instrument is—*theoretically*, at any rate—different from that which the Prize Court has fixed as its interest in the prize.

From the point of view of the British Government it is presumably advantageous to keep the value to be accounted for to the owners as low as possible, and, while it will be difficult to resist the argument that the value to be fixed by the Prize Court is that on the date of requisition, it will be desirable to keep open the contention that the only value to be accounted for to the owners is the value of the ship on the day of seizure in an enemy port from which she could not sail for an indefinite period.

It is of course important that the proper basis of valuation shall be taken, and counsel is referred to the argument in the Privy Council in the case of the "Germania" and others, a transcript of which is herewith.

Counsel may remember that this was an appeal from New South Wales. Certain German ships which at the outbreak of war were found in the port of Sydney were ordered by the Prize Court of New South Wales, following the "Chile," to be detained until further order. Orders were then made that they should be temporarily delivered to the Admiralty without appraisement under Order 29, Rule 4 B, "Emergency Manual," vol. i, p. 367. Some months later the Court ordered that the ships be delivered to the Crown without appraisement, that is to say, they turned the temporary requisition under Rule 4 B into a permanent requisition under Rules 2 and 3. It was then referred to the Registrar to fix the amount to be paid by the Crown in respect of the values of these ships. The German masters who appeared applied for an adjournment to enable them to get evidence from Germany as to the values of these ships. This application was refused, and in effect the appeal to the Privy Council was from the refusal of the Registrar to adjourn the valuation until after the war.

Mr. Bateson, who appeared for the appellants in the Privy Council, argued that under The Hague Convention No. 6, article 2, a ship under detention should only be requisitioned on terms that the owner should be "indemnified."

Considerable discussion took place during the argument as to the meaning of the words "moyennant indemnité" in article 2 of The Hague Convention No. 6, but the appeal was dismissed without actually deciding this question.

A list is herewith showing the ships which have been requisitioned by the Admiralty and have not been condemned as prize.

As already stated, a number of these ships were requisitioned temporarily under Order 29, Rule 6, as amended by Order in Council, dated the 29th April, 1915 ("Emergency Manual," vol. iii, p. 510), but it is proposed to apply for an order to requisition the ships permanently under Rules 1 and 2 of Order 29.

The question whether under The Hague Convention No. 6 the owner is entitled as of right to the return of his ship, or only to compensation at the option of the belligerent who has requisitioned it, is one which may be open to doubt.

It is felt that in the circumstances, whichever may be the correct view, the position of the Crown will be strengthened by converting all temporary requisitions into



unqualified requisitions under Order 29, Rule 2. This will at any rate remove the possibility of an argument for their return being based on the temporary character of the order of requisition.

The effect of an unqualified order under Order 29, Rule 2, will no doubt be of importance at a later date, and the question may be raised whether its effect is to transfer to the Crown an absolute title on the ship for all purposes or whether it only confers a right of user and enjoyment without transferring the title, which right will automatically come to an end at the declaration of Peace. If there is any risk of this happening it should be borne in mind when the Treaty of Peace is framed.

The Prize Court Rules themselves do not, of course, confer on the Crown any power which it has not already acquired *aliunde*, but it is submitted that the Crown should, if necessary, contend that The Hague Convention gives power to requisition absolutely and for all purposes, and that in acting under it the Crown has more extensive powers than it has in requisitioning the ships and goods of its own nationals.

Counsel is requested to advise:—

1. In the case of the vessels appraised, whether the Crown will be safe in taking the appraised value appraised under a commission of appraisement as fixing the value of the ship absolutely.

2. In case of vessels not appraised—

- (a.) What date should be fixed for the valuation—

- (1.) The beginning of the war;
- (2.) The date of seizure;
- (3.) The date of the decree ordering detention;
- (4.) The date of the order for requisition;
- (5.) The date when the ship was handed over pursuant to the order to requisition; or
- (6.) The end of the war.

- (b.) What basis of value should be taken, *e.g.*—

- (1.) The value to the owner;
- (2.) The market value—
 - (a.) The world market;
 - (b.) The allied market;
 - (c.) The "free" market, or the market subject to requisition;

- (3.) Whether the owner is in fact entitled to an indemnity (see 6th Hague Convention, article 2, "moyennant indemnité"). If so, what does the term imply?

- (4.) Whether the Crown is to account to the owner for all net profits made by ships while under requisition;

- (5.) Whether the value should be deferred from the date taken until the end of the war;

- (6.) Whether allowance should be made on the basis that the Crown is not bound to keep the ship and machinery in good condition.

- (c.) What procedure should be adopted in order to get the values fixed, or possibly the appraisements amended so as to make them in accordance with counsel's advice upon the previous questions (see Order 29, Rule 4).

- (d.) Whether in the case of any ships requisitioned in respect of which a final order for condemnation has not been made, such requisition will cease to be operative at the end of the war.

Opinion of the Law Officers, Mr. Raeburn, K.C., and Dr. Pearce Higgins, with regard to Detained Enemy Ships under Requisition.

Before answering in detail the questions submitted to us we think it well to make a preliminary observation on The Hague Convention No. 6, 1907. The Prize Court has declined to decide expressly on the relationship between the 1st and 2nd articles, and we do not therefore propose to anticipate any decision which it may ultimately give should it be called upon for one.

Dealing now with the questions submitted:—

1. In the case of the vessels appraised, whether the Crown will be safe in taking the appraised value appraised under a Commission of Appraisement as fixing the value of the ship absolutely.

2. In case of vessels not appraised—

- (a.) What date should be fixed for the valuation—

- (1.) The beginning of the war;
- (2.) The date of seizure;
- (3.) The date of the decree ordering detention;
- (4.) The date of the order for requisition;
- (5.) The date when the ship was handed over pursuant to the order to requisition; or
- (6.) The end of the war.

- (b.) What basis of value should be taken, *e.g.*—

- (1.) The value to the owner;
- (2.) The market value—
 - (a.) The world market;
 - (b.) The allied market;
 - (c.) The "free" market, or the market subject to requisition;
- (3.) Whether the owner is, in fact, entitled to an indemnity (see The Hague Convention, No. 6, article 2, "moyennant indemnité"). If so, what does the term imply.

- (4.) Whether the Crown is to account to the owner for all net profits made by ships while under requisition.

- (5.) Whether the value should be deferred from the date taken until the end of the war.

- (6.) Whether allowance should be made on the basis that the Crown is not bound to keep the ship and machinery in good condition.

- (c.) What procedure should be adopted in order to get the values fixed, or possibly the appraisements amended, so as to make them in accordance with counsel's advice upon the previous questions (see Order 29, Rule 4).

1. No; see our next answer.

2. (a.) We are of opinion that the valuation should be fixed as at the date of seizure.

- (b.) We are of opinion that the value to be taken should be that which the vessel would have had in the world market at the date of seizure.

- (3.) We are of opinion that the term "moyennant indemnité" means that if the vessel is to be restored to the owner he is to be compensated on the basis of the value of the ship in the condition in which she would have been had she been laid up and not requisitioned. We think that the detaining power under this Convention, in case it does not requisition a ship, is only under a duty to protect it from damage by pillage, but is under no obligation to make any compensation for deterioration due to non-user.

- (4.) The owner has no claim for the freight earned by the ship if she has been requisitioned.

- (5.) We see no reason for deferring the valuation until the end of the war.

- (6.) See our answer under (3).

- (c.) An application should be made to the Court to fix the amount to be paid.



1919

6

PRIZE LAW.

(d.) Whether in the case of any ships requisitioned in respect of which a final order for condemnation has not been made, such requisition will cease to be operative at the end of the war.

(d.) We think not. The requisition will, in our opinion, continue until it is determined by an order of the Court.

April 1919.

G. H.
E. M. P.
W. N. R.
A. P. H. (except as regards 2 (d).)

[126901]

No. 1^B.

[Admiralty.]

[File 289/1919.]

[August 15, 1919.]

Case for the Opinion of the Law Officers of the Crown.

HEREWITH are sent:—

1. Copy telegrams.
2. Copy Executive Order of United States taking over German ships in American ports.
3. Memorandum by First Sea Lord.
4. Memorandum by the Economic Section of the British Delegation on Reparation—Enemy Merchant Shipping.
5. Memorandum by Dr. Pearce Higgins.

Title to
enemy
ships in
U.S. ports
on the
outbreak
of war.

It is understood that the United States representatives at the Congress in Paris claim that the title to the enemy ships seized in United States ports has become legally vested in the United States Government under the Joint Resolution adopted by Congress and approved by the President on the 12th May, 1917, and an Executive Order dated 30th June, 1917.

No decree of condemnation by a Prize Court has been made in respect of these vessels.

It may be that for municipal purposes the transfer of the vessels is valid and effective, but greater doubt is felt as to the validity of the transfer in international law, and it is understood that the naval authorities desire to have the observations of the Law Officers upon this aspect of the question.

A memorandum on the subject by Dr. Pearce Higgins is sent with these papers.

The Law Officers are requested to advise whether a valid title to these vessels has been transferred to the United States Government in international law under the Joint Resolution and Executive Order without a decree of condemnation by a Prize Court.

Opinion of the Law Officers of the Crown.

In our opinion a valid legal title to these vessels has been transferred to the United States Government under Resolution and Executive Order, and no decree of condemnation by a Prize Court is necessary to perfect such title.

Subject to any treaties, we think that a belligerent State may, if it thinks fit, lawfully seize and confiscate any enemy property found within its territories, and the intention to exercise this right cannot be evidenced more conclusively than by a Legislative Act. Prize Courts are the creatures of the Sovereign creating them, and can have no higher authority than the Sovereign Power itself. According to Maine ("International Law," p. 96), their object in the abstract "is to satisfy the conscience of the Sovereign that the captures made by its subjects are valid captures."

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
August 15, 1919.

PRIZE LAW.

7

[119310]

No. 1^C.

[Procurator-General.]

[File 9529/1919.]

[August 20, 1919.]

Case for the Opinion of the Law Officers of the Crown, Mr. Raeburn, K.C., and Dr. Pearce Higgins.

IN the opinion* which is sent herewith, the Law Officers and Counsel advised in paragraph 2 (b) that the value to be taken should be that which the vessels would have had in the world market at the date of seizure.

Valuation
of ships
placed in
the Prize
Court and
requisi-
tioned by
the Crown.

In view of the importance of the valuation proceeding upon correct principles, which will apply to detained enemy vessels throughout the Empire, further guidance is desired as to the considerations which should be taken into account in ascertaining the value of these vessels. The specific point upon which advice is sought is whether the vessels are to be valued as free ships, or whether they are to be valued as enemy ships lying in a belligerent port upon the outbreak of war.

If they are treated as free ships sold in a world market, their value will necessarily be higher than if they are valued as enemy ships.

It is desired to point out that it is not inconsistent with the opinion which has been given to treat the vessels as enemy vessels, and it is submitted that, in valuing a ship, the proper course is to take into account all the considerations which in fact apply to her at the moment at which the ship is to be valued. That is to say, that the vessel should be valued as she in fact is, an enemy ship lying in a belligerent port, immobilised for an indefinite period. She should be treated as a ship for which no neutral would bid, except on the footing that she could not be used until the conclusion of the war, because she could not be transferred to a neutral flag without the consent of the belligerent Governments, which they are under no obligation to give, and she would therefore remain liable to capture if sent to sea under a neutral flag.

The result may indeed be that only British or Allied subjects would bid for her, and that, in fact, would amount to a sale in a restricted market, but the price given for her in these circumstances would none the less be her true value in the world market, which would necessarily have been restricted by the prevailing conditions, so as to limit the potential buyers to firms of British or Allied nationality.

To treat the vessel as a free vessel is to bestow upon her gratuitously advantages and privileges which she does not in fact enjoy, and to put her on the same basis as a British ship is to value her under conditions which are entirely non-existent in the case of the ship being valued. The result would indeed be to give her a purely fictitious value, as it is obviously absurd to suppose that a German ship and a British ship of the same class and tonnage had the same value in the world market upon the 5th August, 1914; still less had they the same value at the somewhat later date of requisition, when no German ship was to be found at sea.

It was meant to raise this point by question 2 (b) (5) of the case upon which counsel wrote their opinion of the 17th April, 1919, but it is possible that in answering this question in the negative counsel did not have in mind all the considerations above stated.

In order to carry out the opinion of counsel three typical cases of detained enemy ships were taken before the President, who made an order for permanent requisition, but decided that the value which should be put upon these ships was the value at the date of the first requisition, not the value at the date of capture.

It should be borne in mind that the value at the date of requisition is not necessarily, although it may be, the value which has to be accounted for to the enemy owner under the Hague Convention. Whatever may be the value to which the enemy owner is entitled, the argument in favour of the value at the date of requisition being the restricted value contended for above seems to be very strong.

It is submitted that these very material considerations should be taken into account in valuing these vessels.

The Law Officers and Counsel are requested to advise as to the basis upon which these vessels should be valued, and the considerations which should be taken into account.

Solicitor's Department, Treasury,
July 1919.

* See No. 1A.



1919

8

PRIZE LAW.

Opinion of the Law Officers of the Crown, Mr. W. Norman Raeburn, K.C., and Dr. A. Pearce Higgins.

THE President has decided that the date of requisition is the date as at which the value is to be fixed.

We have already advised that the basis of such valuation is the value of the vessel in the "world market." It appears to us, therefore, that the world market must be taken as it existed at the date of requisition, that is to say, that enemy purchasers were excluded and that the only possible purchasers were subjects of the Allied States and neutrals. We see no reason to exclude neutrals as possible purchasers, or to assume that the Allied States would not give their consent to the transfer of the vessel to a neutral flag. Put shortly, we consider that the vessel should be valued just as if she were a British vessel put up for sale in a British market during the war, and subject to the same advantages or disadvantages in the eyes of a British, Allied, or neutral bidder.

GORDON HEWART.
ERNEST M. POLLOCK.
W. NORMAN RAEBURN.
A. PEARCE HIGGINS.

*Law Officers' Department,
August 20, 1919.*

[135538]

No. 1.

[File 4577/1919.]

[June 12, 1919.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, May 29, 1919.

I AM desired by Lord Curzon of Kedleston to request your opinion respecting certain questions which have arisen for solution with reference to the action to be taken by His Majesty's Government as regards large numbers of postal packets detained in this country.

As you will be aware, His Majesty's Government have, during the war, exercised the right of visit and search as regards mails. The exercise of the belligerent rights of His Majesty's Government in this respect has formed the subject of controversy with the Government of the United States and certain neutral Governments (a copy of correspondence on this subject is enclosed for convenience of reference), but, as you will observe, His Majesty's Government, acting in co-operation with the French Government, have maintained their right to search mails, and a very large number of postal packets have in fact been detained on the ground that their transmission to their destinations would have increased the material or financial resources of the enemy for the prosecution of the war, and they are at present stored in this country.

The detained postal packets in question fall into the following categories:—

1. Packets containing merchandise proper.
2. Packets containing currency, realisable securities, or documents which are in any way connected with the transfer of money or merchandise, and which have been declared absolute contraband (*vide* proclamations of the 12th April and 23rd November, 1916, of which copies are attached).
3. Packets containing wills, leases, birth and naturalisation certificates, or other forms of a legal nature.
4. Packets containing insurance and reinsurance documents, *e.g.*, "bordereaux."
5. Ordinary commercial or financial letters.
6. Private letters.

Each of the above categories must be sub-divided as follows:—

- (a) Packets posted to or from enemy countries.
- (b) Packets posted to or from non-enemy countries, the actual contents of which were destined for or originated in enemy countries.

PRIZE LAW.

9

In the case of categories 1, 2, 4, and 5, there is a further sub-division:—

- (c.) Packets of which both the cover and contents were destined for or originated in non-enemy countries, but which were transmitted on enemy account or in enemy interest. These packets were detained either on internal evidence that their contents were ancillary to the transfer of money or the passage of merchandise to or from enemy countries, or on external evidence with regard to the enemy associations of the addressor, the addressee, or the parties interested (*e.g.*, the fact that a blacklisted firm was concerned) where there was no evidence that the transactions involved were for neutral benefit only.

With regard to category (2) it should be observed that a large number of the packets falling thereunder were actually detained before the inclusion of their contents in the Contraband List by the Proclamation of the 23rd November, 1916. It should also be observed that a large number of packets were detained on the score, not of German, but of Austrian or other enemy interest, and that many of these were intercepted before the 10th January, 1917, the date upon which the Second Reprisals Order came into force. That Order, however, purports to be retrospective.

I am further to explain that the postal packets, with reference to which your advice is desired, have all been taken from what are known as "transit mails," but that the following different classes of mail are covered by this term:—

- (i.) Mails on board ships bound from one neutral country to another and ordered in by His Majesty's cruisers for the purpose of search, *i.e.*, "Ordered Ships."
- (ii.) Mails on board vessels bound from one neutral country to another which either in the normal course of their voyage or for reasons of a navigational nature or in pursuance of an agreement with His Majesty's Government into which their owners had voluntarily entered (*vide* bunkering conditions of October 1915), called at a port in the United Kingdom, *i.e.*, "voluntary ships."
- (iii.) Transit mails proper, *i.e.*, mails between foreign countries despatched via United Kingdom and transmitted through this country by His Majesty's Post Office.

The treatment accorded to detained packets has been as follows:—

Packets found in the transit mails proper containing merchandise suspected to be either of enemy origin or for enemy destination have been transferred to the Customs, and dealt with under the Customs (War Powers) Acts, as goods imported from an enemy country or as goods "imported in contravention of the law relating to Trading with the Enemy" (*vide* Customs (War Powers) Act (No. 2), 1915).

Packets containing merchandise found in the mails of "ordered" or "voluntary" ships and packets found in transit mails proper, or in any other of the mails above enumerated and containing currency or containing securities or instruments of realisable value included in the list of absolute contraband have been placed in Prize in order that they might be dealt with either as contraband or as "goods" for enemy destination, or of enemy ownership or origin under the Reprisals Orders in Council of the 11th March, 1915, the 10th January, 1917, and the 16th February, 1917.

Packets, whether found in the ordinary transit mail or in any other of the mails above referred to, containing documents included in the list of absolute contraband but not in themselves of any realisable value (*vide* Proclamation of the 23rd November, 1916), have not actually been placed in Prize but an affidavit of seizure has in most cases been sworn in respect thereof, the effect of which has been to transfer them technically to the control of the Admiralty Marshal.

Packets of the nature described in categories 3, 4, 5, and 6 above have remained in the custody and control of the Censor.

The number of registered and unregistered postal packets referred to in the two immediately preceding paragraphs above is extremely large.

Some doubt may be felt as to the legality of the course pursued. In this connection I am to invite your attention to the Hague Convention No. XI, Articles 1

[3996]

C

Disposal on
Conclusion
of Peace of
Parcels and
Letter
Mails
detained by
His
Majesty's
Govern-
ment
during the
War.



1919

and 2. It will be observed that these Articles, if they accurately stated the law, and were strictly applied, might cause serious difficulty, particularly in the case of "Ordered Ships," the number of which, however, was not large.

I am to draw your attention to the manner in which this difficulty was dealt with in the enclosed correspondence. It has, as you will observe, been contended throughout, that the Convention, which deals solely with postal correspondence "found on the high seas," did not apply to the mails of any ship which "voluntarily" entered British territorial waters, and that it related only to "postal correspondence" in the strict sense of the term.

A further difficulty is caused by the Rome Postal Convention. It is, however, apprehended that this Convention has no application to packets which have not been "lost" in the ordinary sense of the word, but detained as the result of belligerent action in time of war. It would be desirable that you should deal with this point also, and it may be observed in this connection that if the indemnity for loss provided for in the Convention were applicable in respect of every registered packet detained by the Censor during the war and not released on the conclusion of peace, the sum payable would amount to about 1,500,000*l.*

Enquiries are now being received as to the eventual disposal of these packets. Requests for release have been received, and it is anticipated that these will continue to be received in increasing numbers. In these circumstances your advice is requested as to what is the best course to pursue. It would seem that the action to be taken by His Majesty's Government to a considerable extent depends upon whether any claim could in fact be successfully maintained in respect of the detention of such postal packets.

It is therefore necessary to consider whether any claim of the kind could be enforced in any Court of Law and, if so, by whom and in what Court. The expense of enforcing a claim, whether in the Prize Court or in any other Court, is a factor to be borne in mind, but it must also be remembered that in some cases the indirect damage suffered by neutrals owing to the detention of a postal packet may have been very serious.

I am to point out that if only one case were brought, and it were held that the detention could not be justified and gave rise to a valid claim against His Majesty's Government or against any officer acting on behalf of His Majesty's Government, the position might become an exceedingly embarrassing one.

I am to suggest that the main question for consideration is what action ought to be taken by the competent departments of His Majesty's Government. There are four courses which might be adopted. The postal packets might be destroyed; or they might be permanently detained; or they might be detained until claimed; or they might be sent on to their destination with or without any explanation. In this connection I am to say that it is understood that the French Government are in favour (a) of destroying all non-registered matter, (b) of detaining *sine die* all registered matter which does not contain valuables, paying claimants in each case the indemnity provided for in the Rome Convention, and (c) of handing over to a sequestrator all letters containing valuables. The United States censorship authorities on the other hand, are understood to take the view that letters of commercial or unusual sentimental value should now be sent on.

Assuming the Convention of Rome to be inapplicable, it may be doubted whether the distinction between registered and unregistered letters is of material importance, except as regards the difficulty of tracing their seizure, which is much greater in the case of unregistered than in the case of registered letters, since the seizure of most of the latter has been recorded in the registered letter lists, which went forward to the postal administrations of the countries of destination.

A more important distinction is the one mentioned above, viz., that between packets containing letters proper and packets containing "goods," as to which, *vide* the case of the steamship "Frederick VIII" (No. 95), in which an order was made for detention under the Order in Council of the 11th March, 1915, of bonds and shares of enemy origin outward bound from Copenhagen to New York, and *vide* also the case of the steamship "Kristianiafjord" (No. 1570), in which an order signed by an addressor in a neutral country (United States of America) directing an addressee in a neutral country (Denmark) to make a payment to a person in an enemy country and to charge the same to addressor's account was condemned as contraband.

It would seem that packets seized previous to the 16th February, 1917, if dealt with under the Orders in Council, would have, in the absence of further legislation, to be eventually released to claimants, whereas those seized subsequently to that date

would, if containing goods of enemy destination or origin, be liable to condemnation. You will no doubt bear this point in mind.

Your attention is further drawn to a distinction as regards the treatment of detained packets which arose after the entry of the United States into the war, and which, although it does not seem to affect the principles involved, is referred to here in order to make this statement of facts as far as possible complete.

During the period between the declaration of war by the United States and the establishment of a censorship in that country, the mails between the United States and Europe continued to be dealt with by the British censorship in precisely the same way as when the United States was still a neutral country, but a list of all packets, both registered and unregistered, detained during that period was supplied to the United States consul-general in London. A considerable number of such packets remain in the hands of the British censor and of the Admiralty Marshal.

The United States Government eventually decided to leave the censoring of the mails between the United States and Northern Europe to the British censorship, appointing a liaison officer to advise the latter, but from the moment the American censorship came into being packets in transit between the United States and other non-enemy countries, when detained by the British censorship, were no longer kept in this country, such packets being transferred to New York for disposal. It may be observed in this connection that transit mails to and from certain Associated countries, *e.g.*, Japan, Brazil, Siam, have from first to last been dealt with on precisely the same lines as those passing between non-enemy (*i.e.*, neutral) countries.

It should perhaps be added that there are a number of letters which the Procurator-General will wish to retain because they constitute, or may constitute, useful evidence in cases in the Prize Court.

I am to ask that you will be so good as to favour Lord Curzon with your opinion on the following points:—

1. Whether any action or other proceeding could be brought against His Majesty's Government, or any person acting for His Majesty's Government, in respect of the detention of packets in any of the above categories of mails?
2. Whether there is any distinction for this purpose between registered and unregistered letters?
3. What the nature of the proceedings might be, and in what Court?
4. Whether in the event of diplomatic claims being brought His Majesty's Government would, in your opinion, have a valid answer to such claims?
5. Whether letters, other than those containing merchandise, which have been detained under the various conditions set out above, can be regarded as "goods" within the Orders in Council of the 11th March, 1915, 10th January, 1917, and 16th February, 1917, and if so whether you think it advisable that all, or any, of the packets which remain in the hands of the Censor should be placed in the custody of the Admiralty Marshal so as to come under those Orders in Council.
6. Whether the Postal Convention of Rome has any application to packets detained as the result of belligerent action?
7. Whether in your view the best course to pursue would be that the packets should be (a) destroyed, (b) permanently detained, (c) detained until claimed, (d) sent on, and if the latter whether with or without explanation?

I am to add that Lord Curzon would be glad to be favoured at as early a date as possible with your views, and further, with any observations of a general character which you may be good enough to offer on this subject.

I have, &c.
W. TYRRELL.

Foreign Office to the Law Officers of the Crown.

Gentlemen,

June 5, 1919.

WITH reference to the letter from this department of the 29th ultimo, I am directed by Earl Curzon of Kedleston to transmit to you herewith, for your information, a copy of further correspondence on the subject of the detention of postal packets by His Majesty's Government.

It will be observed that in the memorandum No. 136261 which was circulated to

[3996]

C 2



the representatives in London of all neutral Governments, a copy of which is enclosed, it was stated that the privileges of mails that are protected by the Hague Convention would continue to be carefully observed.

As you will doubtless be aware, the policy of His Majesty's Government in regard to the treatment of such mails has not, however, been altogether in accordance with that statement, and Lord Curzon would be glad to learn what bearing, if any, the statement has upon the question of the liability or otherwise of His Majesty's Government in respect of claims arising from damages and loss caused by the detention of postal packets.

I have, &c.
W. TYRRELL.

Opinion of the Law Officers of the Crown.

1 and 3. In our opinion the detention of the packets is an act of State in respect of which, except in cases where the packets are put in the Prize Court, no action or other proceeding can be brought by any alien in any Court, either against His Majesty's Government or against any person acting for the Government. See *Buron v. Denman* (1848), 2 Ex. Rpts., p. 167. Where the packets are put in the Prize Court, a claim for damages may be made in the proceedings in that Court.

2. There is no distinction for this purpose between registered and unregistered letters.

4. This is a question of considerable difficulty. The first point seems to be whether and if so, how far, the Hague Convention No. XI applies. It might, we think, be validly contended that the Convention has no application because it was not ratified by Russia and certain of the other belligerent Powers, but we do not think it is desirable to insist on this contention, especially having regard to the terms of the memorandum to the United States Government of the 12th October, 1916. Upon the assumption that Convention No. XI is recognised as binding, it applies (see Article 1) to "the postal correspondence of neutrals or belligerents . . . found on board a neutral or enemy ship at sea." In our opinion it applies to letter mails on "ordered ships," but not mails on "voluntary ships" or "transit mails proper," and not to parcel mails or merchandise proper at all. We cannot suggest any valid answer (if the Convention is recognised as binding) to claims through the diplomatic channel, properly substantiated, in respect of letter mails in "ordered ships" in categories 3, 4, 5 and 6. This remark also applies to category 2 where the packets were detained before the inclusion of the contents in the contraband list, unless they are put in the Prize Court and dealt with under the Reprisals Order in Council. See "Frederick VIII" (1917) P., p. 43. Apart from the Hague Convention No. XI, we think a valid answer can be made to any claim on the lines of the memorandum of the 12th October, 1916, already referred to in the case of sub-divisions (a) and (b) of all the categories, though it is somewhat difficult to justify the detention of such documents as wills, leases, &c. (category 3). As regards sub-division (c), it is impossible to express an opinion without knowing the exact nature of the contents of the particular packets. We do not think, for instance, that the detention can be justified on the mere ground that a black-listed firm was concerned.

5. We do not think that any of the documents in categories 3, 4, 5 and 6 can be regarded as "commodities" or "goods" within the Orders in Council, or that any advantage is to be obtained by placing them in the custody of the Admiralty Marshal. All those in category 2 which are liable to condemnation as contraband should, however, in our opinion, be placed in the custody of the Marshal, even if they are not of a realisable value.

6. We think not. The words in the Convention (Article 15) are "lost, taken by robbery, or damaged" (*perdu, spolié ou avarié*). (The Convention relates only to the parcel post.)

7. We think categories 3, 4 and 5 should be sent on, without explanation, as soon as peace is ratified,* and category 6 (private letters) should be detained with a view to their destruction after the lapse of a reasonable time, unless they are claimed in

* *I.e.*, as soon as peace is ratified by Germany.

the meantime. (If any of the documents the Procurator-General desires to retain as evidence are in category 4 or 5, copies can be made of them, and the copies used in evidence.)

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
June 12, 1919.

Enclosures.

Parliamentary papers, Miscellaneous. Nos. 5, 9, 20, 23 and 28 (1916), and Miscellaneous, No. 2 (1917).
Proclamations (Contraband) of April 12 and November 23, 1916.
Bunkering conditions, October 1915.
Reprisals Order, No. 6, January 10, 1917.
Reprisals Orders in Council, March 11, 1915, and February 16, 1917.
Memorandum circulated to Neutral Representatives in London, September 23, 1915 [136261].
Sir A. Johnstone, No. 1827, Commercial, April 10, 1916 [60893].
Memorandum communicated by Norwegian Minister, May 3, 1916 [84846].

AUSTRIA-HUNGARY.

No. 2.

[62103]

[File No. 2138/1919]

[April 22, 1919.]

Foreign Office to the Law Officers of the Crown.

Gentlemen.

Foreign Office, March 21, 1919.

I HAVE the honour, by direction of Earl Curzon of Kedleston, to transmit to you herewith copies of the papers noted on the enclosed schedule relative to a question which has been raised by the Italian Government as to the right of the Governments of Austria and Hungary to dispose freely of war material which was formerly the property of the Imperial and Royal Government of Austria-Hungary.

2. You will observe that this question arose as the result of a note addressed by the Austrian Government to the representatives at Vienna of the neutral Powers charged with the protection of the interests of Austria-Hungary in the countries of the Allied Powers, protesting against the action of certain British and Czecho-Slovak officers who declared that the sale of such war material was illegal. The Government of Austria appears to have fixed upon this incident as an excuse to endeavour to induce the Governments of the Allied Powers to negotiate direct with them rather than through the intermediary of the neutral Powers charged with the respective interests of those countries.

3. I am to request that you will be so good as to favour Lord Curzon with your opinion on the points raised in the letter from the Treasury of the 12th March at your early convenience, as the matter is one of some urgency.

I have, &c.
GERALD SPICER.

Schedule.

1. Swedish Minister, January 16 [9499].
2. French Ambassador, January 27 [15333].
3. Italian Ambassador, February 19 [30737].
4. Treasury, March 12 [39870].
5. Article 19 of Armistice with Germany.
6. Armistice Convention with Austria-Hungary.
7. Financial clauses of Protocol to Armistice Convention, signed December 17, 1918.

Report.

The questions raised in the Treasury letter of the 2nd March, or the 12th March [39870], are whether a prohibition on the sale of the property in question can be claimed under "principles of common law," and whether the application of stipulations laid down in the Armistice Convention with Germany (see article 19) can be extended also to the German-Austrian Government without a further specific convention with that

Disposal
of war
material by
the Govern-
ments of
Austria and
Hungary.



Government. We do not think that there is any principle of "common law" (*diritto naturale*) under which such a prohibition can be claimed. In a sense, the goods of a debtor are the natural security of the creditor, but that does not prevent a debtor from selling and giving a good title to his goods. It is of course open to the Allies to declare that they will not recognise such sales, but it cannot be said that they are in any sense illegal. Nor do we think that the stipulations in the Armistice Convention with Germany apply to the German-Austrian Government.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
April 22, 1919.

CHINA.

[114538]

No. 3.

[File 15508/1919]

[August 9, 1919.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, July 22, 1919.

China
(Companies)
Amendment
Order in
Council,
1919.

I HAVE the honour, by direction of Earl Curzon of Kedleston, to refer to the letter* addressed by the Solicitor-General to the Secretary of State for Foreign Affairs on the 25th October, 1915, in which that officer reports that in his opinion the draft Order in Council to be entitled "The China (Companies) Order in Council, 1915" may properly be submitted to the King for the approval of His Majesty in Council.

I am to state that in consequence of certain difficulties which have arisen in connection with the working of certain provisions of the original Order in Council and to which His Majesty's Minister at Peking has called attention it has been found necessary to prepare in consultation with the Colonial Office and the Board of Trade sundry amendments to that Order, which it is proposed to embody in an Amending Order to be entitled "The China (Companies) Amendment Order in Council, 1919."

A draft of the proposed Amendment Order is transmitted to you herewith.

I am therefore to request that you will take the draft Amendment Order into your consideration, and that you will favour Lord Curzon with your opinion whether its terms are fit and proper to be submitted to the King in Council for His Majesty's approval.

As it is desirable that the Amending Order should be passed with as little delay as possible, Lord Curzon would be grateful if he could be furnished with the expression of your opinion at your early convenience.

I have, &c.

VICTOR WELLESLEY.

Report.

In our opinion the terms of the draft Amendment Order† are fit and proper to be submitted to the King for the approval of His Majesty in Council.

In the last line but one of Article 6(2) the word "to" should, we think, be inserted between the words "by" and "with." See line 3 of Article 6(2).

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
August 9, 1919.

* Confidential 10,708, page 3.

† The text of the Order in Council is contained in the "London Gazette" of October 10, 1919 (Confidential No. 11328*).

GENERAL.

[130504]

No. 4.

[File 71213/1919.]

[May 27, 1919.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, May 19, 1919.

I HAVE the honour, by direction of Earl Curzon of Kedleston, to request that you will favour his Lordship at your earliest convenience with your opinion on the following case:—

Question of
revoking
the safe-
conduct
granted to
Captain
Kiese-
wetter.

2. The German Kapitänleutnant Wilhelm Kieseewetter, late commanding officer of the German submarine "U.C. 56," was found on the 6th instant at Falmouth on board the Netherlands steamship "Frisia" among a party of officers and crews from German submarines formerly interned in Spain, who were travelling from that country to the Netherlands under a safe-conduct for the journey issued by the French Embassy at Madrid and countersigned by a secretary of His Majesty's Embassy in the same capital. A copy of this document is enclosed.

3. Kapitänleutnant Kieseewetter also had in his possession documents, copies of which are enclosed herewith, showing that he had torpedoed the British hospital-ship "Glenart Castle" on the 26th February, 1918, and in view of this fact he was, under instructions from the naval authorities in London, removed from the "Frisia." He is now under detention pending consideration of the question whether he should be brought to trial for that infraction of the laws of naval warfare.

4. The circumstances in which the safe-conduct was given are not known to Lord Curzon, and he is making enquiry as to whether the document is genuine, and, if so, how it came to be issued and endorsed. The only form in which His Majesty's Government had agreed to the repatriation of officers and crews of German submarines from Spain consisted in assent given to a proposal made by the Spanish Government in December last to ship to Hamburg the German refugees in Spain, including the interned officers and crews of submarines. The agreement of His Majesty's Government to this proposal was given on certain conditions, one of which was that the "names of ships used for repatriation to Hamburg should be submitted beforehand for the approval of His Majesty's Government." It was understood that a Spanish ship would be used for the purpose.

5. It seems, however, to Lord Curzon that if the safe-conduct is genuine it cannot be disregarded by His Majesty's Government merely on the ground that His Majesty's Embassy had not authority to endorse it and so to make it binding upon them. It appears to his Lordship at the same time to be, at any rate, arguable that His Majesty's Government would be within their rights in revoking the safe-conduct in the case of this officer on the ground that he was included in its scope in ignorance of all the facts. There is authority (*e.g.*, Calvo, "Droit international," section 2112, and Halleck, "International Law," vol. ii, 1893 edition, page 324) for the proposition that the general principles of the law of nations allow of a safe-conduct being, for good reason, revoked by the grantor. It is, however, stated in the British Manual of Military Law, 1914 edition, section 333, that if a safe conduct is revoked the bearer of it must be given an opportunity to withdraw in safety. If this rule is to be regarded as binding upon His Majesty's Government in all circumstances it would apparently make it impossible to keep Kapitänleutnant Kieseewetter in custody and bring him to trial.

6. It has been suggested to Lord Curzon that it may fairly be argued that the effect of the safe-conduct is only to relieve the persons to whom it was granted of liabilities in their capacity as enemies and that it does not exonerate them from liability, on account of any crimes which they may have committed, to arrest and detention by the British authorities in order that they may be charged with such crimes before a proper tribunal. Kapitänleutnant Kieseewetter was suspected of being guilty of having torpedoed the "Glenart Castle," but, as will be realised from what is stated above, the safe-conduct was not granted to him advisedly and in the consciousness of such suspicion, and it would certainly not have been granted to him if the facts disclosed in the documents which were found upon him at Falmouth had been known to, and present to the minds of, His Majesty's Government.



1919

16

GENERAL

7. Lord Curzon would be glad if you would take the facts set out above into your consideration, and would give him the benefit of your opinion whether it is open to His Majesty's Government to revoke the safe-conduct, so far as it applies to Kapitänleutnant Kiesewetter, and to detain this officer in custody for the purpose of bringing him to trial, either before a British court-martial or before such Court as may be appointed in pursuance of the terms of the Treaty of Peace to try persons charged with offences against the laws of warfare committed during the present conflict. The case will be submitted to the Peace Delegation in Paris for consideration from this latter point of view.

8. As will readily be appreciated, an early solution of the matter is eminently desirable, and Lord Curzon trusts that he may be favoured with your report with as little delay as possible.

I have, &c.
W. TYRRELL.

List of Papers.
Safe-conduct. 1
Documents re guilt.

Report.

On the assumption that the safe-conduct is genuine, we do not think that it is open to His Majesty's Government to detain the officer in custody for the purpose of bringing him to trial. There is no doubt as to the right to revoke a safe-conduct for good reason (e.g., if it is abused), though we doubt whether revocation would be justified by the facts in this case. But where a safe-conduct is revoked "good faith obviously requires that the grantee who has placed himself in the grasp of his enemy under a promise of immunity shall be allowed to withdraw in safety" (Hall, 3rd edition, page 542). We think that the Government must let this German go in accordance with the terms of the safe-conduct granted to him, which appears to contemplate Germany as his ultimate destination, and not to permit him to remain in Holland as an asylum. The Government will then rely on the provisions of the Peace Treaty for his being handed over by the German Government for trial.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
May 27, 1919.

[116790]

No. 5.

[File 104007/1919]

[August 15, 1919.]

Foreign Office to the Attorney-General.

Transportation of passengers of German nationality by Royal Holland Lloyd Steamship Company's vessels.

Sir, I AM directed by Earl Curzon of Kedleston to inform you that the agents in Rio de Janeiro of the Royal Holland Lloyd Steamship Company have enquired of His Majesty's Minister in that capital what the attitude of His Majesty's Government is towards the transportation of passengers of German nationality by their vessels.

2. The Director of Naval Intelligence, Admiralty, has concurred in a proposal, originally made by this Department, to reply that, in view of the ratification of the Peace Treaty by Germany, His Majesty's Government do not propose to interfere with German travellers on neutral ships unless they attempt to land in British territory, but he has suggested the additional proviso that such travellers are not persons whose surrender is required under article 228 of the treaty.

3. It does not appear to Lord Curzon that this suggestion could have any practical effect, either in preventing the conveyance of persons required under article 228 (unless it induced the steamship company to refuse all German passengers) or in facilitating their apprehension, unless the company or the British port authorities, or both, were in possession of the lists of such persons, which could not, of course, be communicated to them. But as the company's enquiry raises the question how best to prevent the

Foreign Office, August 12, 1919.

GENERAL

17

escape of such persons from the ends of justice, his Lordship would be glad to be favoured with your views as to how it and similar enquiries should be answered. From the point of view just mentioned, the reply originally suggested by this Department appears inadequate, and it has now been suggested by Mr. Justice Peterson that it might be supplemented by requiring the steamship company to submit to His Majesty's Government beforehand the names of intending travellers by their vessels if males over the age of 21 years outward bound from Europe. This would give His Majesty's Government the opportunity of objecting to any particular passenger or of easily identifying and arresting him if he sailed and if the vessel conveying him came within their reach.

4. If such an arrangement were put into force, its detection might conceivably lead to the persons at whom it was aimed adopting in some cases assumed names for the purpose of escape. So long as it were not detected, its effect would probably be to prevent the transportation of persons likely to be arrested, for the object of the steamship company in making the enquiry is, no doubt, not so much to keep His Majesty's Government informed of their actions as to ensure that their vessels are not exposed in British ports to the risk of delay or interference at the hands of the British authorities, as they might be if they carried passengers likely to be apprehended. It would, further, possibly afford indications of the whereabouts and intentions of some of the persons who are wanted for trial.

5. If the Royal Holland Lloyd are willing to notify names in this way by arrangement with His Majesty's Government, it is probable that no difficulty would arise, but it is necessary, before making such a proposal, to consider how far such a policy could in this and other cases be maintained if objected to by neutral Governments, and Lord Curzon would therefore be glad to know your views both as to the expediency of the course suggested by Mr. Justice Peterson in this particular case and as to the steps, if any, which you would consider necessary and practicable under present international conditions with the view of impeding the emigration of persons required under article 228.

6. Lord Curzon would be glad to receive your observations on the matter at an early date, as the company's agents are pressing for an answer to their enquiry.

I have, &c.
GERALD SPICER.

Report.

I think that Mr. Justice Peterson's suggestion should be adopted, but, if the shipping company is unwilling to notify names in the way suggested, there is no means of compelling it to do so, and I do not know of any practicable steps that can be taken to impede the emigration of the persons in question until the German Government has been notified of the persons required. When that notification is made, an obligation will lie on the German Government itself to prevent the emigration.

GORDON HEWART.

Law Officers' Department,
August 15, 1919.

[3996]

D



1919

18

GENERAL

[106393]

No. 6.

[File 1876/1919].

[August 19, 1919.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, August 8, 1919.

Restricted
Immigra-
tion of
Aliens into
the United
Kingdom.
Question of
compati-
bility with
provisions
of com-
mercial
treaties
between
Great
Britain and
other
countries of
measures on
lines of
Article 22
(b) of the
Aliens
Restriction
Order.

I HAVE the honour, by direction of Earl Curzon of Kedleston, to request that you will favour him with your opinion on the question explained below concerning the compatibility with the provisions of the commercial treaties between Great Britain and other countries of measures to restrict the immigration of alien workers into the United Kingdom on the lines of article 22 (b) of the Aliens Restriction Order.

2. The article in question reads: "A person shall not take steps to obtain the services for work other than munitions work in the United Kingdom of aliens or any alien not in the United Kingdom, except with the permission in writing of the Minister of Labour, and subject to such special or general conditions as the Minister of Labour may impose." The article came into force in October 1916, and was originally adopted, Lord Curzon understands, to meet the agitation against aliens taking situations which British subjects had had to give up on joining His Majesty's Forces.

Apart from cases where there are objections on personal grounds to the respective employer or employee, the main principles followed in applying the order are: (1) That no alien shall, as a general rule, be allowed to enter the country for the performance of any class of services for which unemployed British labour is available; and (2) that employers shall not evade the payment of British rates of wages by securing alien employees willing to work for lower remuneration.

3. The number of persons affected by the article during the war has been comparatively small; up to April 1919, 4,373 persons had been allowed to enter the country under it, and approximately 1,190 had been refused admission. It is clear, however, that under peace conditions the problem will increase greatly in magnitude. Since the armistice the number of applications for permits has steadily risen and at present amounts to some 300 a week or 15,000 a year, of which rather more than two-thirds are being refused. It is the view of the Ministry of Labour that if it became known that the restriction imposed by the article had been removed there would be an even larger movement of alien labour towards this country than at present. There are now about 1,000,000 persons out of employment in the United Kingdom, and in view of the low wages which aliens will frequently accept, their competition would be a very serious factor in maintaining a large volume of unemployment among British workmen. For the next year or more, therefore, drastic restrictions would appear to be necessary to prevent the labour market from being flooded by aliens. The problem will, it is thought, become acute as soon as shipping facilities are available from countries able to supply cheap labour on a considerable scale, such as Poland.

4. The question of the maintenance or revocation of the article has accordingly been submitted to the Committee of Home Affairs of the War Cabinet, who, on the recommendation of the Aliens and Nationality Committee, decided on the 26th June that the article should, as a temporary measure, be maintained in force for a period of at least twelve months after the end of the war, but in a form so modified as to provide that an alien being desirous of entering the service of an employer in the United Kingdom should produce to the aliens officer at the port of arrival a permit in writing for his engagement issued by the Ministry of Labour to the employer.

5. In order to estimate the effect on the relations of this country with foreign States of the continuance of the policy in question after the restoration of peace, Lord Curzon feels that it is necessary to consider whether any foreign Governments may not have legitimate cause for protest on the ground that the provisions of their commercial treaties with the United Kingdom are infringed, and it is upon this point that his Lordship desires to be favoured with your advice.

6. For convenience of reference a copy is transmitted herewith of de Bernhardt's "Handbook of Commercial Treaties," and a summary of the relevant provisions of these instruments is also appended.

7. One group of the treaties, e.g., those with Austria-Hungary and Bulgaria, may, as is apparent, be excluded on the ground that they were determined by the outbreak of war, and it seems to Lord Curzon that His Majesty's Government might perhaps successfully resist complaints based upon certain others on the ground that the governing purpose of the treaties was specifically to secure to the other contracting parties the

GENERAL

19

right to carry on trade in the United Kingdom, and that provisions, even though expressed in somewhat general terms, with reference to travel, residence, &c., must be read as having reference only to commercial travellers and traders. This contention is, however, by no means free from difficulty even in the case of treaties where it is fairly clear that the governing consideration is trade, for it may be urged with considerable force that labour is a saleable commodity, and that it is therefore a breach of the treaty to prevent a national of the other contracting party from selling his labour as freely as British subjects. The treaty with Bolivia is an example of a treaty of this kind.

8. The treaty with Switzerland of the 6th September, 1855, seems to Lord Curzon to present the most serious obstacle to the proposed policy. It appears to his Lordship difficult to read article 1 of that treaty in any way which would make what is now contemplated to be done consistent with the terms of the treaty. The meaning of that article would seem to be that Swiss citizens are to be allowed to come to the United Kingdom to reside and to exercise any profession or business. It seems difficult to narrow its meaning so as to exclude a labourer working for hire.

9. I am therefore to request that you will be good enough to take the matter into your consideration and will favour Lord Curzon with your opinion whether the measure contemplated could be reconciled with the obligations of His Majesty's Government to foreign Governments under the provisions of the commercial treaties now in force. His Lordship would be glad to receive also any general observations which you may be so good as to offer on the main subject.

I have, &c.

GERALD S. SPICER.

List of Papers.

"Handbook of Commercial Treaties,"
Summary of relevant Treaty provisions.

Report.

This question seems to us a difficult one. We do not think that a prohibition for employers in the United Kingdom to employ aliens, except under permit, constitutes a breach of any of the treaties. But if the prohibition takes the form of preventing an alien from landing and residing here without a permit, it is extremely difficult to contend that it is not a breach of such treaties as those with Switzerland and Bolivia. We think that these treaties require that subjects of the countries concerned should be permitted to land and reside here, and carry on their business, but not that they should be guaranteed the same opportunity of employment as British subjects.

We think that it would be better to extend the article in its original form, and then to apply section 1, sub-section 3 (a), of "The Aliens Act, 1905" (5 Ed. VII, cap. 13), and exclude as undesirable any alien whose only means of decently supporting himself and his dependants is the possibility of obtaining employment, unless his employment has been sanctioned by the permission in writing of the Minister of Labour. It would then be necessary for any foreign Government desiring to protest, to contend that the provisions of the Aliens Act of 1905 are a breach of treaty, a position it would be much more difficult to maintain.

GORDON HEWART,
ERNEST M. POLLOCK.

*Law Officers' Department,
August 19, 1919.*



[140757]

No. 6^A.[Inland Revenue
Department.]

[File 62641/1919]

[September 19, 1919.]

*Case for the Opinion of the Law Officers of the Crown and Counsel.*Position of
foreign
sovereign
Powers in
relation to
British
income tax.

COUNSEL is requested to advise generally as to the position of foreign sovereign Powers in relation to British income tax, regard being had to the following considerations:—

1. Taxation by way of direct assessment, under Schedules (A), (B), and (D).
2. Taxation by way of deduction, under Schedules (A), (C), and (D).
3. The private property of—
 - (a.) A foreign Sovereign;
 - (b.) The President of a foreign Republic or State, as distinct from his public property.
4. The property of the Government of a foreign sovereign Power. [This property is probably the same as the public property of the respective Sovereign or of the head of the respective State.]
5. Whether colonial Dominions and Commonwealths are to be treated as sovereign Powers, and, if so, whether as a distinct sovereignty or really as the British Crown.
6. If there is exemption from all income tax, then as to repayment of the tax for all years since it was first suffered by a sovereign Power.

THE SIAMESE GOVERNMENT: INCOME TAX.

Opinion of the Law Officers of the Crown, Mr. T. H. Parr and Mr. R. P. Hills.

1-4. In our opinion the Siamese Government is not liable to pay income tax in respect of the interest earned on the money deposited by it with banks in London. Assuming, as we must, that this money is the public property of the Siamese State, we consider that it is protected from taxation under the Income Tax Acts by the general principle of international law, which treats Sovereigns and the public property belonging to them as not being subject to the municipal laws of foreign States. This principle of international law is, in our opinion, recognised and adopted as municipal law by the Courts of this country:—

Halsbury's "Laws of England," vol. vi, p. 430, and note (f).
 Dana's "Wheaton's International Law," section 242.
 Oppenheim's "International Law," vol. i, p. 467.
 Moore's "International Law Digest," vol. ii, p. 591.
 Le Parlement belge, L.R., 5 P.D. 197.
 Parkinson v. Patter, 16 Q.B.D. 152.
 De Haber v. Queen of Portugal, 20 L.J. Q.B.D., at p. 496.
 Attorney-General v. Kent, 31 L.J. (N.S.), Ex. 391 (and see per Martin, B., on p. 396).
 Twycross v. Dreyfus, L.R., 5 Ch. Div. 605.
 Vavasseur v. Krupp, L.R., 5 Ch. Div. 351.
 Franco-belge 1898, 1 Ch. 190.
 South African Republic v. Compagnie.

We have considered the effect of rule 7 to Schedule (A), No. IV, in section 60 of "The Income Tax Act, 1842," and of rule 5 of Schedule (C) in section 88 of the same Act.

Both these rules apply in terms only to accredited Ministers of foreign States and not to foreign Sovereigns themselves.

The first of these provisions does not appear to be inconsistent with our view, and as regards the second, we do not think that the rule of construction contained in the maxim *expressio unius exclusio alterius* avails to override stronger considerations based upon general principles and upon the whole tenour of the Income Tax Acts. We think that, if the Legislature had intended to compel foreign States to pay income tax in such cases, contrary to the principles of international law, it would have inserted clear words expressly enforcing the liability, and that in the absence of such words the liability does not exist. Moreover, international comity, which is in this respect the basis of international law, overrides the municipal enactments of the Income Tax Acts.

We think that the principle applies without distinction to the public property of any sovereign State, whether it be monarchical or republican, and that upon the present state of the authorities it should also be recognised as applying to the private property of a foreign monarch. Whether it should be rigidly applied to the private property of a temporary head of a State, such as a President elected for a term of years, with possibly a limited position as representative of his State, may be more doubtful, and this question can be reserved until a concrete case arises for decision, although the inclination of our opinion is that the private property of a President of a Republic is not to be regarded as governed by the same principles as those stated above.

We think, in any case, that it is undesirable to decide any other question than the liability to income tax of the particular property in question. It is obvious that so broad a principle of international law as that cited above may, in its application to the diverse and complicated conditions of modern property and of the taxation of that property, in the complex conditions of the modern State system, be subject to modification and qualification. The decided cases have been few, and the writers on international law state the principle in varying terms and with different limitations; such matters, for instance, as customs and tolls being sometimes treated as lying outside the rule. The operation of the principle concerns other departments of the State besides the Board of Inland Revenue, and we therefore confine our consideration of it to the particular matter of income tax.

The machinery of deduction at the source which is in force under the Income Tax Acts need, we think, cause no embarrassment in the application of the immunity so recognised. A company which has paid income tax on its profits will continue to recoup itself by deducting a proportionate share from each dividend which it pays, and any foreign Sovereign who receives dividends so diminished will apply to the revenue authorities for repayment. Again, if a bank is bound by the Income Tax Acts to deduct tax from interest and to account for the tax to the Commissioners of Inland Revenue, a similar application for repayment would be made. Some special procedure should, we suggest, be devised for making such applications and receiving repayment so as to render it unnecessary for a foreign State to deal with the usual assessment authorities in such matters.

5. In our opinion the Colonial Dominions and Commonwealth are to be treated not as distinct sovereignties, but as the British Crown.

6. No time limit, such as the three years fixed by 23 & 24 Vict., cap. 14, sec. 10, applies. Any time limit must be arranged by diplomatic action.

GORDON HEWART.
 ERNEST M. POLLOCK.
 T. G. PARR.
 REGINALD HILLS.

*Law Officers' Department,
 September 19, 1919.*



1919

22

GENERAL.

[148642]

No. 7.

[File 104007/1919.]

[November 4, 1919.]

Foreign Office to the Attorney-General.

Sir,

Foreign Office, September 20, 1919.

Communi-
cation to
His
Majesty's
Consul-
General,
Rotterdam,
of list of
German
Naval Per-
sonalities
to be
surrendered
under
Treaty
of Peace.
Notification
by foreign
shipping
companies
of names of
German
adult male
passengers
outward
bound from
Europe.

I AM directed by Earl Curzon of Kedleston to inform you that on the receipt of your report* dated the 15th ultimo steps were taken to inform the Royal Holland Lloyd Steamship Company, in reply to their enquiry as to the attitude of His Majesty's Government towards the transportation in their vessels of passengers of German nationality, that no objection was seen to such transportation provided that the names of intending passengers of enemy nationality, if males over the age of 21 outward bound from Europe, were submitted to His Majesty's Government beforehand.

The Director of Naval Intelligence has now proposed, in a letter of which a copy is forwarded herewith, that in this connection His Majesty's Consul-General at Rotterdam should be furnished with a list of the German naval personalities whose surrender will be required under article 228 of the Treaty of Peace with Germany. The list of such personalities forwarded by Commodore Sinclair in this letter is without doubt already known to you.

I am to request that you will be good enough to favour Lord Curzon with your views on the matter generally, and in particular on the questions (1) whether the communication of the list to His Majesty's Consul-General at Rotterdam is advisable, and (2) whether a notification to foreign shipping companies generally, requesting the submission of names of German male passengers over 21 years of age outward bound from Europe, or other similar action, would serve any useful purpose in view of the impending ratification of the Treaty of Peace with Germany.

I have, &c.

VICTOR WELLESLEY.

Report.

1. We can see no objection to the communication of the list when it is ready for disclosure to His Majesty's Consul-General at Rotterdam as proposed by the Director of Naval Intelligence. At present, however, the list has not been revised by us, and is of the most secret nature. We have taken careful steps in Paris to avoid the leakage of the names, or even categories, of the persons wanted, so as to prevent the escape by land or sea of persons who might be able to identify themselves as included in the lists.

2. We think that a notification to foreign companies generally, requesting the submission of the names of German male passengers over 21 years of age outward bound from Europe, might serve a useful purpose. We cannot see any harm in issuing such a notification for what it may be worth.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
November 4, 1919.

* See No. 5.

(23)

TURKEY.

[129560]

No. 8.

[File 1270/1919.]

[August 7, 1919.]

Foreign Office to Law Officers of the Crown.

Gentlemen.

Foreign Office, July 10, 1919.

I HAVE the honour, by direction of Earl Curzon of Kedleston, to request you to be so good as to favour him, with the least possible delay, with your opinion on the following matter:—

Trial and
punishment
of Turkish
offenders.

After the conclusion of the armistice with Turkey on the 31st October, reports were continually received by the War Office of delays and obstructions put in the way of the fulfilment of its clauses by various individuals in the service of the Turkish Government.

In addition to these breaches of the armistice, it was represented that Turkish troops were pillaging stations and towns in areas outside Turkish territory to which the terms of clause 24 of the armistice with Turkey were not applicable. It was suggested to His Majesty's High Commissioner at Constantinople that disciplinary action in these cases should be taken by the Turkish Government against the individuals concerned, and in one particularly flagrant case where the retreating Turks were reported to have committed excesses against the population he was instructed to insist upon the Turkish Government issuing orders that the three officers responsible should be handed over to the commander of the British forces at Batoum for trial by British court-martial. It was also suggested that a formal demand should be made to the Turkish Government for the surrender to the British military authorities of persons against whom specific charges were brought of cruelty or criminal neglect to British prisoners of war.

In reply to these suggestions Admiral Calthorpe pointed out that the alleged offences were committed by individuals over whom the existing Turkish Government were unable to exercise efficient control. He expressed the opinion that in order to deal with the situation it would not be enough for him to press the Turkish Government to issue orders to these individuals, and suggested that he should be authorised to demand the immediate arrest and delivery to the Allied military authorities of all persons against whom there appeared to be a *prima facie* good case. It should be explained that in view of the apparent powerlessness of the Turkish Government to prevent the repetition of disorders, even in Turkish territory, no analogy could be drawn between the procedure to be followed in dealing with the Turkish Government and that adopted in dealing with the German Government. It was considered necessary to take such immediate steps as would result in dissuading Turkish officials from persisting in their course of action, and it was anticipated that if the Turkish Government were to concentrate their efforts rather on the apprehension for delivery to the British military authorities of certain individuals than on any attempt to enforce their wishes in an area which was not under their effective control, more satisfactory results were likely to be obtained.

Admiral Calthorpe was accordingly instructed to demand from the Turkish Government that they should immediately hand over either to himself or to the nearest Allied commander such Turkish officers or officials as he or the commander concerned considered should be surrendered for the following reasons:—

1. Failure to comply with armistice terms.
2. Impeding execution of armistice terms.
3. Insolence to British commanders and officers.
4. Ill-treatment of prisoners.
5. Outrages to Armenians or other subject races both in Turkey and Transcaucasia.
6. Participation in looting, destruction of property, &c.
7. Any other breaches of the laws and customs of war.

At the same time Military Courts were formed in Transcaucasia, Mesopotamia, and Syria for the trial of those Turks who had committed offences in occupied territory and in Transcaucasia.

[3996]

E 2



constitute breaches of any regulations in force in such territory. As a matter of policy, we think that all other offences should be reserved for disposal under the provisions of the Peace Treaty.

3. In our opinion, the surrender of these persons to the Allies for treatment by Allied Military Tribunals should be provided for in the Treaty of Peace.

4. Does not arise

5. There is no legal objection to the detention of these offenders. Such detention is an act of State, the propriety of which cannot be questioned in any court of law.

6. Yes, we think that the course proposed is both practicable and desirable.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
August 7, 1919.

[172545]

No. 9.

(File 3006/1919.)

[December 23, 1919.]

Foreign Office to Law Officers of the Crown.

entlemen,

Foreign Office, December 10, 1919

Administra-
tion of
Justice at
Constanti-
nople.

I HAVE the honour, by direction of Earl Curzon of Kedleston, to request you to be so good as to favour him at your early convenience, in view of the urgency of the matter, with your opinion on the following question :—

In the Armistice terms with Turkey of the 30th October, 1918, there was no express provision entitling the Allies to occupy Constantinople and the adjacent region. Clause 7 of the terms is as follows :—

"The Allies to have the right to occupy any strategic points in the event of a situation arising which threatens the security of the Allies."

Admiral Calthorpe, who conducted the negotiations, in transmitting home the terms of the Armistice, made the following observations on clause 7 :—

"It will be observed that there is nothing in this clause, or elsewhere in the Armistice, which permits Constantinople to be occupied unless the security of the Allies is threatened."

"The Turkish Delegates endeavoured to obtain an exemption for Constantinople even in the above circumstances and were most obstinate on the point but finally gave way."

Since the date of this communication there has been no modification of the status of Constantinople, and the British High Commissioner, in a despatch dated the 6th September last, remarked that the contention always put forward by him to the effect that Constantinople was not in the occupation of the Allied troops still held good, and that were it not to do so, the good faith of the Allies would be liable to be impugned by the Turks. In fact, however, British forces under the command of General Milne have been in Constantinople since the time of the Armistice. This force with the French and Italian contingents is under the supreme command of the French General Franchet d'Esperey, the Commander-in-chief of the Allied Armies of the Orient. The offices of the British High Commission were established at the former British Embassy at Constantinople shortly after the Armistice.

The position being as above stated, a serious problem has arisen with regard to the administration of justice in Constantinople and the other regions within the sphere of the High Commissioner. Shortly before the declaration of war between Turkey and Great Britain, the Capitulations were declared by the Turks to be abrogated. The legality of this action by the Turks has never been admitted by His Majesty's Government, but the effect of this declaration and the subsequent war has been that the consular courts which administered civil and criminal justice between foreigners in Constantinople have ceased to function. Recently the former judge of the consular court held a court for the transaction of urgent business, but the period of the sitting of the court was not prolonged and Lord Curzon is advised that the legality of the

learned judge's action cannot be upheld. His decisions, so far as they affect British subjects, must be validated by subsequent legislation or by a clause to be inserted in the Turkish Treaty. For over a year, however, there has been no appropriate jurisdiction over British subjects in civilian or criminal matters, either in respect of their relations between themselves, with other foreigners or with Ottomans. The Ottoman courts are understood to be functioning, but as it was thought to be undesirable in time of peace for British subjects to resort thereto, it is considered impossible to admit the jurisdiction of the Ottoman courts over British subjects at the present time when the Turks are still actually enemies. On the other hand, the need for a tribunal of undoubted jurisdiction is becoming more and more urgent every day. To meet the situation it was recommended to the High Commissioner on the 2nd April last that civil offenders who were British subjects should be dealt with by martial law, but Lord Curzon has been advised that unless Constantinople has actually been placed under the authority of the Allied Armies and can therefore be considered to be in actual military occupation, it is questionable whether the rule of martial law carried out by means of court-martial is valid in accordance with international doctrine. In this connection I am to draw your attention to articles 42 and 43 of The Hague Regulations, which are as follows :—

Article 42 says that "Territory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territories where such authority is established and can be exercised."

Article 43 provides that "The authority of the legitimate Power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure as far as possible public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

To alleviate the situation it was proposed earlier in this year to establish an inter-Allied tribunal in Constantinople as a temporary expedient. The Legal Advisers to the Peace Conference at Paris, who were consulted, were in favour of such a course. It was pointed out, however, by Mr. Balfour in his despatch of the 8th August last, that as a condition precedent to the establishment of such a tribunal, the High Commissioner must be satisfied, *inter alia*, that the Turkish Government consented to the creation of such a tribunal, and to its exercising jurisdiction over Ottoman subjects, to the extent proposed, *i.e.*, in respect of all civil and commercial disputes between Allied subjects and Ottomans. At this time it was also proposed to revive the jurisdiction of the Consular judges up to the limits of their former powers in order that they might deal with crimes committed by British subjects against other British subjects or against Ottoman subjects or against foreign subjects of another Power, or *vice versa*. The Turks have not agreed to this proposal.

To sum up the situation, a quotation from a telegram from the High Commissioner of the 10th November last illustrates the position :—

"The situation is quite unparalleled. Ottoman Courts judge Ottoman subjects, and Allied troops are subject to Allied courts-martial. Beyond this no courts of law exist at the moment of writing. The Turkish Government are reluctant to adopt proposed temporary international tribunal, and even this would be a quite inadequate palliative. Criminal charges are dealt with in a rough and ready way by the Inter-Allied Police, but with no real legal sanction; offenders are often arrested and then released after a few days, as there is no prison accommodation and no tribunal which can deal with, say, a case of fraud. There are measures which it is most desirable to enforce in the public interest, such as the prevention of profiteering, or the speculation in roubles and shipping, passport or customs regulations. Whilst we can, more or less impose our decisions on the Porte, we have no legal authority over foreigners. This absence of law courts, tolerable as it was for a time, presents every day greater disadvantages."

Lord Curzon, therefore, would be glad if you would take these matters into consideration and favour him with your opinion on the following questions :—

1. Whether the circumstances in which the Allied forces are at Constantinople are, in view of the difficulty of contending that there is an actual military occupation, such as to justify a general system of martial law.

2. If the answer to (1) is in the affirmative, is it then possible to set up tribunals with a general jurisdiction over all cases criminal and civil irrespective of the nationality of the parties concerned?



TURKEY.

3. If the answer to (1) is in the negative, what steps can be taken by the High Commissioner to provide—

- (a.) For the safety and security of members of the Allied forces;
- (b.) For the trial and punishment of criminal offences committed (1) by British civilians; (2) by Ottoman subjects against British civilians; (3) by foreigners other than Ottoman subjects against British civilians;
- (c.) For the trial of civil litigation between (1) British subjects; (2) British subjects and Ottoman subjects; (3) British subjects and foreigners other than Ottoman subjects;
- (d.) Generally on the situation.

I have, &c.

H. MONTGOMERY.

List of Papers.

- (A.)—Armistice terms signed with Turkey.
- (B.)—Admiralty to Foreign Office, November 11, 1918.
- (C.)—Admiral Webb (Constantinople) to Foreign Office, April 2, 1919. (Telegraphic.)
- (D.)—Foreign Office to Admiral Calthorpe (Constantinople), April 12, 1919. (Telegraphic.)
- (E.)—Admiral Calthorpe (Constantinople) to Foreign Office, July 23, 1919. (Telegraphic.)
- (F.)—British Delegation, Paris, to Foreign Office, No. 1552, August 8, 1919.
- (G.)—Admiral Webb (Constantinople) to Foreign Office, September 6, 1919.
- (H.)—Admiral de Robeck (Constantinople) to Foreign Office, November 10, 1919. (Telegraphic.)

Report.

1. In our opinion this question must clearly be answered in the negative. A general system of martial law can only be established by an army in actual military occupation, and it is clear that the Allies are not in actual military occupation of Constantinople.

2. Does not arise.

3. The only course we can suggest is that pressure should be put on the Turkish Government to compel them to agree to the establishment of an inter-Allied tribunal to exercise jurisdiction in the various classes of cases mentioned. Such a tribunal would derive its jurisdiction from the Turkish Government and could be given jurisdiction over foreigners other than Ottoman subjects, as well as over British and Ottoman subjects. The Turkish Government might be coerced by a threat that if they did not consent to the establishment of the tribunal the Allies would occupy Constantinople, on the ground that the security of the Allies is threatened by the failure of the Turkish Government to maintain order and protect the persons and property of Allied subjects.

We have, &c.

GORDON HEWART.

ERNEST M. POLLOCK.

Law Officers' Department,
December 23, 1919.

P.S.—The additional papers received by us on the 31st ultimo do not appear to affect the opinion already given. They emphasise the necessity for the establishment of an inter-Allied tribunal. The telegram (No. 2145) from Admiral de Robeck is not quite easy to follow. It shows the urgency of the matter, but does not indicate what the step is which it is desired to take, though it appears to be some form of pressure to be applied to induce the Turkish Government to consent to the establishment of the tribunal.

GORDON HEWART.

ERNEST M. POLLOCK.

Law Officers' Department,
January 20, 1920.



1920

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office.

CONFIDENTIAL.

(11810)

LAST COPY.

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1920.



LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked *I^A*, &c.

PRIZE LAW.

No.		Date.	SUBJECT.	Page.
<i>I^A</i>	Law Officers, Mr. Raeburn, Mr. Bowstead and Dr. Pearce Higgins [Procurator-General]	Feb. 9, 1920	Detained enemy ships: applicability of sixth Hague Convention	1
<i>I^B</i>	Law Officers .. [Ministry of Shipping]	Mar. 31,	Ships sold by Germans to the Dutch during the war	10
<i>I^C</i>	Law Officers and Dr. Pearce Higgins [Procurator-General]	July 8,	Claim of French Government to share in prizes captured at Duala and Bonaberi, and in Cameroon River	16
<i>I^D</i>	Law Officers and Dr. Pearce Higgins [Procurator-General]	Dec. 31,	Detained Austrian ships: applicability of sixth Hague Convention	26

VARIOUS.

(Arranged according to Countries.)

AUSTRIA.

<i>I^E</i>	Law Officers and Mr. Austen-Cartmell	July 8, 1920	Austrian Treaty of Peace: rate of exchange for payment of debts	31
----------------------	--------------------------------------	--------------	---	----

CHINA.

1	Law Officers ..	Jan. 31, 1920	China (Kashgar) Order in Council, 1920 ..	32
2	Law Officers ..	June 3,	China Order in Council, 1920, and China (Consular and Marriage Fees) Order in Council, 1920 ..	33
3	Law Officers ..	July 14,	China (Amendment) Order in Council, 1920 ..	34
4	Law Officers ..	Oct. 13,	China (Amendment No. 2) Order in Council, 1920 ..	35

EGYPT.

5	Law Officers ..	May 5, 1920	Case of <i>Cimitian v. Gout and Geary</i> : demand for renewal of registration of British subjects ..	36
---	-----------------	-------------	---	----

(iii)

GENERAL.

No.		Date.	SUBJECT.	Page.
5 ^A	Law Officers .. [Colonial Office]	Jan. 23, 1920	Mandates: questions connected with such of former German colonies as will be administered by the Self-Governing Dominions	38
5 ^B	Law Officers .. [Admiralty]	Feb. 21,	Control of Arms Convention, September 10, 1919 ..	41
5 ^C	Law Officers .. [Colonial Office]	July 13,	Acts of Canadian Parliament: suggested extra-territorial operation	42
5 ^D	Lord Chancellor and Law Officers [Cabinet Office]	Oct. 14,	Proposed Permanent Court of International Justice	45
6	Law Officers ..	Oct. 23,	Use of economic weapon of League of Nations (article 16 of the Covenant)	51
6 ^A	Law Officers .. [Colonial Office]	Nov. 10,	Proposed amendment of British North America Act: powers of extra-territorial legislation for Canadian Parliament	53
7	Law Officers ..	Dec. 22,	Suspension, &c., of telegraph or radio-telegraph services throughout the British Empire; draft notifications	54
7 ^A	Law Officers .. [Colonial Office]	Dec. 24,	Proposed amendment of British North America Act: control of Canadian aircraft outside the Dominion	56

GERMANY.

7 ^B	Law Officers, Mr. Austen-Cartmell and Mr. Branson [Board of Trade]	Feb. 24, 1920	Restitution in specie of British property in Germany under article 297 of Treaty of Peace	57
7 ^C	Law Officers and Mr. Austen-Cartmell [Clearing Office, Enemy Debts]	May 18,	British companies with branches in foreign countries: position under Treaty of Peace with Germany and Treaty of Peace Order, 1919 ..	59
7 ^D	Law Officers and Mr. Branson [Board of Trade]	Dec. 14,	Restitution in specie of British property in Germany under article 297 of Treaty of Peace	62
8	Law Officers ..	Dec. 24,	Private property of ex-Emperor William: position in regard to article 248 of the Treaty of Versailles	63

RUSSIA.

8 ^A	Law Officers .. [Russian Trade Committee]	June 4, 1920	Attachment of Russian gold or goods sent to United Kingdom	65
9	Attorney-General ..	Nov. 26,	Status and privileges of M. L. B. Krassin, Russian delegate in United Kingdom	66



(iv)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1920.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

AIR—DEN.

A.

Aircraft: Canadian; control outside Canada, 42-45, 56, 57.
Annexation: of Cyprus; claim to be British subject by virtue of, 36-38.
"Argo," 28.
"Ariel," 13, 14.
Arms Traffic: Convention of September 10, 1919; legislation for enforcement, 41, 42.

B.

"Baltica," 12-14.
"Benedict," 12.
Bonaberi: claim of French Government to share in prizes captured at, 16-26.
"Braunschweig," 10-15.
British North America. *See* Canada.

C.

Cameroon River: claim of French Government to share in prizes captured in, 16-26.
Canada: powers of extra-territorial legislation for Parliament, 42-45, 53, 56, 57.
" " Amendment of British North America Act, 42-45, 53, 56, 57.
" " control of Canadian aircraft outside Canada, 42-45, 56, 57.
Captures. *See* Prizes.
Censorship. *See* Telegraphs. Wireless Telegraphs.
"Chile," 1.
China: Order in Council, 33.
" " Amendment Order in Council, 34.
" " Amendment (No. 2) Order in Council, 35.
" " Consular and Marriage Fees Order in Council, 33.
" " Kashgar Order in Council, 32, 33.
"Christine," 13.
Cimitian, J.: lawsuit claiming renewal of registration as British subject, 36-38.
Colonies: German; Mandates. *See* Mandates.
Companies, British: with foreign branches; position under Treaty of Versailles and Treaty of Peace Order, 1919, 59-61.
Court of International Justice: establishment 45-51.
Cyprus, annexation of: claim to be British subject by virtue of, 36-38.

D.

"Dankebaar African," 12.
Debts: under Treaty of Peace with Austria; rate of exchange, 31, 32.
" " attachment of Russian gold or goods sent to United Kingdom, 65, 66.
"Denderah," 10-15.

DIP—JEM.

Diplomatic Privileges. *See* Privileges.
Dominions, British; power for execution of mandates for former German colonies, 38-41.
" " : proposed powers of extra-territorial legislation for Canada, 42-45, 53, 56, 57.
"Dordrecht," *The*, 25.
Duala: claim of French Government to share in prizes captured at, 16-26.

E.

"Edna," 13.
"Edward and Mary," *The*, 25.
"Eendijk," *See* "Braunschweig."
"Empress," 25.
"Endraught," 12.
Enemy vessels. *See* Vessels.
"Ernst Merck," 13.
"Erzherzog Franz Ferdinand," 27.
Exchange, rate of. *See* Debts.
Extra-territoriality: proposed powers of extra-territorial legislation for Canada, 42-45, 53, 56, 57.

F.

Fees, Consular and Marriage. *See* China.
"Fenix," 28.
"Ferd Laeisz," 21.
"Forsigheid," *The*, 25.
France: claim to share in prizes captured at Duala and Bonaberi and in Cameroon River, 16-26.

G.

Geary, Consul A. B.: lawsuit brought by J. Cimitian, 36-38.
"General Hamilton," 12.
Germany: vessels sold by Germans to Dutch during the War, 10-15.
" " private property of ex-Emperor William; position under Treaty of Peace, 63-64.
Gout, E. E. D.: lawsuit brought by J. Cimitian, 36-38.
"Grotius," *The*, 25.
"Guillaume Tell," 25.

H.

Hague Convention VI: applicability to detained enemy ships, 1-10, 26-31.
"Hercules," *The*, 25.

I.

"Island of Trinidad," 24.

J.

"Jan Frederick," 12.
"Jemmy," 12.

JOH—PRO.

"Johann Heinrich Burchard," 10-15.
"Juffrons Anna," 12.
Justice, Court of. *See* Court.

K.

"Karpas," 27.
Kashgar Order in Council, 32, 33.
"Koerber," 27.
Krassin, L. B., 66-68.

L.

League of Nations: use of economic weapon (article 16 of Covenant), 51, 52.
" " Mandates for former German colonies: power to enable Dominions to execute, 38-41.
"L'Étoile," 25.
"Limburgia," *See* "Johann Heinrich Burchard."
Lindo v. Rodney, 28-30.
"Lokken," 25.

M.

Mandates: for former German colonies; power to enable Dominions to execute, 38-41.
"Marianna Flora," 15.
"Marie Leonhardt," 28-30.
"Masatba," 13.
"Minerva," 12.
"Moedijk," *See* "Denderah."

N.

"Nassau," 10-15.
Nationality, British: claimed in virtue of annexation of Cyprus, 36-38.
" " lawsuit against Consul to compel registration as British subject, 36-38.
Netherlands: vessels sold to Dutch by Germans during the War, 10-15.
"Noydt Gedacht," 12.

O.

"Odessa," 28.
Orders in Council. *See* China.

P.

"Pellworm," 25.
"Perla," 27.
"Polnay," 30.
Privileges: of Russian Soviet Government Delegate in United Kingdom, 66-68.
Prizes: captured at Duala and Bonaberi and in Cameroon River; claim of French Government to share, 16-26.
Property: British in Germany; restitution in specie under Treaty of Peace, 57-59, 62, 63.
" " private, of ex-Emperor William; position under Treaty of Peace, 63, 64.

REG—ZAM.

R.

Registration: as British subjects; right to demand renewal, 36-38.
" " case of Cimitian v. Gout and Geary, 36-38.
"Resolution," *The*, 25.
Russia: attachment of gold or goods sent to United Kingdom, 65, 66.
" " status and privileges of Soviet Government Delegate in United Kingdom, 66-68.

S.

"Sabbia," 27, 29, 30.
"Sechs Geschwistern," 12.
"Soglasie," 13.

T.

Telegraphs: suspension, &c., of services throughout British Empire; draft notifications, 54-55.
"Tergeste," 27, 29, 30.
Treaty of Peace (Austria): rate of exchange for payment of debts, 31, 32.
" " (Germany): restitution in specie of British property in Germany under, 57-59, 62, 63.
" " " position of British Companies with foreign branches, 59-61.
" " " position of private property of ex-Emperor William, 63, 64.

V.

Vessels: enemy, detained in British ports; applicability of Hague Convention VI, 1-10, 26-31.
" " sold by Germans to the Dutch during the War, 10-15.
" " enemy; transfer to neutral flag or ownership during the War, 10-15.
" " captured at Duala and Bonaberi and in Cameroon River; French claim to share in, 16-26.
"Vigilantia," 12.
"Vrouw Margeretha," 12.

W.

"W. Leaat," 12.
"William Oswald," 10-15.
Wireless Telegraphy: suspension, &c., of services throughout the Empire; draft notifications, 54-56.

Z.

"Zamora," 8.



Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1920.

PRIZE LAW.

[T 1335]

No. 1^A.

[Procurator-General]

[File 115/1920]

[February 9, 1920.]

Case for the Opinion of the Law Officers of the Crown and Counsel.

HEREWITH are sent:—

1. Copy "Chile" Order.
2. Correspondence between the Foreign Office and the United States Embassy in 1914 with regard to the applicability of the Sixth Hague Convention.
3. Copy correspondence with the Foreign Office with regard to the disposal of detained enemy ships.
4. Agreement with United States, May 1919.
5. Memorandum by Dr. Pearce Higgins.

Detained
Enemy
Ships:
Applica-
bility of
Sixth Hague
Convention.

With the conclusion of peace with Germany by the deposit of the ratifications of the Treaty of Peace, the question of the ultimate disposal of enemy ships detained in British ports becomes one of great importance.

Enemy ships have been detained under the form of order known as the "Chile" Order not only in the United Kingdom but in British ports throughout the Empire, and in the aggregate they represent a very large amount of tonnage and are of great value.

The immediate question for decision is whether, in the events which have happened, the Sixth Hague Convention is applicable. If it is applicable, the question arises whether the ships fall to be dealt with under the provisions of the Treaty of Peace. If, on the other hand, it does not apply, it is necessary to consider whether application can successfully and should be made to the Prize Court for a decree of condemnation.

It may be observed that these questions arise mainly in connection with German ships, as Austrian vessels were given days of grace and for the most part either departed or were dealt with under a private arrangement with the owners. There are a few Austrian ships which were prevented by *force majeure* from leaving and were detained under the common form of order. Turkey had not ratified the Convention, and Turkish ships are not, therefore, affected by it. No Bulgarian ships were detained. Germany is the country principally concerned in this question.

The Sixth Hague Convention provides as follows:—

Article 1.—"When a merchant ship of one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely either immediately, or after a sufficient term of grace, and to proceed direct after being furnished with a passport to its port of destination or such other port as shall be named for it."



"The same applies in the case of a ship which left its last port of departure before the commencement of the war and enters an enemy port in ignorance of the hostilities."

Article 2.—"A merchant ship which, owing to circumstances of *force majeure*, may have been unable to leave the enemy port during the period contemplated in the preceding article, or which may not have been allowed to leave, may not be confiscated. The belligerent may only retain it under an obligation of restoring it after the war without indemnity, or he may requisition it on condition of paying an indemnity."

Article 3.—"Enemy merchant ships which left their last port of departure before the commencement of the war and are met at sea while ignorant of the hostilities cannot be confiscated . . ." (Provision as to restoration as in Article 2.)

Article 4.—"Enemy cargo on board the vessels referred to in Articles 1 and 2 is likewise liable to be detained and restored after the war, without indemnity, with the ship or separately."

"The same applies in the case of cargo on board the vessels referred to in Article 3."

Article 5.—"The present Convention does not affect merchant ships whose construction indicates that they are intended to be converted into ships of war."

Article 6.—"The provisions of the present Convention are only applicable between the Contracting Powers, and only if all the belligerents are parties to the Convention."

The following table shows the position with regard to signature and ratification of the Convention by the several belligerent Powers:—

1. Belligerents who were in a state of war on the 4th August, 1914:—

Signed and Ratified.—France, Great Britain, Austria, Belgium.

Signed and Ratified, subject to Reservations of Articles 3 and 4 (Paragraph 2, Ships met at Sea).—Germany and Russia.

Signed, but not Ratified.—Montenegro and Serbia.

2. Belligerents who subsequently entered the war:—

Signed and Ratified.—Brazil, Japan, Cuba, Guatemala, Hayti, Liberia (adhered), Nicaragua (adhered), Roumania, Portugal, Panamá, Siam.

Signed, but not Ratified.—Italy, Greece, Bolivia, Ecuador, Peru, Uruguay, Turkey.

Neither Signed nor Ratified.—United States of America, China, Honduras.

On the outbreak of war with Germany, Great Britain intimated that she would be prepared to give days of grace to German ships, provided an intimation were sent from Germany within a fixed period of time that she would accord reciprocal treatment to British ships in German ports. The necessary intimation was not received within the time specified, and days of grace were accordingly not given by either belligerent (see Proclamation of the 4th August, 1914, "Manual of Emergency Legislation," vol. i, p. 138).

Correspondence ensued between the Foreign Office and the United States Ambassador in London in consequence of the German Government having purported to accept the British offer after it had expired. A copy of this correspondence is sent herewith.

On the 14th August, 1914, Sir E. Grey informed the United States Ambassador that His Majesty's Government would abide by the provisions of Articles 2, 4 (first paragraph) and 5 of the Convention, relative to the status of the Sixth Convention, provided the German Government also abided by those provisions, but that, inasmuch as the German Government was not a party to Article 3 of the Convention, the provisions of that article and of the second paragraph of Article 4, to which also they were not a party, would not be applied.

On the 25th August, 1914, a memorandum was received from the German Government through the American Embassy in London, in which the German Government asked if the British Government would hand back German ships and their cargoes at the end of the war or in case of requisition would give compensation, stating that Germany was ready to fulfil its treaty obligations, but, in view of the British Order in Council, must first require a similar promise from Great Britain.

To this memorandum Sir E. Grey replied on the 2nd September, 1914, in a note addressed to the United States Ambassador, which contained the following paragraphs:—

"In reply, I have the honour to inform your Excellency that, so far as enemy merchant ships and enemy cargoes are concerned, the procedure followed by His Majesty's Government is covered by the Sixth Hague Convention of 1907, which has been ratified by Great Britain. As regards German ships, I would refer your Excellency to my note of the 14th ultimo, in which the attitude adopted by His Majesty's Government was fully explained. . . .

"As stated in my note of the 14th ultimo, His Majesty's Government will grant to German ships the benefits of Articles 2, 4 (first paragraph) and 5 of the Convention, but not those accorded by Articles 3 and 4 (paragraph 2), to which Germany was not a party. The decisions of the Prize Court in such a case will proceed upon this basis."

The German Government presented a further memorandum, under date of the 2nd September, 1914, from Copenhagen, setting out its understanding of the arrangement, and Sir E. Grey acknowledged this memorandum on the 20th September, 1914, accepting generally the interpretation placed by the German Government on his previous notes.

It will be seen from this correspondence, of which a copy is attached, that, notwithstanding the fact that Article 1 of the Convention had not been applied and days of grace had not been given, the British Government expressed its intention at the beginning of the war of applying Articles 2 and 4 (first paragraph) and 5 of the Convention, provided Germany did the same, and the questions arise, first, whether, by reason of the events which have happened during the war, a new situation has been created which relieves the British Government from any obligation to give effect to the assurance then given to the German Government, and, secondly, whether the operation of the Convention or of any such undertaking by His Majesty's Government has been excluded by the Treaty of Peace.

It may perhaps be contended that the true meaning of the Foreign Office letters referred to above is that the British Government agreed to hold itself bound by Articles 2, 4 (paragraph 1) and 5 of the Sixth Hague Convention, so long as the Convention was, according to its own terms, applicable; for example, so long as all the belligerent Powers were parties to the Convention, or so long as Germany observed it; but when the Convention ceased to be applicable either by reason of Powers who had not ratified it joining in the war, or for some other reason, Great Britain ceased to be bound by it.

It may be urged against this reading of the correspondence that Sir E. Grey's letters were written after two, at least, of the non-ratifying Powers—Serbia and Montenegro—had entered the war,* and that he cannot, therefore, be supposed to have been making this reservation.

It must be conceded that there is force in this view, unless it can be said that Serbia and Montenegro were not maritime Powers, and that the application of the Sixth Convention was a matter on which their participation in the war should not be final. The intervention of Italy, Turkey and the United States, who were maritime Powers, was a more relevant circumstance, and might well be the determining factor.

This aspect of the question is not free from difficulty, and it is desirable to consider the other arguments upon which reliance can be placed in support of the view that the Convention is not legally binding on Great Britain.

The arguments can be summarised as follows:—

1. That all the belligerents were not parties to the Convention.
2. That Article 1, not having been applied, Article 2 did not come into force.
3. That Germany's flagrant breaches of The Hague Conventions, which it did not suit her to observe, relieves Great Britain of any obligation to observe the Sixth Convention.
4. That the effect of the Armistice was to override the Convention.
5. That the effect of the Treaty of Peace was also to override the Convention.

1. It will have been seen from the table given above that of the Powers involved in the war on the 4th August, 1914, when Great Britain declared war on Germany,

* Austria declared war on Serbia on July 28, 1914. Germany declared war on Serbia on August 6, 1914. Montenegro announced a state of war with Austria on August 7, 1914, and declared war on Germany on August 9, 1914.



four had signed and ratified the Convention; two had signed and ratified with reservations, and two had not ratified. Of the Powers subsequently entering the war, eleven had signed and ratified; seven had signed but not ratified, and three had neither signed nor ratified.

At the date of the Armistice, the position was that of the belligerents fifteen had signed and ratified; two had signed and ratified subject to reservations; nine had signed but not ratified, and three had neither signed nor ratified. In the aggregate, therefore, seventeen belligerents had ratified with or without reservations, and twelve had not ratified the Convention.

It may be argued in these circumstances that in accordance with Article 6, the provisions of the Convention were not applicable, as all the belligerents were not parties to the Convention. Such a contention would raise the further question of the effect of the subsequent intervention of Powers, who had not ratified the Convention, in a war in which all the Powers theretofore engaged had ratified it.

On the 4th August, 1914, when Great Britain joined in the war, the position was still undeveloped. Germany was at war with Russia, Belgium, France and England, all of whom had ratified, but not with Serbia and Montenegro, who had not ratified. Austria was at war with Serbia and Montenegro, but not with Russia, Belgium, France or Great Britain. There were, therefore, two well defined groups of belligerents, which did not begin to overlap until Austria declared war on Russia on the 5th August, 1914, and Germany declared war on Serbia on the 6th August, 1914. France and Great Britain declared war on Austria on the 12th August, 1914, Turkey entered the war on the 5th November, 1914.

It might, therefore, be open to Germany to contend that on the 4th August, 1914, all the belligerents in the war in which she was engaged had ratified the Convention, and that at that moment it became binding upon each belligerent. After the declaration of war on Germany by Great Britain, the development of events was rapid, and the declarations of war by Austria on Russia on the 5th August, 1914, and Germany on Serbia on the 6th August, 1914, were the inevitable result of the general outbreak of hostilities, and formed part of the same transaction. Springing as they did from the same causes, and from the alliances between the principal combatant Powers, it would be a legal refinement to contend that they were to be regarded as separate wars, without effect upon the relations of the other group of belligerents.

2. An argument against the applicability of the Convention can be founded on the view that Articles 1 and 2 are mutually interdependent, and that where Article 1 has not been applied, and days of grace have not been given, Article 2 does not arise, and, therefore, merchant ships, which, owing to *force majeure*, have been unable to leave the enemy port, or which may not have been allowed to leave, do not become entitled to the immunity from confiscation which Article 2 purports to confer.

Apart from any special agreement which Germany can found on the Foreign Office correspondence in 1914, there is some force in this argument if the Convention must be read as a whole. The fundamental principle of the Convention is that it is desirable that days of grace should be given to ships in port, and it may be submitted that the words used in Article 2 "or which may not have been allowed to leave," are intended to be covered by the preceding words, which refer specifically to the period contemplated by the preceding article. Article 2 is not perhaps very happily expressed, and it is right to observe that the principal authorities are against this view, and consider that the words "which may not have been allowed to leave" make Article 2 applicable, notwithstanding that days of grace may not have been given under Article 1. The point should however be considered.

3. The Final Act of The Hague Conference, 1907, provides that the Conventions and the Declarations shall form so many separate Acts.

If, notwithstanding, it is open to the Crown to contend that the fourteen Conventions must be read as a composite body of law, and that a belligerent is not at liberty to disregard some of the Conventions when it is in its interest to do so, and at the same time claim from its opponents the benefit of other Conventions, there is an overwhelming case to be made against the German claim to be entitled to the benefit of the Sixth Hague Convention.

If, however, this provision is to be construed in a sense opposed to the above contention, it would seem to follow that retaliatory action, so far as the Conventions are concerned, can only be taken in kind. There is no rule of international law which so limits the right of a belligerent to take reprisals against an enemy, for the only restrictions seem to be that the reprisal must be commensurate with the offence and in accord with the dictates of humanity.

Retaliation based on the confiscation of these vessels as a reprisal against the lawless destruction of merchant shipping by Germany may be said to comply with the most exacting standards. It tends to counter and repair the actual damage inflicted by the enemy in his unlawful operations at sea, since it enables the wronged Power to replace the ships destroyed in breach of international law with ships of the enemy in his possession.

It violates no principle of humanity, for while inflicting financial loss it causes no physical suffering or loss of life to persons in the enemy country.

As a measure of punishment it falls far short of the crime which caused the death at sea of over 15,000 persons who were in no sense belligerents.

Moreover, there is hardly any article in the Regulations annexed to the Fourth Convention concerning the laws and customs of war on land, which Germany did not flagrantly disregard. The administration of the occupied parts of Belgium and France, the treatment of prisoners of war, the use of poison and poisoned arms, the murder of the wounded, the deliberate destruction of property, the bombardment of undefended towns, the pillage of towns, the devastation of the countryside, the deportation of the Belgian and French populations, and the requisitions effected in Belgium and France are a few notorious examples of the wholesale disregard by Germany of the articles of this Convention.

These can be proved beyond any question of doubt.

It is important to remember that Germany did not hold herself bound by the Eleventh Hague Convention (Restrictions on Capture in Maritime War). Her naval officers consistently destroyed mails on board enemy and neutral ships, which are declared inviolable by Article 1, not only by sinking the ships without first taking off the mails, but also by deliberately throwing overboard mails found on captured ships.

Moreover, in a note which the German Government addressed to the Government of Siam on the 5th July, 1917, before Siam entered the war she dealt specifically with Article 5 of the Eleventh Convention, which provides that such of the crew of an enemy merchant ship captured by a belligerent as are nationals of a neutral State are not made prisoners of war. The German note contained this paragraph:—

"This treaty stipulation, however, is not binding on any of the belligerent Powers in the present war, as, according to Article 9, the Convention finds application only if the belligerents are all parties to the Treaty; now, a large number of the belligerents, among them Russia and Italy in particular, have not ratified the Convention. Consequently, the Convention is not valid at all in the present war, so that no neutral Power is entitled to appeal to the stipulation of Article 5."

The terms of Article 9 of the Eleventh Convention, upon which Germany relied, are identical with the terms of Article 6 of the Sixth Hague Convention, and, if the argument of Germany is valid in respect of the Eleventh Convention, it is equally valid in respect of the Sixth Convention, and that Convention was, therefore, not binding on any of the belligerent Powers. The parallel is completed by the circumstance that Italy had also not ratified the Sixth Convention.

It is hardly necessary to dwell on the other grave breaches of international law committed by Germany, such as the sinking of ships, including passenger liners and hospital ships, without giving warning or making any provision for the safety of the passengers and crews. These will be present to the minds of the Law Officers and Counsel.

The action of certain of the Allied and Associated Governments may perhaps be cited as exemplifying their view of the applicability of the Convention. The United States did not sign or ratify the Sixth Hague Convention because the United States Government was of opinion that the Convention, in making the granting of days of grace optional casts doubt on a practice which had become obligatory, but it is to be observed that, although in time of peace they held this view, in time of war no days of grace were in fact granted to German ships in United States ports. On the contrary Congress by legislative act authorised the President to take over the property in all such vessels, and the Law Officers have advised that this was a valid transfer of the property.

This proceeding furnishes an apt illustration of the difference in some countries between the theory and practice of international law.

It is believed that Brazil followed the same course although a ratifying Power. No doubt, a similar course could be taken by the British Parliament, if it were thought necessary, but as the Prize Court has already held that the vessels in question were



lawfully seized as prize, all that is necessary would be for further application to the Court for condemnation, if the Government should be advised that the Hague Convention in question was inapplicable.

Italy had not ratified the Convention, but in the earlier stages of the war issued a special decree making provision for its application. The decree also provided that enemy property might be confiscated to make good any injury caused by illegal acts of warfare, and, acting under this clause, the Italian Prize Courts have proceeded to the condemnation of enemy ships in port at the outbreak of war.

The Armistice.

4. In considering whether the Sixth Hague Convention is applicable, it is important to bear in mind the terms of the Armistice which brought active hostilities to a close. Under Article 30 of the Armistice "all merchant ships now in German hands belonging to the Allied and Associated Powers shall be restored *without reciprocity* in ports specified by the Allies and the United States." All British ships in German hands, with the exception of a few which had been requisitioned and sunk, were restored under this article. Nowhere, either in the Armistice or the Peace Treaty, is any mention made of The Hague Convention, nor does it appear from the reply of the Allies to the German Delegation that any claim was made by the latter for the application of the Convention in their proposed amendments to the terms of the Treaty of Peace submitted to them.

Moreover, the fact that the surrender of Allied merchant-ships under the Armistice was made without reciprocity may possibly be regarded as overriding The Hague Convention and depriving Germany of any claim to its benefit, though Germany might, perhaps, contend in reply, that the Armistice only required the ships to be handed over without immediate reciprocity, but did not determine or restrict their ultimate right to claim the return of the ships under the Convention.

The Treaty of Peace.

5. It was expected that the Treaty of Peace would make provision for the final disposal of these vessels, but it has been suggested that differences arose with the United States Government which prevented effect being given to this intention.

No direct reference is made to them in the Treaty of Peace, and if they are covered by its phrasing, it would seem to be by accident rather than by design. Annex III of the Reparation Clause provides for the surrender of all German merchant ships over 1,600 tons, one-half of those between 1,000 and 1,600 tons, one-quarter of the steam trawlers, and one-quarter of other fishing boats.

It may be that the ships which are detained and not condemned are technically still German ships. The ownership is, presumably, still in the original German owner, but they are not entitled to fly the German flag, for, apart from being captured ships, they have been requisitioned and given British registry and must of necessity fly the British flag.

It is difficult to see how they can have been registered and the provisions of the Merchant Shipping Act complied with, unless the beneficial interest is in the King or the British Government.

Moreover, the annexe purports to relate to ships which Germany was in a position to hand over to the Allies when the Treaty was signed. The vessels detained in Great Britain do not fall within this category, since neither the owners nor the German Government had any control over them.

The terms of the annexe are difficult to apply to these vessels, and it would appear that the position may ultimately have to be accepted that they are not dealt with by the Treaty.

Upon this question the Law Officers and Counsel are referred to the letter addressed by the Procurator-General to the Foreign Office on the 12th June, 1919, and to the correspondence and memoranda in the same bundle concluding with Sir Eyre Crowe's letter to Earl Curzon of the 23rd October, 1919, in which the conflicting considerations are dealt with in greater detail.

It should be observed that, under paragraph 8, Annex III, of Part 8 of the Treaty, Germany waives all claims against the Allies in respect of the detention, employment, loss, or damage of any German ships or boats. This paragraph, however, is probably intended to refer to claims for damages for the period of detention and not to the ultimate disposal of the vessels themselves.

A more relevant article in the treaty is perhaps No. 237, which deals with the liquidation of German assets in this country. Paragraph (b) of this article provides as follows:—

"Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the present Treaty to German nationals or companies controlled within their territories," &c.

These words are wide enough to cover the detained enemy ships, and may fairly be regarded as superseding the terms of the Convention.

The Lloyd George-Wilson Agreement.

Within the last few weeks the Procurator-General has had brought to his attention an agreement, concerning the origin of which little or no information can be obtained.

It is a curious fact that no reference to this agreement is made in the despatch addressed by Sir Eyre Crowe to Earl Curzon on the 23rd October, 1919, a copy of which is in the bundle of Foreign Office correspondence, although paragraph 4 purports to deal with the question of the disposal of these vessels as between Great Britain and her Allies.

The explanation of the omission of any reference to the agreement is not known.

The agreement was made in Paris in May 1919, and is signed by Mr. Lloyd George and President Wilson, and provides that the Reparation Committee will take steps to prepare a list of all enemy ships in existence captured, seized, or detained by any Allied or Associated Government, and also all other enemy ships ceded under the Treaty of Peace. Having done so, the Reparation Committee will take such steps as will secure that each of the Allied and Associated Governments will retain as its own the complete title to and use of all ships captured, seized, or detained during the war as a war measure prior to the 11th November, 1918, and will own the same free from any of the other Allied or Associated Governments.

The agreement proceeds to make provision for securing contributions to the Reparation Fund from those Powers whose captures exceed their tonnage lost, with a view to compensating Powers whose losses exceed the tonnage captured by them.

This agreement is open to criticism.

It seems to have been based on the assumption that the title to and property in the detained enemy ships had already been transferred from the enemy owners to the Allied and Associated Governments, and that all that remained to be done was to apportion the vessels in proportion to losses. If, however, the transfer of the title was not effected by the Treaty of Peace, it is not clear how, in the case of England at any rate, where no legislative action has been taken as has been done in the United States, the title in the vessels has been transferred, and therefore how the agreement can become operative or what steps the Reparation Committee can take to secure to England the complete title to and user of all the ships detained in this country.

Germany is not a party of this agreement, and is not, of course, bound by it. So far, therefore, as Germany is concerned, it is of no assistance. So far as England is concerned, unless the ships can be regarded as British ships, it seems to be a premature attempt to award a prize which has not yet been secured. The United States, however, benefit with certainty by it, as they obtain recognition of their right to retain the very valuable ships which were seized in their ports and vested in the President by Legislative Act of the Senate on paying a sum of money into the Reparation Fund.

All that the agreement can be regarded as doing is to show that it was considered that the Allied and Associated Governments were in a position to apportion the ships, but whether this view is or is not correct is a matter with regard to which different opinions may be held.

The Effect of Requisition.

The question whether detained ships which have been requisitioned can be regarded as British ships vested in the British Government becomes in these somewhat uncertain conditions one of considerable materiality.

It has already been stated that all the detained ships have been requisitioned and given British registry.



PRIZE LAW.

The Sixth Hague Convention, Article 2, provides as follows:—

"Article 2.—The belligerent may only detain it under an obligation of restoring it after the war without indemnity, or he may requisition it on condition of paying an indemnity ('moyennant indemnité')."

It is to be observed that the two alternatives are clearly set out in this article. The belligerent can either detain and restore or requisition and pay an indemnity.

Applications to requisition the ships once they had passed into the custody of the Prize Court were made under the Prize Court Rules Order XXIX, as amended by the Order in Council of the 29th April, 1915.

This order does not of course create any power to requisition; it merely prescribes the procedure by which the power of requisition derived *aliunde* is to be exercised (the "Zamora," 2 B. and C.P.C., page 1).

In the case of enemy ships detained in this country in time of war there would seem to be a double right of requisition: first, the Sovereign Right of Angary, which must apply to enemy property with equal if not greater force than to neutral property (the "Zamora," *supra*, page 21, &c.); and, second, the somewhat more restricted right conferred by the Sixth Hague Convention quoted above.

If the exercise of these rights or either of them is to effect an absolute acquisition of the ship for all purposes, it would seem to follow that these detained ships have become British property, subject, if The Hague Convention is applicable, to an obligation to pay an indemnity.

The wording of the Convention itself clearly contemplates that the ship is taken absolutely and for all purposes. The two alternatives emphasise this: either the belligerent detains and returns the ship, or he requisitions it and pays an indemnity. It will be observed that the second alternative does not provide for requisition and either return or indemnity, which would have been necessary if that possibility were in contemplation.

A strong argument can therefore be put forward in support of the view that requisition under the Convention is a permanent and complete acquisition of the ship. There are, however, two points which should be mentioned against this contention—one is that some international jurists do not accept it as the true interpretation of the Convention.

The other is a point which arises under the Prize Court Rules.

Originally Order XXIX, referred only to the requisition of a ship without specifying any period of time during which the requisition should continue. A doubt arose whether, where the order was made in that form, the Crown could return a ship to the Admiralty Marshal when it no longer required the vessel. This led to the rule being amended by the Order in Council of the 29th April, 1915, paragraph 6 of which provided that where the Crown desired to requisition a ship temporarily, the Court might make an order for temporary delivery of a ship to the Crown and laid down the procedure to be followed in the event of the ship being returned to the custody of the Court.

It is submitted that there is no difference in principle between the two forms of requisition and that the so-called "temporary requisition" has the same legal effect, so far as the transfer of property and title is concerned, as the unqualified requisition, and confers on the Crown in addition a right to terminate the requisition and return the ship to the custody of the Court.

The effect of requisitions in this form is important, inasmuch as most of the orders were for temporary requisition. Two test cases were taken recently, and orders of temporary requisition were converted into orders of requisition under Order XXIX, Rule 1. If this conversion strengthens the legal position of the Crown, there would seem to be no reason why similar applications should not be made in all the other cases.

If there is any means by which these ships can be permanently secured, it is very desirable that the Government should avail itself of them, for in the present conditions the ships themselves are both on economic and financial grounds of far greater value than is represented by their appraised value at the date of requisition. From both points of view it would be preferable to acquire the ships, even if compensation had to be paid on that basis than to return the ships to the enemy owners, unless the effect of such restitution were to bring the ships within the reparation clauses of the Treaty (Annexe III) and render them liable to redelivery to the Allied and Associated Governments. This, however, seems doubtful.

Certain of the Colonial Governments wish to secure permanently detained ships in their ports, and if condemnation of the vessels cannot be obtained either by reason of

PRIZE LAW.

the applicability of the Sixth Hague Convention or any other cause, it is very desirable to obtain orders of permanent requisition under Order XXIX, Rule 1, if such orders will result in securing to them an absolute title to the ships. The advice of the Law Officers as to the steps which it is open to the Colonial Governments to take to attain their object will be of great assistance to them on this question.

Detained Ships lost by Enemy Action while under Requisition.

A number of detained enemy ships have been lost as the result of illegal enemy action while under requisition to His Majesty's Government. For the most part the requisitions are in form temporary, and the Procurator-General as proper officer of the Crown, has, in accordance with the Prize Court Rules given undertakings to pay into Court the value of the ships when required so to do.

The general principles arising out of the Sixth Hague Convention and the Treaty of Peace, which apply to detained enemy ships, will no doubt apply to the appraised values of these vessels, but there is the further question whether, where the loss has resulted from illegal enemy action the enemy owner is, even if the Sixth Hague Convention be held to apply as between Great Britain and Germany, entitled to claim compensation from His Majesty's Government, and ought not rather to raise the claim against the German Government, by whose orders the illegal acts were committed.

It is not, however, altogether clear that *vis-à-vis* the Prize Court to whom the undertaking has been given, the Procurator-General is relieved from his obligation to pay the appraised values of the lost ships into the Prize Court by illegal act of the enemy.

Under Order XXIX, Rule 5, as amended by the Order in Council of the 29th April, 1915, it is not necessary for the proper officer of the Crown to lodge the money in Court until the "Court shall declare by Order that the same is required for the purpose of payment out of Court."

If, therefore, the illegal action of the German Government in sinking these ships is in itself a bar to a claim by the German owner against His Majesty's Government, the necessity for lodging the money in Court will not arise save, perhaps, at the instance of the Exchequer, with a view to ultimate disposal under the terms of the Treaty of Peace.

It would shock the public conscience if money were paid over to the enemy in respect of the loss of a detained ship which had been destroyed by a German submarine without warning perhaps with the loss of the lives of all the British crew on board.

The desirability of providing against such an anomaly is apparent.

The Law Officers and Counsel are requested to advise:—

1. Whether The Hague Convention, No. VI, is applicable as between Great Britain and Germany and Great Britain and Austria.
2. If the Convention is applicable—

- (a.) Whether the ships none the less fall to be dealt with under the provisions of the Treaty of Peace (Annexe III of the Reparation clauses or Article 297), and, if so, what further application, if any, should be made to the Prize Court to secure a title to the ships.
- (b.) If they do not fall, to be dealt with under the Treaty of Peace, whether they must be returned to the German owners or in what other way they should be disposed of.
- (c.) Whether it is still open to His Majesty's Government and Colonial Governments to apply to the Prize Court to convert temporary orders of requisition into orders of requisition under Order XXIX, Rule 1, and, if so, whether absolute titles will thereby be obtained.
- (d.) In what way the appraised values of detained enemy ships sunk by illegal enemy action, while under requisition to His Majesty's Government, should be dealt with, and what application, if any, should be made to the Prize Court with regard to their disposal.

3. If the Convention is not applicable, whether application can successfully be made to the Prize Court for decrees of condemnation.
4. Generally upon the matter.

H.M. Procurator-General's Department,
January 22, 1920.



Opinion of the Law Officers of the Crown, Mr. W. N. Raeburn, K.C., Mr. Bowstead, and Dr. Pearce Higgins.

1. We are of opinion that, in view of the correspondence with the United States Government in August and September 1914, it is not open to the British Government to contend that the Sixth Hague Convention is inapplicable because all the belligerents were not parties thereto. We think that, by this correspondence, Great Britain did undertake as between herself and Germany to observe the provisions of the Convention. But in our opinion a strong argument may be presented that Great Britain is justified, by way of retaliation for the flagrant violation of other Hague Conventions and of the rules of international law on the part of both Germany and Austria, in refusing to observe the terms of the Sixth Hague Convention.

2. In view of our answer to 3 below, we do not think it is necessary to decide these questions herein.

3. We think that application for condemnation should be made in accordance with the right reserved to the Crown by Sir Samuel Evans in the Chile case, when he left over for future decision what the full rights of the Crown as seizers of the vessels in port may be.

4. It is possible that the Court may take the view that the Convention is binding, notwithstanding the conduct of the enemy, and we advise that a test case should be brought before the Court on an application of condemnation, and, in the alternative, for permanent requisition of the vessel. A case in which it is probable that the German owners will resist the application should be chosen, so that the matter may be fully argued.

GORDON HEWART.
ERNEST M. POLLOCK.
W. N. RAEBURN.
W. BOWSTEAD.
A. P. HIGGINS.

*Law Officers' Department,
February 9, 1920*

[193305]

No. 1^B.

[Ministry of Shipping]

[File 3015/1919]

[March 31, 1920.]

Case for the Opinion of the Law Officers of the Crown.

(A copy Memorandum by Professor A. Pearce Higgins accompanies this Case.)

*Ships sold
by Germans
to the Dutch
during the
War.*

BY article 8 of the Convention prolonging the Armistice with Germany, signed at Trèves on the 16th January, 1919, it was agreed:—

"In order to secure the provisioning of Germany and of the rest of Europe, the German Government shall take all necessary steps to place the whole German merchant fleet, for the duration of the Armistice, under the control and the flags of the Allied Powers and the United States, who shall be assisted by a German delegate. This arrangement shall in no wise affect the final disposal of such vessels. The Allies and the United States shall, if they consider this necessary, replace the crews either entirely or in part, and the officers and crews so replaced shall be repatriated to Germany. Suitable compensation, to be fixed by the Allied Governments, shall be made for the use of such vessels.

"All questions of details, as also any exceptions to be made in the case of certain types of vessel, shall be settled by a special agreement to be concluded immediately."

Five vessels, viz., the "Johann Heinrich Burchard," "William Oswald," "Braunschweig," "Denderah" and "Nassau" were not delivered on the pretext that these ships, having been sold in 1915-16 by the Hamburg-Amerika and the Kosmos Line to Dutch shipping companies, were consequently not German but Dutch ships.

The German Government was repeatedly informed by the president of the Allied Naval or Armistice Commission that the Allied and Associated Powers did not recognise

any transfer of enemy tonnage to a neutral flag or ownership during the war except by special consent, and the Supreme Council has called upon the German Government to send, without further delay, the above-named five vessels to the Firth of Forth for delivery to the Allied and Associated Powers, and to remove the Dutch crews.

A communication in the above sense was addressed to the Dutch Government, who replied to it on the 28th October, 1919, in the following terms:—

"The 'William Oswald' and the 'Johann Heinrich Burchard' were acquired by the Dutch shipping company known as 'Koninklijke Hollandsche Lloyd' on the 15th June, 1916, the three remaining ships having been bought by the Dutch shipping company known as 'Hollande-Amerika Lijn' on the 29th July and the 7th August, 1915.

"At the time of the transaction the above-mentioned ships (the purchase price of which has been paid by the two companies) were under construction. As ships properly so called they have at no time been German property, and were never entered on any register of German ships. Their first certificates of registry were Dutch.

"The ships in question are, therefore, indubitably Dutch property, the more so that at the date when the transactions took place there were no regulations prohibiting Germany from disposing of ships under construction, or from acquiring ships from neutral countries.

"The Dutch Government has represented to the German Government the rights of the Dutch companies.

"The Royal Dutch Government has considered it its duty to bring the above to the notice of the Supreme Council. It is confident that the Supreme Council will recognise the rights of the Dutch companies, and will refrain from measures calculated to hinder the handing over of the ships in question to their rightful owners."

It appears that the Supreme Council replied to the Dutch communiqué of the 4th November that the conditions in which the transaction took place did not allow the principal Allied and Associated Powers to recognise the rights of ownership in those vessels of the Dutch parties concerned. It was also pointed out that, according to the terms of the Armistice Convention of the 16th January, 1919, Germany was to surrender all her merchant ships to the Allies, and that between the signature and the coming into force of the Treaty of Peace no agreement entered into by Germany can affect the execution of the obligation imposed on her by the treaty to surrender her merchant ships to the Allied and Associated Powers.

In these circumstances the Supreme Council informed the Dutch Government that the claim by the Dutch parties concerned cannot be satisfied, but that if the parties have claims they must submit them to Germany, whose intervention in this respect is provided for in paragraph 7 of Annex 3 of Part V (Reparation) of the Treaty of Peace with Germany.

On the 7th November, 1918, the Foreign Office addressed a circular telegram to all neutral Governments to the effect that His Majesty's Government would refuse to recognise, either during or after the war, any transfer of enemy tonnage to neutral flag or ownership made before the final conclusion of peace, except with their special consent. His Majesty's Government hold that Allies have a claim against the shipping of Central Powers in view of illegal submarine campaign, and they did not intend to allow their claim to be defeated by any such transfer.

The exchange of ratifications of the Treaty of Peace with Germany took place on the 10th January, 1920.

The "Limburgia," formerly the "Johann Heinrich Burchard," left Bremerhaven on the 3rd February and reached Ymuiden, in Holland, on the following day. The other four vessels are still in German waters.

The Reparation Committee has handed to the German representative the following instructions:—

1. The German Government to be informed that clearance papers must not be given to the ships mentioned in the Reparation Commission's letter of the 31st January, 1920.
2. If clearance papers are given to the ships, the Reparation Commission will have to inform the Allied and Associated Powers that Germany is evading her obligations under the Peace Treaty.

[6498]



3. If ships try to leave or leave without clearance papers, it is for the German Government to take all steps usual for a Government to take in such circumstances.
4. The Reparation Commission request that these steps be taken pending settlement of ownership. The Reparation Commission will hear all parties concerned, but meanwhile request an undertaking that the necessary steps to prevent ships leaving will be taken.

There is a possibility that the remaining four vessels may attempt to reach Holland, without clearance papers if necessary, and the British and other Admiralties are desired to take the necessary steps to prevent this.

The opinion of the Law Officers is desired as to the steps which His Majesty's ships may take against these vessels should they be met on the high seas with or without German clearance papers.

Memorandum by Professor A. Pearce Higgins.

One of the questions raised by these papers relates to the transfer of an enemy ship to a neutral flag after the outbreak of war. It is claimed by the Dutch that all five vessels were sold to Dutch purchasers by the German builders before the end of 1916 and that they had never been German, but that in order to run no risks of capture by the British or French warships they did not attempt to leave Germany during the war. Against this, it is alleged that as regards the "Denderah" and "Braunschweig," either under these names or under their Dutch names of "Moerdijk" and "Eemdijk," they do not appear in any Dutch shipping lists corrected to the 1st April, 1919, nor in the list of the Holland-America fleet. Also that an examination of returns of the German shipbuilding yards throughout the war does not reveal a single case of a ship being returned as built for the Dutch account.

British prize law on the subject of the transfer of merchant vessels to a neutral owner during or in contemplation of hostilities is set forth as follows in the memorandum prepared for the Naval Conference of London of 1908-9 (Parl. Papers, "Misc. No. 4 (1909)," p. 10, [Cd. 4554]), and for the present purpose is treated as a sufficiently accurate statement:—

1. The assignment, either by sale or gift, to a neutral of an enemy ship, other than a ship of war, is not rendered invalid merely by the fact that it was made during or in contemplation of hostilities ("Benedict," Spinks, 314, 2 E.P.C. 527; "Baltica," 11 Moore, P.C., 141, 2 E.P.C. 628; "Minerva," 6 C. Rob. 396, 1 E.P.C. 591).
2. Such an assignment is not, however, valid if:—
 - (a.) It is made in blockaded port ("General Hamilton," 6 C. Rob. 62, 1 E.P.C. 528).
 - (b.) It is made in the course of a voyage. For this purpose a voyage is at an end as soon as the ship reaches a port where she can actually be delivered into the possession of the transferee ("Dankebaer Africaan," 1 C. Rob. 112, 1 E.P.C. 74; "Vrouw Margeretha," 1 C. Rob. 336, 1 E.P.C. 149; "Jan Frederick," 5 C. Rob. 128, 1 E.P.C. 435; "Baltica," 11 Moore, P.C., 141, 2 E.P.C. 628).
 - (c.) The vendor retains any share in the ship, or if there is an agreement to reconvey her at the end of the war ("Sechs Geschwistern," 4 C. Rob. 100, 1 E.P.C. 363; "Noydt Gedacht," 2 C. Rob. 137, note).
3. The onus of proving that the transfer is genuine lies on the claimant, and the assignment must be complete, *bonâ fide*, and for good consideration.

The vessel transferred to a neutral flag is, therefore, still liable to be condemned by the Prize Court if the circumstances of the transfer are attended with suspicion not removed by the claimant ("Vigilantia," 1 C. Rob. 1, 1 E.P.C. 31; "Endraught," 1 C. Rob. 19; "Welvaart," 1 C. Rob. 122; "Juffrou Anna," 1 C. Rob. 124, 1 E.P.C. 76; "Noydt Gedacht," 2 C. Rob. 137, note; "Jemmy," 4 C. Rob. 31, 1 E.P.C. 331;

"Soglasie," Spinks 105; "Ernst Merck," Spinks 99, 2 E.P.C. 338; "Ariel," 11 Moore P.C., 110, 2 E.P.C. 600; "Christine," Spinks 82, 2 E.P.C. 320), as, for example:—

- (a.) No documentary evidence of the assignment is found on board at the time of the seizure;
- (b.) The transferor has any control over the ship, reservation of the profits, or power to revoke the assignment;
- (c.) Possession has not been taken by the alleged transferee, or by some agent of his who is not an enemy;
- (d.) The ship is under the control of an enemy;
- (e.) The master or other person in command is in the service of an enemy.

The views of other countries on this subject are set forth in Parl. Papers, "Misc. No. 5 (1909)," [Cd. 4555] pp. 112-114. They may be summarised as follows:—

Germany.—A ship flying a neutral flag can be treated as enemy if until the commencement of hostilities, or within two weeks preceding it, she has flown an enemy flag.

Austria accepted the rule proposed by the Institut du Droit international, which provided that the legal act evidencing the sale of an enemy ship during war must be perfect, and the ship must be registered in conformity with the legislation of the country whose nationality it has acquired before leaving its port of departure.

Spain accepted the British rules, which are set forth above.

France says that the change of nationality of merchant ships made after declaration of war is void and of no effect.

Italy presumes that a transfer made after outbreak of war is fraudulent ("fictive"), and therefore is not to be recognised, but proof to the contrary may be admitted in special cases.

Japan allows such a transfer only if there is sufficient proof of a complete *bonâ fide* transfer.

Holland recognises the transfer without restriction.

Article 56 of the Declaration of London provides:—

"The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

"Provided that there is absolute presumption that a transfer is void—

- "1. If the transfer has been made during a voyage or in a blockaded port.
- "2. If a right to repurchase or recover the vessel is reserved to the vendor.
- "3. If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled."

The subject of transfer to a neutral flag after the outbreak of war was discussed by Lord Sterndale in the "Edna," ex "Mazatlan" (1919, p. 157), and the following extract from his judgment deals with it:—

"Then it is said she was enemy property, and she could not become anything else during the war. If she is a merchant ship, according to the decision in the 'Baltica' (11 Moore, P.C., 141), she can be acquired by a neutral during the war so long as it is a *bonâ fide* transfer, which I have held this to be. I will assume that she was enemy property and was a German ship. I have already expressed my opinion, and I retain it, that what took place with regard to the change of the flag from Mexican to German and from German to Mexican had nothing whatever to do with the question of ownership. But I will assume that I am entitled to go behind the entity of the Mexican company and to look at the persons who were really concerned; and I will assume that this vessel was a German-owned merchant vessel at the beginning of the war. I can find nothing to show that if that is so she cannot be *bonâ fide* bought and transferred to a neutral flag—i.e., American, as this vessel was during the war. As I have said, I find a distinct statement that she can, by the Privy Council in the 'Baltica' (11 Moore, P.C., 141), and the only argument I have heard to the contrary is that such a transfer is prohibited by article 56 of the Declaration of London. Article 56 is to this effect: 'The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.'



Now that must be read, of course, in conjunction with the previous article, article 55: 'The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed.' The difference between the two is this: Before the war, *prima facie* the transaction is good, but it may be shown to be bad because it may be shown that it is made in order to evade the consequences to which an enemy vessel, as such, is exposed; after the war, *prima facie* (this is the highest degree to which it seems to me you could put this article) it is invalid, but it may be shown to be valid if it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed. It was argued (at least, I think this is what the argument came to) on behalf of the Crown, that an enemy vessel, by reason of being an enemy vessel, is always exposed to certain consequences, and therefore she never can be transferred validly because the transfer always will evade the consequences of her being an enemy vessel. I think the Solicitor-General rather disclaimed the wish to put the argument as high as that; but if it is not to be put as high as that, it seems to me to come to nothing so far as this case is concerned. If the sale is made *bona fide* because the purchaser wishes to get the ship for his own purposes, that, in my opinion, is not made in order to evade the consequences to which an enemy vessel is exposed. It does, no doubt, put an end to the consequence that follows on her being an enemy vessel, namely, that so long as she is an enemy vessel she may be seized. But it is not made in order to evade those consequences. I think that article 56 is really pointing at what may be called colourable transfers, and some support of that is afforded by the words that follow: 'Provided that there is an absolute presumption that a transfer is void . . . (2) If a right to repurchase or recover the vessel is reserved to the vendor'—giving one instance of it being colourable. I do not think that this article was intended to interfere with the general principle of law as laid down by the 'Baltica' at all, except so far as it might throw the onus of proving the *bona fides* of the transaction upon the purchaser. Here *bona fides* is shown, and I think that this transaction was a perfectly sound and valid one, and there was nothing in the circumstances to prevent the Lloyd Mexicano passing a perfectly good title to the claimants."

In no one of the cases under consideration was the transfer completed by the delivery of the ship during the period of hostilities; they all remained in Germany till the "Limburgia" (formerly known as "Johann Heinrich Burchard") escaped on the 3rd February. Assuming the validity in international law of article 56 of the Declaration of London, there is no evidence that the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have been fulfilled. Such evidence as exists is to the effect that two at least do not appear on the lists of Dutch ships.

In the "Baltica" (2 E.P.C. 628) it is stated that the purchase by a neutral of an enemy ship is valid after the outbreak of war, even when vessel is lying in an enemy port; in the "Ariel" (*ibid.*, 600) the enemy ship was sold when in a British port and only partly paid for; but in both cases the condemnation was reversed on appeal. They are strong cases in favour of a neutral purchaser, but in the present case no attempt was made to take possession for three years after the alleged sale took place.

It does not appear to me that the views of the Allied Powers that they would not recognise any transfer to neutral flags during war except by consent can be supported by international law as administered by British Prize Courts. The French, however, take a stronger line against transfers *flagrante bello*. Had they been met at sea by British or Allied warships during the war they would certainly have been captured and brought in for condemnation, as on the facts so far as they are known there is a strong *prima facie* case against the *bona fides* of the alleged transfer.

The relevant articles of the Treaty of Versailles relating to German shipping are contained in Annex 3 to Part VIII (Reparation), under which Germany undertakes to deliver to the Allied and Associated Powers the ships mentioned in article 1. These ships are defined in article 3, and include all ships which fly or may be entitled to fly the German merchant flag, or are owned by any German national, company, or corporation, &c., or are under construction in Germany or in other than Allied or Associated countries for the account of any German national, company, or corporation. If the ships in question were not validly transferred to neutral owners before the termination of the war, *i.e.*, before the exchange of deposit of the ratification of the Treaty of Peace,

they still remained owned by German owners, and therefore come within the terms of the article above mentioned. By article 23 of the armistice of the 11th November, 1918, "no transfers of German merchant shipping of any description to any neutral flag are to take place after the signature of the armistice" (see Oppenheim, "International Law," 2nd ed., vol. 1, sections 255 and 261).

All the facts are not before us, but there seems a strong *prima facie* case for suspicion of the *bona fides* of the transfer, and there is a presumption that merchant ships which have remained in a German port for so long a period during the war, without any attempt being made to get them to a port of the country to which they are alleged to belong, are enemy.

If, however, the Dutch statements can be substantiated, I think it very doubtful whether a British Prize Court would have condemned them if they had put to sea and had been seized during the war. If they are seized now in German ports, the Dutch owner will also probably commence an action *in rem* in the Courts of this or any other country where he may find the vessels.

We are now at peace with Germany, and any attempt to interfere with a merchant ship on the high seas flying the Dutch flag on the ground that she is in fact a German vessel would be treated by Holland as a grave insult to her flag (see "The 'Marianna Flora,'" 11 Wheaton 1).

A. PEARCE HIGGINS.

March 15, 1920.

Opinion of the Law Officers of the Crown.

Assuming that the transfer of these ships was invalid, we think that His Majesty's ships (or those of any of the Allied Powers) would be justified in seizing them if found on the high seas sailing under the Dutch flag, on the ground that they are German vessels and are wrongfully sailing under the Dutch flag in order to evade the provisions of the Armistice Convention and of the Peace Treaty with Germany. The facts are not sufficiently known to found a conclusion as to the validity of the transfers, but we agree with Dr. Pearce Higgins that there is a strong *prima facie* case for suspicion as to the *bona fides* of the transactions, and we think that this suspicion would justify the seizure of the vessels in order that the circumstances might be fully enquired into. In view of the circular telegram, dated the 7th November, 1918, addressed to neutral Governments and of the communications from the Supreme Council addressed to the Netherlands Government in reference to these five ships in particular, we do not see how Holland could justifiably treat this action as a grave insult to her flag. If it turned out that the transfers were valid, we think that the claims of Holland would be adequately met by a proper apology, with restoration of the vessels and compensation for any damage; and if, on the other hand, it turned out that the transfers were invalid, we do not think that Holland would have any grounds of complaint at all.

As to Dr. Pearce Higgins' suggestion that if the vessels were seized the Dutch owners would probably commence an action *in rem*, the answer is, we think, that, the seizure being an act of State, no such action would lie in any British Court.

It seems to us that the whole matter is one of policy rather than law, and that the remedy in case of seizure would be diplomatic and not legal.

GORDON HEWART.
E. M. POLLOCK.

Law Officers' Department,
March 31, 1920.



[T 9193]

No. 1^c.

[Procurator-General.]

[File No. 1252/377/1920.]

[July 8, 1920.]

Case for the Opinion of the Law Officers and Dr. Pearce Higgins.

Claim of
French
Government
to share in
Prizes cap-
tured at
Duala and
Bonaberi,
and in
Cameroon
River.

HEREWITH are sent :—

1. Memorandum setting out the facts and legal questions.
2. Reports of Captain Fuller.
3. Correspondence with French Government.
4. Memorandum by M. Charguéraud.
5. Anglo-French joint capture convention.
6. Chart.

The operations against the German Colony in the Cameroons were in their broad characteristics a joint operation undertaken by the British and French naval and military forces. The first objective was the capture of the town of Duala and the shipping lying in the harbour and the Cameroon River. The British naval force arrived first at the mouth of the Cameroon River, and by far the greater part of the preparatory work was undertaken and completed by them before the arrival of the French warships.

This preparatory work included the sweeping of the river for mines and the clearing of a way through the wreck barrage, and this had been completely accomplished before the arrival of the French naval forces.

The bombardment of Duala took place after the French cruiser "Bruix" had arrived, but without its assistance, as "Bruix's" draught was too great to permit of its passing through the barrage as H.M.S. "Challenger" had done.

The capitulation of the town of Duala, which enabled the ocean-going ships lying above the town, and the vessels and craft in the harbour, to be seized was, however, expressed to be made to the Allied forces, and the French Government claims to be entitled to share in all the ships, vessels and craft captured except, perhaps, the steamship "Kamerun" and the three water lighters which had been captured by the British before the French naval forces arrived.

The question to be decided will apparently ultimately resolve itself into this :—

Did the British naval forces accomplish so much of the work as to exclude the French from making a claim? It is clear from the observations of Captain Fuller, the Senior Naval Officer in the Cameroons, that the feeling upon this subject entertained by the British naval forces concerned is somewhat strong, and some distaste is felt at the prospect of having to divide the result of their labours with the French forces. It may be that there is some ground for this feeling, but the question is, of course, whether the law is such as to entitle the French to claim.

The British claim to the vessels captured before the arrival of the French is no doubt well founded, and is believed not to be seriously disputed.

The claim to the vessels on the wreck barrage can be supported by cogent arguments, and with regard to these vessels the question is, whether when the British ships reached and passed through the wreck barrage they were in effective possession of the wrecks upon the barrage—in other words, whether the effective possession of the site on which a sunken ship is lying amounts to effective possession of the wreck before it is raised.

The British claim to the exclusive right in the large ships and craft captured off and above Duala and Bonaberi seems much more difficult to establish in view of the authorities which bear on the question of joint capture cited in the memorandum herewith.

The memorandum by M. Charguéraud represents the views of the French Government.

If the French Government's claim were considered to be so well founded as to admit, if no possibility of successfully contesting it might be considered diplomatic, to concede it without requiring it to be submitted formally to the Prize Court for adjudication.

The British Government is, however, fully within its rights in insisting on obtaining a legal decision in accordance with the arrangement made with the French Government, to which reference is made hereafter, and the Law Officers and counsel may think that, in view of the feeling in the navy upon this subject, it will be better to leave the matter to the decision of the President of the Prize Court, even, though they may consider that the prospects of successfully establishing the naval view are not very strong.

It may be explained that the general division of prizes captured by joint British and French forces is for the most part regulated by a Convention entered into by the United Kingdom and France on the 9th November, 1914. Article 5, paragraph 1, of the Convention provides for the division of the prizes into as many shares as there were men on board the captured ships, and the shares of each Ally so ascertained is to be paid over to the Government entitled to receive the same. Paragraph 2 provides that if the capture shall have been made by cruisers of one of the Allied nations in the presence and sight of a cruiser of the other, the division, &c., of the proceeds of the prize shall likewise be made in the manner above-mentioned. There is nothing in the Convention which purports to make it retrospective, and, as the captures in the Cameroons had all been effected before the 9th November, 1914—the date of the Convention—it does not apply. It has, however, been agreed in diplomatic correspondence that the question whether in the general principles applicable in such cases the French Government is entitled to share in these craft shall be referred to the President of the Prize Court for decision. The late Sir Samuel Evans, when President, agreed to the adoption of this course.

The French Government has now requested that the matter may be decided, unless the British Government is prepared to admit its right to share.

In the event of the French Government being held to be entitled to share in all or any of the ships, there will be the further question whether, in computing the respective shares of the two Governments, the naval forces present alone should be taken into account, or whether the military forces on board the transports at the mouth of the Cameroon River should also be included. This question is dealt with at some length in the memorandum, as it will be greatly to the advantage of the British navy if the naval forces alone are reckoned. Moreover, legal authority appears to support this view.

The Law Officers and counsel are requested to advise—

Whether the claim of the French Government to share in all or any, and if so which, of the ships and craft should be admitted, or whether the matter should be left to the President of the Prize Court for decision.

*Department of His Majesty's Procurator-General,
Storey's Gate, St. James's Park, S.W.,
June 1920.*

Memorandum on the Claim of the French Government to share in Prizes captured at Duala, Bonaberi and in the Cameroon River.

	INDEX.	Page
1. General		17
2. Questions for decision		19
3. British Government's Case		19
4. French Government's Case		21
5. Shares of British and French Governments		22
6. Summary of Cases		22
7. Conclusions		24

1. General.

In the course of the operations in the Cameroons, a number of valuable ocean-going steamers as well as a large number of tugs, lighters and other floating craft were captured by naval forces and have been condemned by the British Prize Court.

[6498]

D



The French Government put forward a claim to share in the proceeds of many of the foregoing and it was agreed that the French claim should, if necessary, be adjudicated on by the British Prize Court, and to this the late President, Sir Samuel Evans, agreed.

The subject has now been taken up by a French advocate, M. Chaguéraud, on behalf of the French Government, and it becomes necessary to ascertain what are the exact claims of that Government, what are the grounds on which they are based, and what are the arguments upon which the British Government relies in answer to the French claim.

It may be noted in the first place that a convention was entered into between the British and French Governments on the 9th November, 1914, relating to prizes captured during the war, the object of which, as set forth in the preamble, is "to determine the jurisdiction to which the adjudication of joint captures which may be made during the course of the present war by the naval forces of the Allied countries shall belong, or of captures which may be made of merchant-vessels belonging to one of the countries by the cruisers of the other," and "to regulate at the same time the mode of distribution of the proceeds of joint captures." It will be seen that the question whether or not there was a joint capture in fact is left to the decision of the Court having jurisdiction.

The captures in the Cameroons were all effected before the signature of the Anglo-French Convention; and the view that strictly it does not operate retrospectively so as to apply to captures already made has met with general acceptance.

The capitulation of the towns of Duala and Bonaberi to the Allied forces took place on the 27th September, 1914. Under the terms of the capitulation these towns and areas, as therein defined, were surrendered unconditionally to the Allied forces.

The terms of the capitulation are as follows:—

"Nigerian Government yacht 'Ivy,' off Duala.
September 27, 1914.

"(30590/16)

"I, as representative of the German Government, do hereby surrender unconditionally the towns of Duala and Bonaberi to the Allied forces.

"The area surrendered is to include all inhabited portions of Duala and Bonaberi, Bell Town and Bonaberi, and as far east as Beseke and to a point on the Edea Railway 3½ kilom. from Duala. On the Bonaberi side the area surrendered is to extend to a point on the railway 1½ kilom. from the wharf. The arms, ammunition and all Government property are to be surrendered, and all shipping in the harbour and the wharfs of Duala and Bonaberi is also to be handed over to the naval authorities of the French and British Allies. All German and Austrian male subjects at present within the surrendered area to be prisoners of war.

"(Signed) L. BLOCHER.

"Signed in the presence of the undersigned, as representatives of the British and French Allied forces in the Kamerun River.

"(Signed) C. M. DOBELL, Brigadier-General.
"(Signed) A. MAGES."

An Agreement was made between the French General Aymerich, and the British General Dobell regarding the disposal of German maritime property of uncertain or private ownership, under which all ships, boats, &c., derived from private ownership, including all found sunk, which had been placed in the Prize Courts were to be disposed of under those Tribunals; the Allied Governments were to determine whether vessels and craft, private property, which were sunk for the defence of the country, had lost their character of private property; and all vessels retained by the Allied Governments for need of their administrations were to be considered on loan from the Prize Court until a decision was arrived at.

Considerable correspondence took place between the French Ambassador and the Foreign Secretary, and between various Departments concerned, in regard to the claim by France to share as joint captors in the craft captured in the Cameroons, as a result of which it was ultimately agreed that all the craft captured at Duala should be placed in the British Prize Court, reserving to the French Government the right to put forward the claims to which they consider they are entitled under the terms of the

capitulation of Duala to which they consider the terms of the Anglo-French Convention of the 9th November, 1914, should apply.

As above stated, all the craft referred to, including those sunk, have been condemned as prize by the British Prize Court.

M. Chaguéraud, the French Advocate entrusted by the French Government with the negotiating in this country, has put forward a summary of their case; and Captain Fuller, R.N., who was Senior Naval Officer at Duala, has also made a report as regards the operations in which he was engaged. From these documents it appears that the principal questions for decision are as follows:—

Captain
Fuller's
Report of the
31st August,
1916, and
enclosures.

2. Questions for Decision.

1. Whether all or any of the vessels were joint captures so as to entitle the French forces to share.
2. If they were joint captures—
 - (I.) Which of the following vessels or classes of vessels were joint captures—
 - (a.) Steamship "Kamerun" and three water lighters captured before the arrival of the French.
 - (b.) Large vessels and craft found in the river off Duala and Bonaberi.
 - (c.) Vessels and craft found in the river above Duala and craft captured there and in the creeks, &c.
 - (d.) Vessels on the wreck barrage.
 - (II.) In what proportions the vessels are to be divided between the two forces and in particular—
 - (i.) Whether the division is to be based on the relative strengths of the forces engaged.
 - (ii.) If so, whether the naval forces only are to be taken into account, or whether the land forces also are to be reckoned.
 - (iii.) Whether the Anglo-French Joint Capture Convention applies, and if not, whether it is desirable that it should be applied.
 - (iv.) Whether the effect of the capitulation is to give the French a right to 50 per cent. of the ships, or their value, irrespective of the relative strengths of the forces engaged.

3. British Government's Case.

The case for the British Government is presented by Captain Fuller, R.N., in his report of the 31st August, 1916, and enclosures.

His view is that the steamship "Kamerun," the three water lighters cut out at Victoria and the vessels on the wreck barrage were all captured before the French ships arrived; that the large vessels lying above the town were not surrendered under the capitulation, but were seized by British naval forces alone and not as the result of joint operations; but he does not seriously contest that some of the smaller craft were covered by the capitulation. He bases his view upon the following contentions:—

Captain Fuller's original orders were to dispose of any German cruisers near Duala River, and thereafter turn his attention to the thirty-two German merchant-ships reported at Duala.

Accordingly a British naval force, consisting of H.M.S. "Cumberland" and H.M.S. "Dwarf," and some light Nigerian marine craft, arrived off the Cameroons at the beginning of September 1914. On the 8th September they began sweeping operations towards the Cameroon River entrance, and these operations were continued until, by the 10th September, a channel had been swept through the wreck barrage to within about 5 miles of Duala.

On the 10th September, 1914, Captain Fuller received from the Admiralty a telegram dated the 2nd September, 1914, that General Dobell, commanding the operations in the Cameroons, was expected to arrive at Sierra Leone on the 11th September, and he was to co-operate with him. Captain Fuller was instructed to gain intelligence and prepare to assist by attack with light-draught vessels on Duala. He

Report,
paragraphs
4 and 8.



was also directed to discuss the scheme of operations personally with General Dobell and French S.N.O. before taking action.

Report.
Paragraph 9.

Captain Fuller states that prior to the receipt of this telegram it was his intention to send launches up the river to take possession of the large merchant-ships lying above the town, which was a feasible operation after the Joss battery had been dealt with.

On the 11th September the "Dwarf" engaged and silenced the Joss battery, the only guns in the defences at Duala, and on the succeeding nights engagements were fought with armed enemy ships.

Between the 17th and 20th September the main channel to the wreck barrage was surveyed and buoyed, and preparations were made to clear a passage through the wreck barrage for H.M.S. "Challenger." This necessitated diving operations and blowing up of some of the lighters which had been sunk by the Germans.

On the 23rd September, A.M., H.M.S. "Challenger" arrived with six transports of British troops, and during the day lightened ship so as to enable her to pass through the barrage.

On the 25th September, at 8.45 A.M., H.M.S. "Challenger" passed through the wreck barrage and proceeded up river towards Duala.

At 8.55 A.M. on the 25th September, the French warship "Bruix," with five transports containing French troops, arrived and anchored at the Suellaba base. The commander of the "Bruix" was asked whether he proposed to take part in the bombardment at Duala, but the draught which the ship drew prevented her passing through the barrage and he was unable to do so.

At 9.25 A.M. on the 25th September, 1914, H.M.S. "Challenger" sent an ultimatum to Duala and proceeded further up the river.

On the 26th September, 1914, in the morning, H.M.S. "Challenger" commenced the bombardment of Duala, and a British naval and military reconnaissance was made to M'benge. An attempt was made by two British naval vessels to blow up the railway at the Japona Bridge, thereby threatening the enemy's line of retreat.

On the 27th September, 1914, between 12 noon and 12.30 P.M., Duala capitulated, and in the afternoon Duala and Bonaberi, which is immediately opposite to Duala across the river, were occupied by landing parties from H.M.S. "Challenger." The capitulation was signed by the British General Dobell and a French military officer, Colonel Mages, in the Nigerian Government yacht "Ivy."

On the 28th September, in the morning, British troops disembarked at Duala, and at 9.30 A.M. the prize vessels above Bonaberi were taken possession of by H.M.S. "Dwarf." At 5 P.M. on the same afternoon French troops commenced to disembark at Duala. [It is believed that French sailors landed earlier in the day. M. Charguéraud says that the British and French Commanders entered Duala with pickets of thirty sailors at 3 P.M. on the 28th September, 1914 (Memorandum, paragraph 4). It is understood that there were thirty British and thirty French sailors.]

It will be seen from the above statement that the arduous and dangerous work of sweeping the channels, clearing the wreck barrage and dealing with the land defences was entirely carried out by British forces, for the most part before the arrival of the French ships. The way into Duala had in fact been opened; but, on the other hand, it is clear that Captain Fuller received orders from the Admiralty on the 10th September directing him to discuss the scheme of operations with General Dobell and the French Senior Officer before taking action, that is to say, before making the final attack upon the town. (Report of Captain Fuller, enclosure 1, paragraphs 4 and 8.)

Captain Fuller's view at the time seems to have been that the French cruiser "Bruix" was only a convoy for French transports and was not intended to take any active part in the operations. It is the case that she remained at the Suellaba base, 14 miles from Duala and 11 miles from the position of H.M.S. "Challenger" when she was bombarding that town, but it should be noted that the "Bruix" was in sight of H.M.S. "Challenger" and within sound of her guns during the bombardment. Beyond, however, lending two steamboats for guard duty at Suellaba base on one night and three small guns which were mounted in the Nigerian marine tug "Balbus," the French warship did not contribute directly to the capture of Duala or to the subsequent seizure of the ships and craft.

The attitude of the British naval forces towards the French claim is succinctly summed up in enclosure 4 to Captain Fuller's report, paragraph 4:—

"It is this fact—that the British navy having done all the work and run all the risks from mines, shore batteries, armed craft and infernal machines, should have to divide the result of it because the French warship arrived at the last

moment without having any effect upon or helping in any way towards that result—which renders this claim so distasteful to those who took part in the operations."

4. French Government's Case.

The case for the French Government is presented in M. Charguéraud's memorandum as follows:—

The British General Dobell was appointed Commander-in-chief of all the forces operating against the Cameroons, both English and French, military and naval. Accordingly, the French forces took their orders from General Dobell and Captain Fuller. The date of the arrival of the French ships in the Cameroon River was fixed in consultation between the commander of the "Bruix" and the commander of the "Challenger."

M. Charguéraud's Memorandum.
Paragraph 1.
Paragraph 2.

On the 19th September, 1914, the commander of the "Challenger" informed the commander of the "Bruix" that he was starting on the following day with his convoy, arriving on the 23rd September. He expressed the wish that the French ships should not arrive at the same time, and it was accordingly arranged that the French convoy should leave Lagos on the 20th September and arrive at the mouth of the Cameroon River on the 22nd September at 12 noon. This programme was departed from owing to General Dobell ordering the "Bruix" to call at Calabar for victuals.

Paragraph 3.

On the 26th September the "Challenger" shelled Duala. Some English troops tried to disembark, but finding themselves in the marsh were taken off again and it was decided that French troops should disembark on the following day. Two staff officers and fifty bluejackets were to reconnoitre the proposed place of disembarkation. At the time at which this was being done (between 12 and 1 P.M. on the 27th September) Duala capitulated.

Paragraph 4.

The principal point of the French case is that the capitulation was signed by General Dobell and Colonel Mages of the French army, and in terms surrendered unconditionally the towns of Duala and Bonaberi to the Allied forces, and further provided that all shipping in the harbour and the wharfs of Duala and Bonaberi was to be handed over to the naval authorities of the French and British Allies. The French contend that all the shipping and craft passed under the capitulation and not by independent capture by the British naval force, which on the following day took possession of the vessels lying in the harbour and above the town. Their view is that the expression "harbour and wharfs of Duala and Bonaberi" is wide enough to include all those parts of the river in which the big ships and the greater part, if not all, of the craft were found. In the alternative, if the words "harbour and wharfs of Duala and Bonaberi" are not wide enough to include those parts of the river immediately above the town, where some of the big ships were lying, they contend that the capture was the result of a common enterprise and that the fact that the British naval force was detached to seize the ships was a fortuitous circumstance, and that a French naval force might, if General Dobell or Captain Fuller had thought fit, equally well have been detailed to do the work.

Paragraph 5.

Paragraph 5A.

Paragraph 5C.

With regard to the British contention that the French forces were not in sight at the capture, the French do not admit that this is the case or that, if it were the case, it would necessarily disentitle them from sharing if the operations were in fact joint operations. It is true that at the time of the bombardment of Duala to which the capitulation may fairly be ascribed, the "Bruix" was 14 miles away from the town. The "Challenger" was, however, in sight and the sound of the guns could be heard. Technically therefore the French may successfully maintain that the "Bruix" was in sight during the action.

This is rather a legal nicety. The substance however of the matter is that the capitulation was to the joint forces, and was signed by a British and French officer; that French forces were landed at Duala on the following day and the town was then and thereafter in the joint possession of the two Allied Powers.

Alternatively, on this part of the case, the French contend that to entitle them to share as joint captors it was not necessary for the French ship to be actually in sight provided she was taking part in joint operations. In support of this view they rely:—

1. Upon the case of the "Ferd. Laeisz"—a German ship captured during the present war by a French cruiser in co-operation with but out of sight of a British cruiser—in this case the British were held to be entitled to share.

2. Upon the case of operations at Piræus, where a French torpedo-boat was detached from the combined French and British forces operating in the harbour to



seize an enemy ship at a distant port where no British ship was present, and also to cargo seized in warehouses at Piræus after the British force had left. The British have been held to be entitled to share on the ground that the seizures were part of a general scheme of joint operations.

With regard to the particular ships seized at Duala, it is understood that no claim is made by the French to share in the steamship "Kamerun" or the three water-lighters cut out of Victoria which were actually captured before the French arrived.

With regard to ships on the wreck barrage, the French do not admit that there was an effective capture by the British at the moment at which the passage was cleared through the barrage.

The French contend that a captor must be in actual possession of the vessel as distinguished from being in military occupation of the site of the river upon which the vessel lies. In the French view, therefore, these vessels should be treated as having been covered by the capitulation. With regard to the vessels at Bonaberi, they contend that they were either covered by the capitulation or were captured as the result of a common enterprise.

5. Shares of British and French Governments.

If the French successfully maintain the claim in principle, there will be the further question of the proportions in which the prizes are to be divided.

The French contend that the military forces in the transports should be taken into account in ascertaining these proportions.

The importance of this question is that if the proportions are to be calculated on the relative strengths of forces engaged, the British naval personnel was very much larger than the French naval personnel, there being only one French ship as against three big British ships and many small armed craft, and if therefore only naval forces are taken into account the British will secure a larger proportion than the French.

If, however, the military forces in the transports are taken into account the disproportion will be much reduced, and the French share correspondingly increased.

According to English Prize Law, land forces are only entitled to share in the proceeds of naval prize if they can show that there was actual co-operation or preconcerted action on their part (Dordrecht, 2 C. Rob. 68).

In this respect they stand on a less favourable footing than naval forces claiming to share in a joint capture.

The law upon this question is dealt with hereafter, and it is sufficient for the moment to express the view that there would seem to have been no sufficient co-operation or preconcerted action by the land forces at Duala to entitle them to share according to English Prize Law, and that they should not, therefore, be taken into account.

6. Summary of Cases.

The conflicting claims of the two Governments can be conveniently summarised as follows:—

British Government's Claims.

(i.) That the steamship "Kamerun" and three water-lighters were captured before any French ships arrived in Cameroon waters.

(ii.) That the steamship "Lorne," steamship "Anna Woermann" and other vessels on the barrage were captured on the 10th September, 1914, when H.M.S. "Cumberland" and H.M.S. "Dwarf" passed through, before the arrival of the French.

(iii.) That the capitulation did not apply to the nine big ships and other craft, e.g., "Sokoto," "Fullah," "Hausa," &c., because these were in the river above the limits of the harbour.

French Government's Claims.

(i.) As to these vessels no claim will probably be made by the French.

(ii.) As to ships on the barrage, it is not admitted that passing through the site constitutes an effective capture. An actual taking of possession is necessary.

(iii.) That under the capitulation of Duala all shipping in the harbour and wharves of Duala and Bonaberi were handed over to the naval authorities of the French and British Allies, and that some, if not all, of the big ships and many of the small craft were in the harbour area.

(iv.) That these vessels were captured on the following day by British naval parties, and that no French warship was in sight at the time.

(iv.) That any that were outside the strict limits of the harbour area were captured in the course of joint operations in which the French forces, naval and military, were under the command of General Dobell.

That the fact that British naval forces actually took possession after the capitulation was a fortuitous circumstance, and that the French forces, who were also in Duala at the time, might have done so just as well had not General Dobell detailed the British forces for this particular service.

That the British took possession of shipping surrendered under the capitulation as a matter of convenience only and for purposes of safe custody, and not by right of capture.

(v.) That if Captain Fuller had not been expressly ordered to await the arrival of General Dobell and the French force all the enemy vessels *could have* been captured by the British naval forces after the 11th September, 1914, when H.M.S. "Dwarf" dealt with the Joss battery, that is to say, before the arrival of the French warship "Bruix" on the 25th September, 1914.

(v.) It will probably not be admitted that this is relevant consideration, inasmuch as the interest of one service as against another service of an ally must of necessity be subordinated to the requirements of the general scheme of operations, and the fact that the navy has been prevented from making a valuable capture by such considerations does not give it any claim to the prizes when taken. Moreover, the success of a cutting-out expedition in an enemy port must necessarily have been hazardous and uncertain.

(vi.) That "Bruix" did not take part in bombardment of Duala on the 27th September, her draught being too great for her to cross the barrage, and she remained 14 miles by direct line and out of sight of Duala.

vi. That "Bruix" was in sight of "Challenger" during the bombardment of Duala; that the capitulation of Duala and the surrender or capture of the craft was the result of a joint operation which entitled the French to share, even if not in sight. (See the "Ferd. Laeisz.")

(vii.) H.M.S. "Challenger" proceeded to Duala on the 27th September and occupied town and Bonaberi.

(vii.) That the town and harbour were surrendered to combined French and English forces.

(viii.) As the French claim has never been admitted, the question of the division of the ships has never been officially considered. It should be noted that although the surrender of the town was to the *Allied forces*, the shipping was handed over to the *naval authorities*. The French say this was only for convenience.

(viii.) That the proceeds of the prize should be divided between the two Governments in the proportion which the forces bore to one another, and that land forces should be included in computing the personnel, because Duala surrendered to the Allied forces, which included both naval and military, thereby enabling the ships to be captured. The capitulation was signed by the Allied military officers, General Dobell and Colonel Mages, and not by the naval officers.

The capture of Duala was the result of a purely naval operation, all land forces being at the time at Suellaba base, 14 miles away; and as the army did not contribute, it should not be taken into account. (Dordrecht, 2 C. Rob. 65). General Dobell was in supreme command of the military and naval forces, and the fact that he, and not Captain Fuller, signed the capitulation does not in any way show that the surrender of Duala was not the result of a purely naval operation and of the threat of naval bombardment.

In the alternative that as the vessels passed under the capitulation, they should be divided equally between the French and British Governments irrespective of the relative strengths of the forces.



7. Conclusions.

It is difficult to see how, if an impartial view is taken of these conflicting claims, it is possible to resist the French claim in so far as it is based on the contention that the capitulation of Duala and consequent surrender or seizure of the ships was the result of a joint operation.

It is clear from Captain Fuller's report that the actual capture of the ships at Duala was not effected until after the capitulation on the 27th September, although he considers that he could have seized the German merchant-ships at any time after the "Dwarf" had passed through the wreck barrage on the river and silenced the Joss battery on the 11th September, 1914. Operations were, however, suspended until after the arrival of General Dobell on the 23rd September, 1914, and of the French vessel "Bruix" on the 25th September, 1914. The presence of the French ship with the British squadron was capable of being known to the Germans, because Captain Fuller says, in addition to native spies, they were able, before the surrender of Duala, to keep themselves informed of the movements of vessels at the mouth of the river by a lookout posted at the top of the wireless mast. In the case of the "Island of Trinidad" (5 C. Rob. 92) the question before the Court was as to the right to share in the capture of that island by several ships which had been sent to form part of the besieging squadron. The ships in question were not present at the first overture for the surrender, but arrived before the final agreement and actual signing of the capitulation, though they do not appear to have taken any part in the fighting. At the time the terms of capitulation were agreed upon the ships were in sight, and were held entitled to participate. The "Bruix," though not taking part in the bombardment, did patrol duty with two steamboats, and lent three guns to the "Balbus," which, however, were not used. Her presence was, on Captain Fuller's evidence, probably known to the Germans, and she took some part, though very slight, in the operations. The fact that the "Bruix" could not get in close enough to bombard is not enough to exclude her from sharing, as she was engaged on a joint operation with the British vessel. In the "Harmonie" (3 C. Rob. 318), the smaller ships engaged in a blockade were sent close in because they drew less water. The larger vessels of the outer line, though possibly out of sight on that account, were yet all employed on one common indistinguishable service, the enforcement of the blockade, and were allowed to share in the joint capture made by one of the smaller vessels.

From these authorities it appears to result that the vessels captured at Duala after the arrival of the French warship "Bruix" on the 25th September were a joint capture, though the credit for the capture and the capitulation of Duala were due very largely, if not wholly, to the ships under Captain Fuller's command. The arrival of the French warship "Surprise" at Libreville, 180 miles distant, was not part of the expedition against Duala, and was not of sufficiently material assistance in the capture of Duala to entitle her to share as joint captor: she had been sent off on a separate mission (see "The Island of Trinidad," 5 C. Rob., at p. 96).

With regard to the several classes of vessels captured, it is probable that no claim will be made to the vessels admittedly captured before the arrival of the French ships, i.e., steamship "Kamerun" and three water-lighters cut out at Victoria.

The ships and craft found in harbour and above the town are covered by the conclusion reached above, and the French are entitled to share in these.

The only remaining category are the ships on the wreck barrage. With regard to these there is a difference of opinion as to whether there was an effective capture in law when H.M.S. "Dwarf" passed through the barrage on the 11th September, that is to say, before the French ship arrived.

The British claim that there was, because they were in command of the site.

Captain Fuller states that H.M.S. "Dwarf" passed through the barrage on the 10th September, 1914, and on the following day the vessels on the barrage were boarded and examined by craft belonging to the squadron to ascertain if anyone was on board. The vessels were found to be deserted. Although they were sunk the living spaces on the upper deck of some of the craft were clear of high water, and were used as necessary in connection with the work of clearing a passage through the barrage.

The French cruiser "Bruix" did not arrive in the Cameroons waters until the 25th September, 1914.

The French claim is that there must be some actual taking possession of the vessels *cum animo capiendi*. The English Prize Court has had to consider an analogous

question as to the moment of capture on two occasions, viz., in the "Lokken" (34 T.L.R. 594) and the "Pellworm" and three other German ships. ("Lloyd's List," 31st July, 1919.) In the former case Sir Samuel Evans treated the material time as the moment when the British warship started the operation of closing on the enemy and ordering her to stop, and the stopping of her engines; in the "Pellworm," Lord Sterndale held that the act of capture was not complete until the boarding party took possession. The older cases are not conclusive, nor is there a complete unanimity amongst text-writers, but if a conclusion may be drawn from this evidence it appears to be necessary for some effective control to be exercised by the captor to complete the capture of the prize ("The Edward and Mary," 3 C. Rob. 306; "The Resolution," 6 C. Rob. 21; "The Hercules," 2 Dod. at p. 363; "The Grotius," 9 Cranch 370; Hall, "International Law," 7th Ed., p. 484; Phillimore, iii, S. 318; H. Taylor, "International Law," p. 570).

There would seem, however, to be a strong argumentative case to be made in support of the contention that the vessel came under effective control as soon as the British ships were in command of the site of the barrage. Those which were only partly submerged could have been boarded, and all were under the guns of the British ships.

Assuming that the question of joint capture is decided in favour of the French there is the further question as to the proportion in which the prizes are to be divided, and whether the military forces operating are entitled to share.

It is admitted by the French that the Anglo-French Convention is not retrospective, and does not apply to surrender to naval and military forces, but it is contended that it would be equitable for it so to be applied, and for the net proceeds of the prizes or the prizes themselves to be divided into as many shares as there were men, naval and military, associated for the common enterprise. To this contention it is objected by the British that the capture of Duala was a purely naval operation, all the military forces being some 14 miles away at the time of the capitulation. To this it is replied by the French that all forces, naval and military, were under the command of General Dobell and all co-operating, that all were associated for a common purpose, producing "encouragement to the friend and intimidation to the enemy." (L'Etoile, 2 Dod. at p. 110); that being in sight was not necessary ("The Forsigheld," 3 C. Rob. 311; "Guillaume Tell," Edwards 6; "Empress," 1 Dods., 368.) The cases just cited, however, are all cases of joint capture by ships, and the principles applicable to ships engaged in a common expedition or operation have not been applied to joint operations by naval and military forces. The principles applicable to the latter are those laid down in "The Dordrecht" (2 C. Rob. at p. 65). "The services which I should require must be such as were directly or materially influencing the capture, so that the capture could not have been made without such assistance, or, at least, *not certainly*, and without great hazard."

Admiral Sir Henry Jackson points out that the assistance of the land forces must be taken into account in estimating the operations at Duala from the military point of view. He says that the surrender at Duala without severe fighting, and consequently with no considerable losses, was the result of careful naval preparations by the British and joint operations carried out by suitable forces of the Allies. By English Prize Law, however, in a claim on the part of the army to share in a capture made by the fleet, the *onus probandi* lies on them to show that there was actual co-operation and assistance on their part, but where there is preconcerted action it is not of so much consequence that the services should be material, because then each party performs the service that was previously assigned to him, and whether that is important or not, it is not so material ("The Dordrecht," 2 C. Rob., 65). Consequently, although the military aspect of the operations must be borne in mind in considering the claims of the French to equal participation in the capture of the prizes at Duala, it does not seem that from a strictly legal point of view the land forces took any direct part in the operations leading to the capitulation and the capture of the ships such as would entitle them to share in the prizes.

The opinion of Admiral Sir Henry Jackson, a most distinguished strategist, cited above, is of great importance, and when, as in this case, the question is one between Allies, and not between British naval and military forces, it may possibly be deemed to be of greater value than a strict application of the legal decisions in former cases in British Prize Courts on disputes between purely British forces, but a concession made on such grounds alone would be one of policy and not of law.

In this connection it may be mentioned that the Naval Prize Tribunal has already held, although without formal argument, that the British military forces engaged in



the Cameroons expedition are not entitled to share in these prizes, and, if this decision be correct, it would seem logically to follow that the French military forces cannot be entitled to share either.

The true conclusion of this aspect of the matter seems therefore to be that all the ships and craft, other than those actually captured before the arrival of the French ship "Bruix" (those on the wreck barrage being doubtful), should be divided in proportion to the relative strengths of the British and French naval forces in the Cameroon River at 12 noon on the 27th September, 1914, the time and day of the capitulation of Duala.

Department of His Majesty's Procurator-General,
Storey's Gate, St. James's Park, S.W. 1,
March 10, 1920.

Opinion of the Law Officers of the Crown and Dr. A. Pearce Higgins.

The claims fall under four classes: (1) those captured before the arrival of the French ships, (2) those captured on the barrage, (3) and (4) those captured in Duala and above it.

(1) We are of opinion that all the enemy vessels captured before the arrival of the "Bruix" were British naval captures, and that (2) the British naval forces took effective possession on the enemy vessels sunk on the barrage before the arrival of the French cruiser.

(3) and (4). We are of opinion that the vessels and craft taken in the river off Duala and Bonaberi, as well as those captured above Duala, after the capitulation of Duala, were captured by the British and French naval forces jointly.

We think, therefore, that an offer may well be made to France to divide with her all vessels, except the craft captured before the arrival of the "Bruix," in proportion to the relative strengths of the British and French naval forces at the time of the capitulation, i.e., the 27th September, 1914, and that if this offer be not accepted, the whole matter should be left in the hands of the President of the Prize Court.

GORDON HEWART.
ERNEST M. POLLOCK.
A. PEARCE HIGGINS.

Law Officers' Department,
July 8, 1920.

[T 849]

No. 1st.

[Procurator-General.]

[File 13/1921.]

[December 31, 1920.]

Case for the Opinion of the Law Officers and Dr. Pearce Higgins.

Herewith is sent: Print of the Judgment of the Prize Court in the case of the steamship "Marie Leonhardt."

Detained
Austrian
Ships:
Applica-
bility of
Sixth
Hague
Convention.

UPON the outbreak of war between this country and Austria on the 12th August 1914, there were in the ports of the United Kingdom and the Dominions a number of Austrian and Hungarian ships.

It will be remembered that in the case of Germany, Hague Convention No. 6 according days of grace was not brought into force, but in the case of Austria matters took a different course.

On the 4th August, 1914, immediately after the outbreak of war with Germany, a Proclamation, which is to be found in the "Manual of Emergency Legislation," vol. I, p. 138, was issued stating that, in the event of one of His Majesty's Principal Secretaries of State being satisfied by information reaching him not later than midnight on Friday, the 7th August, the German Government would accord to British ships in their ports treatment not less favourable than that provided by Articles 3 to 7 of that Order, then Articles 3 to 8 of that Order were to come into

force. Articles 3 to 8 in question permitted the departure, up till a date specified, of enemy merchant ships which—

1. At the outbreak of war were in any port to which the Order applied; or
2. Cleared from their last port before the declaration of war and after the outbreak of hostilities entered a port to which the Order applied without knowledge of the war.

Paragraph 6 of the Order provides as follows:—

"The privileges accorded by Articles 3 and 4 are not to extend to cable ships or other seagoing ships designed to carry oil fuel, or to ships whose tonnage exceeds 5,000 tons gross or whose speed was 14 knots or over . . . Such vessels will remain liable on adjudication by the Prize Court to detention during the war or to requisition in accordance, in either case, with the Convention aforesaid."

When Austria-Hungary came into the war a further Proclamation was issued, which will be found in the same volume of the "Manual of Emergency Legislation" at page 97, which, by paragraph 3, applied the Proclamation of the 4th August, 1914, with the necessary alterations in names and dates, to Austro-Hungarian ships and cargoes.

Austria agreed within the time limited by the Proclamation to accord reciprocity to British ships in their ports, and, so far as Austria-Hungary was concerned, the Proclamation of the 4th August was accordingly brought into force. (See "Times" "Documentary History of the War," vol. III, pp. 89 and 90.) In pursuance of this arrangement days of grace were accorded to Austro-Hungarian ships, and the great majority of them left the British ports in which they found themselves and proceeded under passes to neutral ports.

Seven vessels were, however, unable to leave.

In the United Kingdom there were three—

1. Steamship "Tergeste," 4,272 tons gross. Owners: Premuda & Co., Trieste. Port of Registry: Trieste.
2. Steamship "Sabbia," 2,752 tons gross. Owners: Navigazione Libera Triestina Società in Azione, Trieste. Port of Registry: Trieste.
3. Steamship "Karpas," 5,056 tons. Owners: Hungarian Levant Steamship Company, Budapest. Port of Registry: Fiume.

In overseas ports there were four—

4. Steamship "Erzherzog Franz Ferdinand," 6,105 tons. Owners: Lloyd-Austriaco. Port of Registry: Trieste.
5. Steamship "Perla," 5,355 tons. Owners: Navigazione Libera Triestina Società in Azione. Port of Registry: Trieste.
6. Steamship "Turul," 3,530 tons. Owners: Hungarian Levant Steamship Company. Port of Registry: Fiume.
7. Steamship "Koerber," 5,440 tons. Owners: Lloyd-Austriaco. Port of Registry: Trieste.

The steamships "Tergeste," "Sabbia" and "Turul," being under 5,000 tons, were entitled to depart, but were prevented from leaving by circumstances beyond their control. The steamships "Tergeste" and "Sabbia" were under arrest in civil proceedings, and the steamship "Turul" was under arrest as a prize to another port. The steamships "Karpas," "Erzherzog Franz Ferdinand," "Perla" and "Koerber" were of a tonnage exceeding 5,000 tons, and were not permitted to leave, in accordance with paragraph 6 of the Proclamation.

The position of Austrian ships will be seen, therefore, to differ from that of German ships, inasmuch as the provisions of The Hague Convention were not applied in the case of German ships, but were, to a limited extent, applied in the case of Austrian ships.

It is important here to observe that the Proclamation of the 4th August, 1914, does not in terms say that Hague Convention No. 6 shall apply, subject to the exceptions specified in paragraph 6.

In form it is a substantive agreement between the two countries that certain specified classes of vessels, subject to the exceptions in paragraph 6, shall be allowed to depart within a fixed time after complying with certain requirements as to discharging cargo, &c.

[6498]

E 2



Nothing is said in the Proclamation with regard to vessels falling within the privileged classes, which, owing to circumstances beyond their control, may have been unable to leave within the period contemplated.

Article 2 of Hague Convention No. 6 provides expressly that such vessels may not be confiscated, but may merely be detained, and had there been an application in terms of the Convention (subject to the exceptions in paragraph 6 of the Proclamation) it would have followed that these vessels would have been covered by this Article.

The effect, however, of having made a substantive agreement by Proclamation without applying the Convention or incorporating a provision analogous to Article 2 thereof, is apparently that the British Government undertook to permit the departure of Austrian ships which were able to go, but that vessels which were unable to avail themselves of the right to go and remained in British ports did not derive immunity from any other paragraph of the Proclamation, and are in the position of any other unprotected enemy ships in our ports, and liable to condemnation under the Rule in *Lindo v. Rodney* (steamship "Marie Leonhardt").

It may well be that the omission to make any provision in the Proclamation for the case of these ships was due to an oversight; but the fact remains that there is no such provision in the Proclamation, and the question for decision is whether or not the legal consequence of the omission is to render the three ships under 5,000 tons liable to condemnation.

In the letter from the Foreign Office of the 12th November, it is suggested that it might be argued that the Convention became applicable to vessels which were unable to leave during the days of grace. If the effect of the Proclamation is to bring the whole Convention into force, there may be some grounds for the argument; but there do not appear to be in the Proclamation any words which have this effect.

It may perhaps be added that if in construing this Order in Council the precedent of the Order in Council issued at the beginning of the Crimean war is followed, reference should be made to Dr. Lushington's rule, which was laid down in the "Fenix" (2 E.P.C. 238) and the "Argo" (*ibid.* 294). In the former case he said: "I am perfectly free to confess that I think it to be quite clear that whenever the Government of Great Britain or of any other country, by a public document in the nature of an Order in Council, relaxes the severity of belligerent rights, it ought to be taken in favour of the party for whom it is intended, and that a liberal construction should be put upon it." In the "Argo," after referring to his judgment in the "Fenix," he added: "I am of opinion that all relaxation of belligerent rights emanating from the Government of this country, and declared in authentic documents, should receive as liberal a construction as the terms of those documents will admit of; but in so doing I must be forewarned and instructed of the words which are used, and abstain from giving an interpretation which cannot be borne out by the instrument to be construed."

The Order in Council of the 29th March, 1854, allowed a Russian vessel which had sailed prior to the date of the Order from any foreign port bound to a port in His Majesty's Dominions to enter such port and to discharge her cargo, and "afterwards forthwith to depart without molestation" (2 E.P.C., p. 239, note). In the "Odessa" (*ibid.*, p. 469), Dr. Lushington said: "I think the word 'forthwith' ought not to be pressed with too much severity against a vessel so circumstanced. I think so for this reason: circumstances might intervene which would render it difficult, perhaps impossible, to discharge the cargo with great expedition, or to leave the port. She might have had to make repairs, or something of the kind."

These decisions do not, however, seem to go beyond laying down the rule that where use is made of an ambiguous word such as "forthwith," a liberal interpretation should be put upon it. They do not go so far as to say that concessions should be extended to classes of ships which either by design or accident have been excluded or omitted from the Proclamation. Such an interpretation of the powers of the Court would be to invest the Court with powers and functions which can be exercised by the executive authority alone.

Reference should, however, be made to the judgment of the Privy Council in the case of the "Turul," reported in 3 B and C. P.C., p. 356, because there are passages in it which suggest that the Privy Council acted on the view that the effect of the Proclamation was to bring Article 2 of the Convention into force, *e.g.*, at p. 359:—

"Now, the question is whether this ship, by reason of circumstances beyond its control, was unable to leave the enemy port within the time limited by the previous Article within the terms of Article 2 of the Convention. If that was so, then she could not be confiscated and the Order made by the Court below was right."

The facts of the "Turul" were special, because she was prevented from leaving by the action of the officers of the Crown itself. As they were acting under a misapprehension, it would have been wrong to have condemned the ship in consequence, and it may well be that in the case of this ship a decree of condemnation cannot now be asked for.

There is, however, a further passage in the same judgment, p. 360, which assists the Crown against the other two vessels under 5,000 tons:—

"It is to be remembered that a Proclamation of this kind may operate in favour of the belligerent who publishes it, since it may be used to diminish by limiting them the advantages which the Convention was intended to secure to the enemy ship, for by its publication the belligerent Power . . . determines also some, at any rate, of the terms upon which the exercise of the privilege is to be enjoyed."

This, it is submitted, was done in the case of the "P. Tergeste" and "Sabbia" by the omission of any reference in the Proclamation to vessels prevented from leaving by circumstances beyond their control.

The four ships exceeding 5,000 tons appear to be in a more favourable position, inasmuch as they are dealt with by paragraph 6 of the Proclamation, which provides that:—

"Such vessels (*i.e.*, vessels exceeding 5,000 tons, &c.) will remain liable on adjudication by the Prize Court to detention during the period of the war, or to requisition in accordance in either case with the Convention aforesaid."

The last words must presumably be taken to refer to Article 2 of the Convention, which provides that vessels which were not allowed to leave the enemy port may not be confiscated, but may merely be detained on condition of being restored after the war.

If it be the correct view that paragraph 6 of the Proclamation incorporates by reference Article 2 of the Convention in so far as relates to ships exceeding 5,000 tons, it would seem that these vessels are protected from condemnation if the Proclamation is, in the events which have happened, binding on the Crown.

It will be remembered that in the case of the steamship "Marie Leonhardt," a detained German ship, the Crown asked for condemnation on the ground that Hague Convention No. 6 did not apply, or, in the alternative, that, if it did apply, Germany had disentitled herself from claiming the benefit of it by reason of the breaches of the laws of war committed by her naval and military forces. The judgment of the President proceeded solely upon the ground that The Hague Convention had not been put into force by the British and German Governments and the vessels were, therefore, in the same position as enemy vessels in the days when Lord Mansfield decided the case of *Lindo v. Rodney*:—

"Upon the declaration of war or hostilities all the ships of the enemy are detained in our ports to be confiscated as the property of the enemy if no reciprocal agreement is made."

It was not necessary therefore for the President to decide the second point, and the question whether, if The Hague Convention had been applied, the vessels could still be condemned as a measure of reprisal was not determined.

The same question arises for consideration in the case of Austrian and Hungarian vessels, partly by reason of breaches of the laws of war committed by the Austro-Hungarian naval and military forces and partly by reason of their participation or acquiescence in the grave violations of the laws of war committed by Germany.

The evidence with regard to Austria's active participation in major outrages is not voluminous. With regard to submarine warfare, Count Czernin, in his book "In the World War," p. 334, quotes a speech which he delivered on the 11th December, 1918, in the course of which he explained Austria's position upon this subject. If his account is correct, it would appear that Austria acquiesced in the submarine campaign after a considerable struggle against Germany, and because they were unable to act otherwise. In the note addressed by the Austrian Government to the American Government on the 5th March, 1917, it is stated that throughout the entire course of the war Austro-Hungarian warships had not destroyed a single merchant ship without previous warning, though this may have been of a general character (p. 283).



It does not appear to be possible to prove any specific cases in which Austrian submarines sank merchant vessels without warning, and the foundation of the charges under this head would be limited to the assistance rendered to Germany in carrying on their campaign by putting the Austrian ports in the Adriatic at the disposal of German submarines as bases.

The Admiralty state that, beyond rendering this assistance, no specific cases of grave violation of the laws of war at sea are recorded against Austria.

Detailed enquiry has not at present been made as to the extent to which Austrian forces were guilty of breaches of the laws of war on land, and enquiry would probably have to be made of the Italian and Serbian Governments if it were decided to endeavour to obtain condemnation of Austrian ships on such grounds.

It may, however, be observed that the report of the Committee of Enquiry into Breaches of the Laws of War refers to several cases in which the laws of war on land were violated by Austria.

The Treaty of Peace with Austria contains in Annex III to Part VIII, reparations, p. 47, similar provisions to those contained in the Treaty with Germany.

The Austrian Government cede to the Allied Governments the property in all merchant ships and fishing boats belonging to nationals of the former Austrian Empire. It would appear, therefore, that even if certain of the detained Austrian ships are immune from condemnation in the Prize Court, they still fall to be dealt with in accordance with the above-mentioned paragraph of the Treaty of Peace.

The advice of the Law Officers and Counsel is desired upon a further question of an analogous character.

The Austrian steamship "Polnay" was in a British port at the outbreak of war. She was given days of grace and allowed to depart, but she had on board cargo which she was required to discharge before leaving. As the owners did not come forward to claim the cargo it was sold, and, as a matter of convenience, the proceeds were handed over to the Admiralty Marshal and lodged in the Prize Court. Proceedings were not instituted for the condemnation of these proceeds because it was considered at the time that they might prove to be Austrian owners and therefore protected by Article 4 of Hague Convention No. 6, which reads as follows:—

"ARTICLE 4.

"Enemy cargo on board the vessels referred to in Articles 1 and 2 is likewise liable to be detained and restored after the war without indemnity, or to be requisitioned on payment of indemnity with the ship or separately. The same applies in the case of cargo on board the vessels referred to in Article 3."

It has now been ascertained that part of the cargo so discharged and dealt with is German-owned.

As the Law Officers and Counsel are aware, the Sixth Hague Convention was not brought into force between Great Britain and Germany, and detained German ships have recently been condemned. Had the cargo referred to above been in a German ship it is clear that it would have been liable to condemnation.

It is submitted that German cargo in an Austrian ship, which was given days of grace, is liable to condemnation for the same reasons a detained German ship is so liable. The fact that it was in a ship which was given days of grace is immaterial, inasmuch as the Sixth Hague Convention was not applied between Great Britain and Germany and German cargo wherever found in a British port is therefore liable to condemnation in accordance with the principles laid down in the case of *Lindo v. Rodney*, cited in the "*Marie Leonhardt*."

The Law Officers are requested to advise if this is a correct construction of the Convention and whether proceedings should now be instituted for the condemnation of the proceeds of sale of the German-owned part of the cargo of this vessel. It is not anticipated that any serious difficulty will arise in proving the seizure, more particularly in view of the fact that the proceeds of sale of the cargo were lodged in the custody of the Marshal of the Prize Court.

The Law Officers and Counsel are requested to advise—

1. Whether by reason of the omission from the Proclamation of the 4th August, 1914, of any reference to vessels which have been unable to leave owing to circumstances beyond their control, the Austro-Hungarian vessels "Sabbia" and "Tergesteia," being under 5,000 tons, are liable to condemnation.

2. Whether for the same reason the steamship "Turul" is liable to condemnation.
3. Whether Austro-Hungarian vessels exceeding 5,000 tons are liable to condemnation.
4. Whether Austro-Hungarian vessels are liable to condemnation as a measure of reprisal by reason of breaches of the laws of war by Austria-Hungary.
5. If any detained Austrian ships are not liable to condemnation, they fall to be dealt with under the Treaty of Peace with Austria.
6. As to the course to be pursued with regard to these vessels.
7. Whether German-owned cargo discharged from an Austrian ship, to which days of grace were allowed, is liable to condemnation.
8. Generally.

Opinion of the Law Officers of the Crown and Professor A. Pearce Higgins.

1, 2 and 3. In our opinion the Proclamation ("Pulling's Manual," p. 97) applying the Order in Council (*ibid.*, p. 138) must be construed as incorporating the provisions of the recited Hague Convention No. 6, except so far as the provisions of that Convention are superseded by the provisions of the Order in Council. We, therefore, subject to the point raised in question 4, answer the first three questions in the negative.

4. We doubt whether the evidence in the case of Austria is strong enough to justify the Crown in asking the Court to say that she is to be treated as an "outlaw," and not entitled to the benefits afforded by the Convention and Proclamation, and, on the whole, we answer this question in the negative also.

5. Yes, we think so.

6. The vessels should be treated as subject to The Hague Convention and the provisions of the Peace Treaty.

7. Yes.

GORDON HEWART.
ERNEST M. POLLOCK.
A. PEARCE HIGGINS (except as regards 7).

*Law Officers' Department,
December 31, 1920.*

AUSTRIA.

[E 1028]

No. 1^E.

[Board of Trade.]

[File 1027/1921]

[July 8, 1920.]

Opinion of the Law Officers of the Crown and Mr. J. Austen-Cartmell.

(Secret.)

WE agree with the view of Mr. Austen-Cartmell. Paragraph 14 of the Annex to Section IV (p. 78 of the treaty) provides that, in the settlement of matters provided for in article 249, in respect of which Section III is not adopted, the provisions of Section III respecting the rate of exchange shall apply unless a notification is made as provided to the contrary. Article 249 (b) (p. 75) provides for the proceeds of the property, &c., and cash assets of nationals of the former Austrian Empire being applied in payment of the debts defined by paragraph 4 of the Annex; and paragraph 4 of the Annex (p. 77) provides for the charging of such property, &c., and assets, with payment of debts owing by Austrian nationals. It follows, in our opinion, that if the debts are charged on the assets in pursuance of this provision, the provisions of Section III as to the rate of exchange apply to such debts, although Section III is not adopted.

This view is supported by the first paragraph of clause 14 of the Annex to Section IV (p. 78), providing that the provisions of article 249 and the Annex apply to debts, Section III regulating only the method of payment.

GORDON HEWART.
ERNEST M. POLLOCK.
J. AUSTEN-CARTMELL.

*Law Officers' Department,
July 8, 1920.*

Austrian
Treaty of
Peace:
Rate of
exchange
for payment
of debts.



ANNEX.

Opinion of Mr. Austen-Cartmell.

I AM upon the whole of opinion that if the Clearing Office scheme is not adopted, the provisions contained in article 248 (d) (currency pre-war rate of exchange, &c.), will apply to such debts as would, if the Clearing Office scheme were adopted, be dealt with by the Clearing Office under Section III, that is, debts due under (1) or (2) of article 248 from Austrian nationals who are, on the coming into force of the Treaty, resident within Austrian territory to British nationals who are at the same date resident within British territory. By Austrian nationals and Austrian territory I mean of course, subject to the exceptions indicated in the Treaty, nationals and territory of the former Austrian Empire.

My reasons for the above opinion are shortly as follows:—

By paragraph 14 of the Annex to Section IV it is in effect provided that, if the Clearing Office scheme is not adopted, the provisions of article 248 (d) are (unless excluded by notice as mentioned in paragraph 14 of the Annex to Section IV) to apply in the settlement of matters provided for in article 249. Now one of the matters which is (if the Clearing Office scheme is not adopted) provided for in article 249 is the application, if thought fit, of the property mentioned in (h) (2) thereof "in payment of the claims and debts defined by this article or paragraph 4 of the Annex hereto." I do not find in article 249 itself any reference to debts (as distinguished from claims) except so far as may be contained in the somewhat ambiguous sentence "this property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto" in paragraph (c) of the article. Paragraph 4 of the Annex does, however, refer to debts, power being given to an Allied or Associated State to create the charge therein mentioned for debts owing to the nationals of such State by Austrian nationals. In a case in which the Clearing Office scheme is adopted these debts are in my opinion, speaking generally, limited to debts which can be dealt with by the Clearing Office (see the Law Officers' opinion of April last upon the Treaty of Peace with Germany); and I think that, in a case in which the Clearing Office scheme is not adopted, the same limitation must be put.

I may possibly be permitted to add that, if the Clearing Office scheme is not adopted, there will, in my opinion, be great difficulties in the way of carrying out the provisions of Section IV of the Treaty.

J. AUSTEN-CARTMELL.

Lincoln's Inn, June 23, 1920.

CHINA.

No. 1.

[176191]

(File 143337/1919.)

[January 31, 1920.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, January 16, 1920.

China (Kashgar) Order in Council, 1920.

I HAVE the honour, by direction of Earl Curzon of Kedleston, to inform you that it is deemed desirable to issue an amending Order in Council providing for the application of British-Indian instead of English law to British subjects within the jurisdiction of his Majesty's consul-general at Kashgar.

A draft of the proposed Order in Council, which has been prepared in this Department in consultation with the India Office, is transmitted herewith, together with a copy of a letter, with enclosures, addressed by the India Office to this Department.

The considerations which render advisable the issue of this Order are set forth in a memorandum, copy of which is enclosed herewith, drawn up by His Majesty's consul-general at Kashgar in 1915. They are based upon the fact that by far the greater number of the persons under the jurisdiction of His Majesty's consul-general are of Asiatic descent and have much in common with India; that His Majesty's consuls-general at Kashgar have hitherto been nominated from among officials in the service of the Government of India, and not from among His Majesty's consular officers in China; and that, in view of the relative proximity of Kashgar to India, it is desirable that the Consular Court should be subordinated to the Indian judicial system rather than to the Supreme Court at Shanghai.

The draft Order follows generally the lines of similar Orders providing for the application of British-Indian law, such as the "Persian Coast and Islands" and the "Bahrein" Orders in Council, but omitting all the provisions relating to maritime jurisdiction. Certain provisions, such as articles 22 to 24, 27, and 46, which are necessitated by the fact that the limits of the Order are within China, have been taken from "The China Order in Council, 1904," and various Orders amending it. The

Order will have the effect of having in force in Kashgar the following Orders in Council:—

- "The China (Consular and Marriage Fees) Order in Council, 1906."
- "The China (Consular Fees) Order in Council, 1909."
- "The Foreign Jurisdiction (Neutrality) Order in Council, 1904."
- "The Foreign Jurisdiction (Probates) Order in Council, 1908."

I am therefore to request that you will take the draft Order into your consideration and that you will favour Lord Curzon with your opinion whether its terms are fit and proper to be submitted to the King in Council for His Majesty's approval.

I have, &c.

J. A. C. TILLEY.

List of Papers.

- (A).—Draft "China (Kashgar) Order in Council, 1920."
- (B).—India Office to Foreign Office, October 18, 1919.
- (C).—Memorandum by His Majesty's Consul-General, Kashgar, September 14, 1915.

Report.

We are of opinion that the terms of the draft Order,* which we have initialled, are fit and proper to be submitted to the King in Council for His Majesty's approval.

GORDON HEWART.
ERNEST M. POLLOCK.*Law Officers' Department,
January 31, 1920.*

[F 917]

No. 2.

[File 917/1920]

[June 3, 1920.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, May 26, 1920.

I AM directed by Earl Curzon of Kedleston to transmit to you herewith drafts of two Orders in Council, to be entitled respectively "The China Order in Council, 1920," and "The China (Consular and Marriage Fees) Order in Council, 1920," which have been prepared with the object of empowering the Judge of His Majesty's Supreme Court in China to prescribe such fees as he may deem expedient in respect of proceedings taken under "The China and Corea Order in Council, 1904," and of legalising the collection of fees under that Order and under "The China (Consular and Marriage Fees) Order in Council, 1906," at the rate of 10 dollars to the pound sterling.

I am to request that you will take the draft Orders in Council into your consideration, and that you will favour Lord Curzon with your opinion whether its terms are fit and proper to be submitted to the King in Council for His Majesty's approval.

I have, &c.

V. WELLESLEY.

Report.

In our opinion, the drafts of the two Orders in Council,† as initialled by us, are fit and proper for submission to the King in Council for His Majesty's approval.

GORDON HEWART.
ERNEST M. POLLOCK.*Law Officers' Department,
June 3, 1920.*

* The text of the Order in Council is contained in the "London Gazette" of March 12, 1920 (Confidential No. 11512*).

† The text of the Orders in Council is contained in the "London Gazette" of June 29, 1920 (Confidential Nos. 11551* and 11552* respectively).



1920

34

CHINA.

[A 4795]

No. 3.

[File No. 39/1920.]

[July 14, 1920.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 8, 1920.

"China (Amendment) Order in Council, 1920."

I HAVE the honour, by direction of Earl Curzon of Kedleston, to transmit to you the accompanying draft of "The China (Amendment) Order in Council, 1920," which has been drawn up with a view to making provision for the taking of precautionary measures against, and, if necessary, the deportation of, seditious British subjects in China.

The Order amends "The China Order in Council, 1904," and repeals article 2 (1) of "The China and Corea (Amendment) Order in Council, 1909," and the whole of "The China (War Powers) Order in Council, 1917," subject to certain reservations specified in article 5. Copies of these enactments are enclosed for convenience of reference.

Article 6 is similar in form to article 170 (1) of the principal Order of 1904, and has been inserted in order to determine the date and manner of the coming into force of the (amended) Order.

A copy of the correspondence relative to the drawing up of this draft Order is enclosed herein, which shows that its terms, as submitted to you, have been concurred in by the India Office, His Majesty's Representative at Peking and His Majesty's Acting Judge at Shanghai.

I have the honour to request that you will take this draft into your consideration and favour Lord Curzon with your opinion whether its terms are fit and proper for submission to the King in Council for His Majesty's approval, or whether any, and if so, what, additions or amendments are required.

I have, &c.

H. J. SEYMOUR.

List of Papers.

- (A.) Sir J. N. Jordan (Peking), No. 514, Secret, November 19, 1919 (with enclosure).
- (B.) Foreign Office to India Office, Secret, February 14, 1920.
- (C.) Foreign Office to Sir J. N. Jordan, No. 76, Secret, February 14, 1920.
- (D.) India Office to Foreign Office, Secret, March 5, 1920.
- (E.) Mr. B. F. Alston (Peking), No. 258, Telegraphic, May 15, 1920.
- (F.) Draft Order in Council.
- (G.) "China and Corea Order in Council, 1904."
- (H.) "China and Corea (Amendment) Order in Council, 1909."
- (J.) "China (War Powers) Order in Council, 1917."

Report.

In our opinion the draft Order in Council,* as initialled by us, may properly be submitted to the King in Council for His Majesty's approval.

*Law Officers' Department,
July 14, 1920.*

GORDON HEWART.
ERNEST M. POLLOCK.

* The text of the Order in Council is contained in the "London Gazette" of September 28, 1920 (Confidential No. 11557*).

CHINA.

35

[T 11699]

No. 4.

[File 8452/1920]

[October 13, 1920.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, September 30, 1920.

I HAVE the honour, by direction of Earl Curzon of Kedleston, to transmit, for your consideration, the draft of an Order in Council to be entitled "The China (Amendment No. 2) Order in Council, 1920" (Paper (A)). The object of this Order is to confer upon His Britannic Majesty's Supreme Court in China all such jurisdiction in matters matrimonial as for the time belongs to the High Court in England. In this connection I am to remind you that article 101 of the China Order in Council, 1904, a copy of which is sent herewith (Paper (B)), at present excepts the jurisdiction relative to dissolution or nullity or jactitation of marriage. I am also to send you herewith copies of a despatch dated the 6th May, 1920 (Paper (C)), from the Acting Judge of the Supreme Court in China, with enclosures, from which you will observe that the effect of the recent decision of the House of Lords in the case of *Casdagli v. Casdagli* (L.R. 1919, A.C. 145) is to deprive British subjects domiciled in China of access to any existing Tribunal for the purpose of adjusting their matrimonial relationship.

With reference to the learned judge's suggestion that the duties of King's Proctor should be added to those of Crown Advocate, I am to suggest that section 12 (i) of the principal Order authorises the Secretary of State to appoint a person to discharge these functions, and that there seems to be no reason why the same person should not discharge the duties attached to either office.

I am therefore to request that you will take the draft Amendment Order in Council into your consideration, and that you will favour Lord Curzon with your opinion whether its terms are fit and proper to be submitted to the Privy Council for His Majesty's approval.

I have, &c.

CHARLES TUFTON.

List of Papers.

- (A.) Draft "China (Amendment No. 2) Order in Council, 1920."
- (B.) "China and Corea Order in Council, 1904."
- (C.) Judge Skinner Turner (Shanghai), May 6, 1920 (with enclosures).

Report.

In our opinion the draft Order in Council,* as initialled by us, may properly be submitted to the King in Council for His Majesty's approval.

GORDON HEWART.
ERNEST M. POLLOCK.

*Law Officers' Department,
October 13, 1920.*

* The text of the Order in Council is contained in the "London Gazette" of May 20, 1921. (Confidential No. 11593*).

[6498]

F 2



EGYPT.

[T 4923]

No. 5.

[File 3033/1920]

[May 5, 1920.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 21, 1920.

Case of
Cimitian v.
Gout and
Geary:
Demand for
renewal of
registration
as British
subjects.

I HAVE the honour, by direction of Lord Curzon of Kedleston, to lay before you the papers noted in the annexed list on the subject of a case recently heard in His Britannic Majesty's Supreme Court for Egypt, in which the plaintiff claimed a declaration that he and his wife and child were entitled to the renewal of their registration as British subjects, and for a writ of mandamus against His Majesty's Consul at Cairo commanding him to renew the registration pursuant to "The Ottoman Order in Council, 1910" (Paper (F)), and "The Egypt Order in Council, 1915" (Paper (G)).

The facts of the case are set out in the interlocutory judgment delivered by the Court on the 2nd January, 1920 (Paper (B)), and the questions which arise are discussed in a Memorandum by Mr. Malkin, Assistant Legal Adviser to this Department (Paper (C)), and in the letter from this Department to the Colonial Office of the 23rd February, 1920 (Paper (D)), and the reply dated the 20th March, 1920 (Paper (E)). You will observe that the plaintiff contended that he had become a British subject under "The Cyprus Annexation Order in Council of the 5th October, 1914" (Paper (H)), the High Commissioner's Proclamation of the same date (Paper (J)), and a subsequent Proclamation of the 3rd March, 1915 (Paper (K)). The Court found in favour of the plaintiff's contentions, and that he had become a British subject under the 1914 Order in Council (Paper (H)), and the two Proclamations referred to above. The question then arose: What was the effect, if any, on the plaintiff's nationality of "The Cyprus Annexation Amendment Order in Council of the 27th November, 1917" (Paper (L)), which was based on your predecessors' opinion of the 11th April, 1916, a copy of which is enclosed for convenience of reference (Paper (M)). The Judge appears to have thought that this question was one which the Court had no power to decide, and must be referred to the Secretary of State under section 4 of the Foreign Jurisdiction Act; and he has accordingly referred by his despatch of the 3rd January, 1920 (Paper (A)), two questions which are set out in the order of the Court of the 2nd January (see Paper (B)).

The exact effect of the two questions put by the Court to the Secretary of State is not very clear, but, as you will observe, the Secretary of State is advised that it is extremely doubtful whether they are such as can properly be put under section 4 of the Foreign Jurisdiction Act (see Paper (C)), and his Lordship is desirous of ascertaining your opinion on this point. Should you be of opinion that the questions should not have been so put, and should therefore not be answered, the question arises what steps should be taken, as it appears that the Secretary of State has now power to decline to answer questions put to him under the section above referred to, and the only means of avoiding doing so would appear to be by an appeal to the Privy Council against the order of the Court. Further, you will observe that the Secretary of State for the Colonies is unwilling to accept the finding of the Court as to the nationality of the plaintiff as a correct interpretation of the Proclamations and Orders in Council in question, and it is therefore desirable, if possible, that the finding of the Court on this point should be reviewed by the Privy Council.

Lord Curzon of Kedleston would therefore be grateful if you will take the annexed papers into your consideration and would favour him with your opinion on the following points:—

1. Whether the two questions put to the Secretary of State by the order of the Court dated the 2nd January, 1920, are questions which can properly be put under section 4 of the Foreign Jurisdiction Act?
2. If the answer to the first question is in the negative, whether an appeal should be taken to the Privy Council against the order of the Court, or what other steps should be taken?

EGYPT.

3. If the answer to the first question is in the affirmative, in what way the questions put should be answered?
4. Whether you are in agreement with the finding of the Court as to the effect of the various Proclamations and Orders in Council on the plaintiff's nationality, and, if not, whether an appeal should be taken to the Privy Council against the finding of the Court that the plaintiff became a British subject under the 1914 Order in Council and the two Proclamations issued thereunder? If such an appeal were brought, it would probably be necessary to go into the question as to the effect on the plaintiff's position of the Order in Council of the 27th November, 1917, but it is presumed that it would be open to the Crown to go into this point on such an appeal, even though the Judge has not given any decision.
5. Whether, in the event of an appeal to be brought on the question of the plaintiff's nationality, you anticipate any difficulty from the point raised in Paper (C) as to the interpretation put by the Court upon article 159 (2) of "The Ottoman Order in Council, 1910," an interpretation which, although in this case it operated in favour of the Crown, may be held to be erroneous.

His Lordship would be grateful for any observations of a general nature on the case as to the action to be taken in connection therewith which you may be good enough to offer.

I have, &c.

CHARLES TUFTON.

List of Papers.

- (A.) The Acting Judge, Supreme Court for Egypt, to Foreign Office, January 3, 1920.
- (B.) Order and interlocutory judgment (in original for return).
- (C.) Mr. Malkin's Memorandum, February 10, 1920.
- (D.) Foreign Office to Colonial Office, February 23, 1920.
- (E.) Colonial Office to Foreign Office, March 20, 1920.
- (F.) Ottoman Order in Council, 1910.
- (G.) Egypt Order in Council, 1915.
- (H.) Cyprus Annexation Order in Council, 1914.
- (J.) High Commissioner's Proclamation, November 5, 1914.
- (K.) High Commissioner's Proclamation, March 3, 1915.
- (L.) Cyprus Annexation Amendment Order in Council, November 27, 1917.
- (M.) Law Officers' Report, April 11, 1916 (and reference of October 20).

Report.

In our opinion—

1. The two questions put to the Secretary of State are not questions which can properly be put under section 4 of the Foreign Jurisdiction Act, 1890 (53 and 54 Vict., cap. 37), because (a) the questions are not as to the "existence or extent of any jurisdiction of His Majesty in a foreign country" within the meaning of that section; (b) the questions are not framed "so as properly to raise" any question which arises in the proceedings. The real questions that the Judge desired to be answered seem to be whether the Order in Council of 1917 (Cyprus (Annexation) Amendment Order in Council) has any legal effect in Egypt since the declaration of the protectorate, and whether such Order in Council can deprive a British subject in Egypt of his status as such. The questions put do not raise these points at all. Question 1 could be answered by saying "Of course it has if it is an Order which purports to apply to Egypt," and question 2 by saying "No," but these answers would obviously be of no assistance to the Court.

2. The Secretary of State could properly refuse to answer the questions on the grounds indicated above, but we think that an appeal should be taken to the Privy Council against the Order of the Court so that a ruling may be obtained as to the scope of section 4 and the kind of questions that may properly be put to the Secretary of State.

3. Does not arise.

4. The ruling of the Court as to the effect of the various Proclamations and Orders in Council on the plaintiff's nationality appears to be wrong. We agree with the opinion of the former Law Officers of the 20th October, 1915, that the words "resident in" in the Proclamation of the 3rd March, 1915, should be interpreted as meaning



"who were ordinarily resident in." We think that the appeal to the Privy Council should raise this point, as well as the propriety of the questions put to the Secretary of State. It will be open on such an appeal to go into the question of the effect (if any) of the Order in Council of the 27th November, 1917.

5. The ruling of the Court on this point appears to be wrong, but we do not think that the effect of article 159 (2) of the Ottoman Order in Council, 1910, is that the registration as a British subject must be continued after it has been discovered that the registrant is not of British nationality. The point, however, is arguable.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
May 5, 1920.

GENERAL.

[211613]

No. 5^A.

[Colonial Office.]

[File 200303/1919]

[January 23, 1920.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, December 30, 1919.

I AM directed to lay before you certain questions which have arisen in connection with such of the former German Colonies as will be administered by the self-governing dominions.

2. Under article 119 of the Treaty of Peace with Germany (enclosure 1) Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions, and by the decision of the Supreme Council of the 7th May (enclosure 2) the Mandates for South-West Africa, the Samoan Islands, and the German Pacific Possessions other than the Samoan Islands and Nauru are to be held by the Union of South Africa, New Zealand, and the Commonwealth of Australia respectively.

3. The position of the mandatory under the League of Nations is regulated by article 22 of the Treaty of Peace. Express provision is made in the sixth paragraph of that article in regard to the territories which will be administered under Mandate by the three self-governing dominions mentioned.

4. I am further to invite attention to Part II of the accompanying print (enclosure 3), containing correspondence as to the procedure necessary to enable Dominion Governments legally to exercise powers conferred upon them by the Mandate in their own mandated territory.

I am to enclose (enclosure 4) the ruling by the Speaker of the House of Assembly of the Union of South Africa referred to in Lord Milner's telegram to Lord Buxton of the 8th November (No. 8, in Part II of the print), together with the correspondence as to the validating legislation referred to in the same telegram (enclosures 5 and 6, 7 and 8).

Part I of the print, it will be seen, includes correspondence as to steps required to give international effect to the Mandates. On this point it may be added that it has been suggested that the procedure should be by way of formal conventions, but that it is not yet possible to say whether this procedure will be adopted, and your report is desired irrespective of the question as to what procedure, if any, in this connection will ultimately be adopted.

5. It will be observed from Part II of the printed correspondence that, while His Majesty's Government and the Government of New Zealand are agreed that in respect of the Samoan Islands it would be appropriate to issue an Order in Council under the Foreign Jurisdiction Act, General Smuts contends that such a procedure is both unnecessary and undesirable, whether for South-West Africa or Samoa, and further expresses doubt whether the Foreign Jurisdiction Act can be used even for the portion of German East Africa which will be administered by this country under a Mandate in conformity with the fifth paragraph of article 22 of the Treaty of Peace. It may be mentioned that a despatch has been received from the Governor-General of the Union

Mandates.—
Questions con-
nected with
such of the
former Ger-
man Colonies
as will be ad-
ministered by
the Self-
Governing
Dominions.

of South Africa, forwarding a request by his Ministers, dated the 16th October, 1919, for the application to South-West Africa of the Royal Proclamation of the 23rd January, 1911, relating to Coinage (enclosure 9), and that there appears to be no existing means of complying with this request except by an Order in Council under the Foreign Jurisdiction Act. There is no precedent for conferring on the Parliament of a self-governing dominion power to legislate for the exercise of His Majesty's jurisdiction under the Foreign Jurisdiction Act, but there are precedents for conferring such power on a colonial legislature (e.g., the Sierra Leone Protectorate Order in Council, 1913, enclosure 10). The Act passed by the Union Parliament during the recent session with regard to the South-West African Mandate will be found on pp. 3 and 4 of Part II of the printed correspondence.

6. If, in respect of German South-West Africa, some formal act or instrument on the part of His Majesty, other than an Act of the Union Parliament, is necessary in order to enable the Union to make provision for the execution of the Mandate, the conflicting views appear to point to the selection of one of these alternatives:—

- (a.) An Order in Council under the Foreign Jurisdiction Act, 1890; or
- (b.) Some act or instrument emanating from His Majesty in his Government of the Union of South Africa (as suggested by General Smuts).

7. It appears to be necessary to rule out certain alternatives which might perhaps be suggested. The first is that the necessary instrument might take the form of an Order in Council under section 151 of the South Africa Act, 1909, which section provides as follows:—

"151. The King, with the advice of the Privy Council, may, on Addresses from the Houses of Parliament of the Union, transfer to the Union the government of any territories, other than the territories administered by the British South Africa Company, belonging to or under the protection of His Majesty, and inhabited wholly or in part by natives, and upon such transfer the Governor-General in Council may undertake the government of such territory upon the terms and conditions embodied in the schedule to this Act." It is, however, politically impracticable to suggest a procedure which would exclude South-West Africa from the legislative authority of the Union Parliament, and it cannot be contended that South-West Africa will come under His Majesty's protection unless at the same time it is held to be subject to the Foreign Jurisdiction Act. It will be observed from the printed correspondence that the attention of the New Zealand Government has been drawn to the fact that Samoa will not strictly be a British protectorate; and that the Finance Act, 1919, distinguishes between cases "where any territory becomes under His Majesty's protection," and cases where the territory "is a territory in respect of which a Mandate of the League of Nations is exercised by the Government of any part of His Majesty's dominions."

8. The alternative might also be suggested of an Order in Council annexing German South-West Africa and including it in the Union under the Colonial Boundaries Act, 1895; but the objection to this is that, while it is undoubtedly the fact that the Mandate for South-West Africa will amount to practical annexation, in form and law this will not be the case. Article 127 of the Peace Treaty relating to the status of native-inhabitants would be meaningless if the mandatory State were at liberty to issue a formal Act of annexation.

9. With regard to the position of the Commonwealth of Australia in respect of New Guinea, the question involved would appear to be, whether His Majesty will have already placed New Guinea under the authority of the Commonwealth within the meaning of the Constitution, and, if not, whether the formal placing of the territory under the authority of the Commonwealth can be effected under the Constitution Act alone, or must be effected under both that Act and the Foreign Jurisdiction Act. (See cap. VI of the Commonwealth of Australia Constitution (63 & 64, Vic. cap. 12). Copies of the Letters Patent of the 18th March, 1902, and the Order in Council of the 30th March, 1914, placing British New Guinea and Norfolk Island, respectively, under the authority of the Commonwealth, are enclosed (enclosures 11 and 12), together with a copy of the Reserved Bill amending the Australian Navigation Act, which, *inter alia*, provides that territory under the authority of the Commonwealth includes any territory governed by the Commonwealth under a Mandate and a copy of the Order in Council of the 25th November, 1919, declaring His Majesty's assent thereto (enclosures 13 and 14).



GENERAL.

10. I am accordingly to request that you will take into your consideration the general constitutional questions at issue, as set out in this letter, and those involved in particular cases when the time comes for the issue of the appropriate Mandates, and advise on the following points:—

(1.) Whether some formal act or instrument on the part of His Majesty (termed for the sake of convenience in the succeeding questions a "Crown instrument") is necessary in order to enable the Union to make provision for the execution of the Mandate under the Treaty in respect of South-West Africa?

(2.) If no such Crown instrument is necessary, whether the Union Parliament is competent to make provision for the execution of the Mandate, and, if so, whether it derives its authority from the Treaty and/or Mandate, or from what other source?

(3.) If any such Crown instrument is necessary, whether an Act of the Union Parliament assented to by the Governor-General in His Majesty's name and not disallowed by His Majesty would constitute such an instrument, or whether such an Act would be *ultra vires* as an Act of a Colonial Legislature purporting to extend its own jurisdiction beyond its fixed constitutional limits?

(4.) If the effect of the answers to the three foregoing questions is that some Crown instrument other than an Act of the Union Parliament is necessary, whether that instrument should be—

- (a.) An Order in Council under the Foreign Jurisdiction Act, 1890? or
- (b.) Some Act or instrument emanating from His Majesty in His Dominion of the Union of South Africa (as suggested by General Smuts), and, in the latter event, what should be the nature of that Act or instrument; and, if neither (a) nor (b), what other instrument would be necessary and proper for the desired purpose?

(5.) So far as the answers to the above questions do not cover the cases of Mandates to be issued to Australia and New Zealand, what will be the instruments necessary in connection with these Mandates?

(6.) Whether in the case of German East Africa an Order in Council under the Foreign Jurisdiction Act will be effectual for the purpose in view and, if not, what other form of instrument should be adopted?

I am, &c.

W. D. ELLIS.

List of Papers.

- | | | |
|----------------------------|---|---------------|
| Validating
Legislation. | 1. Treaty of Peace with Germany. | |
| | 2. Decision of Supreme Council, 7th May, 1919. | |
| | 3. Printed correspondence as to Mandates. | |
| | 4. Speaker's Ruling. | |
| | 5. Governor-General's despatch, No. 107, 23rd February, 1917. | (16216/17.) |
| | 6. S. of S. despatch, No. 300, 30th June, 1917. | (28376/17.) |
| | 7. S. of S. despatch, No. 383, 16th August, 1917. | (38177/17.) |
| | 8. Governor-General's despatch, No. 906, 6th December, 1918. | (4316/18-19.) |
| | 9. Governor-General's despatch, No. 835, 24th October, 1919. (Coinage.) | (67114/19.) |
| | 10. Sierra Leone Protectorate Order in Council, 1913. | |
| | 11. British New Guinea Letters Patent, 30th March, 1902. | |
| | 12. Norfolk Island Order in Council, 1914. | |
| | 13. Australian Navigation Bill, 1919. | |
| | 14. Order in Council, 25th November, 1919, assenting to No. 13. | |

Report.

In our opinion:—

1. General Smuts's view is correct, and no Crown instrument is necessary to enable the Union to make provision for the execution of the Mandate under the Treaty in respect of South West Africa.

2. The Union Parliament is competent to make provision for the execution of the Mandate, and it derives its authority from the Treaty and Mandate. His Majesty's assent is sufficiently shown by the execution of the Treaty, to which His Majesty in his Dominion of the Union of South Africa is a party, and by the conferring of the Mandate.

GENERAL.

3. Does not strictly arise. An Act of the Union Parliament assented to by the Governor-General in His Majesty's name and not disallowed by His Majesty is sufficient for the purpose in question.

4. Does not arise.

5. The above answers cover the cases of Mandates to be issued to Australia and New Zealand (these Dominions also being parties to the Treaty) also.

6. Yes; we think that in the case of German East Africa, where the Mandate is to be given to His Majesty in his British Government, an Order in Council under the Foreign Jurisdiction Act will be sufficient and appropriate for the purpose in view.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
January 23, 1920.

[182390]

No. 5ⁿ.

[Admiralty.]

[File 2411/1919]

[February 21, 1920.]

Case for the Opinion of the Law Officers of the Crown.

HEREWITH:—

- (1.) Copy Convention for the Control of the Trade in Arms and Ammunition and Protocol, signed at Saint-Germain-en-Laye, 10th September, 1919.
- (2.) Copy Admiralty File.

Control of
Arms Con-
vention,
Septem-
ber 10, 1919.

The preamble of the above-mentioned convention recites that there are accumulations in various parts of the world of considerable quantities of arms and munitions of war, the dispersal of which would constitute a danger to peace and public order; that in certain parts of the world it is necessary to exercise special supervision of the trade in and the possession of arms and ammunition; that the existing treaties and conventions, and particularly the Brussels Act of the 2nd July, 1890, regulating the traffic in arms and ammunition in certain regions, no longer meet present conditions, which require more elaborate provisions applicable to a wider area in Africa and the establishment of a corresponding régime in certain territories in Asia; and that a special supervision of the maritime zone adjacent to certain countries is necessary to ensure the efficacy of the measures adopted by the various Governments, both as regards the importation of arms and ammunition into those countries and the export of such arms and ammunition from their own territory.

The question is raised, therefore, whether legislation either by statute or Order in Council is necessary to enable Great Britain to carry into operation the provisions of the convention.

Previous treaty stipulations regarding the introduction of firearms into certain parts of Africa have had relation to the suppression of the slave trade. Articles 8-14 of the Brussels Act, 1890, are concerned with this subject. To enable the British authorities to carry out the provisions of this treaty, an Order in Council was made on the 9th May, 1892, which provided that the said General Act should be deemed to have been and to be an existing Slave Trade Treaty within the meaning of the Slave Trade Act, 1873 (Statutory Rules and Orders revised to the 31st December, 1903, vol. xi, "Slave Trade," pp. 1-46). Section 29 of the Slave Trade Act, 1873 (36 & 37 Vic., cap. 88) is the authority under which the Order in Council was issued, but it expressly provides for the application of the provisions of the statute in relation to the slave trade. The following appear to be the statutes still in force on this subject: 5 Geo. IV, cap. 113; 6 & 7 Vic., cap. 98; 36 & 37 Vic., cap. 59; 36 & 37 Vic., cap. 88; 39 and 40 Vic., cap. 46; 42 & 43 Vic., cap. 38, and 53 & 54 Vic., cap. 27.

The provisions of the Arms Convention of the 10th September, 1919, have a wider object than the mere prevention of the slave trade, and by article 6 the High Contracting Parties undertake, each as far as the territory under its jurisdiction is concerned, to prohibit the importation of arms and ammunition specified in articles 1 and 2 into certain specified areas, and to prevent the importation and exportation in the maritime zone

[6498]

G



therein defined. The areas include the whole of Africa, excluding Algeria, Libya and the Union of South Africa, Transcaucasia, Persia, Gwadar, the Arabian peninsula and such continental parts of Asia as were included in the Turkish Empire on the 4th August, 1914, and the maritime zone includes the Red Sea, the Gulf of Aden, the Persian Gulf and the Sea of Oman. There is a provision for the issue of special licences for the import of arms and ammunition into these areas. Chapter III of the Convention deals with the supervision on land and Chapter IV with maritime supervision. Chapter V, which contains general provision, by Article 22 provides that the High Contracting Parties who exercise authority over territory within the prohibited areas and zones specified in Article 6 agree to take the measures required for the enforcement of the Convention and in particular for the prosecution and repression of offences against the provisions of the Convention, and to communicate these measures to the Central Office and to the Secretary-General of the League of Nations. By Article 25 the provisions of former general international conventions relating to matters dealt with in the Convention are to be considered as abrogated in so far as they are binding between the Powers who are parties to the Convention.

It is suggested that the legislation under the Slave Trade Acts is not applicable to the traffic in arms contemplated by the new Convention, and that further legislation will be necessary to enable the British authorities within the areas and zones under British jurisdiction to carry out the terms of this Convention, and to subject British subjects to the international jurisdiction created, as well as to provide for the prosecution of offences against the provisions of the Convention (see Article 22).

Section 43 of the Customs Consolidation Act, 1876, provides that the importation of arms, ammunition, gunpowder or any other goods may be prohibited by proclamation or Order in Council, and by the Exportation of Arms Act, 1900 (63 & 64 Vic., cap. 44), power is given to His Majesty by proclamation to prohibit the exportation of arms or naval stores (see Highmore's "Customs Law," pp. 62, 127).

The Law Officers are requested to advise whether any and, if any, what legislation is necessary in order to carry out the provisions of the Convention for the control of the trade in arms and ammunition of the 10th September, 1919.

Opinion of the Law Officers of the Crown.

We agree that legislation under the Slave Trade Acts is not applicable to the traffic in arms contemplated by the Convention, and the provision of section 43 of the Customs Consolidation Act, 1876 (39 & 40 Vic., cap. 36), applies only to importation into the United Kingdom. The Exportation of Arms Act, 1900 (63 & 64 Vic., cap. 44) is confined to cases where the prohibition is judged expedient in order to prevent the arms, &c., from being used against His Majesty's subjects and forces, or against forces engaged in operations in co-operation with His Majesty's forces.

We think that legislation is clearly necessary in order to carry out the provisions of the Convention, and we would suggest a short Act giving His Majesty power to make such Orders in Council as appear to him to be necessary for giving effect to the provisions of the Convention.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
February 21, 1920.

[211613]

No. 5^c.

[Colonial Office.]

[File 200303/1919]

[July 13, 1920.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, May 27, 1920.

I AM directed by Viscount Milner to transmit to you a copy of a despatch from the Governor-General of Canada (dated the 16th February) forwarding an approved Minute of the Privy Council for Canada in which the Canadian Government request His Majesty's Government to submit, for the sanction of the Parliament of the United Kingdom, an amendment to the British North America Acts, declaring generally in

Acts of
Canadian
Parliament.
Suggested
extra-
territorial
operation.

effect that an enactment of the Parliament of Canada, otherwise *intra vires*, shall operate, and be deemed to have operated, extraterritorially according to its intention in the like manner and to the same extent as if enacted by the Parliament of the United Kingdom.

2. On the 26th February, 1920, the Minister of Justice gave notice in the House of Commons of Canada of a resolution for an address to the King, praying His Majesty to give his consent to submit a measure to the Parliament of the United Kingdom to amend the British North America Act, 1867, by adding the following subsection to section 91 of that Act:—

"Any enactment of the Parliament of Canada otherwise within the legislative authority of the Parliament shall operate and be deemed to have operated extraterritorially according to its intention in the like manner and to the same extent as if enacted by the Parliament of the United Kingdom."

3. It will be observed that the question was raised primarily with reference to legislation for the control of aerial navigation, especially in connection with the International Air Convention, and that there is no suggestion in the Minute of Council that so far as the Convention is concerned, the necessary powers for carrying out the obligations which it will impose on Canada, if ratified by His Majesty in respect of the Dominion, already exist under section 132 of the British North America Act.

4. The Air Navigation Bill now before Parliament, which will enable effect to be given to the Convention so far as this country and the colonies are concerned, is drawn up on the basis that the Dominions will pass their own legislation for the purpose. I am to enclose in this connection a copy of a letter, dated the 7th January, 1919, from the Minister of Justice to the Prime Minister of Canada, in which Sir R. Borden expressed his concurrence, dealing with an early tentative draft Bill printed in the Report of the Civil Aerial Transport Committee (*vide* enclosed copy of the Parliamentary Paper, Cd. 9218). It will be seen that strong exception was taken to that draft Bill as not only governing Canadian aircraft when beyond the limits of Canada, but also regulating aircraft even while in or over the territory of the Dominion.

5. Had the request in the Minute of Council been confined to the matter of aerial legislation, Lord Milner would have taken immediate steps to meet the wishes of the Canadian Government, but the very general terms in which the proposed amendment of the British North America Act is expressed appear to him to call for the most careful consideration from both a legal and a constitutional point of view, and he has accordingly sent to the Canadian Government the telegram of which a copy is enclosed.

6. It will be observed that the letter of the Minister of Justice mentioned in paragraph 4 of this letter, while asserting the sole right of the Canadian Parliament to legislate for Canadian aircraft while out of the Canadian jurisdiction, was equally emphatic in asserting the same right in respect of all aircraft within the Dominion. The allusion in the Minute of Council to section 177 of the Army Act (which appears in an adapted form as section 177 of the Air Force Act) suggests, however, that the proposed amendment does not exclude legislation for other parts of the Empire. In any case the terms of the proposed amendment are not such as exclude the possibility of conflicts of law between Canadian legislation and Acts of the Imperial Parliament operating extraterritorially, or the possibility of the Canadian Parliament legislating for other parts of the Empire. So far as the Imperial Parliament and the United Kingdom and the colonies are concerned, this is a matter solely between His Majesty's Government and the Canadian Government, but it is open to grave question whether His Majesty's Government would be justified, so far as the other Dominions are concerned, in assenting on their own responsibility to any arrangement which might derogate from their existing jurisdictions. The difficulty of dealing with the proposal of the Canadian Government is, of course, increased by the fact that it is retrospective in character.

7. The only Dominion Constitution which expressly confers powers to legislate extraterritorially is that of the Commonwealth of Australia. Section 5 of the Commonwealth of Australia Act (63 & 64 Vic., cap. 12) declares that "the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth," and section 51 (X) of the Constitution gives the Commonwealth Parliament power to legislate for "Fisheries in Australian waters beyond territorial limits." The powers of Dominion Parliaments generally to legislate for ships outside their territorial limits are those conferred by section 735 and section 736 of "The Merchant Shipping Act, 1894." Lord Milner is consulting the Board of Trade as to the position of British ships, other

[6498]

G 2



than those registered in Canada, not engaged in the coasting trade, under the proposal of the Canadian Government, and their views will be communicated to you later. In the meantime, I am to invite attention to the general statements as to the respective provinces of the Imperial and Dominion Parliaments in merchant shipping matters contained in the despatches to the Commonwealth Government of the 29th November, 1907, and the 18th September, 1908 (No. 3 and No. 7 in Cd. 3891 and Cd. 4355, respectively), to the correspondence as to Canadian merchant shipping legislation printed in the accompanying Colonial Office prints (Dominions, No. 9, 18, 43 and 56), and to Resolution XXI of the Imperial Conference of 1911 and the discussions at that Conference on the legislative powers of the dominions in regard to merchant shipping (Cd. 5745, pp. 18, 144-146, 149-153, 406-424). A Consolidating Bill relating to merchant shipping is now under consideration in Canada. A memorandum on the Bill by the Board of Trade recently communicated to the Canadian Government is also enclosed.

8. Other Departments that may be concerned are also being consulted, and their views will be submitted to you when received. In the meantime, Lord Milner would be glad if you would take the matter into consideration and favour him with any observations which you may be good enough to offer on the legal and constitutional problems involved in the proposal put forward by the Canadian Government.

I am, &c.

H. LAMBERT.

List of Papers.

1. Governor-General's despatch, February 16, 1920.
2. Mr. Doherty to Prime Minister of Canada, January 7, 1919.
3. Reports of the Civil Aerial Transport Committee [Cd. 9218].
4. Telegram to the Governor-General, May 6, 1920.
5. Correspondence. Proposed legislation of Australia and New Zealand in regard to merchant shipping [Cd. 3891].
6. Further correspondence. Proposed legislation of Australia and New Zealand in regard to merchant shipping [Cd. 4355].
7. Colonial Office prints (Dominions, Nos. 9, 18, 43, 56).
8. Minutes of Proceedings. Imperial Conference, 1911 [Cd. 5745].
9. Canada Shipping Bill.

Report.

Section 91 of "The British North America Act, 1867," gives the Parliament of Canada power to legislate for the peace, order and good government of Canada, and amongst other subjects within this power enumerates the regulation of trade and commerce, navigation and shipping, patents and copyright and criminal law. In *Attorney-General for Canada v. Cain* (1906) A.C. p. 542, it was held that a Canadian enactment was not necessarily *ultra vires* because it involved extraterritorial constraint, but no doubt, as a general rule, colonial legislation is *ultra vires* if it purports to operate extraterritorially. The reasons for this rule are obvious. If it were acknowledged as a general principle that laws of the colonies might have extraterritorial operation, frequent conflicts between the various colonies would almost inevitably arise owing to overlapping and conflicting legislation. (Conflict between Imperial and Colonial legislation is prevented by "The Colonial Laws Validity Act, 1865" (28 & 29 Vic., cap. 63), any colonial law repugnant to the provisions of any Imperial Act extending to the colony being void to the extent of the repugnancy.)

It is difficult to say what would be held to be the effect of the proposed amendment, having regard to the words "otherwise within the legislative authority of the Parliament." It might be held that it merely expresses the existing law, as exemplified in *Attorney-General for Canada v. Cain* (*ubi supra*). But if it were construed as giving the Canadian Parliament power to legislate extraterritorially generally with regard to all the matters mentioned in the section, provided only that the legislation could be said to concern the peace, order and good government of Canada, it would reverse the fundamental rule that colonial legislation must *prima facie* relate exclusively to the colony, and might, we think, quite probably lead to conflict with the other self-governing Dominions, who would naturally expect to be placed on the same footing in this respect as Canada.

In our opinion the Government should refuse to assent to the proposed amendment, and should consent to extraterritorial powers being given to colonies only as regards specified subjects, where, for special reasons, it is considered desirable that they should have such powers.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
July 13, 1920.

[W 1264]

No. 5^d.

[Cabinet Office.]

[File 241/1920.]

[October 14, 1920.]

Memorandum by the Lord Chancellor and the Law Officers of the Crown.

IN our opinion there are good grounds for apprehending that the establishment of such a Court as is suggested—at all events at the present time—would be contrary to the interests of this country. Under articles 33 and 34 a State can, in case of a dispute, be brought against its will before the Court by another, and as between States which are members of the League the Court is to have jurisdiction, without any special agreement, to determine any case of a legal nature concerning a question in international law. It may, we think, be gravely doubted whether it would be politic for Great Britain in any circumstances to bind herself to refer any disputes which might arise in the future within this very wide jurisdiction to a tribunal of whose impartiality she has no assurance. It may be asked, perhaps, whether it is reasonable to expect impartiality from any permanent international Court. And there are special reasons why this country should not be a party to such an engagement now. It is well known that some neutral nations (*e.g.*, Sweden and Holland) are dissatisfied with our proceedings during the war, and also with some of the decisions of our Prize Courts. If the proposed Court were established it would be open to these and other States to make claims based on such proceedings, and, if they were not settled diplomatically, to carry them before the new Court, with the result that we might, and probably should, have to pay very heavy compensation, and various decisions of the Prize Courts might, in effect, be reversed.

Another serious objection to the setting-up of the Court at the present time is that America is not yet a member of the League of Nations, and would therefore have no influence on the election of the judges. Nor would America or other States outside the League be bound in any way by the rulings of the Court, so that there would be a set of rules of international law growing up which would be binding on some of the Great Powers as well as the smaller States members of the League, but not on the Great Powers and the States outside the League.

Law Officers' Department,
October 14, 1920.

B.
G. H.
E. M. P.

ANNEX.

(Translation.)

Draft Scheme for the Institution of the Permanent Court of International Justice.

ARTICLE 1.

A Permanent Court of International Justice, to which parties shall have direct access, is hereby established, in accordance with article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organised by The Hague Conventions of 1899 and 1907 and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

CHAPTER I.—Organisation of the Court.

ARTICLE 2.

The Permanent Court of International Justice shall be composed of a body of independent judges elected, regardless of their nationality, from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law.



GENERAL.

ARTICLE 3.

The Court shall consist of fifteen members: eleven judges and four deputy judges. The number of judges and deputy judges may be hereafter increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of fifteen judges and six deputy judges.

ARTICLE 4.

The members of the Court shall be elected by the Assembly and the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

ARTICLE 5.

At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant or to the States which shall have joined the League subsequently, inviting them to undertake, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

No group may nominate more than two persons; the nominees may be of any nationality.

ARTICLE 6.

Before making these nominations each national group is hereby recommended to consult its highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of law.

ARTICLE 7.

The Secretary-General of the League of Nations shall prepare a list, in alphabetical order, of all the persons thus nominated. These persons only shall be eligible for appointment, except as provided in article 12, paragraph 2.

The Secretary-General shall submit this list to the Assembly and to the Council.

ARTICLE 8.

The Assembly and the Council shall proceed to elect by independent voting first the judges and then the deputy judges.

ARTICLE 9.

At every election the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilisation and the principal legal systems of the world.

ARTICLE 10.

Those candidates who obtain an absolute majority of votes in the Assembly and the Council shall be considered as elected.

In the event of more than one candidate of the same nationality being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

ARTICLE 11.

If, after the first sitting held for the purpose of the election, one or more seats remain to be filled, a second, and if necessary a third, sitting shall take place.

ARTICLE 12.

If after the third sitting one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed at any time at the request of either the Assembly or the Council for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the committee is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations made by the Court of Arbitration.

If the joint conference is not successful in procuring an election, those members of the Court who have already been appointed shall, within a time limit to be arranged by the Council, proceed to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

ARTICLE 13.

The members of the Court shall be elected for nine years.

They may be re-elected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall complete any cases which they may have begun.

GENERAL.

ARTICLE 14.

Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the Court elected to replace a member the period of whose appointment has not expired will hold the appointment for the remainder of his predecessor's term.

ARTICLE 15.

Deputy judges shall be called upon to sit in the order laid down in a list. This list shall be prepared by the Court, having regard first to the order in time of each election and secondly to age.

ARTICLE 16.

The exercise of any function which belongs to the political direction, national or international, of States by the members of the Court during their terms of office is declared incompatible with their judicial duties.

Any doubt upon this point is settled by the decision of the Court.

ARTICLE 17.

No member of the Court can act as agent, counsel or advocate in any case of an international nature.

No member may participate in the decision of any case in which he has previously taken an active part as agent, counsel or advocate for one of the contesting parties, or as a member of a national or international Court, or of a Commission of Inquiry, or in any other capacity.

Any doubt upon this point is settled by the decision of the Court.

ARTICLE 18.

A member of the Court cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

When this happens a formal notification shall be given to the Secretary-General.

This notification makes the place vacant.

ARTICLE 19.

The members of the Court, when outside their own country, shall enjoy the privileges and immunities of diplomatic representatives.

ARTICLE 20.

Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

ARTICLE 21.

The Court shall elect its President and Vice-President for three years: they may be re-elected. It shall appoint its Registrar. The duties of Registrar of the Court shall not be considered incompatible with those of Secretary-General of the Permanent Court of Arbitration.

ARTICLE 22.

The seat of the Court shall be established at The Hague. The President and Registrar shall reside at the seat of the Court.

ARTICLE 23.

A session shall be held every year. Unless otherwise provided by rules of Court, this session shall begin on the 15th June, and shall continue for so long as may be necessary to complete the cases on the list. The President may summon an extraordinary meeting of the Court whenever necessary.

ARTICLE 24.

If, for some special reason, a member of the Court considers that he cannot take part in the decision of a particular case, he shall so inform the President.

If, for some special reason, the President considers that one of the members of the Court should not sit on a particular case, he shall give notice to the member concerned.

In the event of the President and the member not agreeing as to the course to be adopted in any such case, the matter shall be settled by the decision of the Court.

ARTICLE 25.

The full Court shall sit, except when it is expressly provided otherwise. If eleven judges cannot be present, deputy judges shall be called upon to sit, in order to make up this number.

If, however, eleven judges are not available, a quorum of nine judges shall suffice to constitute the Court.



GENERAL.

ARTICLE 26.

With a view to the speedy despatch of business the Court shall form, annually, a chamber composed of three judges, who, at the request of the contesting parties, may hear and determine cases by summary procedure.

ARTICLE 27.

The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

ARTICLE 28.

Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates by some national group in the Court of Arbitration.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this article shall fulfil the conditions required by articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.

ARTICLE 29.

The judges shall receive an annual salary, to be determined by the Assembly of the League of Nations upon the proposal of the Council. This salary must not be decreased during the period of a judge's appointment.

The President shall receive a special grant for his period of office, to be fixed in the same way.

Deputy judges shall receive a grant for the actual performance of their duties, to be fixed in the same way.

Travelling expenses incurred in the performance of their duties shall be refunded to judges and deputy judges who do not reside at the seat of the Court.

Grants due to judges selected or chosen as provided in article 28 shall be determined in the same way.

The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

A special regulation shall provide for the pensions to which the judges and Registrar shall be entitled.

ARTICLE 30.

The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

CHAPTER II.—*Competence of the Court.*

ARTICLE 31.

The Court shall have jurisdiction to hear and determine suits between States.

ARTICLE 32.

The Court shall be open of right to the States mentioned in the Annex to the Covenant, and to such others as shall subsequently enter the League of Nations.

Other States may have access to it.

The conditions under which the Court shall be open of right or accessible to States which are not members of the League of Nations shall be determined by the Council in accordance with article 17 of the Covenant.

ARTICLE 33.

When a dispute has arisen between States, and it has been found impossible to settle it by diplomatic means, and no agreement has been made to choose another jurisdiction, the party complaining may bring the case before the Court. The Court shall, first of all, decide whether the preceding conditions have been complied with; if so, it shall hear and determine the dispute according to the terms and within the limits of the next article.

ARTICLE 34.

Between States which are members of the League of Nations the Court shall have jurisdiction (and this without any special convention giving it jurisdiction) to hear and determine cases of a legal nature concerning—

- (a.) The interpretation of a treaty;
- (b.) Any question of international law;
- (c.) The existence of any fact which, if established, would constitute a breach of an international obligation;
- (d.) The nature or extent of reparation to be made for the breach of an international obligation;
- (e.) The interpretation of a sentence passed by the Court.

GENERAL.

The Court shall also take cognisance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties.

In the event of a dispute as to whether a certain case comes within any of the categories above mentioned, the matter shall be settled by the decision of the Court.

ARTICLE 35.

The Court shall, within the limits of its jurisdiction as defined in article 34, apply in the order following:—

1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
2. International custom as evidence of a general practice, which is accepted as law;
3. The general principles of law recognised by civilised nations;
4. Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

ARTICLE 36.

The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.

When the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special commission of from three to five members.

When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision.

CHAPTER III.—*Procedure.*

ARTICLE 37.

The official language of the Court shall be French.

The Court may, at the request of the contesting parties, authorise another language to be used before it.

ARTICLE 38.

A State desiring to have recourse to the Court shall lodge a written application addressed to the Registrar.

The application shall indicate the subject of the dispute, and name the contesting parties.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the members of the League of Nations through the Secretary-General.

ARTICLE 39.

If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

ARTICLE 40.

The parties shall be represented by agents.

They may have counsel or advocates to plead before the Court.

ARTICLE 41.

The procedure shall consist of two parts: written and oral.

ARTICLE 42.

The written proceedings shall consist of the communication to the judges and to the parties of statements of cases, counter-cases and, if necessary, replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

ARTICLE 43.

The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the Government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

ARTICLE 44.

The proceedings shall be under the direction of the President or, in his absence, of the Vice-President; if both are absent, the senior judge shall preside.



GENERAL.

ARTICLE 45.

The hearing in Court shall be public, unless the Court, at the written request of one of the parties, accompanied by a statement of his reasons, shall otherwise decide.

ARTICLE 46.

Minutes shall be made at each hearing and signed by the Registrar and the President. These minutes shall be the only authentic record.

ARTICLE 47.

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

ARTICLE 48.

The Court may, even before the hearing begins, call upon the agents to produce any document or to supply to the Court any explanations. Any refusal shall be recorded.

ARTICLE 49.

The Court may, at any time, entrust any individual, bureau, commission or other body that it may select with the task of carrying out an enquiry or giving an expert opinion.

ARTICLE 50.

During the hearing in Court the judges may put any questions, considered by them to be necessary, to the witnesses, agents, experts, advocates or counsel. The agents, advocates and counsel shall have the right to ask, through the President, any questions that the Court considers useful.

ARTICLE 51.

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

ARTICLE 52.

Whenever one of the parties shall not appear before the Court or shall fail to defend his case, the other party may call upon the Court to decide in favour of his claim.

The Court must, before doing so, satisfy itself not only that it has jurisdiction in accordance with articles 33 and 34, but also that the claim is supported by substantial evidence and well founded in fact and law.

ARTICLE 53.

When the agents, advocates and counsel, subject to the control of the Court, have presented all the evidence and taken all other steps that they consider advisable, the President shall declare the case closed.

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

ARTICLE 54.

All questions shall be decided by a majority of the judges present at the hearing. In the event of an equality of votes, the President or his deputy shall have a casting vote.

ARTICLE 55.

The judgment shall state the reasons on which it is based. It shall contain the names of the judges who have taken part in the decision.

ARTICLE 56.

If the judgment given does not represent, wholly or in part, the unanimous opinion of the judges, the dissenting judges shall be entitled to have the fact of their dissent or reservations mentioned in it. But the reasons in it for their dissent or reservations shall not be expressed in the judgment.

ARTICLE 57.

The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

ARTICLE 58.

The judgment is final and without appeal. In the event of uncertainty as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

GENERAL.

ARTICLE 59.

An application for revision of a judgment can be made only when it is based upon the discovery of some new fact, of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings for revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognising that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

No application for revision may be made after the lapse of five years from the date of the sentence.

ARTICLE 60.

Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party.

It will be for the Court to decide upon this request.

ARTICLE 61.

Whenever the construction of a convention, in which States other than those concerned in the case are parties, is in question, the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings; but, if it uses this right, the construction given by the judgment will be as binding upon it as upon the original parties to the dispute.

ARTICLE 62.

Unless otherwise decided by the Court, each party shall bear its own costs.

[W 1548]

No. 6.

[File 279/1920]

[October 29, 1920.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, October 15, 1920.

I HAVE the honour, by direction of Earl Curzon of Kedleston, to request the favour of your advice on the following question:—

2. One of the items on the agenda for the first meeting of the Assembly of the League of Nations, which is to take place in November, is "Preparations required to enable the economic weapon of the League to be used in case of necessity." The reference is, of course, to article 16 of the Covenant, the text of which will be found on p. 3 of Paper A, and you will find on pp. 6 and 7 of the same document the report presented by the Italian representative on the Council of the League at the San Sebastian meeting in August last, where it was decided to place upon the agenda of the first Assembly the consideration of the necessary measures to ensure the application of article 16, and to propose to the Assembly that, as a preliminary measure, an International Blockade Commission should be appointed under the authority of the first Assembly, for the purpose of studying the problem and settling the general plan of action, the organisation of the more permanent machinery required and the principles on which it should work.

3. The Board of Trade, in a letter dated the 6th October (Paper B), has raised the question of the legal powers actually possessed by His Majesty's Government for carrying out the obligations in this connection imposed on this country as a member of the League. The points which arise are fully dealt with in that letter. Those on which it is desired to obtain your advice are (1) whether the necessary action to enable this country to fulfil its obligations under article 16 of the Covenant can be taken by means of Orders in Council under "The Treaty of Peace Act, 1919," and (2) whether, when the circumstances contemplated in article 16 arise, this country is, *ipso facto*, at war with the Covenant-breaking State, so that the common law and special legislation of this country applicable to a state of war would automatically come into force. I am to draw your attention to the observations of the Secretary-General of the League

[6498]

H 2

Use of
Economic
Weapon of
League of
Nations.
(Article 16
of the
Covenant.)



(see Paper A, p. 11, paragraph (a)), suggesting that the economic weapon may have to be used in cases arising under articles 11, 13 or 17 of the Covenant. It would appear possible that if the economic weapon is used in a case arising at any rate under article 11 or article 13, the provision in article 16 under which the Covenant-breaking State is deemed to have committed an act of war against all other members of the League might not apply, and that it might consequently be difficult to hold that this country was at war with the State concerned so that the provisions of British municipal law relating to a state of war would apply.

4. I am therefore to request that you will take these papers into your consideration, and will favour his Lordship with your opinion as to :—

(1.) Whether "The Treaty of Peace Act, 1919," gives power to impose by Order in Council any prohibition on trade and financial relations and intercourse which may be necessary to give effect to article 16 of the Covenant of the League of Nations.

(2.) Whether, in the event of the circumstances contemplated in article 16 of the Covenant arising, this country is automatically placed in a state of war against the Covenant-breaking State in the sense that the common law against trading with the enemy would apply to relations with that State, and that "The Customs (Exportation Prohibition) Act, 1914," and "The Customs (Exportation Restriction) Act, 1914," would therefore become applicable.

5. Lord Curzon would also be grateful for any observations of a general nature which you may be good enough to offer.

6. It will be necessary that the instructions to be given to the British representatives at the meeting of that Assembly should be settled at an early date, and Lord Curzon would therefore be glad to receive your opinion as soon as possible.

I have, &c.

CHARLES TUFTON.

List of Papers.

- (A.) Memorandum by the Secretary-General of the League of Nations (W 674).
(B.) Board of Trade to Foreign Office, October 6, 1920 (W 699).

Report.

1. In our opinion this question should be answered in the affirmative. The Covenant of the League is part of the Treaty of Peace, and the Act (9 & 10 Geo. V, cap. 33, sec. 1 (i)) empowers His Majesty to make such Orders in Council as appear to him to be necessary for giving effect to any of the provisions of the treaty.

2. No, we do not think that this country is automatically placed in a state of war against the Covenant-breaking State. Some Act of State, such as a Proclamation, is, in our opinion, necessary to place this country in a state of war for legal purposes. But on the issue of a Proclamation, or other formal Act of State, declaring that a state of war exists, the common law relating to trading with the enemy and the statutes mentioned would at once become applicable. (No declaration of war is necessary so far as the offending State and other nations are concerned.)

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
October 29, 1920.

[W 1664]

No 6^A.

[Colonial Office.]

[File 1664/1920]

[November 10, 1920.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, November 2, 1920.

I AM directed by Viscount Milner to acknowledge the receipt of your report of the 13th July* relative to the proposal that the British North America Act should be amended so as to confer powers to legislate extra-territorially on the Parliament of Canada.

Proposed amendment of British North America Act: Powers of extra-territorial legislation for Canadian Parliament.

2. I am now to transmit to you the following further papers :—

- Copy of a despatch from the Governor-General of Canada transmitting the Address of both Houses of the Parliament of Canada, praying the King to submit a measure to Parliament for the purpose in question.
- Copy of a further despatch from the Governor-General enclosing a letter from the Department of External Affairs, explaining, in reply to Lord Milner's telegram of the 6th May, the nature of the proposed amendment as viewed by the Canadian Government.
- The Debates on the Address which took place in the House of Commons of Canada on the 24th June and in the Senate on the 26th June.
- Letters containing the observations of the Foreign Office, Air Ministry, Board of Trade, War Office, Home Office and Admiralty on the proposed amendment of the British North America Act, together with copies of subsequent correspondence with the Foreign Office.

3. Lord Milner would be obliged if you would favour him with any further observations which you may have to offer after considering these papers.

I am, &c.

HENRY LAMBERT.

List of Papers.

- Governor-General of Canada, No. 569, September 8, 1920.
- Governor-General of Canada, Secret, September 1, 1920.
- Extract from Debates in Canadian House of Commons, June 24, 1920.
- Extract from Debates in Canadian Senate, June 26, 1920.
- Foreign Office to Colonial Office, June 10, 1920.
- Colonial Office to Foreign Office, August 13, 1920.
- Foreign Office to Colonial Office, August 20, 1920.
- Air Ministry to Colonial Office, June 23, 1920.
- Board of Trade to Colonial Office, June 28, 1920.
- War Office to Colonial Office, July 20, 1920.
- Home Office to Colonial Office, August 6, 1920.
- Admiralty to Colonial Office, August 19, 1920.

Report.

In our opinion the further papers do not call for any observations by us. These papers do not appear to afford reason for any modification of the views expressed in our report of the 13th July, 1920.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
November 10, 1920.

* See No. 5^C.



1920

54

GENERAL.

[W 3529]

No. 7.

[File 279/1920]

[December 22, 1920.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, November 30, 1920.

WITH reference to the Foreign Office letter of the 11th December, 1912, and your predecessors' reply of the 17th February, 1913, relative to the draft forms of notification to the International Telegraph Bureau at Berne respecting the suspension or limitation of the transmission of telegrams and radio-telegrams throughout British Possessions and Protectorates, I have the honour, by direction of Earl Curzon of Kedleston, to state that the Censorship Sub-Committee of the Committee of Imperial Defence have had these forms of notification under consideration.

2. The Committee are of opinion that certain alterations in the text of Notification 1 imposing a general censorship are necessary, and that the Dominion Governments and the Government of India should be asked to issue separate notifications, to be known as Notification 1A, to the International Telegraph Bureau.

3. I am to point out that the different wording in Notification 1 is required, in the opinion of the Sub-Committee, for the following reasons:—

(1.) The omission of a reference to any foreign Government (*vide* line 10 of the old form of Notification 1) is considered unnecessary owing to the fact that it is undesirable to indicate any special country against which censorship should be established before war is declared. In fact, this procedure was adopted on the 3rd August, 1914.

(2.) So as to apply to all territory under His Britannic Majesty's protection, including territory for which a mandate has been, or will be, granted to His Majesty's Government.

4. In view of these circumstances, it has also been considered necessary slightly to alter the wording of Notification 2 imposing a local censorship.

5. I am to enquire whether you consider that the revised drafts of Notifications 1 and 2 and the draft of Notification 1A are in a proper form for issue by the British Government or Governments concerned under Article 8 of the International Telegraph Convention of St. Petersburg and Article 17 of the International Radio-Telegraph Convention, in the event of the establishment of a general or local censorship of telegrams and radio-telegrams being necessary.

6. In consequence of a revision of the regulations with reference to the use of registered addresses and codes, Notifications 3, 4 and 5 are no longer required.

7. Lord Curzon would be glad to receive your views on this matter at your early convenience, and to learn whether you consider these drafts could be advantageously altered or modified, and, if so, in what respect. His Lordship would also be glad to receive any observations of a general nature which you may care to offer.

8. I am to transmit, for convenience of reference, copies of the correspondence referred to in the first paragraph of this letter, and copies of the Conventions mentioned in paragraph 5.

I have, &c.

G. H. VILLIERS.

List of Papers.

- (A.) Draft Notifications respecting suspension or limitation of telegraph or radio-telegraph services throughout the British Empire.
- (B.) Foreign Office to Law Officers, December 11, 1912 (49798/12).
- (C.) Law Officers to Foreign Office, February 17, 1913 (7380/13).
- (D.) International Telegraph Convention, July 22, 1875; Lisbon Revision, 1908 (Confidential, 9395*).
- (E.) International Radio-telegraph Convention, July 5, 1912 (Treaty, 1483).

Report.

In our opinion the revised drafts of Notifications 1 and 2 and the draft of Notification 1A, as initialled by us, are in a proper form for issue by the British

Suspension,
&c., of
telegraph or
radio-
telegraph
services
throughout
the British
Empire;
Draft
Notifications.

GENERAL.

55

Government or Governments concerned under Article 8 of the International Telegraph Convention of St. Petersburg and Article 17 of the International Radio-Telegraph Convention, in the event of the establishment of a general or local censorship of telegrams and radio-telegrams being necessary.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
December 22, 1920.

Annex.

I.—DRAFT NOTIFICATION OF SUSPENSION OF TELEGRAPH AND RADIO-TELEGRAPH SERVICES THROUGHOUT THE EMPIRE.

His Britannic Majesty's Government find themselves under the necessity of availing themselves of the power reserved under Article 8 of the International Telegraph Convention and Article 17 of the International Radio-Telegraph Convention to suspend the transmission of telegrams and radio-telegrams to and from or in transit through the United Kingdom, and to and from or in transit through all British territory or territory under His Britannic Majesty's protection save and except such telegrams and radio-telegrams as are on the service of any British Government.

With a view, however, to minimise inconvenience to the public, His Britannic Majesty's Government will, until further notice, and as an act of grace, permit the transmission of such telegrams and radio-telegrams in plain language as foreign Governments or the public choose to send, provided that such telegrams and radio-telegrams are written in English or French, and on the understanding that they are accepted at the sender's risk and subject to censorship by the British authorities; that is, that they may be stopped, delayed or otherwise dealt with in all respects at the discretion of those authorities and without notice to the senders; and that no claims in respect of them, whether for the reimbursement of the sums paid for transmission or otherwise, will be considered by His Majesty's Government in any circumstances whatever. It is, moreover, essential that such telegrams and radio-telegrams should bear the sender's name at the end of the text, otherwise they are liable to be stopped until the name is notified by paid telegram. Registered abbreviated addresses will not be accepted, either as addresses or as names of senders.

Separate notifications are being issued by the Governments of India, Canada, Australia, the Union of South Africa, New Zealand and Newfoundland in respect of territories under their administration.

1 A.—Notification by the Government of India or of a Dominion.

The Government of † notify the International Telegraph Bureau for communication to the Contracting Governments of the International Telegraph Convention that the notification made by His Britannic Majesty's Government with regard to the suspension of the transmission of telegrams and radio-telegrams applies in all respects whatsoever to † and to all territories administered thereby.

II.—DRAFT NOTIFICATION OF LOCAL SUSPENSION OF TELEGRAPH AND RADIO-TELEGRAPH SERVICES.

His Britannic Majesty's Government find themselves under the necessity of availing themselves of the power reserved under Article 8 of the International Telegraph Convention and Article 17 of the International Radio-Telegraph Convention to suspend the transmission of telegrams and radio-telegrams to and from or in transit through † save and except such telegrams and radio-telegrams as are on the service of any British Government.

With a view, however, to minimise inconvenience to the public, His Britannic Majesty's Government will, until further notice, and as an act of grace, permit the transmission of such telegrams and radio-telegrams in plain language as foreign Governments or the public choose to send, provided that such telegrams and radio-telegrams are written in English or French, and on the understanding that such telegrams and radio-telegrams are accepted at the sender's risk, and subject to censorship

* Strike out word(s) not applicable.

† Here insert name of the British Government concerned.

‡ Here insert the territories, cables, land lines or wireless installations to be placed under censorship.



by the [†] authorities; that is, that they may be stopped, delayed, or otherwise dealt with, in all respects at the discretion of those authorities, and without notice to the senders, and that no claims in respect of them, whether for the reimbursement of the sums paid for transmission or otherwise, will be considered by [†] His Britannic Majesty's Government in any circumstances whatever. It is, moreover, essential that such telegrams and radio-telegrams should bear the sender's name at the end of the text, otherwise they are liable to be stopped until the name is notified by paid telegram. Registered abbreviated addresses will not be accepted, either as addresses or as names of senders.

NOTE 1.—The term "telegram" in the International Convention is applied to radio-telegraph messages sent from shore to shore, as well as to those sent by cable or land line.

The term radio-telegram in the International Convention is used to denote messages exchanged between ships and the shore.

NOTE 2.—Non-adhering Governments, *i.e.*, those of Canada and Newfoundland, should as a matter of convenience send Notification 1A through His Majesty's Government. Notification 2 should similarly be sent through His Majesty's Government, the first paragraph being modified by the omission of references to the International Telegraph Convention and/or the International Radio-Telegraph Convention.

G. H.
E. M. P.

[W 1308]

No. 7^A.

[File 1308/1921]

[December 24, 1920.]

[Colonial Office.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, December 20, 1920.

Proposed
amendment
of British
North
America
Act:
Control of
Canadian
aircraft
outside the
Dominion.

I AM directed by Viscount Milner to acknowledge the receipt of your further report of the 10th November[†] relative to the proposal that the British North America Act should be amended so as to confer powers to legislate extra-territorially on the Parliament of Canada.

2. The origin of the proposal is the adoption by the Canadian Government of the view that such legislation is required to enable the Dominion to control effectively the proceedings of Canadian aircraft outside Canada. The question whether immediate legislation of the character proposed is required from this standpoint would seem to be affected by two points:—

- (1.) Whether or not, if Canada becomes a party to the International Air Convention, the powers conferred by section 132 of the British North America Act can be regarded as such as to enable the Canadian Parliament to deal with offences against the convention, even if committed outside the limits of the Dominion. The section, which seems to be couched in very wide terms, runs as follows:—

"The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries."

- (2.) Whether, apart from any question of treaty obligation, the necessary powers for dealing with Canadian offenders against the Canadian laws relating to aviation found within the Canadian jurisdiction, even if the offences have been committed outside Canada, could not be secured by a Canadian law making it an offence to re-enter Canada having committed such an offence, in accordance with the principle of the judgment of the Judicial Committee of the Privy Council in *Peninsular and Oriental Navigation Company v. Kingston* (A. C. 1903, p. 471).

* Strike out word(s) not applicable

† Here insert name of the British Government concerned.

‡ See No. 6.

3. Lord Milner would be obliged if you would be so good as to take the above points into your consideration and favour him with your observations thereon.

I am, &c.

G. GRINDLE.

Report.

In our opinion—

- (1.) The powers conferred by section 132 of the British North America Act are sufficient to enable the Canadian Parliament, if Canada becomes a party to the International Air Convention, to deal with offences against the convention by Canadian airmen, even though the offences are committed outside the limits of the Dominion.
- (2.) Yes.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
December 24, 1920.

GERMANY.

[C 4297]

No. 7^B.

[Board of Trade.]

[File 104/1921.]

[February 24, 1920.]

Case for the Opinion of the Law Officers, Mr. Austen-Cartmell and Mr. Branson.

COUNSEL'S attention is called to the provisions of article 297 of the Treaty of Peace, and more particularly to paragraphs (f) and (g).

The following is copy of the point submitted to Sir Ellis Cunliffe by Mr. Payne, C.B., the Secretary to the Board, dealing with such points, and of Sir Ellis Cunliffe's opinion thereon.

Restitution
in specie of
British
property in
Germany
under
article 297
of Treaty
of Peace.

(B.T.C. 239.)

Restitution in Specie of British Property in Germany.

Will you kindly advise as to the position on the assumption that the Government decides not to support claims by British nationals to restitution in specie under article 297 (f) of the German treaty, notwithstanding that the wording of 297 (g) may entitle British nationals to restitution on a strict legal interpretation.

H. A. P.

January 18, 1920.

The Solicitor,

See separate memorandum herewith.

R. E. C.

January 27, 1920.

Mr. Payne,

For the Council.

H. A. P.

January 31, 1920.

On this assumption, and subject, of course, to the provisions of section 4, article 297 (a) of the treaty, which arrests uncompleted measures of transfer, the question is, what will the position be if the Government decide not to support claims by British nationals to restitution in specie? Leaving out the question of hostile

[6498]

I



attitude of any considerable portion of the House of Commons against the attitude that the Government may take up, the position is as follows:—

Certain sections of the treaty, including those in question, having been set out in the schedule to the Order in Council, dated the 18th day of August, 1919, have full force and effect as law, and that being so it is at once arguable that our nationals have, if they think that that which is enacted as a law of the land has been misinterpreted by the Government or any department of State, the right to seek redress on a point of law in our own Courts. It will be noted that under paragraph 7 of the annexe to article 298 the Allied or Associated Powers have one year in which to specify the property, rights and interests over which they intend to exercise the right provided in article 297, paragraph (f)—the paragraph in question—but the mere fact that they have a year would not prevent pressure being brought upon them at an early stage to give a reply whether or not they consider our nationals are, or are not, debarred under paragraph (g), though they might ask for a reasonable time to consider the point if they decide to treat it merely as a legal one.

There is probably very little precedent to draw upon to determine the rights of a British subject as against his Government in such a case as this, but it is conceivable that one of two courses may be taken. The subject might present a petition of right on the ground that he is suffering, or will suffer, damage under an intimation by the Government that they refuse to recognise his right to restitution in specie. Petitions of right do not lie in respect of wrongful acts, and therefore a petition would have to be rather ingeniously worded to distinguish the complaint from a complaint of a tortious act by the Government. He possibly might simply allege that the Government had misconstrued the meaning of the treaty. A petition of right has, however, to be filed by the Attorney-General, and therefore the matter would have to come before him before the petition could go forward. Alternatively, there is the procedure which has recently grown up (the right to adopt which, I rather understand, the Crown's advisers are inclined to deny), and that is an action against the Attorney-General for a declaration, which in this case would take the form of a declaration that the subject was entitled under paragraph (f), and notwithstanding paragraph (g) to put in a claim for restitution of his property in specie.

The matter might, from another point of view, come before the Mixed Arbitral Tribunal or the arbitrator appointed by that tribunal, because, while it does not appear clear that the Mixed Arbitral Tribunal or the arbitrator has any specific authority to deal with claims for restitution of property in specie *per se*, it is obvious that they can become seized of such claims, because if the person so claiming (as will happen in most cases) alleges that restitution in specie will not restore him the actual value of the property as it existed at the date of transfer or liquidation, he will be able to put in a claim for compensation under paragraph (f), and the Mixed Arbitral Tribunal (or the arbitrator) will at once have to consider how such a claim is to be dealt with, and it is not easy to predict what course could be taken if the tribunal allowed the claim or disallowed it.

I suppose we have also to bear in mind what will be our position with our allies if we put an interpretation on sections of the treaty which they might regard as a breach of faith.

R. E. C.

February 2, 1920.

(B.T.C. 205.)

Having regard to the great importance of these treaty points, it has been decided that the opinion of the Law Officers should be obtained as to the interpretation of article 297 (f) and (g) of the Peace Treaty, and as to what the position of the Government would be as against persons seeking redress (supposing that article 297 (g) does not debar British nationals from seeking restitution) in the event of the Government deciding not to support the claims of the British nationals.

The Law Officers, Mr. Austen-Cartmell and Mr. Branson are requested to advise accordingly.

Opinion.

In our opinion the legislation in the United Kingdom before the signature of the armistice did not prescribe the "general liquidation" of enemy property, rights or

interests within the meaning of article 297 (g). But we do not know that there was no such legislation in any part of the Empire—we rather gathered that there was in India—and, if there was, we think that British nationals would be debarred by the clause from seeking restitution in specie under article 297 (f). In any case, we think that in view of paragraph 7 of the annexe following article 298 (which is printed in the schedule to the Treaty of Peace Order in Council, and therefore has force and effect as law, as well as article 297 itself), it is for the British Government to decide whether the right of restitution provided for by article 297 (f) is to be exercised, and in the event of the Government deciding not to support claims of British nationals to restitution in specie, we do not think that there are any legal means by which British nationals could challenge this decision.

GORDON HEWART.
ERNEST M. POLLOCK.
J. AUSTEN-CARTMELL.
G. A. H. BRANSON.

Law Officers' Department,
February 24, 1920.

[C 3463]

No. 7^c.

[Clearing Office
(Enemy Debts).]

[File 3463/1920]

[May 18, 1920.]

Case for the Opinion of the Law Officers and Mr. J. Austen-Cartmell.

THE opinion of counsel is desired on behalf of the Controller of the Clearing Office with regard to the following points, which have arisen upon the Treaty of Peace and "The Treaty of Peace Order, 1919," a copy of which accompanies these instructions:—

British Companies having Branches in Foreign Countries.

A number of cases have arisen of British companies incorporated under the Companies Acts or under special Acts of Parliament, having their head offices in London and having branches in neutral and allied countries at which business is carried on, and which have incurred debts and pecuniary obligations to German nationals. These companies are, for the most part, banks and insurance companies, and their foreign branches are registered under the laws of the countries in which they carry on business, and in certain cases these laws provide for a sum to be deposited with the authorities of that country by way of security. The general control is in the hands of the board of directors in London, but the branches have, prior to the war, in the ordinary course of business, issued policies which have become claims or have otherwise incurred debts, and it may be assumed that, in the ordinary course, payment to the German creditor would have been made at the branch where the policy was issued or the debt incurred, and that, in most cases, there are assets available in the foreign country which would be sufficient to answer any judgment which might be obtained against the branch, assuming successful proceedings to be instituted by the creditor.

In certain cases claims are being made against these branches by German nationals resident in the foreign country, and in other cases by German nationals resident in Germany, and certain of these companies have applied to the Controller for information as to the proper course to be pursued in meeting these claims, and whether they ought to hand over the sum in question to the Controller and defend any proceedings brought against them in the foreign country or whether they have no option, notwithstanding the terms of the Treaty of Peace, but to pay the creditor direct. They have further, notwithstanding the terms in certain cases, informed the Controller that they are advised by their foreign lawyers that, under the laws of the country in question, there would be nothing to prevent the creditor, if payment is refused, from commencing proceedings and obtaining a judgment followed probably by execution.

Counsel is referred to article 296 (1) and (2) of the Treaty, and also to [6498]

British Companies with branches in foreign countries: Position under the Treaty of Peace with Germany and "The Treaty of Peace Order, 1919."



Section 1 (xvi) of "The Treaty of Peace Order, 1919." Under article 296 (1) and (2) it will be noted that Germany and Great Britain agree that all debts payable before the war and due by a British national residing in British territory to a German national residing in German territory, and also the further class of debt referred to in paragraph 2, are to be settled through the Clearing Offices to be established in each of the two countries; and under (a) of that article and paragraph 3 of the Annex to Section III, which follows it, all other modes of recovering such debts are prohibited, and contraventions of these provisions are subject to heavy penalties.

Although the expression "national" is not defined in the Treaty, Section 2 of the Order in Council states that such expression in relation to any State includes (*inter alia*) any company or corporation incorporated therein according to the law of that State. There can be no doubt that the companies in regard to which the present difficulty arises are incorporated in the United Kingdom according to British law, and therefore the further question arises whether, in regard to the branch at which the debt was incurred, the company can be reasonably said to be residing in British territory. In general, it would appear that the residence and domicile of an incorporated trading company are determined by the situation of its principal place of business (see Dicey, "Conflict of Laws," 2nd edition, p. 162). On the other hand, for the purpose of special statutes, such as those relating to income tax and service of process, it has been frequently held that a company does not necessarily reside where it is registered, but that its residence is in the place where it in fact keeps house and does its real business (see *De Beers Consolidated Mines (Limited) v. Howe*, 1906, A.C., 455; *Egyptian Hotels (Limited) v. Mitchells*, 1915, A.C. 1022).

If there is good cause to believe that a foreign court, upon proof of the place of incorporation of the British company and of the nationality and place of residence of the German creditor at the date of ratification of the Treaty, would hold it a good answer to the claim for the British bank to plead article 296 of the Treaty, and to allege that it had already discharged the debt in question by payment to the Controller of the British Clearing Office, then in such cases the company may doubtless be advised to resist the claim, and may be offered an indemnity in case of their failing in the defence; if, on the other hand, the foreign court is likely to hold that, by reason of the situation of the branch, the fact that the debt was incurred abroad and was payable abroad, and the fact that the company has assets abroad sufficient to meet the claim, the company is not, in relation to the branch in question, residing in the United Kingdom, then it would appear to be the better policy for the Controller to abandon the claim to the funds in question.

It should be pointed out that such an abandonment would mean considerable diminution of the fund out of which debts owing to British nationals by German nationals will have to be paid. It does not appear likely that Germany will be in a position to carry out her Treaty obligations with regard to the payment of the monthly balances between the Clearing Offices, and, if the debt owing from the company in question is an enemy debt, or can be looked upon as property, rights or interests within British dominions of a German national at the date when the Treaty comes into force, thus becoming subject to the charge created by Section 1 (xvi) of the Order in Council, it would become available to meet British debts and claims.

In certain cases the debt claimed from the branch is due to a German national residing in the foreign country and not in Germany, and in that case the claim would appear more difficult to meet, for it would not be in the nature of an "enemy debt" within article 296 of the Treaty. If the local situation of the debt (as to which see Dicey, pp. 309 and 310) could be said to be, not the foreign country, but the United Kingdom where the company is incorporated, the property might be said to come within the terms of the charge, but even if this were so, there might be a difficulty in preventing a judgment from being recovered in the foreign country where the debt was incurred.

Counsel will, therefore, please advise the Controller what course the above-mentioned companies should be directed to follow with regard to debts claimed against their foreign branches (a) by German nationals resident in Germany; and (b) by German nationals resident in the country where the branch is established, and whether there would be a reasonable probability of the companies successfully defending proceedings abroad to recover such debts either in case (a) or (b), generally upon the matter.

The Law Officers and Mr. Austen-Cartmell are requested to advise—

1. Whether, in the cases referred to, such claims fall to be dealt with under the Treaty of Peace and the Order in Council.

2. Whether, in the event of proceedings having been instituted in enemy countries against the branch of a British company and payment enforced either against funds deposited or against other assets within the local jurisdiction, those cases can be reopened on the ground that the claims fall to be dealt with under the Treaty of Peace and the Order in Council.
3. Generally upon the case.

Opinion of the Law Officers of the Crown and Mr. J. Austen-Cartmell.

1. A company which, having been incorporated in accordance with the laws of the United Kingdom, has its head office and effectively carries on business in the United Kingdom but which also has a branch in a foreign country, resides for the purpose of article 296 (1) *et seq.* of the Treaty of Peace and Section 1 (ii) of "The Treaty of Peace Order, 1919," within the United Kingdom. Such a company (to which we hereinafter refer as "a British company") cannot, we think, be treated as consisting of two entities of which one resides in the United Kingdom and the other resides in the foreign country. The result is that a debt which is claimed as being due from a foreign branch of a British company is, for the purpose above indicated, a debt which is due from a British national residing within British territory.

If the alleged creditor is a German national residing within German territory, the conditions of article 296 of the Treaty of Peace are satisfied, and the case falls to be dealt with (through the Clearing Offices) under the Treaty of Peace and "The Treaty of Peace Order, 1919," Section 1 (i) *et seq.*

If the alleged creditor is a German national who does not reside within German territory, the case does not fall to be dealt with through the Clearing Offices, but if by British law the debt is (as in most instances would probably be the case) situate in the United Kingdom, it would technically be subject to the charge created by Section IV of the Treaty Annex, paragraph 4, and Section 1 (xvi) of the Treaty of Peace Order.

2. German nationals who reside within German territory are, as regards the payment of debts due to them from British nationals who reside within British territory, bound by the relative provisions of the Treaty (see Treaty, article 296 (a), and Annex, paragraph 3). We think therefore that though practical difficulties may arise, any case in which the "actor" is a German national residing within German territory, whether the action is brought in a German or other foreign court, whether neutral or not, can be adjusted on the ground suggested in the question. But we think that the questions contained in No. 2 should be separated and further considered.

3. Generally.—In cases in which the debt (being according to British law situate in the United Kingdom) is due to a German national not residing within German territory and payment thereof is exacted in a foreign country (not being German territory), it would be difficult, if not impossible, to enforce the charge created by Section IV of the Treaty Annex, paragraph 4, and Section 1 (xvi) of the Treaty of Peace Order.

Our recent opinion in regard to the surrender value of life policies does not deal with the points now raised. We should add that the above opinion does not deal with those cases (if any) in which the debts have been vested in the Custodian.

GORDON HEWART.
ERNEST M. POLLOCK.
J. AUSTEN-CARTMELL.

*Law Officers' Department,
May 18, 1920.*



[C 4297]

No. 7^o.

[File 104/1921]

[December 14, 1920.]

[Board of Trade.]

Instructions to settle Case on behalf of the British Government on Arbitration between the British and German Governments.

HEREWITH are sent—

Case for opinion and opinion dated the 24th February, 1920.
Notes relating to the point at issue passing between the British and German Governments.
Translation of extracts from German text-books on trading with the enemy legislation.
Draft case for arbitration.

Restitution
in specie of
British
property in
Germany
under
article 297
of Treaty of
Peace.

A dispute has arisen between the British and German Governments as to the true construction of sub-sections (f) and (g) of article 297 of the Treaty of Peace, and it has been arranged that the question shall be submitted for arbitration to the neutral chairman of the Mixed Arbitral Tribunal. Each Government is to state its contentions in the form of a case. The cases are to be exchanged, and a month is to be given for reply by each party. A rough draft of the proposed case has been prepared, and is sent herewith for counsel's consideration, and it is believed that, subject to the consideration of the précis of colonial legislation hereinafter referred to, it contains information as to all facts that may be material to the point at issue, which point is really confined to that on which counsel advised on the 24th February, 1920, as to whether the legislative measures taken in the British Empire prescribe the general liquidation of enemy property, rights or interests.

In the further papers which were sent to counsel in February last will be found the text of a reply given to a query raised by the German delegation when the Peace Treaty was under discussion between the Allies and Germany. That reply has not been referred to in the case, as it is really part of the German case as against the British Government.

Enquiry has been made into the German legislation corresponding to "The Trading with the Enemy Amendment Act, 1916," and the extracts which are sent herewith show that in fact the German legislation did not require general liquidation. The German legislation was of a permissive character (see p. of the German translations herewith).

The various ordinances and statutes dealing with enemy businesses in the colonies have been inspected, and there is sent herewith a précis of legislation passed in different parts of His Majesty's dominions.

In the case of the colonies specified in the précis, it may be mentioned that legislation on the lines of the Trading with the Enemy Acts passed in the United Kingdom was also passed in those colonies, but it will be for the consideration of counsel whether the proclamations or further legislation passed in those colonies for winding up the trade of alien enemies amounts to "legislative measures prescribing the general liquidation of enemy property, rights and interests."

It will be noted that in certain cases set out in the précis the winding-up of businesses of alien enemies, &c., has been provided for by proclamation; in other cases legislation has been passed in protected territories or in places which may not form part of His Majesty's dominions; but as the Colonial Office included them in answer to the Board's request to be supplied with colonial legislation dealing with the particular subject matter, it was thought best to include them in the précis for the consideration of counsel.

It may well be that, notwithstanding the headings and short title of the Acts included in the précis, it can be contended that the legislation is of an enabling or permissive character, and therefore does not prescribe the general liquidation of enemy property, rights and interests, but counsel will please consider whether such a contention can validly be put forward.

As regards India, to which reference was made in the opinion of February last, it is interesting to observe that, by Act No. 10 of 1916, being an Act to prohibit or control trading of hostile foreigners and hostile firms and for other purposes, it is provided in section 4 (1) that the Governor-General in Council may make an order either (a) prohibiting any hostile firm from carrying on business except for the purposes

and subject to the conditions (if any) specified in the order, and (b) requiring the business of such firm to be wound up, and may, in any case where he has made an order prohibiting or limiting the carrying on of the business at any time if he thinks it expedient, substitute for that order an order requiring the business to be wound up, and many orders were made under section 4 of that Act requiring the businesses of certain firms, &c., set out in schedules to those orders, being wound up.

Counsel will please advise and settle the case for the British Government accordingly.

Opinion of the Law Officers of the Crown and Mr. G. A. H. Branson.

Having regard to the précis of colonial legislation sent with the papers, we think there are difficulties in establishing that none of the legislative measures in the British Empire goes further than the provisions of sections 1 and 4 of "The Trading with the Enemy Amendment Act, 1916." For instance, the law of Jamaica seems to us to go further. What the effect of such legislation in a particular colony may be held to be upon the interpretation to be placed upon 297 (g) is a difficult question. The contention would appear to be open for argument, that legislation prescribing "general liquidation in a limited area does not compel the arbitrator to hold that the restrictive reservation of (g) must come into operation. That clause contemplates legislation prescribing "general liquidation" throughout the territory affected by the restrictive reservation.

It seems necessary, in our opinion—

1. That the whole of the legislation on the subject throughout the Empire should be available to the arbitrator, and that he should also be given for his convenience the précis now with the papers.
2. That the above point should be raised in the case and argued before him.

GORDON HEWART.
ERNEST M. POLLOCK.
G. A. H. BRANSON.

*Law Officers' Department,
December 14, 1920.*

[C 14722]

No. 8.

[File 311/1920]

[December 24, 1920.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, December 18, 1920.

I HAVE the honour, by direction of Earl Curzon of Kedleston, to transmit to you the papers noted in the accompanying list in regard to a decision of the Inter-Allied Conference held in London on the 4th December last, relative to certain payments alleged to have been made to the ex-Emperor William. The facts of the case are as follows:—

A report was recently published in the German press to the effect that the following sums had been paid to the ex-Emperor from German sources:—

In January 1919, between 400,000 and 500,000 M.; in August 1919, 1,800,000 M., as arrears from the privy purse; in September 1919, 10,000,000 M. for the purchase of a house at Doorn, in Holland; and, as the sale price to the German Government of two houses in the Wilhelmstrasse, Berlin, a sum of 40,000,000 M. less 2,000,000 M. taxes. The total sum paid was stated in this report to have been over 50,000,000 M.

This report was brought to the notice of the Inter-Allied Conference of Prime Ministers held in London on the 4th December, when the Conference decided to instruct the French, British and Italian representatives at Berlin to ascertain from the German Government whether it corresponded with the facts. If the report proved to be true, the Allied representatives were further instructed to inform the German Government that such payments were a violation of the spirit of the Treaty of Versailles,

Private
Property of
ex-Emperor
William:
position in
regard to
Article 248
of the
Treaty of
Versailles.



especially in view of the fact that no payment in respect of reparation had yet been made to the Allied Governments.

3. On receipt of these instructions His Majesty's Ambassador at Berlin ascertained that the report was in substance correct. He pointed out, however, that the payment made in August 1919, and the sale price of the two houses in Berlin were money advances made by the Prussian Government out of the private fortune of the ex-Emperor, and that the payments made in January 1919 and the purchase price of the house at Doorn also apparently came out of the ex-Emperor's private resources. In these circumstances, His Majesty's Ambassador enquired whether the protest should still be made.

4. The ground on which the Inter-Allied Conference intended to base their protest to the German Government was presumably that paragraph of Article 248 of the Treaty of Versailles, which reads:—

"Subject to such exceptions as the Reparations Commission may approve, the first charge upon all the assets and revenues of the German Empire and its constituent States shall be the cost of reparation and all other costs arising under the present Treaty or any treaties or agreements supplementary thereto, or under arrangements concluded between Germany and the Allied and Associated Powers during the armistice or its extensions."

5. I am to request that you will take these papers into consideration and that you will favour Earl Curzon of Kedleston with an opinion on the following points:—

- (1.) Whether the private property of the ex-Emperor can be considered to be a part of the assets and revenues of the German Empire and its constituent States.
- (2.) Whether in that case the recent payments made to the ex-Emperor can be considered to be a breach of Article 248 of the Treaty of Versailles, or whether the proposed protest is justifiable on any other grounds.

6. Earl Curzon would also be grateful to be favoured with any observations of a general character which you may be good enough to offer upon the papers now submitted for your consideration.

7. Inasmuch as it is obviously important that any representations which it may be thought desirable to address to the German Government should be made as soon as possible, Lord Curzon would be very grateful if he could be favoured with your reply at your earliest convenience.

I have, &c.

LANCELOT OLIPHANT.

List of Papers.

- (A.) Lord D'Abernon's telegram No. 598 of November 26, 1920 (C 12313/1920).
- (B.) To Lord D'Abernon, telegram No. 363 of December 4, 1920 (C 13464/1920).
- (C.) Lord D'Abernon's telegram No. 621 of December 9, 1920 (C 13481/1920).

Report.

In our opinion—

1. The private property of the ex-Kaiser is not part of the assets and revenues of the German Empire and its constituent States.
2. The payments, if they were in fact made out of the ex-Kaiser's private property, cannot be considered a breach of Article 248 of the Treaty; nor can we suggest any other grounds on which the proposed protest can be justified. It could not, we think, be contended that the German Government is bound to confiscate the private fortune of the ex-Kaiser.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
December 24, 1920.

[203244]

No. 8^A.

[Russian Trade Committee.]

[File 142549/1919.]

[June 4, 1920.]

Case for the Opinion of the Law Officers of the Crown.

A QUESTION has arisen in connection with the reopening of trading relations with Russia on which the Prime Minister desires to have the views of the Law Officers as quickly as possible.

Foreign trade in Russia is stated by the representatives of the Soviet Government to be entirely in the hands of their Government. In order to restart trading operations, the Soviet Government must export from Russia goods or gold or provide services. In the course of the revolution, property has been nationalised, requisitioned and confiscated, and a considerable number of individuals in countries outside Russia have claims against the Soviet Government or particular authorities thought to be acting in accordance with instructions received from the Soviet Government, as well as against particular persons and firms. Further, both foreign Governments and individuals have claims against Russia in respect of loans, bonds, &c., for which the Czar's Government or earlier revolutionary Governments accepted responsibility.

For the purpose of paying for goods in this country, the Russians may adopt one or more of the following courses:—

- (a.) They may export identifiable goods, e.g., precious stones, gold roubles from the Czar's Treasury, works of art, &c.
- (b.) They may export non-identifiable goods, e.g., timber, grain, flax, &c.
- (c.) They may export either under (a) or (b) or both to neutral countries, and in return therefor the neutral financiers may provide sterling credits in London, either to the order of—
 - (i.) Soviet Government;
 - (ii.) Individual members of the Russian Trade Delegation;
 - (iii.) Centrosoyus Limited (a Limited Company formed by the Russian co-operative organisation some time ago for the purpose of facilitating trading operations with Russian co-operative societies, and registered in Great Britain).
 - (iv.) Any other person or corporation, either specially constituted or otherwise.

The observations of the Law Officers are asked for, in particular, on the following questions:—

1. Whether a British subject having claims could with success initiate litigation to obtain possession of gold or goods sent to this country—
 - (a.) If he could establish that the gold or goods had been his property in Russia at the time of the measures of expropriation;
 - (b.) If he could establish that the gold or goods were the produce of mines or land of which he had been the owner, but which were not produced until after the measures of nationalisation were enforced;
 - (c.) On the ground that, though he had no interest in that particular property, it constituted a fund to which as a claimant he might look for the satisfaction of his claim.
2. Whether a British subject having claims against the Soviet Government or against persons or organisations in Russia could secure by legal process that securities deposited or credits opened in this country by the Soviet Government or its agents should be transferred to himself, or could prevent the use of such securities or credits until other claims are determined by the Courts.

Attachment
of Russian
gold or
goods sent
to United
Kingdom.

*Opinion of the Law Officers of the Crown.*

1. Assuming that the Soviet Government is to be regarded as the *de facto* Government of Russia, and that the gold or goods in question have been nationalised, requisitioned or confiscated by or under the authority of that Government, we are of opinion that a British subject could not successfully initiate litigation to obtain possession of gold or goods sent to this country in any of the cases specified. The validity or propriety of the nationalisation, requisitioning or confiscation of the gold or goods, being the executive act of a *de facto* foreign Government, is not a matter into which the Courts of this country would, in our opinion, have jurisdiction to enquire. The remedy, if any, of persons aggrieved is, we think, exclusively diplomatic and not legal.

2. We think not.

GORDON HEWART.
ERNEST M. POLLOCK.

*Law Officers' Department,
June 4, 1920.*

[N 3274]

No. 9.

[File 822/1920.]

[November 26, 1920.]

Memorandum for the Attorney-General.

Status and
privileges
of M. L. B.
Krassin,
Russian
Delegate
in United
Kingdom.

WHEN the Russian delegation, headed by M. Krassin, was about to arrive in this country for the purpose of negotiating the trade agreement, they requested—and were accorded—the following facilities:—

1. The right to enter and leave England freely.
2. The right of postal, telegraphic and wireless communication, if necessary in cypher, with Moscow, Copenhagen and with "our representatives" in other places.
3. The right to send couriers to and from Russia, Copenhagen and wherever else "our representatives" may be.
4. The right to send "our" despatch bags under seal.

On the 2nd July, 1920, Messrs. Bull and Bull informed the Foreign Office that they had been instructed by M. Krassin with reference to proceedings which had been instituted against him by a Russian consulting engineer in respect of a claim of 4,000*l.* damages for alleged wrongful conversion by the defendant of certain steel ropes and india-rubber belting stated to belong to the plaintiff. They stated that, on the advice of counsel, they proposed entering a conditional appearance only to the writ and to apply to the Court for an order setting aside the writ and all subsequent proceedings as null and void under "The Diplomatic Privileges Act, 1703." Before making this application they asked the Foreign Office to inform them, for the use of the Court, whether or not M. Krassin was a public Minister of the foreign State of Russia authorised and received as such by His Majesty within the meaning of the aforesaid statute. The Foreign Office replied on the 26th July in the following terms:—

"Gentlemen,

"I am directed by Earl Curzon of Kedleston to acknowledge the receipt of your letter of the 2nd July relating to the legal status of M. Krassin.

"I am to inform you that M. Krassin is the authorised representative of the Soviet Government, and was received by His Majesty's Government for the purpose of carrying out certain negotiations, and that, for the purpose of facilitating the conduct of these negotiations, the following privileges have been granted to him:—

- "1. The right to enter and leave England freely.
- "2. The right of postal, telegraphic and wireless communication, if necessary in cypher, with Moscow, Copenhagen and Soviet representatives in other places.
- "3. The right to send couriers to and from Russia, Copenhagen, and wherever else the Soviet representatives may be.
- "4. The right to send despatch bags under seal.

"Whether M. Krassin is a public Minister of the foreign State of Russia within the meaning of the Diplomatic Privileges Act of 1703 depends on the interpretation of that statute, and is not a question upon which Lord Curzon feels able to express an opinion; but his Lordship regards M. Krassin as a foreign representative who should, in view of the privileges which have been granted to him for the purpose of the negotiations with which he is charged, be exempt from the processes of the Courts."

On the 23rd September Messrs. H. W. and S. Patey wrote a letter to the Foreign Office in which the following passage occurred:—

"We are aware that diplomatic relations have not been established between His Majesty's Government and the existing Government of Russia, but our client has been authorised by His Majesty's Government to enter into commercial relations with the members of a delegation who claim to represent, in this country, an existing State Government in Russia.

"What we are anxious to know is whether that claim is one which is assented to by His Majesty's Government, or whether the members of this delegation are regarded by His Majesty's Government as a group of individuals possessing no political character?"

To this the Foreign Office replied on the 5th October as follows:—

"Sir,

"I am directed by Earl Curzon of Kedleston to acknowledge the receipt of your letter of the 22nd September, and to inform you that His Majesty's Government assent to the claim of the delegation to represent in this country a State Government of Russia."

On the 19th November Messrs. Linklaters and Paines wrote a letter to the Foreign Office of which the material portions for the present purpose are as follows:—

"We called at the Foreign Office to see you on behalf of our clients, Aksionairnoye Obschestvo dlia Mechanicheskoy Obrabotky Diereva A. M. Luther, a company registered in Russia in the year 1898, and, as subsequently suggested by you, we are writing to inform you of the information we require.

"The position is that our clients, practically the whole of whose capital is held by Venesta (Limited), an English company, have commenced proceedings here against the firm of James Sagor and Co. with reference to certain shipments of plywood, which the plaintiffs allege were seized by the Russian Soviet Government at the plaintiffs' factory and wrongfully sold to the defendants, who have imported the same into this country.

"According to an affidavit sworn by Mr. Sagor, the sole partner in the defendant firm, it appears that certain enquiries have been made of His Majesty's Foreign Office as to the status of the Russian delegation now in this country, and that a reply was received to the effect that His Majesty's Government assent to the claim of the said delegation to represent, in this country, a State Government of Russia.

"The affidavit further alleges that the deponent believes His Majesty's Foreign Office issued a certificate to the effect that a M. L. B. Krassin was recognised by His Majesty's Government as possessing the character of a diplomatic representative, and that the said L. B. Krassin was thereupon treated by the Court here as entitled to immunity from process.

"We shall be much obliged for any information with regard to the above two allegations and to know the circumstances under which the information, if supplied at all, was supplied to Mr. Sagor or his solicitor.

"Generally, the plaintiffs require assistance to enable them to obtain possession of the goods, which they contend are their property, which have been wrongfully seized by the Soviet Government, and which the Russian delegation here have purported to contract to sell to the defendants.

"The matter is a very serious one and of the greatest importance to Venesta (Limited) and also to traders in this country, and we should be grateful for any assistance that you can afford us in the matter."



To this letter it was proposed to reply by repeating the substance of the statements made in the letters quoted above to Messrs. Bull and Bull and Messrs. Patey. It has, however, been suggested that the statements made to Messrs. Bull and Bull went too far, since M. Krassin is in a different position from that of any ordinary diplomatic agent inasmuch as he is also engaged in trade. It is suggested that any exemption from the processes of the British Courts accorded to M. Krassin might be limited to matters covered by his diplomatic activity and not to his transactions as a trader. Although no such distinction is made by the British Courts in the case of duly accredited diplomatic agents (*Magdalena Steam Navigation Company v. Martin* (1859), 2 E. & E. 94), the peculiar position of M. Krassin may be held to justify such a distinction.

The Secretary of State would be very grateful for the Attorney-General's observations on the position generally, and as to the reply to be returned to Messrs. Linklaters and Paines in particular.

November 26, 1920.

Report of Attorney-General.

As I understand that an immediate opinion is desired in this matter, I am writing at once. It appears to me that, natural as the distinction may be thought to be between the diplomatic duties and the commercial adventures (if any) of an Ambassador, it is very difficult, since the decision in the *Magdalena* case (2 E. & E. 94), to rely upon that distinction so far as immunity from process is concerned. But in the case of M. Krassin I think that there are good grounds for the contention that he is not in the strict sense an Ambassador, but is a person who for a certain limited purpose is accorded certain specified privileges. Upon the whole, I do not think that the letters written by the Foreign Office go definitely beyond this view. The letter of the 26th July really says that the question is one for the Courts, and the letter of the 5th October is concerned less with the privileges of M. Krassin than with the position of his so-called Government. Perhaps the matter is not of great practical importance, inasmuch as a plaintiff must, one would think, very soon be confronted with the fact that the confiscation or conversion relied upon was the act of something called a Government. With regard to the reply to the solicitors of the present plaintiffs, I suggest that they should be told that it is true that for a certain limited purpose the Foreign Office has regarded M. Krassin as exempt from the process of the Courts, and also that for the like limited purpose the Government has assented to the claim that that which M. Krassin represents in this country is a State Government of Russia, but that beyond these propositions the Foreign Office has not gone, and certainly does not purport to decide difficult and, it may be, very special questions of law upon which it may become necessary for the Courts to pronounce.

GORDON HEWART.

November 26, 1920.



1921

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office.

CONFIDENTIAL.

(11933)

LAST COPY.

Nothing mutilated or removed: A.D.M.N.

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1921.



1921

LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked *I^A*, &c.

COLOMBIA.

No.		Date.	SUBJECT.	Page.
1	Law Officers ..	June 15, 1921	Writ against Colombian Government: question of intervention of His Majesty's Government on the ground of diplomatic privilege ..	1

GENERAL.

<i>I^A</i>	Law Officers .. [Treasury]	Jan. 25, 1921	Registration of treaties, &c., under article 18 of League of Nations Covenant ..	3
<i>I^B</i>	Law Officers .. [Colonial Office]	May 31,	Proposed amendment of British North America Act: powers of extra-territorial legislation for Canadian Parliament ..	6
<i>I^C</i>	Law Officers and Mr. C. W. Lilley [Ministry of Labour]	June 1,	International Labour Conventions: obligations under Treaty of Versailles, Part XIII, Labour Clauses ..	8
<i>I^D</i>	Law Officers and Mr. C. W. Lilley [Ministry of Labour]	June 10,	Ratification of International Labour Conventions: obligations under Treaty of Versailles, Part XIII	15
<i>I^E</i>	Law Officers and Mr. W. Bowstead [Board of Trade]	June 30,	Position of Safeguarding of Industries Bill as regards most-favoured-nation clauses of British commercial treaties ..	17
<i>I^F</i>	Law Officers and Mr. R. Hills [Inland Revenue]	July 27,	Foreign Governments trading in United Kingdom: liability to United Kingdom income tax ..	21
<i>I^G</i>	Law Officers .. [Colonial Office]	Aug. 5,	Proposed amendment of British North America Act: powers of extra-territorial legislation for Canadian Parliament ..	24

GERMANY.

<i>I^H</i>	Law Officers and Mr. Branson [Board of Trade]	Jan. 19, 1921	Restitution in specie of British property in Germany under article 297 of Treaty of Peace ..	25
----------------------	--	---------------	--	----

JAPAN.

2	Law Officers ..	June 24, 1921	Termination of Anglo-Japanese Alliance, 1911 ..	28
3	Lord Chancellor 842 [8214]	July 1,	Termination of Anglo-Japanese Alliance, 1911 ..	29

a

(iii)

LEAGUE OF NATIONS.

No.		Date.	SUBJECT.	Page.
3 ^A	Law Officers .. [Colonial Office]	Sept. 21, 1921	Preferential treatment in United Kingdom of goods imported from territories placed under "B" and "C" mandates ..	30

NORWAY.

4	Law Officers ..	Mar. 21, 1921	Draft mining regulations for Spitsbergen ..	32
---	-----------------	---------------	---	----

PALESTINE.

5	Law Officers ..	Feb. 18, 1921	Preferential treatment in United Kingdom of goods imported from Palestine ..	35
---	-----------------	---------------	--	----

RUSSIA.

6	Law Officers ..	Apr. 18, 1921	Signature of Anglo-Russian Trade Agreement: effect as regards recognition of the Soviet Republic ..	36
7	Law Officers ..	Nov. 28,	Liability of a Government for obligations entered into by its predecessors ..	37

TURKEY.

8	Law Officers ..	July 21, 1921	Enlistment by British subjects of persons to serve in Greek naval and military forces to fight Turkish Nationalists ..	40
9	Law Officers ..	Oct. 18,	Delivery of war vessels to Kemalist Government by Russian Soviet Government: question of action under Anglo-Russian Trade Agreement, 1921 ..	40

UNITED STATES.

9 ^A	Law Officers .. [Home Office]	Apr. 7, 1921	National status of child born in the United States of a father who, at date of child's birth, was a natural-born British subject, but, during the child's minority, became a naturalised United States citizen ..	43
----------------	----------------------------------	--------------	---	----



(iv)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1921.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

AGR—GOV.

A.

Agreements: character of those to be registered under article 18 of League of Nations Covenant, 3-6.
Alliance: Anglo-Japanese Alliance, 1911, termination of, 28-30.

B.

Bauer, Marchal, et Cie., 1.
British North America. *See* Canada.

C.

Canada: amendment of British North America Act, 6, 7, 24, 25.
" powers of extra-territorial legislation for Parliament, 6, 7, 24, 25.
Colombia: writ against Government; question of intervention of His Majesty's Government on the ground of diplomatic privilege, 1-3.
Coward, Hawksley, Sons, and Chance, 2, 36, 37.
Customs: preferential treatment in United Kingdom of imports from territories placed under "B" and "C" mandates, 30, 31.
" preferential treatment in United Kingdom of imports from Palestine, 35, 36.

D.

Debts: liability of Governments for debts of predecessors, 37-39.
Diplomatic privilege: writ against Colombian Government; question of intervention of His Majesty's Government, 1-3.

E.

Enlistment. *See* Foreign enlistment.
Extra-territoriality: proposed powers of extra-territorial legislation for Canada, 6, 7, 24, 25.

F.

Foreign enlistment: enlistment by British subjects of persons for Greek forces to fight Turkish Nationalists, 40.

G.

Governments: foreign, trading in United Kingdom; liability to British income tax, 21-24.
" recognition of Soviet Republic; effect of Anglo-Russian Trade Agreement, 36, 37.

GOV—NEU.

Governments: liability for obligations entered into by their predecessors, 37-39.
Gramophone and Typewriter Company (Limited) v. Stanley, 23.
Greece: enlistment by British subjects of persons for Greek forces to fight Turkish Nationalists, 40.

I.

Imports. *See* Customs.
Income tax. British: liability of foreign Governments trading in United Kingdom, 21-24.

J.

Japan: termination of Anglo-Japanese Alliance, 1911, 28-30.

K.

Kodak (Limited) v. Clark, 23.

L.

Labour: Washington Conventions; British obligations under Part XIII of Treaty of Versailles, 8-17.
League of Nations: registration of treaties, &c., under article 18 of Covenant, 3-6.
" territories under mandates; preferential treatment in United Kingdom of imports from, 30, 31, 35, 36.
Liability: of governments for obligations entered into by predecessors, 37-39.

M.

Mandates: preferential treatment in United Kingdom of imports from territories placed under, 30, 31, 35, 36.
Mining: draft regulations. Spitsbergen, 32-34.
Most-favoured-nation clauses. *See* Treaties.

N.

National Provincial and Union Bank of England, 1.
Nationality: child born in United States of father who at date of the birth was a British subject, but during the child's minority became a naturalised United States citizen, 43, 44.
Neutrality: enlistment by British subjects of persons to serve in Greek forces to fight Turkish Nationalists, 40.
" delivery of warships to Kemal Government in Turkey by Russian Soviet Government; question of action under Anglo-Russian Trade Agreement, 40-43.

(v)

PAL—TRE.

P.

Palestine: preferential treatment in United Kingdom of imports from, 35, 36.
" *Parlement Belge*, 23.
" *Porte Alexandre*, 23.
Preferential treatment. *See* Customs.
Property: British in Germany; restitution in specie under Treaty of Peace, 25-28.

R.

Recognition. *See* Governments.
Registration. *See* Treaties.
Russia: recognition of Soviet Republic; effect of signature of Anglo-Russian Trade Agreement, 36, 37.
" liability of Soviet Government for obligations entered into by its predecessors, 37-39.
" delivery by Soviet Government of warships to Kemal Government in Turkey; question of action under Anglo-Russian Trade Agreement, 40-43.

S.

Safeguarding of Industries Bill: position as regards most favoured-nation clauses of British commercial treaties, 17-21.
Sansom v. Commissioners of Inland Revenue in the Court of Appeal, 23.
Spitsbergen: draft mining regulations, 32-34.

T.

Trade: liability to British income tax of foreign Governments trading in United Kingdom, 21-24.
Treaties: registration under article 18 of League of Nations Covenant, 3-6.
" International Labour Conventions; British obligations under Part XIII of Treaty of Versailles, 8-17.

TRE—WRI.

Treaties: British commercial; position of safeguarding of Industries Bill as regards most-favoured-nation clauses, 17-21.
" Anglo-Japanese Alliance, 1911; termination, 28-30.
" signature of Anglo-Russian Trade Agreement; effects as regards recognition of Soviet Republic, 36, 37.
Treaty of Versailles. *See* Treaty of Peace (Germany).
Treaty of Peace (Germany): British obligations under Part XIII, Labour clauses, 8-17.
" restitution in specie of British property in Germany under, 25-28.
Turkey: enlistment by British subjects of persons for Greek forces to fight Nationalists in, 40.
" delivery of warships to Kemal Government by Russian Soviet Government; question of action under Anglo-Russian Trade Agreement, 40-43.

U.

United States: nationality of child born in United States of father who at date of the birth was a British subject, but during child's minority became a naturalised United States citizen, 43, 44.

W.

Warships: delivery to Kemal Government in Turkey by Russian Soviet Government; question of action under Anglo-Russian Trade Agreement, 40-43.
Wharton, D. B. S.: nationality, 43, 44.
Writ: against Colombian Government; question of intervention of His Majesty's Government on the ground of diplomatic privilege, 1-3.



1921

Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1921.

COLOMBIA.

[T 7083]

No. 1.

[File 391/1921]

[June 15, 1921.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, June 7, 1921.

I HAVE the honour, by direction of Earl Curzon of Kedleston, to request the favour of your advice on the following matter.

2. There are deposited with the National Provincial and Union Bank of England, in the name of the Colombian Minister to the Court of St. James, two boxes containing emeralds, the property of the Colombian Government. It appears that there were proceedings some years ago in the Chancery Division, which were ultimately stayed by consent under a general settlement, which left the emeralds absolutely at the disposal of the Colombian Minister in London for the time being. In June last year a Paris firm, trading under the name of Bauer, Marchal et Cie., who had nothing to do with the Chancery proceedings referred to, issued a writ against the bank claiming delivery of the emeralds (which were described in the endorsement to the writ as "the property of the Colombian Government, which the said Government had authorised plaintiffs to sell for their account"), and an injunction to restrain the bank from parting with the emeralds. Lord Curzon is not fully acquainted with the facts on which the plaintiffs' claim is based, but he understands their case to be that some agreement was made in May 1914 between the plaintiffs and the Republic of Colombia, under which the plaintiffs were to act as the agents of the Colombian Government for the sale of emeralds, and that in April 1920 the plaintiffs made a contract to sell the emeralds to another Paris firm. This agreement is said to have been approved by some representative at Paris of the Colombian Government, but to have been subsequently repudiated by the Colombian Minister of Finance.

3. On the 8th December, 1920, the Colombian Minister addressed a note to the Secretary of State for Foreign Affairs (Paper (A)) informing him that on these proceedings being brought to his notice he had maintained his diplomatic privilege and "disclaimed all civil proceedings of the United Kingdom against that property," but that none the less the proceedings were continuing, and requested that steps should be taken "to apply to the emeralds which I hold on behalf of the Colombian Government the prerogatives granted both by the English and the international law to property of foreign diplomatic agents accredited to the Court of St. James." A search in the Foreign Office archives having failed to find any precedent applicable to the case, the Treasury Solicitor was consulted through the Home Office, and a copy of his opinion is enclosed (Paper (B)). In accordance with this opinion, a note was sent to the Colombian Chargé d'Affaires (Paper (C)), suggesting that he should instruct the legal

Writ
against
Colombian
Govern-
ment.
Question
of inter-
vention of
His
Majesty's
Govern-
ment on the
ground of
diplomatic
privilege.



representatives in this country of the Government of Colombia to take such action as might be necessary to bring the facts and any claim of diplomatic privilege which might be founded upon them before the Court.

4. The Colombian Minister was, however, most unwilling to take this course, and on the 18th February a further note was received from the Chargé d'Affaires (Paper (D)) enclosing correspondence between the Minister and the bank, in which the former indicated that his Government was not prepared to appoint any legal representatives in this country to take action in the matter before the Court. The Colombian Government also took the matter up with His Majesty's Minister at Bogotá, and requested the intervention of His Majesty's Government.

5. At this stage it was thought desirable to get into touch privately with the solicitors representing the bank (Messrs. Coward, Hawkesley, Sons, and Chance) in order to ascertain whether they proposed to raise the point of diplomatic privilege when the matter came into court. It was ascertained that they had every intention of doing so. The Colombian Chargé d'Affaires was notified accordingly.

6. On the 23rd March the plaintiffs applied to Mr Justice Roche for an interim injunction. After a full discussion of the privileged position of the Colombian Minister, the Judge refused to grant an injunction, basing his decision, however, upon the serious delay in making the application.

7. The plaintiffs then amended their writ and appealed against the Judge's decision. A copy of the amended writ is enclosed (Paper (E)). Before the appeal was heard the Colombian Chargé d'Affaires communicated to this Department a letter from the Colombian Minister (who, it should be explained, is also accredited to the French Republic and spends most of his time in Paris) which gives some further information about the case (Paper (F)). The Colombian Chargé d'Affaires on the 15th April also addressed a further official note to the Secretary of State (Paper (G)).

8. On the 18th April the Court of Appeal delivered judgment allowing the appeal and granting an interim injunction on the terms that "the name of the Colombian Government should be added to the writ, and that the plaintiffs take such steps as may be possible to bring the writ to the knowledge of the Government." A copy of the judgment is enclosed (Paper (H)). The plaintiffs then obtained an order from Mr. Justice Roche, giving them liberty to join the Republic of Colombia as defendants, and dispensing with service of the amended writ on the plaintiffs undertaking to notify the Colombian Minister of the writ and proceedings and to send him a copy of the writ (Paper (I)). This they did by writing a letter to the Minister and enclosing a copy of the writ. The Minister replied that he was in communication with His Majesty's Government about the matter, and addressed a further note to the Secretary of State (Paper (J)), in which the point of view of his Government is fully set forth.

9. In these circumstances it is clear that the Colombian Government will not take any steps to take part in the proceedings, either to raise the principle of diplomatic privilege or to defend the case on its merits, and look to His Majesty's Government to see that nothing is done which might injure their interests. The Court of Appeal carefully abstained from indicating what would happen in the event of the Colombian Government ignoring the proceedings, but it is obvious that should the Court decide to hear the case in the absence of the Colombian Government and ultimately make an order for the delivery of the emeralds to the plaintiffs, a diplomatic situation of considerable difficulty would arise. Lord Curzon doubts whether he would be justified in running the risk of such a result, for although the bank will presumably continue to defend the proceedings, it may be doubted whether the Court, even if it allowed the point of diplomatic privilege to be put forward by the bank, would attach as much weight to it as if it were made either by the Colombian Government or by His Majesty's Government on their behalf, and it seems in any case unlikely that the bank would be in a position to make a full defence of the case on the merits.

10. In these circumstances his Lordship is anxious to obtain your opinion as to what is the proper course to pursue. It has been suggested that it might be possible for the Attorney-General to appear in the proceedings, and if not to argue the merits of the case, at any rate to put forward the point of diplomatic privilege. The opinion of the Treasury Solicitor (Paper (B)) is opposed to this course, but it may be considered that the judgment of the Court of Appeal has modified the circumstances in which that opinion was given, and if it be thought that His Majesty's Government are bound to take some steps in the matter, it is not apparent what other course is open to them.

11. The authorities on the point are discussed in the judgment of the Court of Appeal, and it does not seem necessary to go into them further. As the joinder of the

Colombian Government and the communication to the Colombian Minister of the writ were effected in consequence of the judgment of the Court of Appeal and the order of Mr. Justice Roche, it is presumed that sections 3 and 4 of "The Diplomatic Privileges Act, 1708," would not apply to those actions.

12. In these circumstances his Lordship would be grateful if you would take the enclosed papers into your consideration, and would favour him with your opinion on the following points:—

- (1.) Whether His Majesty's Government should take any steps to see that the case of the Colombian Government is presented to the Court—

- (a.) On the point of diplomatic privilege,
- (b.) On the merits.

- (2.) If so, what is the proper course to pursue.
- (3.) Generally.

I have, &c.

R. H. CAMPBELL

List of Papers.

- (A.) Colombian Minister to Lord Curzon, December 8, 1920 (T 14042).
- (B.) Opinion of Treasury Solicitor (T 391).
- (C.) Lord Curzon to Colombian Chargé d'Affaires, January 13, 1921 (T 391).
- (D.) Colombian Chargé d'Affaires to Lord Curzon, February 18, 1921, with enclosures (T 2042).
- (E.) Amended Writ (T 4307).
- (F.) Colombian Minister to Colombian Chargé d'Affaires, April 4, 1921 (T 3876).
- (G.) Colombian Chargé d'Affaires to Lord Curzon, April 15, 1921, without enclosure (T 4353).
- (H.) Judgment of Court of Appeal (T 4533).
- (I.) Order of Mr. Justice Roche, May 5, 1921 (T 5933).
- (J.) Colombian Minister to Lord Curzon, May 9, 1921 (T 5501).

Report.

We agree with the opinion of the Treasury Solicitor that it is undesirable for the Government to intervene in legal proceedings in which a foreign Sovereign is interested, and we do not think that it would be advisable for the Government to take any steps in this case. In our opinion sections 3 and 4 of "The Diplomatic Privileges Act, 1708," have no application, and there is no substance in the point of diplomatic privilege.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
June 15, 1921.

GENERAL

[T 1443]

No. 1^a.

[File 211/1921]

[January 25, 1921.]

[Treasury.]

Instructions to the Law Officers to Advise.

A QUESTION has arisen with regard to the construction of article 18 of the Covenant of the League of Nations, upon which the advice of the Law Officers is desired.

Article 18 of the Covenant provides that—

"Every treaty or international engagement entered into hereafter by any member of the League shall be forthwith registered with the secretariat, and shall, as soon as possible, be published by it. No such treaty or international engagement shall be binding until registered."

Registration of treaties, &c., under article 18 of League of Nations Covenant.



GENERAL.

The interpretation which is sought to be put by the League upon article 18 may be gathered from the third paragraph of a memorandum which has been issued by the League, the terms of which are as follows:—

“(3.) The provision that ‘every treaty or international engagement shall be forthwith registered with the secretariat’ leads to the following conclusions as regards the material which requires registration. This material comprises not only every formal treaty of whatsoever character and every international convention, but also any other international engagement or Act by which nations or their Governments intend to establish legal obligations between themselves and another State, nation or Government.”

It is understood that the League are anxious to adopt an extensive interpretation of article 18. At the same time it is understood that the League does not claim to give an authoritative pronouncement as to the interpretation of article 18. The Foreign Office have, the Treasury are informed, been advised that the wording of article 18 is so comprehensive as to render useless any endeavour to embark on negotiations with the object of limiting the scope of the article to the registration of international engagements or treaties of first-class importance only.

As the Law Officers will observe, the interpretation put upon article 18 by paragraph 3 of the League's memorandum appears to be sufficiently wide to cover every engagement entered into between the Government of this country and the Government of another State.

It is difficult to follow the precise significance of the expression in the League's memorandum, “international engagement or Act by which nations or their Governments intend to establish legal obligations between themselves and another State, nation or government,” inasmuch as no engagement between States can be regarded as legal obligations in the sense of being legally enforceable by any municipal tribunal. The meaning may, however, it is submitted, perhaps be that the terms of article 18 include not only treaties and conventions of a formal nature, but agreements or arrangements of so definite a nature as would be enforceable by legal process in a municipal court of law if entered into between private persons subject to the jurisdiction of such court.

The scope of such an interpretation would seem to be very wide, and might, it is suggested, render it necessary, for example, to register with the League a three-months' Treasury bill given by the French Government to the British Treasury, and it is felt by the Treasury that considerable difficulty and inconvenience might arise from the adoption of so wide an interpretation of article 18, and, in particular, such an interpretation would apparently include transactions of a class or classes with which the Treasury are concerned, and of which the following examples may be given to the Law Officers by way of illustration:—

(a.) Agreements have been negotiated, or are in process of negotiation, between the Treasury (or other Departments of the Government) and Allied Governments for the settlement of claims and counter-claims in respect of goods supplied and services rendered during the war. Divergent views have naturally been held on both sides as to the rights and liabilities of the Governments concerned in connection with such claims and counter-claims, and compromises have been necessary for the purpose of arriving at a settlement, and have been reached sometimes as a result either of discussion of each item in dispute or, in cases where the materials for discussion could be obtained only by a wholly disproportionate expenditure of time and money, on a broad view of the interests of the parties. Such settlements when arrived at are frequently included in a formal document, which may be signed by an official or officials of the Department of State of each Government concerned in the negotiations. In other cases the arrangement rests upon correspondence.

It is submitted that agreements under head (a), while constituting an obligation upon one of the parties to them to pay the amount at which outstanding claims have been settled, cannot reasonably be classed as treaties or international engagements within the intention of article 18. In some cases payment of the amount involved will have been made, and in others bills for the amount payable will have been given, before it would be possible to register the agreement, and the sole effect of registration would be to advise other countries of the settlement reached without serving in any way the purpose of the insertion of the article in the Covenant.

GENERAL.

(b.) Agreements relating to money advances made by or to this country, and including arrangements made by the Treasury with the Finance Department of other Governments with regard to loans, as, e.g.:—

1. With Japan for the repayment of the yen loan.
2. With Argentine for the repayment of the pesos loan.
3. With Uruguay for the repayment of the dollar loan.
4. With Canada for the repayment of bankers' loan and one or two similar transactions with the American Treasury.

Such agreements or arrangements may be of all degrees of formality and may be contained in a formal schedule signed by an Ambassador, which may or may not be initialled by the Finance Ministers of the Governments concerned. They may be contained in formal documents signed by Prime Ministers or Finance Ministers of the States concerned, or they may in some cases rest only upon correspondence exchanged between Finance Ministers or between the departmental officials of the two Governments. They may relate either to the advances themselves or to the postponement of the date of repayment or to the reduction of the interest to be paid. These agreements or arrangements are of a somewhat different character from those referred to under heading (a), and no doubt some of them might be held to be within the intention of the article. The question of their registration in full involves questions of policy. If it be held that all financial agreements are to be registered, it might well become impossible for any nation to come to the assistance financially of another nation in an emergency. Publication of the agreement under which the assistance is to be given by means of registration with the League will involve a simultaneous publication to the legislative assemblies of the countries concerned, a course which might give rise to serious political difficulty. Further, publication in certain circumstances might entail grave risks to the financial credit of the borrowing country.

On purely national grounds publication of an agreement with a particular country allowing, say, the postponement of the payment of a debt or a reduction in the rate of interest would assuredly produce similar demands from other debtors which it might, on political grounds, be impossible to resist. The result would be that, unless His Majesty's Government are prepared to allow a general postponement of payment and a general reduction of interest, they would be unable to make concessions to a particular country, no matter how desirable such concessions might be.

Moreover, in such cases it would be impracticable to bring the agreement into force until it had been registered with the League under article 18, and publication in Geneva would presumably necessitate publication in this country of agreements or arrangements which it is not at present the practice to deal with in this way.

While no distinction can be drawn in principle between agreements or arrangements of this class on the ground of their formality, those which relate to postponement of the due date or to reduction of interest are, generally speaking, contained in the less formal of the agreements, and those which relate to the actual advances in the more formal. It is in the publication of agreements or arrangements of the former class that the Treasury foresee the greatest inconvenience, and it might be possible to arrive at a defensible line as to registration of agreements or arrangements of this class based upon the formality of the document.

(c.) Agreement for the sale of surplus material. The same considerations apply to agreements falling under this head as those falling under head (a). Further, their publication would inevitably produce complaints should it prove that a lower price had been obtained from one country than from another. They are purely commercial transactions.

It is submitted for the consideration of the Law Officers that the interpretation placed upon the terms of article 18 of the Covenant by paragraph 3 of the League's memorandum gives too wide a scope and effect to the words which are employed in article 16, and it is suggested for consideration whether the meaning of the expression “international engagement” is not to some extent limited and confined to international engagements of a particular character or class, which would not embrace agreements or arrangements such as those indicated under heads (a), (b) and (c) (or at any rate some of them) by the word “treaty” which immediately precedes the words “international engagement.” The words “international engagement” must, it is suggested, be construed *ejusdem generis* with the word “treaty” which they follow.



GENERAL.

The Law Officers are requested to advise:—

1. Whether the expression "every treaty or international engagement" contained in article 18 of the Covenant of the League of Nations includes only treaties or engagements of a particular nature, class or character, *e.g.*, such treaties and engagements as are ratified by Governments as a whole, and, if so, to what nature, class or character of treaty or international engagement is the operation of article 18 limited.
2. Whether or not departmental agreements or arrangements of the classes referred to respectively in heads (a), (b) and (c) above come within the operation of article 18 of the Covenant; and
3. Generally on the case.

Opinion of the Law Officers of the Crown.

The commentary on the Covenant under the heading "Treaties and Understandings" on p. 17 suggests that articles 18-21 should be taken together as describing the new conditions which must govern international agreements. Article 21 excepts certain international engagements, of which illustrations are given.

If the inclusive interpretation suggested in paragraph 3 of the memorandum were to prevail, no effect could be given to the terms of article 21.

There must be some limitations therefore to be placed on article 18. Probably it was intended to carry into effect the first of President Wilson's fourteen points—"open covenants of peace openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view." The questions put to us are by no means free from doubt, but on the whole we are of opinion that—

1. Article 18 is limited to treaties and engagements arranged through diplomatic channels, but it does not apply to bargains merely terminating differences and not involving any continuing obligation, even if they are arranged through diplomatic channels.
2. None of the arrangements under the classes referred to in heads (a) and (c) come within the scope of the article, however they may be made, and merely departmental agreements, not arranged through diplomatic channels, are also outside its operation.

GORDON HEWART.
ERNEST M. POLLOCK.

*Law Officers' Department,
January 25, 1921.*

[W 8000]

No. 1^B.

Colonial Office.]

[File 1308/1921]

[May 31, 1921.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, May 5, 1921.

WITH reference to your report of the 24th December last* relative to the proposed amendment of the British North America Act respecting extra-territorial legislation, I am directed by Mr. Secretary Churchill to transmit to you a copy of a despatch on the subject addressed by Viscount Milner to the Governor-General of Canada on the 21st January, together with a copy of a despatch in reply which has been received from the Governor-General.

2. It will be seen that the Canadian Government do not share the view that, in matters relating to the enforcement of the treaty obligations of Canada, the desired powers are already conferred by section 132 of the British North America Act, and that they also regard as undesirable and inadequate the expedient of proceeding in

* Confidential 11810, p. 56.

Proposed amendment of British North America Act: Powers of extra-territorial legislation for Canadian Parliament.

GENERAL.

accordance with the principle of the judgment of the Judicial Committee of the Privy Council in *Peninsular and Oriental Navigation Company v. Kingston*. Further, they state that, in the absence of any acceptable suggestion for the improvement of the form of enactment, they adhere to that originally proposed.

3. In these circumstances Mr. Churchill would be obliged if, after taking into consideration the papers accompanying this letter and those forwarded with the previous references, you could either suggest another formula for submission to the Canadian Government or state, for communication to the Canadian Government, precisely what the objections are to the formula originally proposed.

4. In connection with the allusions to "nationals" in the penultimate paragraph of letter accompanying the Governor-General's despatch of the 2nd March, I am to transmit to you a copy of a Bill "to define Canadian nationals," introduced into the House of Commons of Canada by the Minister of Justice on the 1st March, 1921, together with the debates on the Bill so far as received (*viz.*: 1st March, pp. 421-422; 4th March, p. 616; 8th March, pp. 679-684; 10th March, pp. 805-826) and a pamphlet containing the Immigration Act. As regards clause 1 (a) of the Bill, I am to refer to section 2, sub-sections (d) and (f), of the Immigration Act (pp. 8 and 9 of the pamphlet). You will observe that in the second reading debate on the 8th March (Hansard, p. 680) Mr. Doherty remarked:—

"Should the legislation which this House asked last year to have passed by the British Parliament clearing up any doubt as to the extra-territorial effect of our legislation be enacted, as I have every reason to believe it will be, it will then be important to have a clear-cut definition of who are the people who may be affected by that legislation."

I am, &c.
H. LAMBERT.

List of Papers.

1. Colonial Office to Governor-General of Canada, Secret, January 21, 1921.
2. From Governor-General of Canada to Colonial Office, Secret, March 2, 1921.
3. Canadian Bill No. 17, 1921
4. Extracts from debates in Canadian House of Commons, March 1, 4, 8 and 10, 1921.
5. Canadian Immigration Act.

Report.

We cannot suggest any other formula which would at the same time satisfy the desires of the Canadian Government and be free from objection on constitutional grounds. It appears from paragraph 3 of the letter of the 1st March, 1921, from the Department of the Secretary of State for External Affairs that the Dominion of Canada desires the same powers of extra-territorial legislation as are possessed by the Imperial Parliament, and the objections to the formula originally proposed are those indicated in the Law Officers' Report of the 13th July, 1920, namely, that if this formula were construed as giving the Canadian Parliament the power of extra-territorial legislation generally with regard to all the matters mentioned in section 91 of the British North America Act, provided only that the legislation could be said to concern the peace, order and good government of Canada, it would reverse the fundamental rule that colonial legislation must, *prima facie*, relate exclusively to the colony, and might possibly, and even probably, lead to a serious conflict of laws as between the various self-governing dominions if the other dominions were placed on the same footing in this respect as that upon which Canada desires to be placed.

GORDON HEWART.
ERNEST M. POLLOCK.

*Law Officers' Department,
May 31, 1921.*



[W 7574]

No. 1^c

[Ministry of Labour.]

[File 756/1921]

[June 1, 1921.]

Case for the Opinion of the Law Officers of the Crown and Mr. C. W. Lilley.

HEREWITH :—

1. Copy Treaty of Versailles (now with you);
2. Copy draft conventions and recommendations adopted by the International Labour Conference at its first annual meeting;
3. Copy pamphlet entitled "Labour and the Peace Treaty"; and
4. Copy "Hansard," vol. 134, No. 129.

The Law Officers of the Crown and Counsel are requested to advise in connection with certain matters which arise out of the labour clauses (Part XIII) of the Treaty of Versailles (which clauses are reproduced textually in the subsequent Treaties of Peace with the ex-enemy Powers).

1. Chapter 1 of Part XIII, which is entitled "Organisation," deals with the establishment of—

- (a.) A General Conference of representatives of the members (the members being the members of the League of Nations and certain other States).
- (b.) An International Labour Office.

Chapter 2, which is entitled "Procedure," deals with the procedure to be followed by the Conference, the undertakings of the members with regard to proposals which have been adopted by the Conference, and the procedure which may follow the default of any member to carry out his undertakings. Article 405 of this chapter is set out in full below, and great difficulties have arisen in regard to the interpretation of this article and as to the position of the Crown thereunder :—

"ARTICLE 405.

"When the Conference has decided on the adoption of proposals with regard to an item in the agenda, it will rest with the Conference to determine whether these proposals should take the form : (a) of a recommendation to be submitted to the members for consideration with a view to effect being given to it by national legislation or otherwise, or (b) of a draft international convention for ratification by the members.

"In either case a majority of two-thirds of the votes cast by the delegates present shall be necessary on the final vote for the adoption of the recommendation or draft convention, as the case may be, by the Conference.

"In framing any recommendation or draft convention of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial conditions substantially different, and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

"A copy of the recommendation or draft convention shall be authenticated by the signature of the President of the Conference and of the Director, and shall be deposited with the Secretary-General of the League of Nations. The Secretary-General will communicate a certified copy of the recommendation or draft convention to each of the members.

"Each of the members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or, if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment, and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft

convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

"In the case of a recommendation, the members will inform the Secretary-General of the action taken.

"In the case of a draft convention, the member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General, and will take such action as may be necessary to make effective the provisions of such convention.

"If, on a recommendation, no legislation or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the member.

"In the case of a federal State, the power of which to enter into conventions on labour matter is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this article with respect to recommendations shall apply in such case."

The above article shall be interpreted in accordance with the following principle :—

"In no case shall any member be asked or required, as a result of the adoption of any recommendation or draft convention by the Conference, to lessen the protection afforded by its existing legislation to the workers concerned."

2. The first annual meeting of the General Conference of the members of the International Labour Organisation was held at Washington between the 29th October and 29th November, 1919, and the date of the closing of the meeting has been declared to be the 27th January, 1920.

Having regard to the 5th paragraph of article 405, it will be seen that the undertakings of the members should be carried out by the 27th January, 1921, or, in the case of exceptional circumstances, at the latest by the 27th July, 1921.

A reprint of the draft conventions and recommendations adopted by the Conference is sent herewith.

His Majesty's Government is understood to be desirous of taking such action as may be necessary to give effect to all the draft conventions and recommendations, except a part of the recommendation concerning unemployment on p. 15 of the reprint, the recommendation concerning reciprocity of treatment of foreign workers on p. 17, and the draft convention concerning the employment of women before and after childbirth on p. 18. It does not appear to be desirable that the Government should be under an obligation to bring before Parliament the recommendations and draft convention hereinbefore referred to.

The Government desires to carry out the obligations of the Crown under the Treaty of Versailles, and at the same time to do nothing which can be considered to be an infringement or limitation of the Crown's prerogative.

3. It seems that the following cases will have to be dealt with by the Government as a result of proposals of the Conference :—

(1.) Recommendations which it is desired to adopt—

- (a.) Which require legislation in order that effect may be given to them.
- (b.) To which effect can be given by executive action only.

(2.) Recommendations which it is *not* desired to adopt—

- (a.) Which require legislation in order that effect may be given to them.
- (b.) To which effect can be given by executive action only.

(1.) Draft conventions which it is desired to ratify—

- (a.) Which, if ratified, require legislation in order that effect may be given to them.
- (b.) To which, if ratified, effect can be given by executive action only.

[8214]

C



(2.) Draft conventions which it is *not* desired to ratify—

- (a.) Which, if ratified, require legislation in order that effect may be given to them.
- (b.) To which, if ratified, effect can be given by executive action only.

4. In order to ascertain the obligations of this country under article 405, and to decide what is the necessary procedure for giving effect to those obligations, it is first essential to consider what is the correct interpretation of that article, and more especially of the words "the member." In this connection the Law Officers and Counsel are referred to articles 387 and 1 of the treaty, and it is submitted that the effect of these articles is to make the Crown, acting by and through the executive Government, "the member," for it is thought that to identify the Crown for this purpose with the person of the Sovereign would lead to great inconvenience, as it is to be borne in mind that under the Treaty of Versailles a new position is given to the self-governing colonies and India. The case, as laid before the Law Officers and Counsel, is based on the assumption that this submission is correct, but it is understood that an interpretation has been put forward to the effect that the legislative assembly of each country is in reality "the member," from which it would appear that there would be a power in the Secretary-General to communicate a draft convention direct to the proper officer of any legislative assembly with a view to legislation. It is further understood that an extension of this doctrine is contended for under which M. Thomas, Director of the International Labour Office, could himself communicate direct to the legislative assembly of any country.

Recommendations.

The following interpretation is possible:—

"That the Crown has undertaken, within the defined period, to bring any recommendation of the Conference before the authority which is competent to give effect to the recommendation by legislative or executive action, which authority will be the Crown itself or Parliament, according to the nature of the action required to give effect to the recommendation. That, when the recommendation has been brought to the attention of the competent authority in such manner as may be advised by Law Officers and Counsel, the obligation of the Crown ceases."

While it appears to be difficult to interpret this part of the article in any other way, the following considerations appear to be material:—

On the one hand, it would seem that this interpretation conforms with the intention of the framers of these articles if reference is made to the pamphlet entitled "Labour and the Peace Treaty," which is sent herewith, in which certain passages which appear to be material have been marked.

On the other hand, it has to be decided whether the Treaty of Versailles must be taken to override the domestic law of the British Empire, or whether it is right to assume that those who were responsible for the framing of these articles did not intend to infringe the principles of the Constitution in the countries of any of the signatories, and that in signing the Treaty of Versailles any particular signatory did not intend to act in such a manner. The objection, therefore, to this interpretation would seem to be that, in the case of a recommendation which it is not desired to adopt, but which would require legislation in order that effect may be given to it, an obligation would have been placed upon the Crown to bring that recommendation before Parliament. It is for consideration whether it is in accordance with the law and custom of the Constitution that the Crown should be obliged to bring before Parliament a matter which the Crown does not desire should be passed into law, and whether the obligation involved in this interpretation does not involve a limitation of the prerogative of the Crown in this respect.

As, however, it is difficult to see what other interpretation can be placed upon this part of the article, it is possible that the Crown would fulfil its obligations under the treaty by communicating to Parliament the recommendation of the Conference by one of the recognised constitutional methods, that is to say, in the Speech from the Throne, by a communication to both Houses given through a commission under the Great Seal, by message under the Sign Manual or by an oral message delivered, by command, by a Minister of the Crown.

Draft Conventions.

A preliminary difficulty which arises under this head is the correct interpretation of the words "draft convention" and "ratification." Two views appear possible with regard to the correct interpretation of these words in this particular connection:—

- (1.) On the one hand, it has been the view of the British representatives at the Conference of Versailles and at the Washington Conference that the words should not be interpreted in any technical sense, and that the ordinary rules with regard to the ratification of draft international agreements are not applicable in this particular instance.
- (2.) On the other hand, it may be contended that the words are used in their accepted technical signification, that is to say, a draft international convention means a draft international agreement (*i.e.*, an agreement by the emissaries of the Governments concerned), and ratification means the ratification of the agreement of the Government's emissaries which is necessary to complete the validity of the international agreement.

There does not appear to be any definition of these words in any part of the treaty, and therefore it seems at first sight to be somewhat difficult to argue that they are not used here in their usual technical signification; but it is urged in support of the former construction that the Treaty of Versailles does not purport to be an international document upon conventional lines, but is claimed to establish a fresh precedent in international relations and that it should be construed accordingly. It is said further in support of the former view that importance should be attached to the fact that article 405 of the treaty speaks not of a convention but of a *draft* convention. It seems questionable, however, whether this point carries the matter much further, since presumably a draft instrument must be of the same nature as the final instrument itself. Attention is also drawn to the power given expressly by article 405 to federal States to treat a draft convention as a recommendation. It is said that this, upon the principle *expressio unius est exclusio alterius*, shows an intention to exclude any other State from having this power; but the weight of this argument in support of the first construction is diminished if it is considered that the second construction involves not so much an election by any State concerned as to whether a proposal adopted by the conference is to be treated as a draft convention or as a recommendation, but involves rather an implicit limitation upon the power of the Conference itself in arriving at a conclusion as to which of the two forms its proposal is to take. There is no doubt that the impression given both at Versailles and at Washington has been that the British view has hitherto been in accordance with the first of the constructions suggested above, and that it may be difficult at this stage to put forward the other view.

If, however, the second view is correct, and the words are to be interpreted in their usual technical signification, the following observations seem to be material:—

A proposal under discussion between two or more sovereign Powers can only become an agreement or convention in the ordinary technical sense when it has been approved by the emissaries or agents of each of those sovereign Powers. It is certainly difficult to see how two or more sovereign Powers can be said to have "come together" until the emissaries or agents of each of them have signified their approval of such "coming together."

It would, therefore, upon this view of the matter, seem necessary to read into paragraph 1 of article 405 an implied limitation on the power of the Conference to determine whether their proposals shall take the form of a recommendation or a draft convention, and that the position would be that, after a decision has been reached by a two-thirds majority of the Conference, it would only be possible for the Conference to formulate that decision as a draft convention as between those members whose Government delegates (as distinguished from the delegates of the employers and workers) had signified their approval thereto, and that in all other cases where the requisite majority had been obtained, the Conference would be obliged to formulate its proposals as a recommendation.

There is no doubt that the Conference at its first annual meeting cannot have considered that this limitation was placed upon its power to determine the form of its proposals, as it has formulated as a draft convention a proposal concerning the employment of women before and after child-birth, which proposal had not the approval of the delegates of the British Government.



A possible answer to the argument in support of the second construction is that the members in agreeing to article 405 have agreed that the two-thirds majority of the Conference shall be the agents of each one of them for signifying their approval to a proposal, and thereby enabling it to be formulated as a draft convention.

If it is considered that there is an implied limitation upon the power of the Conference to decide which form is to be adopted for the proposals upon which the two-thirds majority has agreed, and that the approval of the delegates of the British Government is necessary before a proposal can be formulated as a draft convention so far as the British Government is concerned, it is for consideration by the Law Officers and Counsel whether the draft convention relating to the employment of women before and after child-birth can either be disregarded or be treated as a recommendation.

If, however, it is thought that the view of the Conference itself and of the British representatives at Washington is correct, and that a proposal, to which the delegates of the Crown were not approving parties, can be formulated as a draft convention, or that it is not necessary to consider a draft convention as a draft international agreement in its usual technical signification, other considerations arise. It becomes necessary to ascertain the obligations of the Crown with regard to draft conventions under the 5th and 7th paragraphs of article 405.

There appear to be four possible interpretations of the obligations which have been assumed by the Crown with regard to draft conventions:—

- (1) "That the Crown has undertaken, within the defined period, to bring any draft convention adopted by the Conference *before the authority which is competent to ratify the draft convention*, which authority under the British Constitution would seem to be the Crown itself. And further that the Crown will, *if and when it is ratified* communicate the formal ratification to the Secretary-General of the League, and take the necessary legislative or executive action to make effective the provisions of such convention."
- (2) "That the Crown has undertaken, within the defined period, to bring any draft convention adopted by the Conference *before the authority which is competent to decide whether enactment of legislation or other action shall be taken to give effect to the draft convention*, which authority under the British Constitution would seem to be the Crown itself. And further that the Crown will, *if it decides to give effect to the draft convention by the enactment of legislation or other action*, ratify the draft convention, communicate the formal ratification to the Secretary-General of the League, and take the necessary legislative or executive action to make effective the provisions of such convention."
- (3) "That the Crown has undertaken, within the defined period, to bring any draft convention adopted by the Conference *before the authority which is competent to give effect to the draft convention by legislative or executive action*, which authority will be the Crown itself or Parliament, according to the nature of the draft convention. And further that the Crown will, *if and when the consent of the competent authority has been obtained*, ratify the draft convention, communicate the formal ratification to the Secretary-General of the League, and take the necessary legislative or executive action to make effective the provisions of such convention."
- (4) "That the Crown has undertaken to ratify any draft convention which is adopted by the Conference, and within the defined period to bring it before the authority which is competent to give effect to the draft convention by legislative or executive action, which authority will be the Crown itself or Parliament, according to the nature of the draft convention. And further that the Crown will, if and when the consent of the competent authority has been obtained, communicate the formal ratification to the Secretary-General of the League, and take the necessary legislative or executive action to make effective the provisions of such convention."

It will be seen that the main differences between these four interpretations are as follows:—

In No. (1), the words "authority or authorities within whose competence the matter lies" mean the authority which is competent to ratify, and the legislative or executive action necessary comes after ratification and after communication of such ratification to the Secretary-General.

In No. (2), the words "authority or authorities," &c., mean the authority which is competent to decide whether legislation or other action shall be taken to give effect to the draft convention, after which decision ratification may or may not take place, to be followed, if it does, by the necessary legislative or executive action.

In No. (3), the words "authority or authorities," &c., mean the authority which is competent to give effect to the draft convention by legislative or executive action. Ratification comes after submission to, and consent of, the competent authority.

In No. (4), the words "authority or authorities," &c., have the same meaning as in No. (3), but ratification is necessary before submission to the competent authority.

In deciding which (if any) of these interpretations is correct, it may be thought that the following point is worthy of consideration: That the Treaty of Versailles was framed to meet the needs of the Constitutions of the various signatories, and that unless a very definite intention to the contrary is expressed it must be assumed that it was not the intention of the framers or of the signatories to infringe or limit the law or custom of the British Constitution.

The first and second interpretations do not appear to involve a limitation of the Crown's prerogative, nor do they seem to infringe the law and custom of the Constitution. It is for consideration whether, in considering a matter of this kind, the presumption that the framers of the articles and the signatories to the treaty were not attempting to alter the law of the land in the country of any particular signatory should not prevail against the views expressed in the marked passages in the pamphlet entitled "Labour and the Peace Treaty."

If it should be considered that the presumption before referred to must prevail in order to arrive at the correct interpretation of the article, it is only necessary to decide whether the first or second interpretation is more consistent with the wording of the article, but it should be noted that the third interpretation does appear to be in accord with the views expressed in the marked passages in the pamphlet before referred to, and would appear to have been adopted by the Home Secretary when moving the second reading of the Women's and Young Persons (Employment in Lead Processes) Bill (see "Hansard," vol. 134, No. 129, at p. 102, which is sent herewith and marked).

On the other hand, it is questionable whether the article, if so interpreted, is not contrary to the law and custom of the Constitution. The Crown is thereby compelled in certain circumstances to bring before Parliament an international instrument which it does not desire to ratify, and presumably to ratify such instrument if it obtains the consent of Parliament. It would appear that the making and ratification of conventions is part of the Crown's prerogative. It would also appear that, except in cases where a convention seeks to alter the law of the land, or when financial provision is required to give effect to it, there is no necessity for the Crown to submit a convention for the approval of Parliament. In both these respects, therefore, the third interpretation seems to place a limitation on the prerogative of the Crown.

The fourth interpretation also appears to be open to a number of serious constitutional objections.

In the first place, the Crown would seem to have bound itself to ratify a convention subject to the consent of the authority which is competent to give effect to it, although it may be a convention which the Crown does not desire to ratify. Secondly, the Crown may be bound to ratify and submit to Parliament a convention to which it does not desire to give effect.

The Law Officers of the Crown and counsel are requested to advise as follows:—

1. Whether the Treaty of Versailles is to be construed according to the law of England, or whether regard should be had to the intention of those who drafted the treaty as expressed in documents other than the treaty itself.
2. Whether or no the Crown, acting through the executive Government, is to be regarded as "the member" under articles 1 and 387 for the purposes of article 405.
3. Whether and, if so, to what extent the Crown should act through the separate executive Governments—

- (a.) Of the United Kingdom.
- (b.) Of the self-governing colonies.
- (c.) Of India.



4. What are the obligations of the Crown under article 405 in respect of—

(A.) *Recommendations*—

(1.) Which it is desired to adopt—

(a.) Which require legislation in order that effect may be given to them.

(b.) To which effect can be given by executive action only.

(2.) Which it is *not* desired to adopt—

(a.) Which require legislation in order that effect may be given to them.

(b.) To which effect can be given by executive action only.

(B.) *Draft Conventions*—

(3.) Which it is desired to ratify—

(a.) Which, if ratified, require legislation in order that effect may be given to them.

(b.) To which, if ratified, effect can be given by executive action only.

(4.) Which it is *not* desired to ratify—

(a.) Which, if ratified, require legislation in order that effect may be given to them.

(b.) To which, if ratified, effect can be given by executive action only.

5. What is constitutionally the correct procedure for giving effect to the obligations of the Crown.

Opinion of the Law Officers of the Crown and Mr. C. W. Lilley.

1. The first question upon which we are asked to advise is really whether the obligations imposed upon this country by Part XIII of the Treaty of Versailles are to be interpreted in the light of the constitutional law and practice of this country as they existed up to the date of the treaty or whether the treaty itself has imposed some new constitutional practice. In our opinion this country is not bound, nor was it intended that it should be bound, to adopt any other than the usual constitutional methods hitherto in force for the fulfilment of its obligations to deal either with recommendations or with draft conventions.

2 and 3. In our opinion the Crown, acting through the executive Government in the ordinary constitutional manner, is to be regarded as "the member" for the purposes of this part of the treaty. This answer applies in all cases, so that the Crown acts through the executive Governments (a) of the United Kingdom, (b) of the self-governing colonies, (c) of India.

4. We think that recommendations made in accordance with the provisions of article 405 by a majority of two-thirds of the votes cast by the delegates present have to be dealt with under the fifth paragraph of the article, whether or not they have obtained the support of the British delegates. In our opinion the obligation involved is as follows:—

- (a.) Where legislation is necessary in order that effect may be given to the recommendations, the authority or authorities within whose competence the enactment of legislation lies means, in our opinion, the whole legislature. It is competent for Members of either House of Parliament to propose measures for enactment. In our opinion, therefore, the obligations imposed by the treaty involve the communication of the recommendations to the legislature even if the Government of the day may not desire that measures in accordance with the recommendations should be enacted. We think that this obligation would be fulfilled by communicating such recommendations to Parliament by a communication made to both Houses of Parliament. We do not think that such communication should be made in the Speech from the Throne, which is the recognised vehicle for the communication to the Houses of the legislative intentions of the Government of the day, but probably the recommendations should be communicated by one of the other methods suggested. The precise method, however, requires further consideration.

If the Government desires to do so, it would, of course, initiate legislation, and adopt the usual procedure to secure its enactment. If it did not desire the enactment, in our opinion the Government would be perfectly free to oppose any measure which might be brought forward in accordance with the recommendations by Members of either House.

- (b.) Where effect can be given to the recommendations by executive action only, we think that the authority within whose competence the matter lies is the Government, and, in our opinion, the seventh paragraph of article 405 contemplates the possibility of such recommendation failing to obtain the approval of the Government. If, therefore, the Government desires not to take executive action, it is, in our opinion, free to abstain from doing so.

5. The provisions of the treaty in regard to draft conventions involve considerations of very great difficulty.

On the whole, we think the expression "draft convention" is not to be given a technical or precise meaning. It remains a "draft" convention until it is ratified by the authority competent to ratify. We think that the intention of the relevant articles is that the requisite majority of the Conference can put forward a form of agreement for the consideration of the proper treaty-making authorities of the signatory States. We do not think it is open to a non-federal State to treat the draft convention submitted to it as a recommendation.

The obligation undertaken by this country seems to us to be that the Crown, acting upon the advice of the executive Government, shall consider any draft convention put forward by the Conference for the purpose of deciding whether or not it will ratify. If it decides to ratify, it must then ratify the convention and take the necessary legislative or executive action to make the provisions effective. It is, of course, equally competent for the Crown not to ratify. Then, under the seventh paragraph of article 405, no further obligation remains. Ratification is, in our opinion, intended to be the considered act of the constitutional treaty-making authority unfettered by the recommendations of the Conference. The decision to ratify is also, we think, a condition precedent to the submission to the legislative authority of any legislative proposals necessary to give effect to the convention.

GORDON HEWART.
ERNEST M. POLLOCK.
CECIL W. LILLEY.

Law Officers' Department,
June 1, 1921.

[W. 7574]

No. 1^b.

[Ministry of Labour.]

[File 756/1921]

[June 10, 1921.]

Case for the Opinion of the Law Officers of the Crown and Mr. C. W. Lilley.

1. A FURTHER question has arisen with regard to the interpretation of Part XIII of the Treaty of Versailles.

One of the conventions reached at the Washington Conference of 1919 dealt with the creation of a 48-hour week, which carried with it the prohibition of overtime except for certain specified seasonal and similar employment. His Majesty's Government, while anxious to support the principle of the 48-hour week, find themselves in considerable difficulty in accepting the text of the conventions as settled at Washington, because the provisions as to overtime would both seriously interfere with agreements upon this subject entered into between the railway companies and the railwaymen's associations, and would, on the other hand, particularly at this juncture, prejudicially affect the general industry of the country. In these circumstances, His Majesty's Government are considering a proposal to notify the Secretary-General of the League their ratification of this particular convention, with certain reservations to meet the points above mentioned.

2. The question which therefore presents itself for consideration is whether, under the terms of article 405, which has been before the Law Officers in another connection,*

* See No. 1^c.

Ratification
of Inter-
national
Labour Con-
ventions.
Obligations
under
Treaty of
Versailles,
Part XIII.



ratification with reservations is competent. This question, therefore, is submitted for the opinion of the Law Officers. The following points appear material :—

In support of the contention that ratification with reservations is inadmissible, it is argued that Part XIII contains no reference to ratification with reservations.

It may be remembered further that under article 405 the General Conference of the International Labour Organisation adopts two kinds of proposals :—

- (a.) Recommendations to be submitted to the members for consideration, with a view to effect being given to them by legislation or otherwise.
- (b.) Draft conventions for ratification.

It is arguable, therefore, that to ratify a convention with reservations is equivalent to treating it as a recommendation and is accordingly inadmissible.

This is believed to be the view of the Director of the International Labour Office, and he has conveyed this view in a letter to the Polish authorities. But it should be remembered that he has no *locus standi* in questions of interpretation. Under article 423, the final arbiter in such cases is the Permanent Court of International Justice.

3. In support of the opposite contention, on the other hand, it may be remembered that in the case of the Treaty of Versailles the claim of the United States to ratify with reservations was not seriously questioned by the other parties to the treaty.

It is argued further that in the case of ordinary diplomatic conventions it is not unusual to ratify with reservations, and that the international labour conventions are susceptible of similar treatment.

It is noteworthy, also, that certain other members of the Labour Organisation propose to ratify with reservations, or have taken steps which are equivalent to such limited ratification. Thus it is understood that India proposes to ratify the draft convention fixing the minimum age for admission of children to industrial employment with certain reservations. Czechoslovakia desires to ratify the draft convention concerning the night-work of young persons employed in industry with reservations. Poland has expressed a desire to ratify three of the conventions with reservations. Belgium provides an example of action which will be equivalent to ratification with reservation. Owing to constitutional difficulties, France and Belgium are unable to ratify the conventions adopted at Washington. They have therefore reproduced the texts of these conventions as ordinary diplomatic conventions, which were signed on the 24th January, 1921. In the case of Belgium, a Bill ratifying these diplomatic conventions will be introduced in Parliament. At the same time, however, the legislation which has been introduced to give effect to the Hours Convention contains a clause by which the King may abrogate the law temporarily should it be essential in the interests of the nation to increase exports in comparison with imports. South Africa also, to take another example, has informed the director that the Government of the Union has "accepted in principle" the Hours Convention. This appears to open the way for legislation to give effect to the convention, which would not necessarily follow in detail the terms of the convention.

4. The Law Officers and Counsel are therefore asked to advise as to whether Part XIII, and particularly article 405, of the Treaty of Versailles can be legally interpreted so as to admit of ratification of draft conventions with reservations.

Opinion of the Law Officers of the Crown and Mr. C. W. Lilley.

UPON the whole we are disposed to think that the ordinary rules of international law as to the ratification of treaties or conventions between States cannot be applied strictly to conventions coming into existence in pursuance of article 405 of the Treaty of Peace.

It is laid down (see, e.g., "Oppenheim," 3rd edition, 1920, vol. 1, pp. 674 and 675) that there is no such thing as conditional ratifications. A treaty must be either ratified or not ratified. The foundation of this rule seems to be that the treaty or convention is in ordinary circumstances the agreement of the national representatives on behalf of their respective countries, which agreement is signified by the signatures of the representatives. In these circumstances a ratification subject to conditions or reservations involves an alteration of the agreement which may or may not be accepted by the other high contracting party.

In ordinary circumstances, therefore, the effect of conditional ratification can be treated by the other party as a refusal to ratify. On the other hand, the modified terms may be accepted, and the treaty or convention is then treated as an international agreement on the altered terms.

The essential difference between a convention in ordinary circumstances and a draft convention under article 405 is that a draft convention does not, in our opinion, embody even a preliminary agreement between the representatives of the high contracting parties. In these circumstances we incline to the view that the ordinary rules of international law as regards ratification cannot be applied in their full rigour. If that be so, and if policy so requires, it would appear that it is competent to a State desirous of ratifying with reservations a convention under article 405 to take that course.

GORDON HEWART.
ERNEST M. POLLOCK.
CECIL W. LILLEY.

*Law Officers' Department,
June 10, 1921.*

[W 7488]

No. 1^E.

[Board of Trade.]

[File 3421/1921]

June 30, 1921.

Case for the Opinion of the Law Officers of the Crown and Mr. W. Bowstead.

HEREWITH is sent a print of the above-mentioned Bill. The question has arisen as to the extent to which (if at all) the issue of orders made by the Board of Trade under either clause 2 (1) (a) or 2 (1) (b) of the Bill would conflict with any obligations contained in certain commercial treaties granting what is known as most-favoured-nation treatment upon which the Board of Trade desire to be advised by the Law Officers. The following clauses are typical of most-favoured-nation treatment clauses :—

Position of
Safeguard-
ing of
Industries
Bill as
regards
most-
favoured-
nation
clauses of
British
com-
mercial
treaties.

United States of America (Treaty of 1815).

"Article 2. No higher or other duties shall be imposed on the importation into the territories of His Britannic Majesty in Europe on any articles the growth, produce or manufacture of the United States, and no higher or other duties shall be imposed on the importation into the United States of any articles the growth, produce or manufacture of His Britannic Majesty's territories in Europe, than are or shall be payable on the like articles being the growth, produce or manufacture of any foreign country."

Italy (Treaty of 1883).

"Article 2. No other or higher duty shall be imposed on the importation into the dominions and possessions of Her Britannic Majesty of any article the produce or manufacture of the dominions and possessions of His Majesty the King of Italy, from whatever place arriving, and no other or higher duties shall be imposed on the importation into the dominions and possessions of His Majesty the King of Italy of any article the produce or manufacture of Her Britannic Majesty's dominions and possessions from whatever place arriving, than on articles produced or manufactured in any other foreign country."

[8214]

D

*Belgium (Modus vivendi of 1898).*

"The undersigned has therefore the honour to state that, on this understanding, Her Britannic Majesty's Government will on their part undertake not to make any modification after the 29th July, 1898, in the system actually applied in the United Kingdom of Great Britain and Ireland to the subjects and products of Belgium unless previous notice of any such change shall have been given three months before to the Belgian Government.

"It is clearly understood that the present engagement does not prevent either of the two Governments making in the system actually in force between the two countries such modifications as may be made applicable to all other countries."

Japan (Treaty of 1911).

"Article 7. Articles, the produce or manufacture of the territories of one high contracting party, upon importation into the territories of the other, from whatever place arriving, shall enjoy the lowest rate of customs duty applicable to similar articles of any other foreign origin.

"Article 8. The articles, the produce or manufacture of the United Kingdom, enumerated in Part 1 of the schedule annexed to this treaty shall not, on importation into Japan, be subjected to higher customs duties than those specified in the schedule.

"The articles, the produce or manufacture of Japan, enumerated in Part 2 of the schedule annexed to this treaty shall be free of duty on importation into the United Kingdom.

"Provided that, if at any time after the expiration of one year from the date this treaty takes effect either of the high contracting parties desires to make a modification in the schedule, it may notify its desire to the other high contracting party, and thereupon negotiations for the purpose shall be entered into forthwith. If the negotiations are not brought to a satisfactory conclusion within six months from the date of notification, the high contracting party which gave the notification may, within one month, give six months' notice to abrogate the present article, and on the expiration of such notice the present article shall cease effect, without prejudice to the other stipulations of this treaty."

Counsel will remember that orders may be made under the provisions of the Bill in two sets of circumstances, and the effect of making an order under section 2 (1) (a) or section 2 (1) (b) of the Bill is different in its application to goods from the country named in the order in that in the event of the order being made under (b) on the ground of deflated rate of exchange the duty becomes applicable to all goods from that country specified in the order, whilst if it be made under (a) on the ground of dumping goods below the cost of production the duty is remitted or returned where there is evidence that the particular consignment in question is sold at a price equal to or exceeding the cost of production as defined in the Bill.

It may very well be that no order under (b) can be made applicable to the countries protected by the existence of most-favoured-nation clauses. To take an example: it would seem that, having regard to the provisions in the Italian treaty, it would be impossible so long as that treaty remains in existence to apply an order imposing a duty of 33½ per cent. under (b) on Italian silk on the ground of the state of the Italian exchange unless the same duty was made applicable to silk of all other origin, whatever might be the condition of the exchange with regard to the country in which the silk originated. It will be appreciated, however, that the countries from which competition arising out of collapsed exchanges is to be feared are in the main either enemy countries such as Germany, Austria or Hungary, in regard to which, of course, no treaty obligations now exist, or new countries such as Finland and Czechoslovakia, with which no treaty obligations have yet been entered into, and the question will not arise.

The case of orders under (a), however, is thought to be different, and it is in regard to such orders that difficulty would arise. The dumping provisions in the Bill will be permanent in character, and it would of course be highly inconvenient if, before effect could be given to them, we found ourselves under the necessity of denouncing any treaty we might have entered into with any country from which dumping was practised. It is suggested that a distinction can be drawn between

orders made under (a) and those made under (b). This distinction lies in the fact that, should an order be made in regard to the dumping of any article, then, though that article becomes liable to a duty of 33½ per cent., any consignment of such articles would, in fact, secure exemption under the provisions contained in section 4 of the Bill, provided that it is proved to be sold in the United Kingdom at a price not less than its domestic selling price. It is contended that such an order does not penalise imported articles as a class, but only such articles as are dumped into the United Kingdom. In regard to all other goods of the same description, the duty prescribed in the order is either remitted or returned under section 4, and it is submitted therefore that, in making the order, duties have not been imposed on goods in contravention of most-favoured-nation treatment. For example, what the American Treaty precludes is a different duty on American than, say, Swedish steel, whereas under any order made under (a) American steel pays no higher or other duty than Swedish steel, unless it is dumped. To put it in another way, the Bill in effect gives power to impose a duty on all articles, irrespective of their origin, if they are dumped, and therefore can it be said that a higher or other duty is being imposed upon the goods of any particular country which does not equally apply to the goods of all other countries? It is true that a particular order, while, for example, imposing a duty on American steel, may not at the same time provide for any special duty on, say, Swedish steel, but that is only because evidence of dumping of Swedish steel may not have been forthcoming, but none the less there can be no doubt that, upon the necessary evidence being produced that dumping is taking place from any country to such an extent that employment in the United Kingdom is, or is likely to be, seriously affected, all such dumped articles will be subjected to the imposition of duty. It is assumed that, in the event of evidence of dumping from Sweden being forthcoming, the committee would be entitled to report in favour of a comprehensive order being made including both American and Swedish steel, the necessary steps of course being taken to revoke the previous American order.

It is proposed to make clear in the Bill, by an amendment to clause 9, that an order may relate to more than one country and more than one description of goods by inserting in line 31 on p. 7, after the word "order," the words "either wholly or as respects any country or article to which the order relates."

It is submitted that under the Bill it would be possible to make an order affecting two or more countries from which dumping was taking place if it could be shown that employment was being, or was likely to be, seriously affected by such dumping taken as a whole, even though evidence would fail to show that dumping from any one of the countries taken by itself would have this effect. And this being so, it is further submitted that it would be possible, on further enquiry being made, for the committee to replace a less comprehensive by a more comprehensive order.

It appears very material to consider the attitude which the United States have thought fit to adopt in construing their obligations under the Treaty of 1815. The United States Government have consistently held the view that they are under no obligation to grant to this country any special favours in the matter of customs duties which they had granted in return for specific compensation to other countries, and whilst many of the American treaties contain a reservation on the subject of advantages specially accorded to other countries in return for compensation, the Treaty of 1815, above referred to, contains no such clause. The American official view is that the omission from this and other treaties of such a reservation "by no means indicates in the absence of other evidence that they were meant to guarantee unconditional most-favoured-nation treatment."* The only positive words in the treaty upon which the Americans can and apparently do rely are the words in the preamble, that the convention was concluded "in such a manner as to render the same reciprocally beneficial and satisfactory."

Acting on this view of their treaty obligations, the United States Government did in fact, under the Tariff Act of the 24th July, 1897, grant to certain countries in return for compensation reductions in duty on certain articles which they refused to accord to the United Kingdom without compensation.

An agreement was finally made in 1907 by which this country secured a reduced rate on some of these articles, but this was secured in return for facilities granted as regards the entry of samples brought by the commercial travellers of the United States. This agreement and all others made under the 1897 Tariff Act, however,

* Vide pages 398 and 402 of a report of the United States Tariff Commission on Reciprocity and Commercial Treaties.—Washington, 1919.



expired at various dates in 1909 and 1910, being denounced by the American Government on the coming into force of the Payne Tariff of 1909.

The existing American tariff authorises the Government to negotiate trading agreements with various countries, which have to be submitted to Congress for ratification or rejection, but so far as it is known no agreement reducing the rates of duty in favour of any country has been concluded under this Act.

His Majesty's Government has never agreed to the American interpretation of the most-favoured-nation clause. But the American interpretation is cited here to show that they do not attach a strictly literal significance to the phrase "higher or other duties."

Moreover, the fact that the United States have themselves recently adopted an anti-dumping measure may have some bearing on a decision in this matter. Under this measure, on its being certified by the Government that there is dumping of any particular article, that article becomes subject to duties varying with the differences between the dumping price in each case and the true market value in the country of export. It therefore follows that dumped steel from the United Kingdom might be subject to a higher anti-dumping duty than that from France, because the duty is intended to vary with the degree of undercutting aimed at by the dumping. This provision places it in the hands of the American Administration to impose differential duties on British products on their own reading of the evidence. The English Bill, on the other hand, makes the duty chargeable a fixed amount, which is the same for all consignors of the dumped article. It appears, therefore, that the English proposal approximates more closely to the strictest interpretation of the treaty than does the American practice.

In any order made under the English Act some country might not be included, on the ground that it was not dumping at the time that the order was made, but as soon as complaint was made of the dumping that case would be enquired into, and it is intended that on the dumping being proved a new order should replace the old to include that country as stated above.

Further, the action taken under the Sugar Convention may be of some relevancy to the interpretation of most-favoured-nation clauses in commercial treaties. Under this convention the signatory countries agreed to prohibit or impose duties on the importation of bounty-fed sugar, which duties were not the same for different countries, but varied according to the convention's opinion of the extent of the bounty given by each country. Thus, while the duty was the same for each consignment from a given country, the duties varied as between countries, and those varying duties were imposed by the countries signatory to the convention, despite most-favoured-nation clauses in commercial treaties entered into by certain of the countries taxed. It may therefore be held that by international consent most-favoured-nation clauses were assumed not to relate to the measures to prevent unfair competition.

The Law Officers are accordingly requested to advise the Board of Trade—

1. Whether, having regard to the terms of the American Treaty of 1815 and to the construction which the Americans themselves have placed upon that treaty, His Majesty's Government would contravene the most-favoured-nation clause of the treaty by issuing an order under section 2 (1) (a) of the Safeguarding of Industries Bill with regard to articles imported from America, there being no evidence of dumping from other countries at the time of making the order;
2. Whether, having regard to the terms of the Italian Treaty of 1883, the Belgian note of 1898, or the Japanese Treaty of 1911, the issue of orders under either section 2 (1) (a) or section 2 (1) (b) of the Bill with regard to articles imported from Italy, Belgium or Japan, as the case may be, would conflict with the obligations of His Majesty's Government under the treaty or note above referred to; and
3. Generally upon the case.

Opinion of the Law Officers of the Crown and Mr. W. Bowstead.

In the light of the information contained in our instructions, we are inclined to think, upon the whole, that measures applied impartially for the prevention of unfair

competition cannot properly be considered a contravention of the most-favoured-nation clauses in commercial treaties. We therefore answer the questions as follows:—

1. No, we think not.
2. We think that the issue of orders under section 2 (1) (a) of the Bill with regard to articles imported from Italy, Belgium or Japan would not conflict, but that the issue of orders under section 2 (1) (b) would conflict, with the obligation of His Majesty's Government under the respective treaty or note.

GORDON HEWART.
ERNEST M. POLLOCK.
W. BOWSTEAD.

*Law Officers' Department,
June 30, 1921.*

[A 8195]

No. 1^F.

[File 6/1921]

[July 27, 1921.]

[Inland Revenue]

Case for the Opinion of the Law Officers of the Crown and Mr. Reginald Hills.

THERE is a committee appointed by the Chancellor of the Exchequer at present sitting and taking evidence in connection with the question as to the liability to United Kingdom taxation of Dominion and foreign Governments and their representatives. What passes before the committee is confidential. The Commissioners of Inland Revenue have already appeared before the committee by their representative and may do so again. The following is an extract from the evidence of Mr. Browett, one of the assistant secretaries to the Commissioners of Inland Revenue, who was their representative before the committee:—

Foreign
Govern-
ments -
trading in
United
Kingdom:
liability to
United
Kingdom
income tax.

"... The situation which may be created when foreign Governments as such carry on or control business or trade operations and derive therefrom income which would unquestionably be liable to taxation in the hands of a private trader.

"(11.) It may be observed that such a situation has been provided for, so far as concerns Germany, Austria, Hungary, Turkey and Bulgaria, by articles in the respective Treaties of Peace. Article 281 of the Treaty of Versailles provides that, if the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty. Exactly corresponding articles appear in the treaties with the other four countries.

"These treaty provisions appear to be very significant in several aspects.

"If, indeed, the profits of a State's enterprise are in all circumstances necessarily exempt from the municipal taxation laws of other countries, it is easy, in the present times, to see the possibilities of a *reductio ad absurdum*. For, in the case of a Government nationalising all its industries and not recognising the existence of any purely private trader, the whole of the lawful profits made by its citizens might theoretically be profits of the Government, and therefore exempt. It occurs to the mind, for example, that difficult questions may hereafter arise in regard to trade carried on in this country under the auspices of the Russian Government."

There was put in also, as part of his evidence, a memorandum, of which the following is a copy:—

"Questions which might arise would presumably be considered from the standpoint of international law. In this connection it may be of interest to note that a recent article* in the 'Journal of Comparative Legislation and International Law' suggests that in France, Italy and Belgium (and particularly in the two latter countries) there

* "State Immunity in the Laws of England, France, Italy and Belgium," by Professor F. P. Walton, LL.D., pp. 252-8 in the October 1920 number of the journal.



has for the better part of a century been a tendency to put a narrower interpretation on the privilege of a foreign State. Three passages may be cited:—

Italian Law.—So far as I can discover, the Italian courts were the first to adopt the distinction for which so many writers have contended between the sovereign acts of a foreign State and acts by the foreign State of a private nature.

"In a number of cases Italian Courts of Cassation have held that the principle of the independence of sovereign States is not violated by the Italian courts assuming jurisdiction over a foreign State in regard to liabilities incurred by such a State in performing acts which were not by nature governmental (see *Journal de Droit international privé* (Clunet), 1889, p. 335).

Belgian Law.—The same view has been adopted in Belgium, and is admirably stated in the judgment of the Cour de Cassation de Belgique of the 11th June, 1903 (Sirey, 1904, 4, 16, D. 1903, 2, 401, *Journal de Droit international privé* (Clunet), 1904, p. 417).

"The action was by a Belgian railway company against the Dutch Government in its character as administrator of the Dutch State Railway, and was a claim for restitution of a sum of money paid under a contract. There was no question of seizure of property, and the Court of Cassation of Belgium assumes, without deciding it, that the property of a foreign State cannot be attached. It declares that, even if this be so, it by no means follows that the Belgian courts are incompetent. If a Belgian citizen gets a judgment against the Belgian State itself, he cannot seize the State property in execution, any more than a French citizen can seize French Government property (Berthelemy, H., *Droit administratif*, 8th edition, p. 520). All the same, the State pays its debts. Why may we not expect a foreign State to do the same? The moral effect of a judgment is considerable, and the public conscience in the foreign State would not allow it to repudiate its debts. But probably the next step will be to allow the attachment of property of the foreign State if this property is within the jurisdiction, and if it is not of a kind specially appropriated to the State's sovereign activities, such as, e.g., the buildings of an embassy or a battleship.

"This step the Italian courts have already taken in the cases previously mentioned.

"Conclusion The French jurisprudence is against the possibility of making the distinction referred to between sovereign acts and other acts. But the principal case is an old one, and the question there was as to an act which might be considered as of a sovereign character. (Cass. 22, janvier 1849, D. 49, 1, 81.)

"In the eighty years which have elapsed since its date, there has been a decided change in the practices of States, and a consequent change of opinion on the matter among legal writers. The change of opinion among professional writers has led the courts in Belgium, Italy and Egypt to adopt what may be called the new view—that is, that the foreign State as a trader has no immunity, and it is quite likely that the French courts will abandon their former attitude. Already in France, in cases against a foreign State arising out of its administration of a State railway, the custom is for the foreign State not to take the plea of incompetence. (See Cass., le 31 mars 1874, Sirey, 1874, 1, 385; Cass., le 12 novembre 1877, Sirey, 1879, 1, 349; Cass., le 5 mai 1885, Sirey, 1886, 1, 353, Dalloz., 1885, 341.)"

Having regard especially to the apparent tendency in some foreign countries to distinguish the position of foreign Governments when performing acts of a governmental nature from their position when performing acts of a non-governmental nature, such as when trading, &c., the Commissioners of Inland Revenue desire to be advised on the following points:—

1. Whether a foreign Government carrying on trade within the United Kingdom is liable to assessment to income tax in the United Kingdom in respect of (a) the profits of such trade; (b) the buildings, &c., occupied for the purposes of such trade, and, if liable, whether the liability can be enforced.
2. Whether a foreign Government carrying on trade within the United Kingdom—(a) through an agent resident in the United Kingdom, or (b) through an agent resident abroad acting in the United Kingdom through an agent resident in the United Kingdom—is liable to assessment to income tax in the United Kingdom in respect of the profits of such trade in the name of the agent resident in the United Kingdom, and, if so liable, whether the liability can be enforced.

3. Whether a foreign corporation carrying on a business, which in truth and in fact is its own business, is liable to assessment to income tax in the United Kingdom so far as its business is carried on in the United Kingdom when the whole of the shares are held by a foreign Government, either in its own name or in the names of nominees on its behalf, either when such foreign Government had the corporation incorporated for the purpose of acquiring the business of the foreign Government, the foreign Government retaining supreme control in its character of shareholder, or when such foreign Government acquired by purchase all the shares in an already existing corporation.

If the Law Officers are of opinion that any case at all can be made out for liability where the position is one of non-governmental acts by the foreign Government, the Commissioners of Inland Revenue would be glad to be advised on what grounds such case might possibly be made out.

Opinion of the Law Officers of the Crown and Mr. Reginald Hills.

We will answer the questions put to us in their order:—

1. No, in regard to each case put. The answer follows from the opinion given on the 19th September, 1919, in the case of the Siamese Government.

2. No, in regard to each case put. The liability is the liability of the foreign principal who carries on the trade, and the assessment through an agent is merely machinery to hit the foreign principal, who is the true taxpayer.

3. Assuming a corporation like a company registered under the Companies Acts and having relations with its shareholders like those existing between such a company and its shareholders, the mere ownership by a foreign Government of all the shares in the corporation would not, in our opinion, render the corporation exempt from liability in respect of a trade exercised by it in this country. We think this principle is well established by such cases as *Kodak (Limited) v. Clark* (1903, 1 K.B. 505), *Gramophone and Typewriter Company (Limited) v. Stanley* (1908, 2 K.B. 89), and the more recent case of *Sansom v. Commissioners of Inland Revenue* in the Court of Appeal.

But there may be other circumstances identifying the foreign Government with the corporation besides the mere ownership of the shares, and we must reserve our view of the liability of any particular corporation until the facts are before us.

Generally on the case, it may be noted that Westlake (vol. 1, p. 277) insists upon the wide view which English authorities have taken of the exemption of foreign States and their representatives from the municipal law of this country (illustrated very recently in the "*Porte Alexandre*," 1920, p. 30), and that this exemption is based in principle upon the equality and sovereignty of all States within the comity of nations (Oppenheim, vol. 1 (3rd edition), p. 197). In this connection we doubt the relevance to income tax questions of the distinction made, in the opinion of the Solicitor-General of New Zealand, between immunity from suit and immunity from legal liability. Jurisdiction of courts, just as much as liability to taxation, depends on law, and the cases which so clearly establish the exemption of foreign States from such jurisdiction involve exemption from law. Foreign States are exempted from taxation under municipal law because taxation is regarded as an infringement of their sovereignty and equality, and, from this standpoint, subjection to income tax and subjection to suit, i.e., to the jurisdiction of courts, do not, in our opinion, materially differ. The English authorities, we may add, give no countenance for present purposes to the distinction suggested between a State in its normal political capacity and the State in its capacity as a trader (see the "*Parlement belge*" (L.R. 5, P.D. 197) and the "*Porte Alexandre*" above cited).

In conclusion, we are not to be taken as expressing dissent from the suggestions on policy made in the extracts from Mr. Browett's evidence and memorandum which are before us. It is clear that the development of trading in this country by foreign States raises questions of far-reaching practical importance both to the Revenue and to other Departments of State. All we mean is that, so far as legal liability under the



Income Tax Acts is involved, the profits of such trading must be reached by a change in the municipal law of this country, and this change we do not think can be expected from judicial decisions, but will require legislation.

GORDON HEWART.
ERNEST M. POLLOCK.
REGINALD HILLS.

Law Officers' Department,
July 27, 1921.

[W 9304]

No. 1^a.

[File 1308/1921]

[August 5, 1921.]

[Colonial Office.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, July 22, 1921.

Proposed
amendment
of British
North
America
Act:
Powers of
extra-
territorial
legislation
for
Canadian
Parliament

I AM directed by Mr. Secretary Churchill to acknowledge the receipt of your report of the 31st May* relative to the proposed amendment of the British North America Act respecting extra-territorial jurisdiction.

2. Mr. Churchill notes that you are unable to suggest any formula which would at the same time satisfy the desires of the Canadian Government and be free from objection on constitutional grounds. It would not, however, in his opinion, be desirable to object to the formula proposed by the Canadian Government on the constitutional ground that it would reverse the fundamental rule that Colonial legislation must, *prima facie*, relate exclusively to the Colony. Having regard to the present status of the Dominions, he feels that it can hardly be expected that the Canadian Government should be content that the Canadian Parliament should remain subject to the limitations of a Colonial legislature.

3. He does not himself see any difficulty, in principle, to complying with the wishes of the Canadian Government, as explained in the despatch from the Governor-General of the 1st September, 1920, and in the Debates in the Canadian Parliament enclosed in the Reference of the 2nd November, 1920, especially in view of the statement contained in the despatch of the 1st September, 1920, as to the intention of the words "otherwise within the legislative authority of the Parliament."

4. Doubts were expressed in regard to the formula proposed by the Canadian Government by certain Departments of His Majesty's Government in the letters forwarded in the Reference of the 2nd November, 1920, but those letters were written before the subsequent explanations of the Canadian Government were communicated to those Departments.

5. Mr. Churchill would, in any event, be reluctant to refuse a request put forward by the Canadian Government with the endorsement of the Canadian Parliament. He would, therefore, be glad to be in a position to inform them that His Majesty's Government will introduce legislation on the lines desired, and if the formula proposed by the Canadian Government does not go beyond the wishes and intentions explained in the despatch of the 1st September, 1920, and in the Debates in the Canadian Parliament, he does not himself see any reason why such intimation should not be made.

6. In these circumstances, he would be glad if you would advise him whether the proposed formula goes beyond the expressed wishes and intentions of the Canadian Government. Should the answer to this question be in the affirmative, and should you still find it impossible to suggest another formula for giving effect to those wishes and intentions, he thinks that it will be necessary to furnish the Canadian Government with a detailed statement of the difficulties to which the proposed formula, as a means of carrying out their wishes and intentions, gives rise, and he would be obliged if you could assist him in this respect.

I am, &c.

H. LAMBERT.

* See No. 1 B.

Report.

The proposed formula does, in our opinion, go beyond the expressed wishes and intentions of the Canadian Government, particularly in view of the doubt as to what would be held to be the effect of the words "otherwise within the legislative authority of the Parliament." We have already expressed our opinion as to these words in our Report dated the 13th July, 1920.

We have again considered the question of suggesting an alternative formula, and beg to report that an Act of the Imperial Parliament might be passed to amend "The British North America Act, 1867," in terms which would, in our opinion, give effect to the expressed intention of the Canadian Government, as explained by Mr. Doherty and Mr. Newcomb, without being open to objection on constitutional grounds.

We are of opinion that the Address of both Houses of Parliament of Canada may be accepted with the substitution of the following for clause 2 of the proposed Act, namely:—

"2. An enactment of the Parliament of Canada may operate extra-territorially provided that, and in so far as, such extra-territorial operation is ancillary to, and necessary for, its enforcement as a law for the peace, order and good government of Canada."

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
August 5, 1921.

GERMANY.

No. 1^u.

[C 4297]

[File 104/1921]

[January) 192]

[Board of Trade.]

Further Case for the Opinion of the Law Officers and Mr. Branson.

HEREWITH are sent the papers previously laid before counsel, with the opinion thereon and copy of case as settled. A copy of the opinion and of the case as settled by counsel was forwarded to the Board, and the following are copy minutes written in relation thereto:—

"Read. You may be interested to read this case. I do not feel altogether happy about the paragraph at the head of p. 3; this could not be maintained if confronted with the minutes of the sub-commission.

"H. J. H.

"December 31, 1920.

"Mr. Payne."

"I do not think that the part in red brackets at the top of p. 3 should stand. The persons concerned undoubtedly believe that the German legislation was very much on the same lines as English legislation. I believe the statement that most other Allied countries had passed similar legislation before the armistice could not be supported. France, for example, could, I believe, only place property under sequestration.

"H. A. P.

"December 24, 1920.

"The Solicitor."

* Confidential 11810, p. 44.

Restitution
in specie of
British
property in
Germany
under
article 297
of Treaty of
Peace.



"It will be necessary to submit the draft case again to counsel to resettle in the light of the foregoing observations, and, having regard to the opinion, a slight modification may have to be made in the wording of p. 3, which I have indicated by double pencil lines. Before this is done I should be glad if the blanks on p. 6 of the draft case could be filled in.

"T. J. B."

The following memorandum was prepared in the Companies Department:—

"I have obtained from Mr. Park, who assisted Mr. Bowyer with regard to the Trading with the Enemy Committee, the figures of the cases which were considered by the Committee.

"The Law Officers appear to desire the figures relating only to 'The Trading with the Enemy Amendment Act, 1916,' and, according to the figures obtained, 979 cases were considered by the committee, of which 71 related to cancellation of contract. This would leave a total of 908 cases. In 554 of these cases winding-up orders were made. In three cases orders were made prohibiting the business from being carried on, and it will be seen that in 98 cases the committee recommended that the enemy interest should be vested for sale to British subjects.

"The figures, therefore, for insertion in the Law Officers' opinion are:—

"Cases considered by the committee	...	908
"Orders to wind up	...	554
"Orders to prohibit business being carried on	...	3
"Cases in which no order was made (except in some cases a vesting order)	...	351

"I attach a copy of the report made by the Trading with the Enemy Committee dated the 16th April, 1918, also a copy of the total figures which have been forwarded to me by Mr. Park."

There has been indicated in counsel's copy of the draft case the amendments suggested in Mr. Payne's minute and the paragraph which may necessitate a consequential alteration indicated in the solicitor's minute. The figures on p. 6 of the draft have also been inserted in pencil, but counsel are not troubled with the reports or figures referred to in the last paragraph of the minute from Companies Department.

The papers were accordingly submitted to Mr. Branson to resettle the draft case, and the following is a copy of his opinion:—

"The new minute placed before me raised a very important question. The submission made on the top of p. 3 of the draft is, in my view, of cardinal importance to the decision of the case, but, on the other hand, of course it would not be proper to put it forward if it does not correctly represent the facts. I think, therefore, that the draft should be resubmitted to the Law Officers. I am not sure whether I am to take Mr. Payne's minute of the 24th December as definite instructions that the sub-committee believed that German legislation was on the same lines as the British, or whether he is merely stating his belief on the question. If the latter be the case, I think that the Law Officers should see the minutes of the sub-committee referred to in Mr. Hutchinson's minute of the 21st December, and should have definite instructions as to what was the belief of the sub-commission on the matter.

"G. A. H. BRANSON.

"The Temple, January 10, 1921."

Mr. Branson's opinion was submitted to the Department for the purposes of obtaining the further information for submission to the Law Officers, and the following is copy of a minute by Mr. Payne:—

"As regards my minute of the 24th December: What was meant was that in my opinion the persons who drew up the reply to the German observations believed that German legislation was on the same lines as English legislation. The reply was not drawn up by the sub-commission, but, so far as I recollect, by myself and the French representative on the sub-commission, and was later approved by the other delegations of the principal Allied and Associated Powers.

No minutes were kept of the discussion in drawing up the reply, and the minutes of the sub-commission in drawing up the clause in the treaty contain no reference to this point. These minutes do, however, indicate that the object of the clause was to exclude British nationals from the right to return of property which had been liquidated in Germany, while according that right to French nationals because German property had not been liquidated in France. (See marked paragraphs on pp. 239 and 244.)"

The following are the paragraphs referred to:—

"Minutes of Second Meeting, March 17, 1919

"In explaining the joint text, the British delegate stated that it included both the French and British views regarding liquidation, and that there was no substantial alteration in principle from the original texts. The principal difference between the original French and British proposals was dealt with in the new project in article Z, paragraph (f). This paragraph provided that where liquidation provisions had not been put into force in an Allied or Associated State, such a State should have the right to demand the return of property of its nationals in Germany which had been sold. For example, France would be able to demand the return of specific property in Germany which had been sold, while England, who had generally wound up enemy property, would be excluded from similar privileges."

"Minutes of Fourth Meeting, March 25, 1919.

"Mr. Payne presented a new wording of article Z, paragraph (g), as follows:—

"(g.) The rights conferred in paragraph (f) are reserved to owners who are nationals of Allied or Associated States within whose territories legislative measures providing for the liquidation of enemy businesses or property were not in operation before the signature of the armistice."

"To this paragraph Mr. Palmer entered a reservation, stating that the position of the United States was that every national of any Allied or Associated State should be entitled to have his property in Germany restored if he so desired.

"The Roumanian and Serbian delegates did not wish article Z, paragraph (g), to exclude the application of paragraph (f) to their respective States, bearing in mind that, owing to the circumstances of the war, it had not been possible up to the present to take measures of liquidation in their countries.

"Mr. Payne desired to have the principle retained, and agreed to try to devise an appropriate wording by which Great Britain would be excluded from the restoration of enemy property which had been wound up, while leaving this course open to Serbia, Belgium, Roumania, the United States and other States in which liquidation had not been put into operation."

The Law Officers and Mr. Branson are requested to consider the foregoing observations and to resettle the draft case.

It should be noted that under the arrangement with the Germans the British case has to be submitted to M. Borell by the 19th January. M. Borell is coming over to London shortly, and it may be possible, of course, to hand it to him; but it will be apparent to counsel that the matter is one of extreme urgency.

The Law Officers and Mr. Branson are requested to settle draft case accordingly.

Opinion of the Law Officers and Mr. Branson.

The whole point in the present dispute is whether paragraphs (f) and (g) of article 297 of the Treaty of Versailles enure for the benefit of British nationals, and the draft case was settled by us to support the contention that it did. We now find from the entries on pp. 239 and 244 of the Minutes of the Proceedings of the Economic Commission—which minutes are now brought to our attention for the first time—that the wording of paragraph (f) was deliberately selected with the intention, in the words of the second minute, of excluding Great Britain from the restoration of enemy



property which had been wound up. In view of these minutes, we do not see how it is possible to put forward the argument contained in the draft case in the passage between square brackets, or indeed the argument in the rest of the case either. It may be that something transpired subsequently—which is not before us—which would justify the putting forward of the argument in square brackets, in which event the draft could stand; but the argument in the passage in square brackets is vital to the case, and if it must come out, as it clearly must in view of the minutes in question if they stand unaffected, the whole case may as well be abandoned at once.

GORDON HEWART.
ERNEST M. POLLOCK.
G. A. H. BRANSON.

Law Officers' Department,
January 19, 1921.

JAPAN.

[F 2316]

No. 2.

[File 63/1921]

[June 24, 1921.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, June 17, 1921.

Termination
of Anglo-
Japanese
Alliance,
1911.

I HAVE the honour, by direction of Earl Curzon of Kedleston, to submit, for your opinion, the papers shown on the attached list, respecting the date of termination of the Anglo-Japanese Agreement of the 13th July, 1911 (Paper (A)).

2. The first two paragraphs of article 6 of that agreement run as follows:—

"The present agreement shall come into effect immediately after the date of its signature and remain in force for ten years from that date.

"In case neither of the High Contracting Parties should have notified twelve months before the expiration of the said ten years the intention of terminating it, it shall remain binding until the expiration of one year from the day on which either of the High Contracting Parties shall have denounced it. But if, when the date fixed for its expiration arrives, either ally is actually engaged in war, the alliance shall, *ipso facto*, continue until peace is concluded."

3. On the 8th July, 1920, a joint communication from the Governments of Great Britain and Japan was addressed to the League of Nations to the effect that, if the Anglo-Japanese Agreement of 1911 were continued after the 13th July, 1921, it must be in a form not inconsistent with the Covenant of the League. The text of the joint notification runs as follows:—

"The Governments of Great Britain and Japan have come to the conclusion that the Anglo-Japanese Agreement of the 13th July, 1911, now existing between the two countries, though in harmony with the spirit of the Covenant of the League of Nations, is not entirely consistent with the letter of that Covenant, which both Governments earnestly desire to respect. They accordingly have the honour, jointly, to inform the League that they recognise the principle that, if the said agreement be continued after July 1921, it must be in a form which is not inconsistent with that Covenant."

4. The question has now arisen whether or not the joint notification of the 8th July, 1920, constitutes notice of termination within the meaning of article 6 of the agreement, *i.e.*, whether, in view of that notification, the agreement will expire automatically on the 13th July next, unless renewed in the interval, or will continue in force until one year from the date on which specific notice of termination is given by one of the contracting parties.

5. This Department have hitherto been acting on the assumption that the joint notification should in fact be held to constitute the notice required under article 6. This view has been based on the reasoning that, from the wording of the joint notification, it results that the agreement cannot be continued after the 13th July next

in its present form; that consequently it must either be modified—*i.e.*, a new agreement be entered into—or that it must terminate on that date.

6. This view has been definitely placed on record in a note addressed by the Secretary of State to the Japanese Ambassador on the 8th June (Paper (G)).

7. It will be observed, however, from the correspondence enclosed in the present letter (Papers (B), (C), (D), (E) and (F)) that the Japanese Government are inclined to question the view hitherto held by this Department.

8. Earl Curzon would accordingly be glad of an authoritative ruling on the subject; and, the matter being one of considerable urgency, I have the honour to request that he may be favoured with your opinion at your early convenience.

I have, &c.

VICTOR WELLESLEY.

List of Papers.

- (A.) Anglo-Japanese Agreement, July 13, 1911 (Treaty Series No. 18, 1911, Cd. 5735).
- (B.) To Sir C. Eliot, No. 104, Telegraphic, May 13, 1921 (F 1797/63/23).
- (C.) Sir C. Eliot, No. 180, Telegraphic, May 21, 1921 (F 1969/63/23).
- (D.) Sir C. Eliot, No. 191, Telegraphic, May 27, 1921 (F 2034/63/23).
- (E.) Sir C. Eliot, No. 198, Telegraphic, May 31, 1921 (F 2025/63/23).
- (F.) Sir C. Eliot, No. 118, Telegraphic, June 7, 1921 (F 2025/63/23).
- (G.) To Baron Hayashi, June 8, 1921 (F 2025/63/23).

Report.

In our opinion the joint communication of the 8th July, 1920, addressed to the League of Nations does constitute a notification within article 6 by both the High Contracting Parties of an intention to terminate the agreement on the 13th July, 1921, unless in the meantime a new agreement should be entered into, and consequently the agreement will expire automatically on the last-mentioned date unless it is renewed in the interval.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
June 24, 1921.

[F 2299]

No. 3.

[File 63/1921]

[July 1, 1921.]

Foreign Office to the Lord Chancellor.

THE Secretary of State for Foreign Affairs presents his compliments to the Lord Chancellor, and begs to transmit herewith, for the latter's concurrence, a revised draft of a note to the Japanese Ambassador respecting the Anglo-Japanese Agreement.

Lord Curzon desires to call the Lord Chancellor's special attention to the draft joint notification to be addressed to the League of Nations. Lord Curzon would be glad if these papers could be returned at once, so that the note may reach the Japanese Ambassador not later than to-morrow, the 2nd July.

Foreign Office, July 1, 1921.

Draft to the Japanese Ambassador (as amended by the Lord Chancellor).

Your Excellency,

Foreign Office, 1921.

1. SINCE the despatch of my note to your Excellency of the 27th June respecting the date of termination of the Anglo-Japanese Agreement of the 13th July, 1911, His Majesty's Government have been giving renewed consideration to the question of the interpretation to be placed on the joint notification addressed to the League of Nations by our two Governments on the 8th July, 1920.

[8214]

F

Termination
of Anglo-
Japanese
Alliance,
1911.



2. The opinion expressed by His Majesty's Government on this point in the note above referred to rested on the advice tendered to them by their highest legal experts; but, as a result of a more mature study of the political considerations involved by such a reading of the notification, His Majesty's Government are prepared to waive their original point of view and to fall in with that taken by the Japanese Government as regards the interpretation to be placed on that instrument.

2. His Majesty's Government recognise that the matters referred to are by no means free from difficulty. They have given full consideration to the view expressed by the Japanese Government in the opposite sense to that held by His Majesty's Government; and are no longer prepared to insist upon their own original interpretation when made so clearly aware that the Japanese Government in writing the joint notification to the League of Nations of the 8th July, 1920, had no intention of denouncing the agreement under the terms of article 6 thereof.

3. I therefore hasten to enclose a revised draft of the further notification to the League of Nations, recast so as to meet the altered circumstances of the case.

Joint Notification.

WHEREAS the Governments of Great Britain and Japan informed the League of Nations in their joint notification of the 8th July, 1920, that they recognised the principle that if the Anglo-Japanese Alliance Agreement of the 13th July, 1911, is continued after July 1921 it must be in a form which is not inconsistent with the Covenant of the League, they hereby notify the League, pending further action, that they are agreed that if any situation arises whilst the agreement remains in force in which the procedure prescribed by the terms of the agreement is inconsistent with the procedure prescribed by the Covenant of the League of Nations, then the procedure prescribed by the said Covenant shall be adopted and shall prevail over that prescribed by the agreement.

LEAGUE OF NATIONS.

[W 10697]

No. 3^d.

[Colonial Office.]

[File 8768/1921]

[September 21, 1921.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, August 22, 1921.

IN your report of the 18th February, 1921,* you advised the Secretary of State for Foreign Affairs that in your opinion it was impossible, in view of the commercial treaties with Italy and Portugal, and of other treaties in similar terms, to extend to Palestine the preference granted in the United Kingdom to goods grown, produced or manufactured in the British Empire. The report in question further stated that Palestine would appear to fall within paragraph 4 of article 22 of the Covenant of the League of Nations, and not within paragraph 6, and that in your opinion Great Britain as a mandatory was in the position of a trustee of the League.

2. The question has now arisen whether there is any objection, on account of the provisions of the commercial treaties referred to above, to the grant of preference in the United Kingdom to goods grown, produced or manufactured in other territories administered or to be administered under a mandate by His Majesty's Government and the Governments of the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa. The territories in question fall into two categories, viz.:

- (a.) Those which are to be administered under what are known as "B" mandates, i.e., East Africa (British), Togoland (British) and the Cameroons (British). The draft mandates relating to these territories are enclosed herewith; they have not yet been approved by the Council of the League of Nations;

* See No. 5.

- (b.) Those which are administered under what are known as "C" mandates, viz., German South-West Africa, German Samoa, Nauru and the German possessions in the Pacific Ocean situated south of the Equator other than German Samoa and Nauru.

The mandates in respect of these territories have been approved by the Council of the League of Nations. Copies are enclosed herewith.

3. The "B" mandates have been drawn up in accordance with paragraph 5 of article 22 of the Covenant of the League of Nations, whilst the "C" mandates have been drawn up under paragraph 6 of the same article.

4. It would appear from your report of the 18th February, already referred to, that the test whether preference in the United Kingdom can be extended to the products of mandated territories is whether such territories are or are not foreign countries in relation to the United Kingdom. The terms of the draft mandates in the case of territories to be administered under "B" mandates, and of the mandates in the case of territories administered under "C" mandates, accordingly require consideration, and I am to call attention to the following paragraphs, viz.: in the case of East Africa (British), articles 3, 7 and 10; in the case of Togoland and the Cameroons, articles 2, 6 and 9; and in the case of the other territories, article 2.

5. I am to request you to be good enough to take the papers into your consideration and advise the Secretary of State whether in your opinion there is any objection to the grant of preference in the United Kingdom to goods which are the produce of—

- (a.) Territories to be administered under "B" mandates (assuming the provisions of the draft mandates remain substantially in their present form);
(b.) Territories administered under "C" mandates.

I am also to ask for any observations which you may be good enough to offer on the subject generally.

I am, &c.

HENRY LAMBERT.

List of Papers.

- (A.)—Draft Mandate for East Africa (British). (Miscellaneous No. 14, 1921.) [Cmd. 1284.]
(B.)—Draft Mandates for Togoland (British) and the Cameroons (British). [Cmd. 1350.]
(C.)—Mandate for German Possessions in the Pacific Ocean, situated south of the Equator, other than German Samoa and Nauru. (Miscellaneous No. 5, 1921.) [Cmd. 1201.]
(D.)—Mandate for Nauru. (Miscellaneous No. 6, 1921.) [Cmd. 1202.]
(E.)—Mandate for German Samoa. (Miscellaneous No. 7, 1921.) [Cmd. 1203.]
(F.)—Mandate for German South-West Africa. (Miscellaneous No. 8, 1921.) [Cmd. 1204.]

Report.

In our opinion there is no objection to the grant of preference in the United Kingdom to the goods which are the produce of (a) territories to be administered under "B" mandates, assuming that the provisions of the draft mandates remain substantially in their present form, or (b) territories administered under "C" mandates. Neither of these classes of territories can in our opinion be regarded as "foreign countries."

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
September 21, 1921.



1921

(32)

NORWAY.

No. 4.

[N 3626]

[File 314/1921]

[March 21, 1921.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 10, 1921.

I HAVE the honour, by direction of Earl Curzon of Kedleston, to request the favour of your advice on the following matter:—

Draft
Mining
Regulation-
for Spits-
bergen.

2. For several years the position of Spitsbergen has presented a problem which it would evidently be desirable to settle. Since the abandonment of certain ancient and rather shadowy claims to sovereignty over the islands, Spitsbergen has been a *terra nullius*, and no form of government has existed there. Of recent years, however, the reported mineral wealth of the islands has led to their being prospected by companies and individuals of different nationalities, some of whom staked out claims and commenced development work, although in the absence of any form of government it was impossible for them to acquire a definite legal title, and conflicting claims were naturally far from uncommon. Claimants usually notified the claims which they had staked out to the Foreign Office of their own country, and such notification constituted the only means of recording a claim. Among these claimants were two English companies, the Northern Exploration Company and the Scottish Spitsbergen Syndicate.

3. Various attempts have been made in the past to provide for the establishment of some sufficiently settled form of government in the islands and for the settlement of these disputed claims. The last of these attempts was made by a conference which met at Christiania in the summer of 1914, but failed to arrive at an agreement.

4. The question was taken up again at the Peace Conference at Paris, when it was finally agreed that Spitsbergen should be placed under the sovereignty of Norway, subject to the investigation of existing claims by an arbitral commission. With this object a treaty was signed at Paris on the 9th February, 1920, of which a copy is enclosed (Paper A). I am to call your particular attention to the provisions of Articles 6 and 8 and the Annex. You will observe that claimants whose claims have been recognised as valid under the Annex are to receive from the Norwegian Government "a valid title securing to them the exclusive property in the land in question, in accordance with the laws and regulations in force or to be enforced in the territory specified in Article 1 of the present Treaty, and subject to the mining regulations referred to in Article 8" (Annex 1 (9), 2 (11)). Under Article 8 the draft mining regulations referred to were to be communicated by the Norwegian Government to the other Contracting Powers, who were to have the right to propose modifications which were to be submitted if necessary to examination and the decision of a commission. The treaty was not to come into force until the mining regulations had been approved.

5. The Norwegian Government consider the assent of His Majesty's Government to the proposed mining regulations to be of particular importance in view of the extent of the British claims in Spitsbergen, and submitted the draft regulations to them before their official communication to the Powers concerned, in order that, if possible, the Norwegian Government might be in a position to submit regulations to which the approval of His Majesty's Government was already assured. The draft regulations were considered by the Board of Trade, who communicated them to the two English companies for their observations. The Board of Trade are now of opinion (Paper B) that the draft mining regulations in the form shown in that paper, and subject to certain further modifications with which it is not necessary to trouble you, are acceptable. The Scottish Spitsbergen Syndicate have also expressed their willingness to accept the regulations.

6. The Northern Exploration Company have, however, raised the most far-reaching objections (see Papers C and D). Under the system provided for by the mining regulations the right to prospect for minerals will be open to all; a person who has discovered minerals by prospecting may obtain from the authorities a mining claim which gives him the exclusive right to work for minerals in the area covered

NORWAY.

33

by the claim, but this right is lost unless a sufficient amount of work is done on the claim. If the claim is located on land the property of which is in someone else, the proprietor has the right to participate in the working of the claim to the extent of one-fourth, sharing expenses and profits. As regards previously acquired claims which have been recognised under Article 6 and the Annex to the Treaty, the position will (under paragraph 35 of the regulations) be that for five years the owners whose title is recognised will have the exclusive right of prospecting, and during that period will be entitled to be granted as many mining claims on their land as they may apply for, subject to certain information as to the mineral deposits which it is proposed to work being given. Mining claims so granted will, however, be subject to the general provision that they are lost by a failure to work them. After the period of five years the proprietors will have the same right as anyone else to prospect and apply for mining claims on so much of their land as is not covered by mining claims which they have already obtained, but this right will not be exclusive, though they will be entitled to participate in the working of a claim on their land granted to anyone else, as explained above.

7. It is to the situation which will thus be created by the mining regulations that the Northern Exploration Company take objection, on the ground that they are inconsistent with the provisions of the Treaty referred to in paragraph 4 above. Their attitude is put quite plainly in their letter of the 27th January to the Board of Trade, which will be found in Paper C, where they state that "in view of paragraph (1), section 9, of the Annex, it would certainly seem that original owners should have the absolute and exclusive right to their properties without liability other than export duty and charges in connection with surveys and with the International Commission," and urge that the mining regulations should be amended in such a manner as to secure to original successful claimants recognised by the Commission, a "clear unfettered title." In other words, they claim to receive a title which will give them the absolute right to develop the land or not as they may please, and to exclude any other person from developing it should they fail to do so. The importance of this contention and of the results which would ensue if it were accepted may be judged from the fact that the company's claims are stated to cover 5,000 square miles, of which only a small portion has so far been developed at all. The views of the Board of Trade on this contention are given in their letter of the 1st February, 1921, which will be found in Paper D.

8. The contention put forward by the company is certainly not in accordance with the intentions with which the Treaty was drafted. There can be no doubt that even had the representatives of the claimants' countries been prepared to put forward any such contention, the Norwegian Government would have refused, and, in his Lordship's opinion, would properly have refused, to accept any such proposal. It was certainly intended that provisions such as those now in question, intended to further the development of the mineral resources of Spitsbergen, might be included in the mining regulations to be enacted by the Norwegian Government, the position of the claimants being amply safeguarded by the provision requiring the regulations to be submitted in draft for the approval of the Powers concerned.

9. In these circumstances, Lord Curzon would have had no hesitation in declining to put forward the contention of the company or to endeavour to obtain an amendment of the mining regulations in the sense desired, but, as will be seen from Paper D, the company, on receiving the Board of Trade's letter of the 1st February, obtained an opinion from Sir John Simon and Mr. Horace Rowlands, which appears to support the company's contention to the fullest extent. It will be seen that these eminent counsel are of opinion that the words of Annex 1 (9) and 2 (11) require that the regulations referred to in Article 8 should be confined to regulations laying down the methods of mining to be adopted and measures to be taken for the protection of workmen, &c. It is not stated in the opinion what meaning is to be attached to the words "the laws and regulations in force or to be enforced in the territories," to which the claimants' title is equally to be subject, and though it is suggested that the regulations might also provide for a scheme for staking out claims in property not already appropriated by the terms of the Treaty to private owners such as the company, it is not clear on this interpretation why the title should be expressed to be subject to such a scheme if it was not to apply to the land in which the claimant's property is recognised. I am to add that his Lordship has not seen a copy of the case submitted to Sir John Simon, but it may be doubted whether the facts were put before him as fully as they have been detailed above.

10. The situation which would arise if this opinion were to be acted upon is discussed in the minutes on Paper D, and I am to add that there can be little doubt



1921

34

NORWAY.

that if His Majesty's Government were to insist on the contention of the company, it would result in the Norwegian Government declining to accept the sovereignty over Spitsbergen on such terms, so that the settlement of the status of the islands would again be postponed, a result to be deprecated on every ground. In view, however, of the eminence of the learned counsel consulted by the company, his Lordship feels that before deciding what action to take in the matter it is essential that he should be in possession of your opinion as to whether the interpretation put upon the Treaty by the company is really the correct one.

11. I have therefore to request you to be so good as to take the enclosed papers into consideration and to favour his Lordship with your advice on the following points:—

(1.) Whether the provisions of the mining regulations referred to in paragraph 6 of this letter, and particularly paragraph 35 of those regulations, are inconsistent with the Treaty, and especially with Annex 1 (9) and 2 (11).

(2.) Whether on a proper construction of the Treaty the mining regulations must be confined to matters such as the methods of mining to be adopted and the measures to be taken for the protection of workmen.

(3.) Whether, if your answers to the above questions are in favour of the company's contention, the company are nevertheless entitled to require His Majesty's Government to adopt it and press it on the Norwegian Government, in view of the fact that it is certainly not consistent with the intention of the parties to the Treaty.

12. His Lordship would also be grateful for any observations of a general nature which you may be good enough to offer.

13. The Norwegian Government are pressing for the observations of His Majesty's Government on the draft mining regulations, and his Lordship would therefore be grateful if your opinion could be furnished at your early convenience.

I have, &c.

J. D. GREGORY.

List of Papers.

- (A.) Treaty relating to Spitsbergen, February 9, 1920.
- (B.) Board of Trade to Foreign Office, February 5, 1921 (N 1679/314/30). In original with minutes.
- (C.) Northern Exploration Company (Limited) to Foreign Office, February 9, 1921 (N 1895/314/30). In original with minutes.
- (D.) Northern Exploration Company (Limited) to Foreign Office, February 15, 1921 (N 2344/314/30). In original with minutes.

Report.

(1.) In our opinion the provisions in question of the mining regulations are not inconsistent with the Treaty. The Annex 1 (9) and 2 (11) provides that claimants whose claims have been recognised shall have a valid title securing to them the exclusive property in the land, in accordance with the laws and regulations in force or to be enforced in the territories, and subject to the mining regulations referred to in Article 8 of the Treaty. There is nothing in Article 8 restricting the regulations to be made to the matters referred to in the joint opinion of Sir John Simon and Mr. Horace Rowlands, and it seems to us that the regulations objected to by the Northern Exploration Company are not only authorised by the Treaty, but are perfectly proper regulations for a place like Spitsbergen. The joint opinion referred to seems to be based on the assumption that the Treaty ought to be interpreted in the light of the English law of real property.

(2.) No.

(3.) Does not arise. But in any case His Majesty's Government is not bound to press the company's contention on the Norwegian Government in view of the fact that it is known to be contrary to the known intentions of the parties to the Treaty.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
March 21, 1921.

(35)

PALESTINE.

[E 2209]

No. 5.

[File 522/1921]

[February 18, 1921.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, February 8, 1921.

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to request your advice on the question whether it is possible, consistently with the commercial treaties to which this country is a party, to extend to goods imported from Palestine the preferential duties which are at present enjoyed by goods consigned from and grown, produced or manufactured in the British Empire.

Preferential
Treatment
in United
Kingdom of
goods
imported
from
Palestine.

2. This question has been raised in a despatch from the High Commissioner (Paper A), and a copy of the "Notice to Importers" which is referred to in Sir Herbert's Samuel's despatch is enclosed (Paper B). The question is discussed in a letter from the Board of Trade of the 10th January (Paper C), and copies of article 2 of the Commercial Treaty with Italy of 1883 and of article 5 of the Treaty with Portugal of 1914, which are referred to in the Board of Trade letter, are also enclosed (Papers D and E).

3. The mandate for Palestine, a copy of which, as submitted to the Council of the League of Nations, is enclosed (Paper F), is to be granted to His Majesty in accordance with article 22 of the Covenant of the League of Nations. Its issue is provided for under article 95 of the Treaty of Sèvres (Paper G), and it will be observed that the conditions of the mandate differ somewhat from those indicated in article 94 (Paper H) for Syria and Mesopotamia, in that it is not provided that Palestine is, like Syria and Mesopotamia, to be provisionally recognised as an independent State subject to the rendering of administrative advice and assistance by a mandatory until such time as it is able to stand alone. Under article 95 the administration of Palestine is to be entrusted "by application of the provisions of article 22" to a mandatory who will be responsible for putting into effect the declaration in favour of the establishment in Palestine of a national home for the Jewish people. The difference between the two forms of mandate foreshadowed by the articles in question is due to the conditions of Palestine as a country whose population is at present predominantly Arab, but in which the Jewish national home is to be established, and it may be doubted whether the mandate can be regarded as exactly corresponding to any one of the three classes of mandate referred to in the 4th, 5th, and 6th paragraphs of article 22 of the Covenant, but no doubt it approximates more nearly to the first class than to either of the others.

4. In these circumstances, the question would appear to turn on whether Palestine is to be regarded as a "foreign country" for the purposes of article 2 of the Commercial Treaty with Italy and article 5 of that with Portugal.

5. I am to request that you will be so good as to take these papers into your consideration and to favour Lord Curzon with your opinion whether, in view of the commercial treaties to which this country is a party, and especially those with Italy and Portugal, it is possible to extend to Palestine the preference now granted to certain goods which are consigned from and grown, produced or manufactured in the British Empire. His Lordship would also be grateful for any observations of a general nature which you may be good enough to offer.

I have, &c.

D. G. OSBORNE.

List of Papers.

- (A.)—High Commissioner for Palestine to Foreign Office, No. 93, October 12, 1920. (E 13507/13507/44/1920.)
- (B.)—"Notice to Importers in Great Britain and Ireland." &c. (E 13507/13507/44/1920.)
- (C.)—Board of Trade to Foreign Office, January 10, 1921. (E 522/522/88/1921.)
- (D.)—Anglo-Italian Commercial Treaty, June 15, 1883. Article 2. (Treaty No. 788.)
- (E.)—Anglo-Portuguese Commercial Treaty, August 12, 1914. Article 5. (Treaty No. 1539.)
- (F.)—Draft Mandates for Palestine. (Miscellaneous No. 3, 1921.)
- (G.)—Treaty of Peace with Turkey, August 10, 1920. Article 95. (Treaty Series No. 11, 1920.)
- (H.)—Treaty of Peace with Turkey, August 10, 1920. Article 94. (Treaty Series No. 11, 1920.)



PALESTINE.

Report.

In our opinion it is impossible, in view of the commercial treaties with Italy and Portugal and of other treaties in similar terms, to extend to Palestine the preference to goods grown, produced or manufactured in the British Empire. Palestine would appear to fall within paragraph 4 of article 22 of the Covenant of the League of Nations, and not within paragraph 6, and we think that Great Britain as a mandatory is in the position of a trustee of the League.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
February 18, 1921.

RUSSIA.

[N 4720]

No. 6.

[File 1221/1921]

[April 18, 1921.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 13, 1921.

Signature
of Anglo-
Russian
Trade
Agreement:
Effect as
regards
recognition
of the
Soviet
Republic.

I AM directed by Earl Curzon of Kedleston to inform you that he is anxious to obtain your views as to the effect on the relations between His Majesty's Government and the Soviet Government of the signing of the recent Trade Agreement entered into between Sir Robert Horne, on behalf of His Majesty's Government, and M. Krassin, on behalf of the Soviet Government. This question, which is bound to arise in various connections, has been expressly raised in the accompanying letter from Messrs. Coward, Hawkesley Sons and Chance.

2. In this connection, I am to refer you to a report of a speech by the Prime Minister in the House of Commons on the 22nd March last, which appears in No. 28, Vol. 139, of the official report of the Parliamentary Debates in the House of Commons on p. 2518, where Mr. Lloyd George states: "This is purely a trading agreement recognising the Soviet Government as a *de facto* Government of Russia—which undoubtedly it is."

3. I am also to remind you that, in response to an enquiry made before the signature of the Agreement, a firm of solicitors were informed, after reference to the Attorney-General, "that His Majesty's Government, for a certain limited purpose, regarded the Soviet Government as a State Government in Russia."

4. If it were held to be the case that there has been *de facto* recognition, the position would appear to Lord Curzon to be similar to that created by the *de facto* recognition of the Governments of the republics of Latvia and Esthonia, when representatives of those Governments resided in London and conducted diplomatic negotiations with the Foreign Office, although their final recognition as envoys to the Court of St. James was deferred until full *de jure* recognition was accorded. The creation of such a situation would entail consequences of grave importance.

5. Lord Curzon would therefore be grateful of your opinion on the following questions:—

- (1.) Would it be correct to inform Messrs. Coward, Hawkesley Sons and Chance that His Majesty's Government recognise the Soviet Government as the *de facto* Government of Russia?
- (2.) If the answer to (1) is in the negative, should Messrs. Coward and Hawkesley be informed that His Majesty's Government recognise that, for a certain limited purpose, the Soviet Government is a State Government in Russia?

RUSSIA.

- (3.) If the answer to (1) is in the affirmative, does it necessarily follow that direct diplomatic relations can be established between representatives of the Soviet Government and the Secretary of State for Foreign Affairs as in the case of the representatives of Latvia and Esthonia referred to in paragraph 4 of this reference?
- (4.) Generally.

I have, &c.
J. D. GREGORY.

List of Papers.

Messrs. Coward, Hawkesley and Co. to Foreign Office, March 21, 1921 (N 3632/1221/38)

Report.

In our opinion—

(1.) It would be correct to inform Messrs. Coward Hawkesley, Sons and Chance that His Majesty's Government recognise the Soviet Government as the *de facto* Government of Russia.

(2.) Does not arise.

(3.) Yes; we think it necessarily follows that direct diplomatic relations can be established between representatives of the Soviet Government and the Secretary of State for Foreign Affairs.

GORDON HEWART.
ERNEST M. POLLOCK

Law Officers' Department,
April 18, 1921.

[N 13126]

No. 7.

[File 12085/1921]

[November 28, 1921.]

Foreign Office to the Law Officers of the Crown.

Foreign Office, November 22, 1921.

Gentlemen,

I HAVE the honour, by direction of the Marquess Curzon of Kedleston, to request that you will favour his Lordship, at your early convenience, with your opinion as to whether the statements of principle contained in paragraphs 4 and 5 of the accompanying draft of an answer which it is proposed to send to M. Krassin, the agent in this country of the Soviet Government of Russia, are sound and whether they are likely to cause embarrassment to His Majesty's Government in the future.

2. The circumstances in which the need for sending the proposed answer to M. Krassin has arisen are as follows:—

3. In October last a conference of representatives of the Powers was held in Brussels for the purpose of considering what measures might be taken to help the starving population in the districts of Russia which are suffering from famine. Among the resolutions adopted by that conference was one to the effect that no help could be given until the Soviet Government had recognised the obligations of its predecessors and the well-established foreign claims arising out of its own actions. The precise terms of the resolution were as follows:—

"The commission feels the difficulty of making specific suggestions in the absence of the necessary information which the Mission of Enquiry proposed at the first meeting was designed to obtain; but, in view of the fact that requests have been made by the Soviet Government for credits in one form or in another, the commission considers it is within its competence to record the following conclusions:—

"(a.) Whatever are the precise dimensions of the famine, no final solution can be found unless economic conditions are established in which normal production and a regular exchange of goods of all sorts are guaranteed within Russia itself; unless the growth of prosperity is stimulated by intensive work; unless confidence exists to a degree sufficient to induce foreign exporters to send goods to Russia.

[8214]

G



RUSSIA.

"(b.) Commercial and financial credit must be based on confidence, and this can only be created and maintained among commercial communities provided debts and obligations are recognised and advances sufficiently secured. These principles apply equally to credits granted by Governments as to private commercial credits.

"(c.) The commission is therefore forced to the inevitable conclusion that the creation of credits to assist exports to Russia will only be practicable on the following conditions:—

"(i.) The Russian Government must recognise existing debts and other obligations arising from established claims.

"(ii.) Adequate security should be afforded for any credit given in the future.

"(d.) If credits are given on these conditions they should be devoted to assisting the import into Russia of those commodities which the commission judges to be most essential, after taking into consideration the report of the Mission of Enquiry.

"(e.) The commission desires to emphasise that in coming to these conclusions it is actuated by no political motive. Its conviction is founded solely on economic considerations of a vital character, and the commission is convinced that only in the manner herein stated will it be possible to extend to Russia public or private credit for the purpose of alleviating the existing distress in Russia and preventing a recurrence in the future."

4. The Soviet Government became aware of this resolution through its publication in the press, and on the 29th October M. Krassin sent to Lord Curzon a note (Paper (A)) indicating the willingness of the Soviet Government to recognise certain classes of obligations; as the terms of this note were thought not to cover the whole field of Russia's obligations, a reply (in Paper (B)) was sent to M. Krassin on the 1st November asking for further information on this point. On the 17th a further note (Paper (C)) was received from M. Krassin, but again no clear statement is made as to the extent of the obligations which the Soviet Government are prepared to recognise.

5. In the circumstances Lord Curzon feels that a clear and specific answer must be insisted upon as to whether or not the Soviet Government are prepared to recognise the principles contained in the resolution of the Brussels Conference. For this purpose he proposes to send the answer of which the draft is enclosed, but, in view of the importance of the principle involved, he would be glad if you would inform him whether you consider the statements made in paragraphs 4 and 5 of that draft to be correct, and whether, if correct, you consider that they are likely to cause embarrassment at any time to his Majesty's Government.

I have, &c.
J. D. GREGORY.

Annex.

Draft Reply to M. Krassin.

November, 1921.

Sir,

I AM directed by the Marquess Curzon of Kedleston to inform you that the communication which you made to me on the 16th November has been carefully considered by His Majesty's Government.

2. In this communication you stated that the problem of Russia's indebtedness is one particular aspect of the general problem of Russia's recuperation, and of the higher issue of the world's recuperation, and that every special question in regard to Russia's debts (including, I presume, the question contained in my letter of the 2nd November), can only be studied at an international conference in conjunction with the whole problem facing mankind. Your communication went on to declare that a people that has freed itself from despotism need not pay the debts of the previous despotic Government, which utilised loans against its own people, but that the Soviet Government agrees exceptionally and upon conditions to recognise State loans concluded by the Tsarist Government before 1914.

RUSSIA.

3. Lord Curzon fears that the meaning of my note of the 2nd November has been imperfectly understood. It is the case that certain aspects of the questions referred to in resolution 5 (c) (1) of the Brussels Conference could not be dealt with by correspondence alone; such aspects (I mention these only for the sake of illustration) as the exact value of an industrial property commandeered by the Soviet Government from a foreign owner, or the value, as collateral, of assets which they might wish to assign as security for a relief credit.

4. But there are certain preliminary questions raised in that resolution which can and should be disposed of without delay. These questions involve no detailed consideration of figures or claims. They raise a clear and simple issue of principle, not of detail, and can be answered plainly and promptly. The first is that of the acceptance by the Soviet Government of the general principle that it is responsible for the fulfilment of the obligations which had been entered into and were binding upon previous Governments in Russia. The accepted rule among civilised States is that contracts made by and debts incurred by a Government are to be regarded as the obligations of the nation it represented and not as the personal engagements of the ruler. Although the form of Government may change, the people remain bound.

5. A further question deals with the recognition of obligations arising from established claims. The forcible expropriation and nationalisation without any compensation or remuneration of property in which foreigners are interested is totally at variance with the practice of civilised States. Where such expropriation has taken place, a claim arises for compensation against the Government of the country. It is to the recognition of these claims that the resolution of the Brussels Conference was directed.

6. The question to which I endeavoured to obtain an answer in my previous letter, and as to which I feel it is essential that there should be no misunderstanding if any real progress is to be made, is whether the Soviet Government is prepared unequivocally to subscribe to the doctrines set forth in paragraphs 4 and 5.

7. His Majesty's Government feel it their duty to express themselves on this subject with the utmost frankness. Acceptance of these doctrines cannot be made the subject of a bargain. They could not accept a position in which recognition of foreign liabilities of the kinds now in question were given in return for an admission of the Soviet Government to a discussion of wider issues. To do so would compromise the object of this correspondence, namely, to find a basis upon which the Soviet Government can reach an accommodation with foreign capital. The discovery of a basis for such an accommodation must precede and not follow discussion of the manner in which effect would be given to the fulfilment of Russia's obligations, if the principle of her liability is admitted; otherwise such discussions would inevitably be barren.

List of Papers.

- (A.) M. Krassin to Foreign Office, October 29, 1921. [N 12085/12085/38/1921.]
(B.) Foreign Office to M. Krassin, November 1, 1921. [N 12085/12085/38/1921.]
(C.) M. Krassin to Foreign Office, November 16, 1921. [N 12733/12085/38/1921.]

Report.

In our opinion, the statements made in paragraphs 4 and 5 of the draft letter to M. Krassin are correct and are not likely to cause embarrassment at any time to His Majesty's Government.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
November 28, 1921.



(40)

TURKEY.

[E 8408]

No. 8.

[File 143/1921]

[July 21, 1921.]

*Foreign Office to the Law Officers of the Crown.**Foreign Office, July 8, 1921.*

Gentlemen,

I HAVE the honour, by direction of the Marquess Curzon of Kedleston, to request that you will be so good as to furnish his Lordship with your views as to the legal situation which would be created if a British subject were to offer to the Greek representatives in this country to endeavour to enlist persons to serve in the Greek naval or military forces during the present hostilities between Greece and the Turkish Nationalists, or were to take other action which, if the enemy with which Greece is at war were "a foreign State at peace with His Majesty," would constitute an offence under the Foreign Enlistment Act.

2. It is a fact that, the Treaty of Sèvres not having been ratified, Great Britain is still in a state of war with Turkey and may perhaps be regarded as still in alliance with Greece. On the other hand, His Majesty's Government have stated in public and informed the Allied and the Turkish Governments that their attitude in respect of the present Græco-Kemalist hostilities is one of strict neutrality, and to this attitude it is desired to adhere.

3. Lord Curzon would be grateful if, taking into consideration the circumstances referred to in paragraph 2, you would favour him, as early as possible, with your opinion upon the question raised in paragraph 1.

I have, &c.

LANCELOT OLIPHANT.

Report.

In our opinion, notwithstanding the circumstances referred to in paragraph 2 of the Foreign Office letter, Turkey cannot be regarded as a "foreign State at peace with His Majesty" and therefore a "friendly State" within the meaning of "The Foreign Enlistment Act, 1870," and it is not unlawful for British subjects to enlist persons to serve in the Greek forces during the present hostilities between Greece and the Turkish Nationalists.

GORDON HEWART.
E. M. POLLOCK.*Law Officers' Department,
July 21, 1921.*

[E 11600]

No. 9.

[File 143/1921]

[October 18, 1921.]

*Foreign Office to the Law Officers of the Crown.**Foreign Office, September 21, 1921.*

Gentlemen,

I HAVE the honour, by the direction of the Marquess Curzon of Kedleston, to request you to favour him with your early opinion on certain questions raised by the apparent intention of the Russian Soviet Government to deliver warships to the Kemalist Turkish Government of Angora.

2. With a view to explain the somewhat complex issues of international law involved, it seems necessary to call attention to the following facts:—

3. His Majesty's Government concluded on the 16th March last a trade agreement with the Russian Soviet Government, a copy of which is transmitted herewith for convenience of reference, together with a copy of the letter addressed by Sir Robert Horne to M. Krassin at the time of its signature explaining the point of view of His Majesty's Government on certain provisions of the agreement. It will be seen that by sub-paragraph (a) of article 1 of the agreement the Russian Soviet Government and

Delivery of
war vessels
to Kemalist
Government
by Russian
Soviet Go-
vernment;
question of
action under
Anglo-
Russian
Trade
Agree-
ment, 1921.

TURKEY.

41

His Majesty's Government reciprocally oblige themselves "to refrain from any attempt by military or diplomatic action or propaganda to encourage any of the people of Asia in any form of hostile action against British interests or the British Empire." This agreement is still in force, but His Majesty's Government have recently instructed the British Trade Commissioner in Moscow, in a despatch a copy of which is enclosed herein, to draw the attention of the Russian Soviet Government to certain apparent breaches of the agreement. It should be mentioned that on the day of the signature of the Anglo-Russian Agreement the Russian Soviet Government signed an agreement with the Turkish Kemalist Government, the constitution and history of which is briefly explained below. A paper giving the substance of the agreement, as known to His Majesty's Government, is also enclosed herein.

4. The principal Allies concluded an armistice with the Turkish Government at Constantinople in October 1918. Certain parts of Turkey were occupied by the principal Allies, and this occupation was extended in March 1920 to Constantinople. On the 10th August, 1920, a Treaty of Peace was signed at Sèvres with the Turkish Government. This treaty has not yet been ratified either by the Turkish Government or by any of the principal Allies.

5. Meanwhile a separate Government in that part of Asia Minor not occupied by the Allies had been constituted in 1920 by a certain Mustapha Kemal. This Government subsequently styled itself the Grand National Assembly. The seat of the Government is at Angora. This Government, while not formally renouncing allegiance to the Sultan of Turkey, regards itself as the sovereign Government of Turkey, in distinction to the Government of Constantinople, with which, however, it does, in fact, for political purposes, remain in close and friendly relations. One of the main objects of the Angora Government was to prevent the entry into force and execution of the Treaty of Sèvres, and, in particular, to drive back the Greek forces who had been sent to occupy the Smyrna area of Asia Minor by the Supreme Council in 1919, an occupation which was subsequently extended in July 1920 in order to drive back the Kemalist forces from the area of the Straits, and force the Turkish Government to sign the Treaty of Sèvres.

6. In the autumn of 1920 the Government of Venizelos fell in Greece, and the succeeding Government ordered a plebiscite, resulting in the return of King Constantine. For political reasons His Majesty's Government and the French Government have not officially recognised the King, but have continued in informal relations with his Government. Partly owing to this change of attitude towards Greece, but principally in order to put a stop to the intermittent warfare between the Kemalist forces and the Greeks, the Supreme Council invited the Greek Government and the Turkish Government at Constantinople to send representatives to a conference in London in February 1921, with a view to agree upon modifications of the Treaty of Sèvres acceptable to both parties. In the hope that the Turkish Government at Constantinople would eventually merge into a united Turkish Government to include the Kemalist Government at Angora, the Supreme Council did not desire to recognise formally the latter, but they invited the Constantinople Government to include in their delegation representatives of the Kemalist Government. It was with such a united delegation that the Supreme Council subsequently negotiated. At the London conference certain proposals were put before both the Greek and Turkish Governments, and it was made clear to both Governments that if hostilities were resumed in Asia Minor the Supreme Council rejected all responsibility. Before final answers to the Supreme Council's proposals were returned, hostilities were resumed in Asia Minor between the Greeks and Kemalist Turks, and towards these hostilities the Supreme Council decided to adopt an attitude of neutrality.

7. Since this renewal of hostilities had taken place in quasi-defiance of the Supreme Council, and while the questions at issue were still *sub judice* by the Supreme Council, the Principal Allied Governments originally decided to interpret their neutrality in such a way as to prevent any export of arms from the countries of the Principal Allies even by private traders to either combatant, and at the same time to deny either side the ordinary rights of a belligerent in the matter of the visit and search of the vessels of the Principal Allies at sea. By this decision as to neutrality it was assumed that a certain *de facto* recognition had been given to the Kemalist Government at Angora, as a Government separate from the Turkish Government at Constantinople, with whom His Majesty's Government were still technically in a state of war, suspended by the armistice of 1918. His Majesty's Government have had, however, no direct official relations with the Kemalist Government. Warfare between the Greeks and the Kemalists has continued since the London conference, the Greek



Government rejecting an offer of mediation made to them only in June 1921. At a meeting of the Supreme Council in August 1921, it was decided to supersede the policy described in the earlier part of this paragraph by adopting the customary rules of neutrality towards the belligerents, so far as private trade in arms between either belligerent and the countries of the Principal Allies is concerned.

8. The Kemal Government have, since its constitution, adopted a somewhat hostile attitude towards Great Britain, without, however, going to the length of a declaration of war. Although His Majesty's Government had, after the London conference of March 1921, made plain their neutrality towards the Græco-Turkish hostilities, the Kemal Government have preferred to regard His Majesty's Government's attitude of neutrality as hypocritical. Some hostile measures, such as the refusal to allow British vessels to call at Turkish ports in the Kemal areas, have not been permanently applied, but modified according to the changing political situation; but the Kemal Government have seized and still detain more than twenty British subjects as prisoners and have rejected an agreement made by their representative at the London conference in March 1921 for an exchange with Turkish prisoners detained by His Majesty's Government at Malta—an agreement which, on their side, His Majesty's Government had begun to carry out.

9. Without burdening the Law Officers of the Crown with further details, Lord Curzon is satisfied that upon the facts a good case could be made out in support of the thesis that the Kemal Government has been guilty of some "form of hostile action against British interests or the British Empire," but he is doubtful whether action under the Anglo-Russian Trade Agreement based upon that case would be consistent with the maintenance of a policy of neutrality towards the Kemalists as belligerents and in harmony with the international practice governing the relations of neutrals towards belligerents.

10. His Lordship would, therefore, be glad to receive your opinion on the following questions:—

- (1.) In the light of the above explanation of the relations of His Majesty's Government with the Turkish Kemal Government, would His Majesty's Government, in view of their declared attitude of neutrality towards the Græco-Kemalist hostilities, be entitled to regard certain acts of the Kemal Government as "hostile action" within the meaning of sub-paragraph (a), article 1, of the Anglo-Russian Agreement?
- (2.) If the answer to the above question is in the affirmative, would His Majesty's Government, knowing that certain vessels of war belonging to the Russian Government were being delivered to the Kemal Government, be entitled (a) to protest against such delivery as a breach of the Anglo-Russian Trade Agreement, (b) to enforce such protest forthwith, in order to prevent an imminent breach of the agreement, by sinking or seizing these vessels, or (c) to make a diplomatic protest to the Russian Soviet Government?
- (3.) Generally.

11. It will be appreciated that, if any action is to be taken in the matter of the delivery of these vessels, it may have to be taken quickly, and Lord Curzon would, therefore, request that he may be favoured with your opinion at your earliest possible convenience.

I have, &c.
LANCELOT OLIPHANT.

List of Papers.

- (A.) Trade Agreement with Russian Soviet Government, March 16, 1921. [Cmd. 1207.]
- (B.) Sir R. Horne to M. Krassin, March 16, 1921. (N 3438/5/38/1921.)
- (C.) Foreign Office to British Trade Commissioner, Moscow, No. 64, September 7, 1921. (N 10221/5/38/1921.)
- (D.) Summary of agreement between the Russian Soviet and Turkish Kemal Governments, March 16, 1921. (E 9905/143/44/1921.)

Report.

1. In our opinion, in view of the declared attitude of neutrality towards the Græco-Kemalist hostilities, His Majesty's Government are not entitled to regard acts of

the Kemal Government as "hostile action" within the meaning of article 1 (a) of the Anglo-Russian Agreement. To put forward a case of breach of the agreement on that basis would, in our opinion, be inconsistent with a policy of neutrality towards the Kemalists.

2. In this view this question does not arise.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
October 18, 1921.

UNITED STATES.

[T 5251]

No. 94.

[File 924/1921]

[April 7, 1921.]

[Home Office.]

Case for the Opinion of the Law Officers of the Crown.

THE question on which the Secretary of State desires the assistance of the Law Officers relates to the national status of a child born in the United States of America of a father who, being at the date of the birth of such child a natural-born British subject, becomes during the minority of that child a naturalised citizen of the United States.

Section 10 (3) of "The Naturalisation Act, 1870," provided that: "Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this Act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalised, and has, according to the law of such country, become naturalised therein, shall be deemed to be a subject of the State of which the father or mother has become a subject, and not a British subject."

The Act of 1870 was repealed by "The British Nationality and Status of Aliens Act, 1914," which came into force on the 1st January, 1915, and section 12 (1) of the latter Act provides that: "Where a person, being a British subject, ceases to be a British subject, whether by declaration of alienage or otherwise, every child of that person, being a minor, shall thereupon cease to be a British subject, unless such child, on that person ceasing to be a British subject, does not become by the law of any other country naturalised in that country."

Title XXX, "Naturalisation," section 2172, of the Revised Statutes of the United States, provides that: "The children of persons who have been duly naturalised under any law of the United States . . . being under the age of 21 years at the time of the naturalisation of their parents shall, if dwelling in the United States, be considered as citizens thereof . . ."

A Mr. Wharton, a natural-born British subject by virtue of his birth in the United Kingdom, settled in the United States in 1884 with his British-born wife and became a naturalised citizen of the United States in 1896. His son, Mr. D. B. S. Wharton, was born in 1885 in the United States; he was therefore still a minor at the date of his father's naturalisation, and appears to have been resident with his father at and after that date. He has now applied "if possible to take out British naturalisation papers."

Mr. D. B. S. Wharton was at birth a natural-born British subject by virtue of 4 Geo. II, cap. 21, and would appear also to have become a citizen of the United States of America if, as is understood to be the case, the law which obtains in that country is substantially the *jus soli*, see article 14, section 1, of the Constitution of the United States: "All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside . . ."; and section 1992 of the Revised Statutes of the United States: "All persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are declared to be citizens of the United States."

If he acquired United States citizenship at birth, it may be open to doubt whether his British nationality was terminated, in consequence of his father's naturalisation in

National status of child born in the United States of a father who, at date of child's birth, was a natural-born British subject, but, during the child's minority, became a naturalised United States citizen.



UNITED STATES.

the United States, by the operation of section 10 (3) of "The Naturalisation Act, 1870," and section 2172 of the Revised Statutes of the United States of America.

It has been the practice in the Home Department, particularly in connection with applications for naturalisation by persons in the position of Mr. D. B. S. Wharton, to regard such persons as not possessing British nationality, and accordingly to entertain such applications. In support of this view it may be urged that, if it be not correct, the fact of birth in the United States of America would confer or impose on an individual a capacity to possess British nationality not enjoyed by an individual (even though a member of the same family) born in British dominions, *e.g.*, it is clear that any children of Mr. Wharton senior, who, having been born in British dominions—whether before or after Mr. D. B. S. Wharton—were still minors at the date of his naturalisation and were then resident in the United States, would cease to be British subjects; and it is equally clear that any other children born to Mr. Wharton outside British dominions after the date of his naturalisation would not possess British nationality.

The questions on which the Secretary of State desires the opinion of the Law Officers are—

1. Has Mr. D. B. S. Wharton lost British nationality under section 10 (3) of "The Naturalisation Act, 1870"?
2. If the same set of circumstances arose after "The British Nationality and Status of Aliens Act, 1914," came into force, would the individual lose British nationality under section 12 (1) of that Act?

Opinion of the Law Officers of the Crown.

In our opinion both of the questions submitted to us should be answered in the affirmative. Section 2172 of the Revised Statutes of the United States, it is true, seems to contemplate the case of persons who are not already citizens of the United States, but its terms are such as to include persons of dual nationality, and we think that persons in the position of Mr. D. B. S. Wharton do become naturalised in the United States by virtue of the law of that country within the meaning of the quoted sections of the two British Statutes.

GORDON HEWART.
ERNEST M. POLLOCK.

*Law Officers' Department,
April 7, 1921.*



1922

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office.

CONFIDENTIAL

(12208)

LAST COPY.

Nothing mutilated or ^{3 removed} ~~altered~~: A.D.M.

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1922.



LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked *I^A*, &c.

AFRICA.

No.		Date.	SUBJECT.	Page.
1	Law Officers ..	Jan. 4, 1922	Parliamentary sanction for cession of British territory in Jubaland	1

BULGARIA.

<i>I^A</i>	Law Officers and Mr. Gavin T. Simonds [Board of Trade]	June 14,	Position of diplomatic and consular pre-war claims under article 179 of Treaty of Peace with Bulgaria	3
----------------------	---	----------	---	---

EGYPT.

2	Law Officers ..	Oct. 13,	Egypt (Amendment) Order in Council, 1922 ..	4
---	-----------------	----------	---	---

FRANCE.

3	Law Officers ..	July 11,	Imposition of French nationality and French military service on British community in Morocco ..	6
4	Law Officers ..	July 11,	Imposition of French nationality and French military service on British community in Tunis ..	9

GENERAL.

<i>I^A</i>	Law Officers .. [Board of Customs and Excise]	Jan. 18,	Offences committed on foreign vessels outside the 3-mile limit: application of British Customs Acts..	18
5	Law Officers ..	Mar. 21,	Correspondence in war time with (a) prisoners of war or interned civilians; or (b) other persons in enemy countries: general licence ..	22
6	Law Officers ..	Apr. 27,	Correspondence in war time with (a) prisoners of war or interned civilians; or (b) other persons in enemy countries: draft licence and notice to public	24
<i>6^A</i>	Law Officers and Mr. H. M. Givern [Treasury Solicitor]	May 17,	Claim of the Mozambique Whaling Company (Limited) in the War Compensation Court respecting detention of whale oil shipped in steamship "Aros Castle" ..	26
7	Law Officers ..	May 17,	Correspondence in war time with (a) prisoners of war or interned civilians; or (b) other persons in enemy countries: draft licence and notice to public	30

GENERAL—continued.

No.		Date.	SUBJECT.	Page.
7 ^A	Law Officers, Mr. James Wylie and Mr. Gavin T. Simonds [Procurator-General]	June 22, 1922	Detained enemy ships: effect of Privy Council judgment in case of the "Blonde," &c. . . .	32
7 ^B	Law Officers, Mr. James Wylie and Mr. Gavin T. Simonds [Procurator-General]	Dec. 16,	Detained enemy ships: effect of Privy Council judgment in case of the "Blonde," &c. . . .	42

GERMANY.

8	Solicitor-General ..	Dec. 28,	Interpretation of Treaty of Versailles, 1919: paragraph 18 of Annex II to Part VIII	45
---	----------------------	----------	---	----

UNITED STATES.

9	Law Officers ..	Aug. 4,	Right of New Zealand or United States to establish preferential tariffs, &c., in Samoa	46
<i>9^A</i>	Law Officers .. [Home Office]	Oct. 24,	National status of child born in the United States whose father became, during the child's minority, naturalised in the United States on or after March 2, 1907	48



(iv)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1922.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

AEM—EXP.

A.

"Aemme Rickmers," 32-41.
"Annapolis," 22.
"Aros Castle": detention of whale oil shipped in;
claim in War Compensation Court, 26-30.
Attorney-General v. Schiers, 20.

B.

"Barenfels," 32-41.
"Blonde," 32-45.
Botterell and Roche, 42-45.
Bryde, Johan, 27-29.
Bulgaria: position under Treaty of Peace of diplo-
matic and consular pre-war claims, 3, 4.

C.

Cession: of British territory in Jubaland; parlia-
mentary sanction, 1-3.
"Chile," 33, 34, 36-39.
Civilians, interned: correspondence with, in war
time; licence and notice to public, 22-26, 30-32.
Claims: diplomatic and consular pre-war claims;
position under Treaty of Peace with Bul-
garia, 3, 4.
"Mozambique Whaling Company, in War
Compensation Court; for detention of
whale oil, 26-30.
Correspondence: in war time with prisoners of war
or interned civilians; licence
and notice to public, 22-26,
30-32.
"in war time with persons in enemy
countries; licence and notice to
public, 22-26, 30-32.
"Corsican Prince," 28.
"Cosmopolite," 22-24.
Courts. See Privy Council. Prize Court. War
Compensation Court.
Customs: application of British Customs Acts to
offences committed on foreign vessels outside
territorial waters, 18-22.

D.

Danziger Rederei Aktien-Gesellschaft, 32-34, 42.

E.

Egypt: Amendment Order in Council, 4, 5.
Enemy countries: correspondence with persons in,
in war time; licence and notice to public, 22-26,
30-32.
Eschert, Carl, 44.
Eschert, Dr. Paul, 44.
Exposito v. Bowden, 23.

FRA—MOZ

F.

France: imposition of French nationality and mili-
tary service on British community in
Morocco, 6-9.
"imposition of French nationality and mili-
tary service on British community in
Tunis, 9-18.

G.

Germany: interpretation of paragraph 18 of Annex II
to Part VIII of Treaty of Versailles, 1919, 45.
"Gutenfels," 32-41.

H.

"Henry L. Marshal," 18.
"Hercules," 32-45.
"Hoop," 23.

J.

Jubaland: cession of territory in; parliamentary
sanction, 1-3.
Jurisdiction: application of British Customs Acts to
offences committed on foreign vessels
outside territorial waters, 18-22.
"of Prize Court or War Compensation
Court in case arising out of right of
visit and search.

K.

"Kong Inge," 27.
"Kronprinzessin Cecilie," 32-41.

L.

Laszlo, P., 23.
"Lauterfels," 32-41.
Leroux v. Brown, 22.
"Lutzow," 29.

M.

"Marie Leonhardt," 36, 37.
Maritime Jurisdiction: application of British Customs
Acts to offences committed on foreign vessels
outside territorial waters, 18-22.
Military service: imposition on British community
in Morocco, 6-9.
"imposition on British community
in Tunis, 9-18.
Morocco: imposition of French nationality and mili-
tary service on British community, 6-9.
Mortensen v. Peters, 19.
Mozambique Whaling Company (Limited): claim in
War Compensation Court, 26-30.

(v)

NAT—SEA.

N.

Nationality: French: imposition on British com-
munity in Morocco, 6-9.
"French: imposition on British com-
munity in Tunis, 9-18.
"of child born in United States whose
father became naturalised in United
States on or after March 2, 1907,
48, 49.
"Neptunus," 27-29.
New Zealand: right to establish preferential tariffs
in Samoa, 46-48.
"Nieuw Amsterdam," 36.

O.

Order in Council. See Egypt.

P.

"Panariellos," 22, 23.
Parliament: sanction of, for cession of British terri-
tory in Jubaland, 1-3.
"Petit Jules," 18.
"Prinz Adalbert," 32-41.
Prisoners of war: correspondence with, in war
time; licence and notice to public, 22-26, 30-32.
Privy Council: judgment in case of "Blonde," &c.;
effect on detained enemy ships, 32-45.
Prize Court: jurisdiction in case arising out of right
of visit and search, 26-30.
"Prosper," 32-45.

R.

"Rabenfels," 32-41.
Reprisals: interpretation of paragraph 18 of Annex II
to Part VIII of Treaty of Versailles, 1919, 45.
Right of search: jurisdiction of Prize Court or War
Compensation Court in case arising out of, 26-30.
Robson v. Premier Oil Company, 23.
"Rotterdam," 36.
"Roumanian," 29.

S.

"St. Helena," 29.
"St. Tudno," 29.
Samoa: right of New Zealand or United States to
establish preferential tariffs in, 46-48.
Schroder, Smidt and Co., 37.
Search. See Right of search.

TAR—ZOL.

T.

Tariffs, preferential: right of New Zealand or United
States to establish, in Samoa, 46-48.
Territorial waters: offences committed on foreign
vessels outside; application of British Customs
Acts, 18-22.
Territory: cession of; parliamentary sanction, 1-3.
Three-mile limit. See Territorial waters.
Treaty of Peace (Bulgaria): position of diplomatic
and consular pre-war claims,
3, 4.
" (Germany): interpretation of para-
graph 18 of Annex II to
Part VIII, 45.
Tunis: imposition of French nationality and military
service on British community, 9-18.

U.

United States: right to establish preferential tariffs
in Samoa, 46-48.
"national status of child born in
United States whose father be-
came, during child's minority,
naturalised in United States on or
after March 2, 1907, 48, 49.

V.

Vessels: foreign: offences committed on, outside
British territorial waters; application of
Customs Acts, 18-22.
"detained enemy ships: effect of "Blonde,"
&c., judgment of Privy Council, 32-45.

W.

War: correspondence in war time with prisoners of
war or interned civilians; licence and notice
to public, 22-26, 30-32.
"correspondence in war time with persons in
enemy countries; licence and notice to
public, 22-26, 30-32.
War Compensation Court: jurisdiction in case arising
out of right of visit and search, 26-30.
"Werdenfels," 32-41.

Z.

"Zollverein," 22.



1922

Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1922.

AFRICA.

[A 148/148/60/1922]

No. 1.

[January 4, 1922.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, December 21, 1921.

I HAVE the honour, by direction of the Marquess Curzon of Kedleston, to request you to favour him with your early observations on the following matter:—

2. Negotiations are in progress for the cession to Italy of an area of British territory in Jubaland. Before the annexation of the colony of Kenya, the province of Jubaland formed part of the East Africa Protectorate. That protectorate, proclaimed as such in 1895, consisted partly of land which fell to Great Britain in the partition of tropical Africa into "spheres of influence" and partly of the mainland possessions of the Sultan of Zanzibar which were held by the Protectorate Government subject to a yearly payment. In 1920 the East Africa Protectorate became the colony and protectorate of Kenya, the latter consisting of the Sultan's mainland dominions, including part of Jubaland, and the former of the rest of the territory comprised in the East Africa Protectorate which was formally annexed to His Majesty's dominions by "The Kenya (Annexation) Order in Council, 1920."

3. Under the provisions of the Treaty of London, 1915, the greater part of Jubaland is being transferred to Italy, the rights of the Sultan of Zanzibar in his portion of that territory being acquired by an annual payment, which may, if the Italian Government so desire, be compounded by the payment of a capital sum.

4. The question therefore arises whether, in respect of that portion of Jubaland which forms part of His Majesty's dominions in virtue of the Order in Council above referred to, it is necessary to obtain the approval of Parliament to the cession of territory, or whether it is within the royal prerogative to cede a portion of His Majesty's dominions without reference to Parliament.

5. As you are aware, this question has been discussed on several occasions in Parliament and in the courts, and I am to transmit herewith for your guidance a copy of a memorandum prepared in the Foreign Office in May 1904, from which you will see that the question has been considered on more than one occasion by the Law Officers of the Crown. Reference may also be made to a text-book entitled, "Cases and Opinions on Constitutional Law," by the late Mr. William Forsyth, Q.C., at pp. 182-186, in particular to the following passage on p. 185:—

"It has, I believe, been supposed that a distinction exists between territory acquired by the Crown by conquest or cession which has not been the subject of parliamentary legislation, and territory to which Acts of Parliament have been applied, and it has been thought that the Crown may by its prerogative cede the former but not the latter to a foreign Power."

1527 [9930]

B



AFRICA

I am also to draw your attention to the observations of Sir Alexander Cockburn ("Hansard" 133, pp. 81 and 82), who stated in the House of Commons that colonies might be divided into two classes—such as were acquired by occupancy and such as were acquired by conquest and by cession. He further observed that while there was no question as to the right of the Crown to cede those acquired by conquest and cession, he was aware that there existed considerable difference of opinion as to whether those acquired by occupancy could be alienated otherwise than by an Act of the Legislature. Reference is also invited to the case of *Damodhar Gordhan v. Deoram Kangi* (1 Appeal Cases, p. 332) where the question was fully argued although no decision was given on the point, the judgment of the lower Court being reversed on a question of fact.

6. Lord Curzon is informed that the last two occasions on which this matter occupied the attention of His Majesty's Government were in 1890 when, on the occasion of the cession of Heligoland by Great Britain to Germany by the Anglo-German Agreement of the 1st July, 1890, Lord Salisbury presented to the House of Lords a Bill entitled "An Act for the Purpose of removing Doubts with respect to the Validity of an Agreement between Her Majesty and the Emperor of Germany," and in 1904 when the Anglo-French Convention of the 8th April, 1904, providing for the transfer to France of certain territory on the West Coast of Africa, was approved by "The Anglo-French Convention Act, 1904." The observations of Mr. Balfour, who took part in the Heligoland debate in the House of Commons, are set out in the Foreign Office Memorandum of May 1904, to which reference is made above.

7. It must be observed, therefore, that the balance of precedent appears to be in favour of the proposition that British territory cannot be ceded without the approval of Parliament, but it is suggested that, in the absence of any authoritative pronouncement on the question, the matter is by no means free from doubt. If Sir Alexander Cockburn's statement that there is no question that the Crown has the right to cede territory acquired by conquest and cession correctly expounds the position in constitutional law, there would seem to be no technical objection to a cession of a portion of Jubaland without parliamentary consent. It may also be noted that, by the provisions of the British Settlements Act of 1887, Jubaland, as a portion of the Kenya Colony annexed by Order in Council in 1920, can be legislated for by Order in Council or by ordinance, and that the territory in question has not been hitherto the subject of parliamentary legislation. Parliament having entrusted the Crown with power to legislate for this territory, it may be permissible to contend that there is no technical reason why such territory should not be ceded without parliamentary consent. In this connection I am to enclose, for convenience of reference, a copy of your report of the 22nd March, 1920, in which you advised the Secretary of State for the Colonies that the colony of Kenya, when annexed, would be a British settlement within the meaning of "The British Settlements Act, 1887."

8. Lord Curzon would therefore be glad if you would take the above matters into consideration, and inform him—

- (1.) Whether it is necessary to obtain the consent of Parliament to the proposed cession to Italy of that portion of Jubaland which forms part of His Majesty's dominions;
- (2.) Whether you have any observations of a general character which you desire to offer on this matter.

I have, &c
H. J. SEYMOUR.

List of Papers.

1. Kenya (Annexation) Order in Council, 1920. (Confidential 11548*.)
2. Foreign Office memorandum as to consent of Parliament to cessions of territory, May 1904. (Confidential 8156.)
3. Report of the Law Officers to the Colonial Office on proposed annexation of part of the territory of the East Africa Protectorate, March 22, 1920.

Report.

1. This is a question upon which, as is shown by the Foreign Office memorandum of May 1904, various views have been expressed from time to time by different Law Officers. We incline to the view that in such a case as Jubaland parliamentary sanction is not necessary for the cession.

BULGARIA.

2. But in view of the differences of opinion of eminent authorities referred to in the memorandum mentioned, and of the precedent of Heligoland, we think that the approval of Parliament to the cession should be sought for, and that it is desirable that such approval should be given by statute.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
January 4, 1922.

BULGARIA.

[C 9281/9281/62/1922]

No. 1^A.

[Board of Trade.]

[June 14, 1922.]

Case for the Opinion of the Law Officers of the Crown and Mr. Gavin T. Simonds.

THE opinion of the Law Officers is requested as to whether the diplomatic or consular claims referred to in article 179 of the Treaty of Neuilly-sur-Seine are claims with the payment of which the property, rights and interests of Bulgarian nationals within His Majesty's dominions or protectorates are charged under section 1 (i) (a) of "The Treaty of Peace (Bulgaria) Order, 1920," giving effect to clause 4 of the annex to section 4 of Part IX of the Treaty of Neuilly.

A copy of the claims is appended, and it will be observed that for the most part they are based upon circumstances which, had they occurred during the last war, would have come within the reparation chapter of the treaty, and not under the economic clauses; e.g., claims arising out of the destruction of private property outside Bulgaria during military operations. So far as the last war is concerned, the treaty clearly distinguishes between damage done by acts of war and that done by the application of exceptional war measures, and it is only the latter class of claim the payment of which is charged upon the assets of Bulgarian nationals in this country; and to assign to the diplomatic and consular claims before referred to, which arise out of the Balkan wars, rights which are not given to similar claims arising out of the last war, would be, it is submitted, contrary to the intention of the treaty. In fact the only grounds for suggesting that such claims are entitled to the benefit of the charge are (1) that the words "property, rights and interests" of Allied nationals are used in connection with them, and (2) that the provision of the treaty relating to such claims occurs in section 4 of Part IX, and it is in the annex to this section that the Allied and Associated Powers are given the right to charge the property, rights and interests within their territories belonging to Bulgarian nationals with the payment of certain classes of claims (clause 4). It will be seen, however, that this clause only provides for the payment of claims by Allied nationals with regard to their property, rights and interests in *Bulgarian territory*, and, as has already been pointed out, a number of the diplomatic or consular claims are with regard to property that never was in Bulgarian territory, a still further number are with regard to property that never was in Bulgarian territory as it now exists or as it existed just prior to the last war. The question would therefore arise as to the meaning of "Bulgarian territory" for the purposes of this clause.

Attention is also drawn to the fact that article 179 does no more than to provide that the determination of these claims is to be undertaken by the Mixed Arbitral Tribunal on the application of the Power concerned, and it is suggested that the intention of the treaty was not to place these claims on a stronger footing than they were on before the war, but merely to assign their determination to an impartial tribunal, having regard to the fact of the last war. It is further submitted that no undue importance should be attached to the fact that these claims are mentioned in section 4, since there are also other claims in that section, such as claims for compensation under article 178, which could hardly be said to rank against the charge.

The Law Officers are accordingly requested to advise the administrator of Bulgarian property whether he is entitled to administer and distribute such property

[9930]



EGYPT.

on the footing that these diplomatic and consular claims will not be entitled to participate in the benefit of the charge.

April 26, 1922.

Opinion of the Law Officers of the Crown and Mr. Gavin T. Simonds.

In our opinion, yes.

*Law Officers' Department,
June 14, 1922.*

ERNEST M. POLLOCK.
LESLIE SCOTT.
GAVIN T. SIMONDS.

EGYPT.

[E 11053/3725/16/1922]

No. 2.

[October 13, 1922.]

Foreign Office to the Law Officers of the Crown.

Egypt
(Amend-
ment)
Order in
Council,
1922.

Gentlemen,

Foreign Office, August 23, 1922.

I HAVE the honour, by direction of the Marquess Curzon of Kedleston, to transmit to you herewith the papers noted in the accompanying list relating to a proposed amendment of the Ottoman Order in Council (Paper (A)) in its application to Egypt.

2. The circumstances which render action necessary, and the reasons which have led his Lordship to consider that the proposed Order in Council (Paper (C)) is the most suitable form for it to take, are fully explained in the correspondence with Lord Allenby and the departmental minutes which are sent herewith (Papers (D) to (J)). It is his Lordship's intention, if you are of opinion that the proposed amendment is one which can properly be made, to take steps as occasion presents itself to insert it in the Orders in Council under which His Majesty's jurisdiction is exercised in other extraterritorial countries.

3. I have the honour, therefore, to request that you will take the enclosed papers into consideration, and will favour his Lordship with your opinion as to whether the proposed Order in Council is one which may properly be submitted to His Majesty in Council. His Lordship would also be grateful for any observations of a general nature which you may be good enough to offer.

I have, &c.

LANCELOT OLIPHANT.

List of Papers.

- (A.) Ottoman Order in Council, 1910 (Confidential 9745*).
- (B.) Egypt Order in Council, 1915 (Confidential 10598*).
- (C.) Draft Egypt (Amendment) Order in Council, 1922.
- (D.) Lord Allenby, No. 180, March 14, 1922, with enclosures (E 3725/3725/16/1922).
- (E.) Minutes by Sir C. Hurst (2) and Mr. Shearman on E 3725/3725/16/1922.
- (F.) To Lord Allenby, No. 407, April 8, 1922 (E 3725/3725/16/1922).
- (G.) Lord Allenby, No. 415, May 27, 1922, with enclosures (E 5704/3725/16/1922).
- (H.) Minute by Mr. Shearman (dated June 22, 1922) on E 5704/3725/16/1922.
- (I.) To Lord Allenby, No. 782, June 29, 1922 (E 5704/3725/16/1922).
- (J.) Lord Allenby, No. 546, July 13, 1922 (E 7298/3725/16/1922).

Report.

The draft Order in Council as amended by us in red ink* may, in our opinion, properly be submitted to the King for the approval of His Majesty in Council. The

* Printed in italics.

EGYPT.

reason for the amendment is to introduce "acts" as well as "conduct," as it is the former word rather than the latter which seems appropriate to cover breaches of the Acts of Parliament referred to.

ERNEST M. POLLOCK.
LESLIE SCOTT.

*Law Officers' Department,
October 13, 1922.*

ANNEX.

Draft Egypt (Amendment) Order in Council, 1922.

Whereas by treaty, capitulation, grant, usage, sufferance or other lawful means His Majesty the King has jurisdiction in Egypt;

And whereas provision is now made by "The Ottoman Order in Council, 1910" (S. R. and O., 1910, No. 1184) (in this Order referred to as "the Principal Order"), and "The Egypt Order in Council, 1915" (S. R. and O., 1915, No. 141) (in this Order referred to as "the Egypt Order"), for the exercise of such jurisdiction, and it is desirable to amend the said Orders;

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890" (53 & 54 Vict., cap. 37), or otherwise in His Majesty vested, is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as "The Egypt (Amendment) Order in Council, 1922," and shall be read as one with the Principal Order and with the Egypt Order and with any Order amending the latter.

2. The following provision is substituted in Egypt for article 81 (1) of the Principal Order:—

Where it is proved that there is reasonable ground to apprehend (a) that a British subject is about to commit a breach of the public peace, or that the acts or conduct of a British subject are or is likely to produce or excite to a breach of the public peace, or (b) that a British subject has been guilty of conduct which would in the United Kingdom constitute an offence subject has been guilty of conduct which, or has done or committed such acts as if done or committed in the United Kingdom, would in the United Kingdom constitute an offence under "The Dangerous Drugs Act, 1920" (10 & 11 Geo. V., cap. 46), or under the Vagrancy Acts, or under the Criminal Law Amendment Acts, 1885 (48 & 49 Vict., cap. 69) and 1912 (2 & 3 Geo. V., cap. 20), the court may, if it thinks fit, cause him to be brought before it and require him to give security to the satisfaction of the court to keep the peace, or for his future good behaviour, as the case may require.

3.—(1.) This Order shall take effect as soon as it is first exhibited in the public office of the Supreme Court for Egypt.

(2.) For that purpose the Judge of the Supreme Court shall, on the receipt by him of a certified printed copy of the Order, cause the same to be affixed and exhibited conspicuously in that office. He shall also keep the same so affixed and exhibited during one month from that first exhibition.

(3.) A certified printed copy of this Order shall also be affixed and exhibited in the public offices of the Consular Courts at Cairo and Port Said at the same time as it is first exhibited at Alexandria or as soon thereafter as circumstances admit.

(4.) Proof shall not in any proceeding or matter be required that the provisions of this article have been complied with, nor shall any act or proceeding be invalidated by any failure to comply with any such provisions.

E. M. P.
L. S.



(6)

FRANCE.

[T 8217/224/317/1922]

No. 3.

[July 11, 1922.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

*Foreign Office, June 6, 1922.*Imposition
of French
nationality
and French
military
service on
British
community
in Morocco.

IN my letter of to-day's date marked A* I had the honour, by direction of the Earl of Balfour, to transmit for your consideration certain papers relative to Decrees recently promulgated in Tunis, under which the French Government seek to impose French nationality and the consequent obligations of French military service on members of the British community in Tunis. A similar situation has arisen in Morocco (French Zone), but, as the circumstances in some respects differ from those in the case of Tunis, it appears convenient to deal with this further question by means of a separate reference.

2. As regards the position occupied by the French Government in Morocco (French Zone), this apparently amounts to no more than a protectorate over territory which is under the sovereignty of a native ruler, the Sultan of Morocco. An extract (Paper (A)) from the French "Annuaire colonial," an authoritative work, setting forth the method of administration of that territory is enclosed, as well as a copy of the Treaty between France and Morocco referred to therein (Paper (B)), for convenience of reference. His Majesty's Government have formally recognised the French protectorate in Morocco (French Zone), but they preserve their capitulatory rights of jurisdiction as guaranteed by Treaties in the past between Great Britain and Morocco, and these capitulatory rights of jurisdiction are still being exercised by the British Consular Courts in that country.

3. On the 8th November last the Decrees (Papers (C) and (D)) were published in Morocco (French Zone) in the form of (C), an edict in the name of the territorial Sovereign, the Sultan of Morocco, and (D), an edict signed by the President of the French Republic. The former pronounces Moroccan all persons born in Morocco (French Zone) of parents of whom one was also born there, with the exception of the citizens, subjects and *ressortissants* of the Protecting Power. The latter pronounces French all persons born in Morocco (French Zone) of parents of whom one justifiable "au titre étranger" before the French tribunals of the protectorate was also born there. Certain qualifications are mentioned in the French Decree, but these seem of minor importance.

4. These Decrees, it will be seen, correspond with those issued in the case of Tunis, which forms the subject of the separate reference from this Department of to-day's date, but, as concerns their application to members of the British community in Morocco (French Zone), there is the important difference that, whereas the capitulatory rights of this country in Tunis no longer exist, such rights are still in existence and are being exercised in Morocco.

5. No information has as yet been received to show that active measures are being taken by the French authorities in Morocco (French Zone) to apply these Decrees to members of the British community, who, being justiciable before the British Consular Courts, are apparently outside the terms of the French Decree, save, perhaps, in cases where the maternal parent was of French or other foreign origin, in such way as to have been deemed justiciable before the French tribunals. Failing this, they might be held to come within the range of the Decree of the Sultan of Morocco. But, apart from the fact that the imposition of a Moroccan status on members of that community would be in derogation of the Treaty rights of jurisdiction possessed by His Majesty's Government, it is not understood that this claim is made. The purpose of the French Government would seem to be that as and when the extra-territorial rights of foreign Powers in Morocco (French Zone) cease and determine the French Decree applies—as in the case of Tunis, where such rights have lapsed—to members of the European communities who come within its category.

6. It is to be noted, however, that in the course of the correspondence (referred to more fully hereafter) which has passed between His Majesty's Government and

* No. 4.

FRANCE.

7

the French Government on the subject of these Decrees in Morocco (French Zone), the latter Government argue that previously to the passing of "The British Nationality and Status of Aliens Act, 1914," which they contend cannot have retroactive effect, no provision of English law existed beyond the statutory enactments applicable to all foreign countries to conserve the British national status of persons of British descent born in extra-territorial countries. On this point reference is invited to paragraphs 7 and 8 of the Foreign Office letter of to-day's date in the case of Tunis, as showing the view originally entertained by the French Government in this respect.

7. On the 10th January last His Majesty's Ambassador at Paris addressed to the French Government the note (Paper (E)) intimating that in view of the extra-territorial rights possessed by His Majesty's Government in Morocco they were unable in any way to admit that the Decrees were applicable to persons entitled to British nationality. The correspondence which passed with the French Government is fully set out in Papers (E), (F), (G) and (H), and the points maintained by His Majesty's Government are, it will be seen, in many respects similar to those maintained by them in the case of the Tunis Decrees, as apart from the special Treaty provisions relating to Tunis. The additional points may be summarised as follows:—

- (a.) The legal condition of foreigners in extra-territorial countries is dealt with by eminent authorities. The French writer, Féraud Giraud, says they always preserve their nationality as if they preserved their residence and domicile in the mother country. English law has always taken cognisance of these conditions, and persons of British descent have long been registered as British subjects by His Majesty's Consular officers in those countries. The French assumption that His Majesty's Government regard Moroccan territory as British territory is quite unfounded.
- (b.) While His Majesty's Government make no claim to a *jus soli* in Morocco they are wholly unable to admit that the French Government can themselves assert such a claim in a country where they occupy only the position of protecting Power in regard to persons who are not only not of French descent but are actually British subjects and entitled to the benefit of capitulatory Treaty rights.
- (c.) The French action both in Tunis and Morocco is evidently founded on the error that these British subjects do not possess British nationality. The French Ambassador's note of the 14th December last (concerning Tunis) in paragraphs 3 and 4 clearly implies this, and that the French Government are fully aware that valid objection would exist if these persons were British subjects. The measures should therefore be withdrawn. If not, the matter must be submitted to arbitration.

8. The latest note of the French Government (Paper (H)) shows that they still maintain their contention that the provisions of English law are insufficient to conserve the British national status of persons of British descent beyond the second generation born in extra-territorial countries. It asserts that the French Government has, conjointly with the Sultan of Morocco, the sovereign right of legislating concerning the nationality of the descendants of foreigners in virtue of their birth in Morocco from the moment that foreign Powers, in accepting the French protectorate, abdicate all title to the maintenance of the prolongation of their privilege of jurisdiction. This sovereign right cannot be referred to arbitration.

9. The refusal of the French Government to admit to arbitration questions affecting the British community in Morocco (French Zone) gives rise to considerations which are set out in paragraph 11 of the separate Foreign Office letter of to-day's date concerning the Tunis Decrees. It seems unnecessary to repeat these considerations in the present letter, but it will be convenient to indicate the paragraphs of the separate letter in which they and the further relevant considerations are set out. I am accordingly to invite reference to paragraphs 11, 12 (1) and (2), 13, 14, 15, 16, 17 and 18 of that letter as being seemingly applicable also to the questions arising out of the Decrees issued in Morocco (French Zone).

10. As regards paragraph 18 of the separate Foreign Office letter it may be observed that the claim of the French Government referred to therein receives a somewhat fuller development in the latest note of the French Government concerning Morocco, where it is asserted that the French Government has conjointly with the Sultan of Morocco, the sovereign right of legislating upon the nationality of the descendants of foreigners in virtue of their birth in Morocco. This sovereign right it is added cannot be submitted to arbitration.



FRANCE.

11. On this latter point, it should be remarked that since the recognition by His Majesty's Government of the French protectorate over Morocco (French Zone), protracted negotiations passed with the French Government with a view to the conclusion of an arrangement under which Great Britain would relinquish British extra-territorial rights in Morocco (French Zone) in return for a similar surrender of French extra-territorial rights in Egypt. It is material to note that the draft Treaty prepared for the purpose contained a provision which was agreed to by both sides, under which the children of foreigners who enjoyed the privileges attaching to foreigners in Morocco would acquire their own foreign nationality, and would not become Moroccan subjects. This appears to be entirely at variance with the contention now advanced by the French Government in the latter part of their note of the 7th April (Paper (H)).

12. In communicating to you the accompanying papers together with the foregoing observations, I am to ask that you will be good enough to take them into your early consideration, in conjunction with the separate reference of to-day's date relative to the similar Decrees promulgated in Tunis, and favour Lord Balfour with your opinion on the following points:—

- (1.) Are His Majesty's Government entitled to protest against the French and Moroccan Decrees of the 8th November, 1921, so far as those Decrees purport to affect persons in Morocco (French Zone) entitled to British nationality, and if so, on what ground?
- (2.) In the case of British subjects born in Morocco (French Zone) whose claim to British nationality may be founded upon the proviso to section 1 (1) of "The British Nationality and Status of Aliens Act, 1914," are the objections raised by the French Government to the retroactive effect of this legislation valid?
- (3.) Are the French contentions sound that they possess in conjunction with the Sultan of Morocco the sovereign right of legislating concerning the nationality of the descendants of foreigners in virtue of their birth in Morocco from the moment that foreign Powers accept the French protectorate, and that this sovereign right cannot be referred to arbitration? If not, on what grounds should the French contention be contested?
- (4.) In the event of a claim for arbitration being renewed, what should be the terms of the question or questions to be submitted to the tribunal?

Lord Balfour would also be glad to be favoured with any general observations you may be good enough to make on the questions which have arisen and the course to be pursued.

I have, &c.
G. H. VILLIERS.

List of Papers.

- (A.) Extract from French "Annuaire colonial," 1921, concerning Morocco.
- (B.) Treaty between France and Morocco of March 30, 1912. ("State Papers," Vol. 106, pp. 1023-24.)
- (C.) Decree of the Sultan of Morocco, November 8, 1921. (T 16077/8936/328/1921.)
- (D.) Decree of the President of the French Republic, November 8, 1921. (T 15481/8936/328/1921.)
- (E.) Lord Hardinge to French Government, January 10, 1922. (T 465/465/328/1922.)
- (F.) French Government to Lord Hardinge, February 11, 1922. (T 2123/465/328/1922.)
- (G.) Lord Hardinge to French Government, February 28, 1922. (T 2776/465/328/1922.)
- (H.) French Government to Lord Hardinge, April 7, 1922. (T 4421/465/328/1922.)

FRANCE.

Report.

We refer to our report* in answer to the Foreign Office despatch relating to Tunis and reply to the present questions briefly as follows:—

- (1.) In our opinion, Yes.
- (2.) In our opinion, No.
- (3.) In our opinion, No.

The claim advanced appears to exceed what can be done by a protecting Power in virtue of its protectorate and to confuse sovereign rights therewith.

- (4.) We prefer to postpone the reply to this question until after a consultation,† which would be useful.

ERNEST M. POLLOCK.
LESLIE SCOTT.

Law Officers' Department,
July 11, 1922.

* No.

† This consultation took place on the 4th August, 1922, when the Law Officers expressed their opinion that the questions to be submitted to arbitration should be as follows:—

1. Is the Government of the French Republic entitled to impose French nationality upon any, and if so what, persons born and resident in the French zone of Morocco who are descendants in the male line of British subjects?
2. Is the Decree of the 8th November, 1921, made by the President of the French Republic, in so far as it purports to impose French nationality upon British subjects, in accordance with international law?

[T 8218/224/317/1922]

No. 4.

[July 11, 1922.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, June 6, 1922.

I HAVE the honour, by direction of the Earl of Balfour, to lay before you, for your consideration, the papers noted in the accompanying list relative to Decrees recently promulgated in Tunis (Papers (A) and (B)), under which the French Government seek to impose French nationality and the consequent obligations of French military service on members of the European communities in Tunis.

2. With regard to the position occupied by the French Government in Tunis, this appears to amount to no more than a protectorate over a country which is under the sovereignty of a native ruler, the Bey of Tunis. An extract (Paper (C)) from the French "Annuaire Colonial" for 1921, an authoritative work, setting forth the method of administration of that country, is enclosed, as well as a copy of the Treaty between France and Tunis (Paper (D)) referred to in that extract, for convenience of reference.

3. His Majesty's Government formerly possessed capitulatory rights of jurisdiction in Tunis, but these lapsed either in 1897, as His Majesty's Government contend, or in 1883, as the French Government contend. On the 20th June, 1883, in a note addressed by Lord Granville to the French Ambassador (Paper (E)), His Majesty's Government consented "to waive the rights of this country under the Capitulations and Treaties to the extent which may be required to give full scope to the exercise of civil and criminal jurisdiction over British subjects by the new French tribunals." On the 31st December, 1883, an Order in Council (Paper (F)) was issued abolishing British consular jurisdiction in Tunis in all such matters as come within the jurisdiction of the French tribunals. It was not, however, until 1897, by the Anglo-French Convention of the 18th September, 1897 (Paper (G)), to

[9930]

Imposition of French nationality and French military service on British community in Tunis.



determine the relations of Great Britain in Tunis, and to define clearly the Treaty position of Great Britain in that Regency, that the capitulatory rights of this country in Tunis were finally extinguished. The material provisions of that Convention are contained in Article 1, and fall under three heads:—

- (1.) All Treaties between Great Britain and France were extended to Tunis;
- (2.) Great Britain abstained from claiming for its Consuls, subjects and establishments in Tunis other rights and privileges than those secured for it in France; and
- (3.) The treatment of the most favoured nation secured by the afore-mentioned treaties were guaranteed to Great Britain for forty years.

As regards (3), an exchange of notes dated the 8th March/the 23rd May, 1919 (Paper (H)) substituted for this provision an undertaking on the part of the French Government not to accord to the subjects of a third Power a treatment which would not be effectively applicable to British subjects.

4. On the 8th November last the Decrees (Papers (A) and (B)) were published in Tunis in the form of (A) an edict in the name of the territorial sovereign, the Bey of Tunis, and (B) an edict signed by the President of the French Republic. The former pronounces Tunisian all persons born in Tunis of parents of whom one was also born there, with the exception of the citizens, subjects and ressortissants of the protecting Powers, under reserve of Treaty stipulations. The latter pronounces French all persons born in Tunis of parents of whom one, justiciable "au titre étranger" before the French tribunals of the protectorate, was also born there. Certain qualifications are mentioned in the French Decree, but these seem of little importance.

5. There is in Tunis a large community of Maltese origin, who, since the withdrawal in 1883 of the British Consular Courts, have been justiciable before the French tribunals. Under the Decrees of the 8th November last members of that community born in Tunis of parents of whom one was also born there, were required by the French authorities to register themselves forthwith as French, and to come forward to have their names inscribed in the French military registers. These proceedings have given rise to urgent and repeated representations to His Majesty's Government from the Maltese community, who claim as British subjects the protection of His Majesty's Government against the imposition of French nationality, as well as against the measures taken by the French authorities to compel their acceptance of the obligations of the Decrees. These measures are reported by His Majesty's Consul-General in Tunis to have been of a harsh and arbitrary nature, and accompanied by threats, such as the withdrawal of fishing licences, &c., in the event of non-compliance. His Majesty's Government have addressed special representations to the French Government against these oppressive proceedings, but without obtaining from that Government more than a general denial that they exist. His Majesty's Consul-General has now been asked to furnish a comprehensive report and such evidence as is available to substantiate the complaints made. Mr. Sarell has also been informed that His Majesty's Government decline in any way to recognise that the Decrees have any application to British subjects in Tunis, and has been asked to obtain if possible lists of members of the British community registered as French by the French officials.

6. In this connection it is to be noted that the French Government in the course of the correspondence (referred to more fully hereafter) which has passed between them and His Majesty's Government on the subject of these Decrees in Tunis argue that previous to the passing of Section 1 (1) of "The British Nationality and Status of Aliens Act, 1914" (Paper (I)), which they contend cannot have a retroactive effect, there was no provision of English law beyond the statutory enactments applicable to all foreign countries which would conserve the British status of persons of British descent born in extra-territorial countries.

7. The argument that the British national status of the members of the community affected had already lapsed indeed forms an important feature of the communications which have been received from the French Government. On the 14th December last a note was received from the French Ambassador (Paper (J)), which, in complaining of the attitude of His Majesty's Consul-General in Tunis in obstructing the operation of the French Decree, argued from the terms of "The British Nationality and Status of Aliens Act, 1914," that persons of Maltese origin of the second generation born in Tunis do not possess British nationality, and would

remain without nationality if the sovereign of the place of their birth did not grant them his. To avoid the profound modification of the régime to which these persons were accustomed the French Decrees substituted for them French nationality in place of Tunisian nationality. It was added: "Une telle mesure ne souffre au point de vue juridique aucune objection dès l'instant qu'elle a pour but de donner une nationalité à des individus qui n'en ont pas."

8. This argument, drawn from the Act of 1914, is of course incorrect, for previous to the passing of that Act, which only became operative on the 1st January, 1915, British nationality extended to two generations born abroad under the Acts 4 Geo. II, c. 21 and 13 Geo. III, c. 21. It would appear, therefore, that the French Government originally proceeded upon a wrong estimate of English law as to nationality, and this view is supported by statements which appeared in the Tunisian press in the course of vigorous propaganda waged there, urging the descendants of British subjects, who had been abandoned by Great Britain, to come under the protecting folds of the French flag. It is also supported by information originally received by His Majesty's Government, that the Italian Ambassador at Paris was told in conversation by the French Government, that the Tunis Decrees were intended to apply to the Maltese community alone. But, however this may be, the French Government have since found it necessary to adopt other though equally questionable arguments to justify the imposition of French nationality on members of the foreign communities born in Tunis.

9. On the 3rd January last, His Majesty's Ambassador at Paris, on the instructions of His Majesty's Government, communicated to the French Government a note (Paper (K)), which in pointing out the misapprehension entertained by that Government as to the nationality laws of this country, protested strongly against any attempt to impose French nationality and the obligations of French military service upon members of the British community in Tunis, proceedings which were, moreover, contrary to Article 1 of the Anglo-French Convention of the 18th September, 1897, relative to Tunis (Paper (G)), modified by the notes exchanged on the 8th March/the 23rd May, 1919 (Paper (H)). The correspondence which passed with the French Government is fully set out in Papers (K), (L), (M) and (N), and the points maintained by His Majesty's Government may for convenience of reference be brought under the following heads:—

- (a.) *Concerning the British status of those affected.*—Children born in extra-territorial countries of British parents are British subjects. Section 1 (1), last paragraph, of "The British Nationality and Status of Aliens Act, 1914," merely put into statute form what had long existed in the common law.
- (b.) *Concerning British Capitulatory rights in Tunis.*—These prevailed until 1897. In 1883 His Majesty's Government only consented to French tribunals exercising on their behalf rights they still maintained *vis-à-vis* the Bey of Tunis.
- (c.) *Concerning British Treaty rights under the Convention of 1897.*—There is no similarity of treatment of British subjects in Tunis and France, as guaranteed by Article 1, when those in Tunis, on the erroneous assumption that they have no nationality, are compulsorily made French by a French Decree substituted for that of the territorial sovereign. There is apparently no right to impose French nationality on British subjects in Tunis. As for French nationality proper, changes in the past have always been accompanied by a right of option to those newly affected.
- (d.) Further, the notes of the 8th March/the 23rd May, 1919, modifying Article 1 of that Convention accorded to British subjects in Tunis a treatment on demand in effect identical with that of the subjects of any third Power.
- (e.) The difference which has arisen, being exclusively of a legal nature, should be referred to the Permanent Court of International Justice.

10. The last note of the French Government (Paper (N)) deals with these points in the following way:—

- (a.) English common law with regard to nationality can be no more than the *ius soli*. Any extension beyond this limit assumes the assimilation of foreign territory to British territory, which is contrary to international law.



- (b.) British capitulatory rights of jurisdiction in Tunis terminated in 1883. Lord Granville's note of the 20th June, 1883, said nothing about delegation of jurisdictional rights to France. The Order in Council of the 31st December, 1883 (Paper (F)), suppressed those rights.
- (c.) The object of the French Decree was not to confer nationality on persons of no nationality. It applies to all persons who cannot invoke express Treaty rights. The measure was taken for general reasons by the two Governments of Tunis and France, closely associated (*étroitement associés*) as protector and protected. Its purpose was to extend to Tunis the French Nationality Law of 1889. Considerations based on past modifications of French law are irrelevant. The law applied in Tunis is the present French law.
- (d.) The most-favoured-nation treatment spoken of in Article 1 of the Convention of 1897, related not to the juridical position of persons, but to the economic treatment of goods. To claim on this ground a treatment superior to that of British subjects in France is contrary to Article 1 of the Convention.
- (e.) The Anglo-French Arbitration Convention of the 14th October, 1903 (Paper (O)), provides for the settlement of certain differences by submission to The Hague tribunal provided *inter alia* they do not affect the interests of a third Power. But apart from the fact that the interests of a third Power, Tunis, are affected, questions of nationality are too closely associated to the constitution of the State to be deemed wholly juridical. Such appears to be also the English point of view. The right of legislating in matters of nationality has never been referred to arbitration. Accordingly, arbitration is refused.

11. In view of the refusal of the French Government, on grounds which appear to Lord Balfour wholly inadequate, to submit to arbitration questions seriously affecting the welfare of the British community in Tunis, it appears to be desirable to bring the matter before the Council of the League of Nations under Article 11 (second paragraph) or other Article of the Covenant of the League of Nations (Paper (P)). Before doing so, however, his Lordship is of opinion that a further reply should be made to the note of the French Government (Paper (N)). It is suggested that this reply should not deal individually with all their arguments, more particularly those concerning British Nationality Law, on which His Majesty's Government may reasonably claim to be in a better position to judge than the French Government. The other arguments, and more especially the contention that the questions cannot be referred to arbitration because they deal with nationality, which is claimed as a subject within their sovereign legislative power, would, however, require to be more fully dealt with. This contention, it is obvious, merely burks the whole point at issue, which is whether the French Government are entitled to enact legislation in a sovereign State under their protection affecting British subjects, and exposing those British subjects to compulsory service in the French army. In Lord Balfour's opinion the reply to the French contention ought, therefore, to develop the view that a refusal to arbitrate this question, which is wholly juridical, and involves a recognised principle of international law, viz., that a State has no right to impose—outside its territories—the obligations of nationality, still less to insist that a foreign subject shall abandon in its favour his nationality of origin (see Hall, *International Law*, 7th edition, p. 225), would, if persisted in by the French Government, reduce the Arbitration Conventions, on which hope has been placed as the best means of ensuring the pacific settlement of international disputes, to mere empty words. In this way the refusal of arbitration might be made one of the grounds in the case presented by His Majesty's Government before the Council of the League of Nations, and in this connection Article 13 of the Covenant (Paper (P)) would naturally be relied on in addition to the Anglo-French Arbitration Convention (Paper (O)), or preferably a reference of the matters at issue to the Court of International Justice set up under Article 14 of the Covenant of the League of Nations would be claimed.

12. Before, however, taking steps in this direction, Lord Balfour considers it would be advisable to examine more fully the contentions on which, for the purpose of the representations addressed to the French Government, His Majesty's Government have hitherto relied. The important points appear to be: (1) the status in English law of the persons of British descent affected; (2) the right of the French Government to impose in the manner adopted in this case French nationality on British subjects in virtue of their birth not on French territory but on that of a

sovereign State under French protection; (3) the date of termination of British capitulatory rights of jurisdiction, *i.e.*, whether in 1883 or 1897; and (4) the bearing of Article 1 of the Anglo-French Convention of the 18th September, 1897, on the question which has arisen. On these points the following observations may be made:—

13. The principle of the *jus sanguinis*, by which nationality is acquired through paternal descent, was unknown to the common law, and before "The British Nationality and Status of Aliens Act, 1914," came into effect the operative statutes were "The British Nationality Act, 1730" (4 Geo. II, c. 21), which conferred the status of natural-born British subject upon the son born abroad of a natural-born British father; and "The British Nationality Act, 1772" (13 Geo. III, c. 21), which extended this principle so as to confer the status of British subject also upon the grandson born abroad. It is probable that the majority of the members of the British community in Tunis are, apart from any question of the capitulatory rights of jurisdiction formerly possessed by His Majesty's Government in that country, British subjects in virtue of the Acts of 1730 and 1772, *i.e.*, as being the children or grand-children of persons who were themselves born within His Majesty's dominions.

14. The status of the children born in extra-territorial countries of British subjects forms the subject of the special provision contained in Section 1 (1), last paragraph, of the Act of 1914, which regards such children, whether born before or after the passing of that Act, as born within His Majesty's allegiance. This provision was framed to give effect to the recommendation of your predecessors in their report of the 18th August, 1904 (Paper (Q)), in order to set at rest any doubt which might arise as to the British nationality of the descendants of British subjects beyond the second generation born in the Ottoman dominions or other country in which His Majesty's Government exercised extra-territorial jurisdiction. As will be seen from that report, these persons were, in the view of your predecessors, British subjects at common law. They have accordingly hitherto been treated as such, and have been so registered at His Majesty's consulates in the Ottoman dominions and elsewhere where similar conditions have existed. It is, however, not altogether easy to find definite authority for the proposition that these persons were British subjects at common law. In addition to the argument derived by your predecessors from Calvin's case, reference may perhaps be made to Bacon *v.* Bacon (1641), Cro. Car. 601; 79 E.R. 1117; and R. *v.* Busheir, 11 Mod. 167.

15. The terms of Section 1 (1), last paragraph of the Act of 1914, particularly the word "exercises," perhaps raise some doubt as to the application of that clause to cases in which British rights of jurisdiction had already ceased to be exercised before the passing of that Act, and more especially in the case of Tunis, where, assuming British capitulatory rights of jurisdiction to have prevailed till 1897, these rights were from 1884 onwards exercised not by British Consular Courts, but by the French tribunals. It will also be observed from the correspondence which has passed with the French Government that the latter deny that the Act of 1914 can have any retroactive effect. These points, however, seem to be covered by the fact that, if these persons were already British subjects at common law, the clause of the Act of 1914 merely confirms a provision of English law already existing, and it is accordingly on this ground that His Majesty's Government have relied in that correspondence. Moreover, if the view of your predecessors in their report of the 18th August, 1904, is taken in its entirety, it would seem that these persons are, apart from any question of extra-territorial rights, British subjects as being born without the allegiance of any other State, since no nationality law claiming their allegiance has hitherto existed in Tunis. And, in any case, the contention of the French Government that they can only be regarded as British subjects on the assumption that Tunisian territory is regarded as British territory is incorrect, since they are claimed as British subjects not in virtue of having been born on British territory, but in virtue of having been born within His Majesty's allegiance.

16. Before leaving this part of the question, the accompanying memorandum (Paper (R)), prepared by the Home Office in 1919 on the interpretation of Section 1 of "The British Nationality and Status of Aliens Act, 1914," may be found useful, more especially as regards the significance of the words "born within His Majesty's allegiance," as used in the proviso thereto.

17. With regard to the French Decrees of the 8th November last, it appears to Lord Balfour that there is no warrant in international law for the exercise by the French Government of what amounts to a *jus soli* in a country which is not French territory, in virtue of the protectorate they have established over it. Theoretically, French citizens are as much foreigners in Tunis as are British subjects. The position



appears to be analogous to what might happen, *e.g.*, in Egypt, if, having maintained their protectorate over that country, and having by agreement obtained from other Powers a waiver of their capitulatory rights of jurisdiction while preserving their own, His Majesty's Government were then to decree that all Europeans of the second generation born in Egypt were British subjects. Such a proceeding would seem to conform neither to the *jus soli* nor to the *jus sanguinis*, the principles on which nationality law is founded, and it is easy to foresee that any such measure would have given rise to strong representations from foreign Powers, whose subjects were affected, and more particularly from the French Government itself.

18. It is of interest to observe the progressive development of the French claim in the course of the correspondence which has taken place. In the note of the French Ambassador of the 14th December last (Paper (J)), concerning Tunis, it is said that the members of the Maltese community affected being without nationality would necessarily continue in this state if the Sovereign of the place of their birth did not grant them his. By substitution the French Decree preserved for them a European status. No objection, it was added, could be entertained to such a measure from the juridical point of view from the moment that the purpose was to give a nationality to persons who had none. In the later note of the French Government of the 22nd March (Paper (N)) this explanation is referred to as incidental and as only concerning the faculty of application of the measure, which had been taken by the two Governments of France and Tunis closely associated as protector and protected. Contrariwise, in another passage of that note the interests of Tunis are referred to by the French Government as those of a third Power. In the same note it is asserted that a question which intimately concerns the exercise of sovereign legislative rights cannot be referred to arbitration.

19. As regards the date at which the capitulatory rights of jurisdiction formerly possessed by Great Britain in Tunis ceased, the contention of His Majesty's Government rests on the qualifications set forth in the note addressed by Lord Granville to M. Tissot on the 20th June, 1883 (Paper (E)), which, in consenting to waive the rights of this country under the Capitulations and Treaties, did so only to the extent which might be required to give full scope to the exercise of civil and criminal jurisdiction over British subjects by the new French tribunals. It was added that His Majesty's Government did not believe it would be expedient to extend the change beyond what was required by the circumstances of the case, and they acceded to the request of the French Government subject to this and the other reservations mentioned in that note. (Certain further papers (Papers (S) and (T)) are enclosed as showing more fully the position which existed in Tunis at the time.) For these reasons His Majesty's Government have maintained throughout the recent correspondence with the French Government that the changes which took place in 1883 amounted to no more than a consent on their part that the French tribunals should exercise capitulatory rights of jurisdiction, which they still maintained *vis-à-vis* the territorial Sovereign, the Bey of Tunis.

20. But even if it should be found that His Majesty's Government are in the circumstances which happened in 1883, unable now to maintain this contention, it does not appear that the situation would be very materially altered. There can be no question that British capitulatory rights of jurisdiction existed at any rate till the end of 1883, and if persons of British origin born in that country previous to 1884 are deemed to have been born within His Majesty's allegiance, it would seem that their children and grandchildren born in Tunis after that date possess British nationality, in virtue of the Acts 4 Geo. II, c. 21, and 13 Geo. III, c. 21 (repealed only by the Act of 1914), as being the children and grandchildren born abroad of persons who were by the common law natural-born British subjects. This would apparently suffice to cover the great part of the British community in Tunis with the exception of children of tender age.

21. The last point concerns the bearing of the Anglo-French Convention of the 18th September, 1897, relative to Tunis (Paper (G)) on the question. As mentioned in paragraph 3 above, the relevant provisions of Article 1 of that Convention fall under three heads: (1) Treaties between Great Britain and France were extended to Tunis; (2) Great Britain abstained from claiming for its subjects other rights and privileges than those secured for it in France; and (3) the most-favoured-nation treatment secured by the above-mentioned treaties was guaranteed for forty years. As regards (1), the only treaty of importance extended appears to be the Convention with France of the 28th February, 1882 (Paper (V)), "to regulate the commercial and maritime relations of the two countries as well as the status of their subjects." This Treaty which is still in existence provided in Article 1 for most-favoured-nation

treatment in certain matters of commerce, as well as "the enjoyment of all legal rights and privileges"; and these most-favoured-nation rights would under (3) be extended to British subjects in Tunis for forty years. As already explained in paragraph 3 of the present letter, however, the exchange of notes of the 8th March/ the 23rd May, 1919 (Paper (H)), replaced this latter provision, and amounted to an undertaking by the French Government not to accord to the subjects or goods of a third Power in Tunis a treatment which will not be effectively applicable to British subjects or goods.

22. This stipulation is of importance as a Convention of the 28th September, 1896, exists between France and Italy, which (Paper (V)), in Articles 1, 2 and 3, provides that Italian subjects in Tunis, who shall be deemed to have preserved under Italian law their Italian nationality, shall be granted the same civil rights as French citizens, and shall be granted exemption from military service. For this reason His Majesty's Government in the course of the correspondence with the French Government have maintained that the notes exchanged in 1919 accord to British subjects in Tunis, on their demand, the same rights as may be accorded to the subjects of any third Power, and although the French Government argue that these notes relate only to economic and not juridical matters, it does not appear to Lord Balfour from the terms of the French note of the 8th March, 1919 (Paper (H)), that there is any good reason why the contention of His Majesty's Government should not be maintained.

23. Finally, as regards the contention of the French Government that the clause (2) of Article 1 of the Convention of 1897 is fully satisfied if British subjects born in Tunis are treated in the same manner as British subjects born in France, and thus regarded as French citizens and liable to French military service, this contention in substance denies the existence of any distinction arising out of birth on Tunisian territory and birth on French territory respectively, and appears to be entirely unsound. By the Decree of the 8th November last, published in Tunis, the French Government profess to apply to that country the French Nationality Law of the 26th June, 1889 (Paper (W)), and in particular that part of it, Article 8, paragraph 3, which enacts that every individual born in France of a foreigner also born there is French. The contention is, therefore, that the law of 1889, which modified the Civil Code of the French Republic of 1803, can be applied to a country under French protection, and that persons born in Tunis in circumstances similar to those set out in Article 8, paragraph 3, of the French Civil Code in regard to persons born in France, may be regarded as French citizens.

24. Moreover, the French Civil Code, which was amended by the French Nationality Law of the 26th June, 1889, decrees in Article 2, which appears to be of general application, "La loi ne dispose que pour l'avenir; elle n'a point d'effet rétroactif." In the note of Lord Dufferin dated the 18th November, 1892 (Paper (W)), enclosing the French Law of the 26th June, 1889, it is stated that the latter law had no retrospective effect; and in practice it did not apply to persons who, having been born in France of a foreigner also born there, had already under the right accorded by the former French Law of the 16th December, 1874, exercised that right at the age of 21 to decline French nationality. Generally, therefore, it may be said that the French Nationality Law of 1889 did not apply to persons of this category who were already of age at the time of its promulgation. In the case of Tunis, on the other hand, the French Government seek not only to apply French Nationality Law to that country, but to apply it to persons of whatever age who may have been born in the past under the conditions named in their Decree.

25. It only remains to add that in the case of other countries whose subjects are affected by the Decrees issued in Tunis, the Greek Government have already addressed a protest to the French Government, and a demand for arbitration, which has been rejected by the latter Government. As regards Italy, there is a large Italian community in Tunis numbering, it is said, 150,000 persons, and the matter has been taken up seriously by the Italian Government, who are disposed to rely on their Treaty rights and are continuing their negotiations with the French Government. According to information recently received from the Italian Embassy here, the Italian Government intend to pursue the matter energetically, and, while ready to concert with His Majesty's Government in diplomatic action, are indisposed at present to resort to arbitration.

26. In communicating to you the accompanying papers with the foregoing observations, I am to request that you will take them into your early consideration, and favour Earl Balfour with your opinion on the following points:—

- (1.) Are His Majesty's Government entitled to protest against the French and

FRANCE.

Tunisian Nationality Decrees of the 8th November, 1921, so far as those Decrees purport to affect persons in Tunis entitled to British nationality, and if so, on what grounds?

- (2.) In the case of British subjects born in Tunis whose claim to British nationality must be founded on the proviso to Section 1 of "The British Nationality and Status of Aliens Act, 1914"—
 - (a.) Should 1883 or 1897 be regarded as the date at which His Majesty ceased to exercise jurisdiction over British subjects in Tunis?
 - (b.) Are the objections advanced by the French Government to the retroactive effect of this legislation valid?
- (3.) Are the French contentions sound that as nationality is too closely associated with the constitution of a State to be deemed wholly juridical, the controversy is not one which should be submitted to arbitration? If not, on what grounds should the French contention be contested?
- (4.) In the event of a claim for arbitration being renewed, what should be the terms of the question or questions to be submitted to the tribunal?
- (5.) Do the terms of the notes exchanged with the French Government on the 8th March/the 23rd May, 1919, in substitution for the most-favoured-nation provisions of Article 1 of the Agreement of September 1897, enable His Majesty's Government to claim for British subjects in Tunis all benefits which may be accorded to subjects of third Powers in Tunis in virtue of special Treaty arrangements, or is this privilege confined to commercial matters?

Lord Balfour would also be glad to be favoured with any general observations you may be good enough to make on the questions which have arisen and the course to be pursued.

I have, &c.

G. H. VILLIERS.

List of Papers.

- (A.) Decree of the Bey of Tunis, November 8, 1921. (T 14261/11967/317/1921.)
- (B.) Decree of the President of the French Republic, November 8, 1921. (T 14261/11967/347/1921.)
- (C.) Extract from French "Annuaire Colonial," 1921, concerning Tunis.
- (D.) Treaty between France and Tunis, May 12, 1881. ("State Papers," vol. 72, pp. 247-249.)
- (E.) Lord Granville to M. Tissot, June 20, 1883.
- (F.) Order in Council, December 31, 1883. (4905*.)
- (G.) Anglo-French Convention relative to Tunis, September 18, 1897. (T 1015.)
- (H.) Notes exchanged with France, March 8/May 23, 1919. ("State Papers," vol. 112, pp. 721-722.)
- (I.) British Nationality and Status of Aliens Act, 1914. (A.P., 369.)
- (J.) French Ambassador to Lord Curzon, December 14, 1921. (T 15767/11967/317/1921.)
- (K.) Lord Hardinge to French Government, January 3, 1922. (T 1795/224/317/1922.)
- (L.) French Government to Lord Hardinge, January 16, 1922. (T 911/224/317/1922.)
- (M.) Lord Hardinge to French Government, February 6, 1922. (T 1880/224/317/1922.)
- (N.) French Government to Lord Hardinge, March 22, 1922. (T 3725/224/317/1922.)
- (O.) Anglo-French Arbitration Convention, October 14, 1903. (T 1162, "Parliamentary Paper," 497 A.)
- (P.) Covenant of the League of Nations.
- (Q.) Law Officers' Report, August 18, 1904.
- (R.) Home Office memorandum on section 1 of "The British Nationality and Status of Aliens Act, 1914."
- (S.) Extract from Memorandum concerning Tunis, October 13, 1898.
- (T.) Memorandum respecting Consular prerogatives in Tunis, July 1902, Confidential. (7748.)
- (U.) Anglo-French Commercial Convention, February 28, 1882. (T 695.)
- (V.) Consular Convention between France and Italy in regard to Tunis, September 28, 1896. ("State Papers," vol. 88, pp. 721-734.)
- (W.) French Nationality Law of June 26, 1889. (Extract from "Parliamentary Paper," 3533.)

Report.

(1.) We are of opinion that His Majesty's Government are entitled to protest against the French and Tunisian nationality Decrees of the 8th November, 1921, so far as those Decrees purport to affect persons in Tunis entitled to British nationality.

We agree with the arguments set out in the Despatch under reply, and generally in the accompanying correspondence on behalf of His Majesty's Government, and also with the Report of the Law Officers dated the 4th August, 1904, subject to the

observations below. We desire to add, however, that the question whether persons of British descent born in a foreign country (not being a British protectorate) where His Majesty exercises jurisdiction over British subjects by Capitulation or Treaty are British subjects at Common Law is a difficult and obscure one upon which there is no direct authority. The reasoning, based upon Calvin's case of the Law Officers in their above-mentioned Report is in our opinion a sound application of the principles established in that case, and has some confirmation from the case of *Abdul Messih v. Farra*, 13 A.C. per Lord Watson at p. 440. But it cannot be affirmed that the law is so clear that another view might not be adopted if the point came up for judicial decision.

In this connection the fact referred to in the Foreign Office Despatch of the 5th May, 1903, that Professor Dicey held a contrary opinion to that of the then Law Officers cannot be overlooked, though his opinion was expressed before the Law Officers wrote theirs.

(2.)—(a.) This question is by no means free from doubt. On the whole, we think there is sufficient ground for regarding 1897 as the date at which His Majesty ceased to exercise jurisdiction over British subjects in Tunis for the reasons given, and upon the arguments advanced in paragraph 19 of the Despatch.

(2.)—(b.) In our opinion, No.

Section 1 of the Act of 1914, in so far as relevant to the present question, is in our opinion declaratory of the Common Law. We have sufficiently indicated under (1), above, the reasons for this view, as well as the measure of difficulty attaching to it.

Further, it must be remembered that the Act of 1914 did not enlarge, but rather restricted the law as enacted by the Statute of 13 Geo. III, Cap. 21.

(3.) In our opinion, No.

The controversy is of the nature contemplated as proper for submission to arbitration both under the Agreement of the 14th October, 1903, and Article 13 of the Covenant of the League of Nations. The difference is clearly of a "legal nature," and it does not concern the interests of Tunis in any sense within the intention of Article 1 of the said Agreement. The only manner in which Tunis's interests are involved is in the question whether France, as protecting Power, is entitled to treat Tunis as her own territory, and in this question Tunis's interests are attacked by France and defended by Great Britain. Further, "the difference" does not, in our opinion, "affect the vital interests, the independence or the honour" of France.

Under Article 13 of the Covenant, the dispute is "suitable for submission to arbitration," and further, it is (in part) a dispute "as to any question of international law" within that Article. The dispute does not relate to the constitution or sovereign rights of the French State, but to its position as protecting Power of Tunis, and its power, as such, to promulgate the Decree in question and thereby to affect persons claiming to be British subjects.

(4.) We postpone answering this question at present as it requires more prolonged consideration, and we would prefer to draw up the question or questions for submission to arbitration after consultation* upon the matter.

(5.) In our opinion, Yes.

The words used are too wide to be restricted to commercial matters only.

ERNEST M. POLLOCK.
LESLIE SCOTT.

Law Officers' Department,
July 11, 1922.

* This consultation took place on the 4th August, 1922, when the Law Officers expressed their opinion that the questions to be submitted to arbitration should be as follows:—

1. Is the Government of the French Republic entitled to impose French nationality upon any and, if so, what persons born and resident in the Regency of Tunis who are descendants in the male line of British subjects?
2. Is the decree of the 8th November, 1921, made by the President of the French Republic, in so far as it purports to impose French nationality upon British subjects, in accordance with international law?
3. Should 1883 or 1897 be regarded as the date at which His Majesty ceased to exercise jurisdiction over British subjects in the Regency of Tunis?

[9930]

D



4. Do the terms of the notes exchanged between the French Ambassador in London and the Secretary of State for Foreign Affairs, dated respectively the 8th March, 1919, and the 23rd May, 1919, enable His Majesty's Government to claim for British subjects in Tunis all benefits and rights which may be accorded by the Government of the French Republic to subjects of third Powers in Tunis, or are the terms of the said notes confined to commercial matters?

GENERAL.

[T 1219/626/330/1922]

No. 4^a.[Board of
Customs and Excise.]

[January 18, 1922.]

Case for the Opinion of the Law Officers.

Offences
committed
on foreign
vessels
outside the
3-mile
limit:
Application
of British
Customs
Acts.

THE question upon which the opinion of the Law Officers is sought is whether certain provisions of the Customs Acts violate the principle of international law that a country may not exercise jurisdiction over offences committed on a foreign ship more than 3 miles from its coasts. The question was raised first in 1911, when the Russian Government apparently quoted section 53 of "The Customs Consolidation Act, 1876," as a precedent for extending the Russian fishery limit from 3 miles to 12 miles from the coast. The matter has been raised again by two specific incidents, viz.: (a) an enactment of the Norwegian Government extending Norwegian territorial waters to a limit of 10 sea miles, with a view to the prevention of the smuggling of intoxicating liquor. It is understood that the Norwegian Government quoted the English Customs Acts as a precedent for such an extension; and (b) the arrest by the United States Government of a British ship, the "Henry L. Marshal," outside the 3-mile limit for the offence of smuggling intoxicating liquor. It is not known that the United States Government have quoted the Customs Acts as a precedent for this seizure, but it is possible that it may be referred to in the negotiations relating to this case.

The question is only of importance in so far as the British Customs Acts may be quoted by a foreign State as a precedent for claiming jurisdiction over offences committed outside the 3-mile limit. The Customs and Excise Department do not attempt to seize or search any foreign vessel outside this limit, or to prosecute for offences committed on a foreign ship or by a foreigner outside it. So far as can be traced, the last case in which the Customs interfered with a foreign vessel outside the 3-mile limit was that of the French vessel, the "Petit Jules," in the year 1850. This case is presumed to have arisen under one of the earlier sections of the Act, 8 & 9 Vict., cap. 87, the statute then in force for the prevention of smuggling. These sections differed greatly from section 179 of the Act of 1876, which is derived from them.

By the directions of the Treasury, the Commissioners now request the opinion of the Law Officers upon this matter. So far as the Commissioners are aware, the only sections which have been quoted, or are likely to be quoted, as involving a claim to jurisdiction over foreign vessels at a distance exceeding 3 miles from the coast of the United Kingdom are sections 53, 135, 141, 142, 147, 169, 179, 180, 181, 189, 190, 229 and 282 of "The Customs Consolidation Act, 1876" (39 & 40 Vict., cap. 36), and section 7 of "The Revenue Act, 1883" (46 & 47 Vict., cap. 55). It will be necessary to deal with the individual sections in some detail.

Section 53.

This section occurs in a part of the Act commencing with section 50 and headed "As to report of Cargo." Section 50 provides that the master of every ship within twenty-four hours of arriving at a port in the United Kingdom from parts beyond the seas is to make due report of his ship, and such report, except in special cases, is to be made before bulk shall be broken. Section 51 imposes a penalty on a master failing to make report, and section 52 deals with a report by the captain of a King's ship which brings into the country goods laden in parts beyond the seas; section 53 provides that the master of every ship (i.e., whether British or foreign) arriving from parts beyond

the seas shall at the time of making report answer the questions of the customs officers. If he refuses to answer or "if after the arrival within 4 leagues of the coast of the United Kingdom bulk shall be broken, or any alteration made in the stowage of the cargo of such ship so as to facilitate the unloading of any part of such cargo before report of such ship or cargo, or if any part be staved, destroyed or thrown overboard or any package be opened," the master incurs a penalty. It is submitted that this section is limited in its application to ships which actually arrive at a port in the United Kingdom, and that, if a vessel breaks bulk outside territorial waters, although within 4 leagues of the coast, and proceeds on her voyage to a port in some other country, no penalty under this section is incurred. A ship need not come into a British port unless it is desired to bring her there, but if she does come, the effect of the section is that her master must comply with the conditions on which she is allowed to come, that he must make report in the ordinary course when he arrives, and that he must not arrive having broken bulk within 4 leagues of the coast. This provision seems to be analogous to that in sections 1 and 2 of "The Trawling in Prohibited Areas (Prevention) Act, 1909" (9 Edw. VII., cap. 8), which prescribes the conditions on which a fishing vessel may land fish in the United Kingdom. These provisions are understood to have been framed at the instance of the Foreign Office in consequence of representations made in respect of the conviction of one Mortensen, the foreign master of a foreign vessel, of illegal trawling in the Moray Firth outside the 3-mile limit (*Mortensen v. Peters*, 43 "Scottish Law Reporter," 872).

Sections 135, 141, 142, 147 and 282, and Section 7 of the Act 46 & 47 Vict., cap. 55.

The first and last of these sections deal with vessels going from one port to another in the United Kingdom, while engaged in a coasting trade. The remaining sections deal generally with coasting ships. It is submitted that these sections do not conflict with international law even though they give a right of interference with a foreign ship outside territorial waters. It has always been conceded by writers on international law that a country is entitled to retain in its own hands exclusively its own coasting trade, and, *a fortiori*, that it is entitled to impose restrictions upon this trade and to prescribe the conditions upon which foreigners may engage in it.

Section 169.

This section reproduces the provisions of the successive Customs Acts of 1825 (6 Geo. IV, cap. 108, sections 20 and 21), of 1833 (3 & 4 Wm. IV, cap. 53, secs. 16 and 17), of 1845 (8 & 9 Vict., cap. 85, secs. 16 and 17), and 1853 (16 & 17 Vict., cap. 107, sec. 199). The provisions of the three earlier Acts are limited specifically to vessels belonging in the whole or in part to British subjects or on board which half the persons are British subjects. The reference to the number of persons on board was presumably intended to apply to those cases where the nationality of the vessel was doubtful. The present section (section 169 of the Act of 1876) does not mention the nationality of the ship or of the persons on board, but it seems obvious from the wording of the section that it was only intended to apply to British craft. Regulations have been made under this section and a copy is sent herewith. Occasional applications for licences under these regulations are received and granted.

Section 179.

This section was intended to reproduce sections 208, 212, 213, 216, 235 and 236 in the Consolidation Act of 1853 (16 & 17 Vict., cap. 107). It may be divided into three parts:—

- (a.) That dealing with vessels having false bulkheads or places of concealment, or carrying spirits or tobacco in illegal packages;
- (b.) That dealing with vessels from which part of the lading has been thrown overboard, or on which goods have been destroyed to avoid seizure;
- (c.) That dealing with persons found on such vessels or on board one of His Majesty's ships, or a foreign packet carrying mails to the United Kingdom, having on board spirits or tobacco in prohibited packages.

(a.) This deals with vessels found or discovered to have been within certain limits. The earliest section dealing with this subject is section 2 of 6 Geo. IV, cap. 108. That related to (1) vessels found within certain limits acting illegally, and (2) vessels discovered to have been within those limits acting illegally. So far as (1) was concerned, the



section undoubtedly involved a claim to seize vessels outside territorial waters; but it is submitted that, with regard to (2), the section only authorised the seizure within territorial waters of such vessels as should come within those limits after doing certain illegal acts outside territorial waters.

On this reading (1) would be repugnant to international law, whereas (2) would be quite reconcilable with it.

The Act 6 Geo. IV, cap. 108, was replaced in 1833 by the Act 3 & 4 Wm. IV, cap. 53. This provided in section 2 for the forfeiture of any vessel "found or discovered to have been" within certain limits. It may be that this was intended to be a mere reproduction of section 2 of the Act 6 Geo. IV, cap. 108, but the reading adopted in late years by the Customs and Excise Department has been that the framers of the Act had deliberately dropped (1) as contrary to international law and had retained (2) as being consistent with it. The Department has assumed that the Act of 1833 only authorised seizure where a vessel was found to have been, or discovered to have been, engaged in illegal acts; that the vessel could only be so found or discovered within territorial waters, and might be forfeited within those waters if before coming within them she had been engaged in illegal traffic. The wording of section 2 of the Act of 1833 is, in this respect, similar to the wording of section 179 of the Act of 1876.

With regard to the construction to be placed upon section 2 of the Act of 1833, the Law Officers are referred to the case of *Attorney-General v. Schiers* (5 Tyr. 1029).

Quite apart from the meaning of the words "found or discovered to have been," it is submitted that this part of the section does not apply to any foreign vessel outside the 3-mile limit. It will be seen that section 179 of the Act of 1876 applies to vessels which (a) belong wholly or in part to British subjects; or (b) have half the persons on board British subjects; or (c) are not British. It will be remembered that the vessels engaged in smuggling were usually small craft, many of which would not be registered under "The Merchant Shipping Act, 1854" (17 & 18 Vict., cap. 104, sec. 19). Even if they were registered, the smuggling vessels might either have no papers on board or only forged papers. If the vessel was British-owned there would be no contravention of international law in declaring it liable to forfeiture for acts done outside the 3-mile limit. If the vessel was definitely not a British vessel, the 3-mile limit was applied strictly by the section. There remained only the doubtful case where the nationality of the vessel either could not be proved or was not known. In such a case, if half the persons on board were British subjects, she was to be treated as a British vessel.

(b.) This part of the section is ungrammatical in its language and extremely difficult to construe. It appears that either some words have been omitted or some words which should have been struck out have been retained upon the consolidation. This part of the section replaces section 216 of the Act of 1853, which was limited in its operation to British ships or to ships whose crew was partly British. It did not mention ships which were clearly foreign. It may be that in the consolidation the reference to British ships or ships of doubtful nationality has been omitted by inadvertence. This supposition seems to gain some force from the words "to prevent seizure" which occur in the latter part of it. It is submitted that these words "to prevent seizure" apply to the throwing overboard of part of the lading as well as to the destruction of goods, and that the words do so apply appears from section 235 of the Act of 1853. It is further submitted that, if articles are thrown overboard or destroyed to avoid seizure, it can only be because they are liable to seizure; they would not be liable to seizure on a foreign ship unless that ship came within territorial waters, and therefore this part of the section does not apply to a foreign ship. If, on the other hand, this part of the section does apply to a foreign ship, the goods on her are not liable to seizure unless she comes within territorial waters, and therefore she cannot be seized under this part of the section for anything done outside these waters.

(c.) This part of the section imposes a penalty upon—

1. British subjects found to have been on board a ship liable to forfeiture under the section within 3 leagues of the coast.
2. Foreigners who have been on such a ship while within 1 league of the coast.
3. Any person who has been on board any vessel in His Majesty's service or on board a foreign post-office packet employed in carrying mails between any foreign country and the United Kingdom having on board spirits or tobacco in illegal packets.

There is a proviso to the section that no person shall be detained whilst actually on board any vessel in the service of a foreign State or country, and a further proviso

has been added by 50 & 51 Vict., cap. 7, sec. 1, exempting from prosecution any person who was not concerned in or privy to the illegal act. So far as 1 and 2 are concerned, there appears to be nothing in this part of the section repugnant to international law. So far as a person on one of Her Majesty's ships is concerned, whether a British subject or a foreigner, there is nothing in international law contrary to the detention of such a person on board the ship until he arrives in a British port and is handed over to the Customs authorities for prosecution. So far as the foreign packet is concerned, the section assumes that she will come to this country and the prosecution can only take place in this country. It is submitted that the detention of such a person is not contemplated except in this country, and this is borne out by the proviso that, if the foreign packet is a national ship, a person on board her shall not be detained until he has actually left the ship.

Sections 180 and 181.

There is no statement in section 180 that this applies to any foreign vessel outside territorial waters. The opening words of section 181, "any ship or boat liable to seizure or examination," may include a foreign vessel liable to examination outside territorial waters on the ground that she is engaged in the coasting trade; but unless a foreign vessel is engaged in coasting trade, which is clearly under the jurisdiction of this country, there is nothing in either section to imply that it affects her while outside territorial waters.

Section 189.

This mentions the distance of 5 miles from the sea coast or any tidal river, and it seems clear that this distance of 5 miles is to be measured inland and not in a seaward direction.

The reasons for this construction are as follows:—

1. This section and the preceding section deal with the persons who assemble to assist in the landing, carrying, conveying or concealing of smuggled goods. These persons would not be the crew of the smuggling vessel, but the persons on shore who assemble to receive the cargo and to carry it inland to a hiding-place. They would not assemble at sea.
2. The measure of distance used is the mile, which is a measure of distance on land, and not the league, which is used in sections 53, 134 and 179 to denote the measurement of distance on the sea. The same distinction between the league and the mile runs through the older Customs Acts (see 16 & 17 Vict., cap. 107, secs. 212, 216, 217 and 242 as to leagues, and sec. 244 as to miles. See also 6 Geo. IV, cap. 108, secs. 2 to 6 inclusive as to leagues, and sec. 52 as to miles).
3. Sections 247 and 248 of the Act of 1853, which are embodied in section 189 of the Act of 1876, clearly refer to persons assembling on land.
4. The distance of 5 miles is to be measured from the sea-coast or any tidal river. If the distance is measured inland, there is a definite line from which to measure; there can be no uncertainty whether a given point is 5 miles inland from a tidal river. If the distance is to be measured in a seaward direction, there is no definite line from which to measure. It is impossible to say at what precise point the Severn estuary becomes the Bristol Channel or where the Thames estuary merges in the North Sea. Moreover, it is probable that, if the distance were to be measured in a seaward direction, every point within 5 miles of a tidal river would also be within 5 miles of the sea coast, and there would be no need to mention a tidal river in the section.

Section 190.

This prohibits signalling from a ship or boat, from the coast of the United Kingdom, or within 6 miles of the coast. Here again it seems clear that the 6 miles are to be measured inland from the coast. The following are suggested as the reasons for this construction:—

1. If the 6 miles were to be measured in a seaward direction, the signal must be from a ship or boat, and it would be unnecessary to mention in the section both signalling from a ship or boat and signalling within 6 miles of the coast; the one or the other would have been omitted.



2. The measure of distance is the mile and not the league.
3. Section 192 empowers a person to go on any lands for the purpose of preventing signalling, and this, combined with the power in section 190 to arrest a person making a signal, goes to show that the distance of 6 miles must be measured inland.

Section 229.

This merely regulates the procedure and deals with jurisdiction. It does not mention foreign vessels or make any offence punishable in the United Kingdom which would not have been punishable if this section had been omitted.

The Law Officers are requested to advise—

1. Whether the sections quoted involve a claim to jurisdiction over foreign vessels outside territorial waters.
2. Whether it is considered advisable so to amend any of these sections as to make it clear that no claim to such jurisdiction is advanced.

Opinion of the Law Officers of the Crown.

1. It is a rule of construction that statutes must be so interpreted and applied, so far as their language admits, as not to be inconsistent with the comity of nations or the established rules of international law. (See Maxwell, 6th edition, p. 262; *Leroux v. Brown*, 22 L. J.; C.P. 1, per Maule J., at p. 3; the "Zollverein," Swab. 96, per Dr. Lushington, at p. 98; the "Annapolis," Lush. 295, per Dr. Lushington, at p. 306.) Reading the sections quoted in the light of this rule, we are of opinion that they involve no claim to jurisdiction over foreign vessels outside territorial waters.

2. In our opinion, No.

GORDON HEWART.
ERNEST M. POLLOCK.

Law Officers' Department,
January 18, 1922.

[W 2509/349/50/1922]

No. 5.

[March 21, 1922.]

Foreign Office to the Law Officers of the Crown.

(Confidential.)
Gentlemen,

Foreign Office, March 2, 1922.

I HAVE the honour, by direction of the Marquess Curzon of Kedleston, to request you to favour him with your opinion on the following matter:—

General
licence for
correspon-
dence in
war time
with
(a) prisoners
of war or
interned
civilians; or
(b) other
persons in
enemy
countries.

2. The Censorship Sub-Committee of the Committee of Imperial Defence have been considering the desirability of arranging for the issue in any future war in which this country may be engaged of a general licence authorising British subjects to correspond on certain conditions with (a) prisoners of war or interned civilians; or (b) other persons resident in enemy countries, and the committee wish that a definite ruling on the legal position with regard to this matter should be obtained. It appears that in the recent war the situation was not clearly defined and some avoidable confusion thereby arose. The two questions which are submitted for your opinion are whether, in the first place, all correspondence with persons in enemy countries is illegal, and, secondly, whether it is permissible for the Crown to permit British subjects to perform what would otherwise be an illegal act by sending letters to enemy countries.

3. I am to remind you that the question of the legality of correspondence with enemy countries has been raised in the courts on more than one occasion. In the case of the "Panariellos" (31 T.L.R., pp. 326-8), Sir Samuel Evans, in his judgment, quoted a dictum of Lord Stowell in the case of the "Cosmopolite" (4 c. Chr. Rob., p. 10). "It is perfectly well known that by war all communication between the subjects of the belligerent countries must be suspended and that no intercourse can legally be carried on between the subjects of the hostile States but by the special

licence of their respective Governments." Sir Samuel Evans continued: "No doubt it was with cases of commercial intercourse that Lord Stowell was dealing in the 'Hoop' and the 'Cosmopolite,' but it will be remembered that in the former he enforced the reason for the rule by reference to the possible consequences of allowing persons to carry on a commercial intercourse, and, under colour of that, to give them the means of carrying on any other intercourse they might think fit." In the case of *Robson v. the Premier Oil Company* (L.R. 2, Chancery 1915, pp. 134-6), Lord Sterndale made the following observations: "We do not think it necessary to decide whether the principle extends to intercourse, if such there be, which could not possibly tend to detriment to this country or to advantage to the enemy; it is enough to say that, in our opinion, all intercourse which could tend to such detriment or advantage, whether commercial or not, is inconsistent with the state of war between the two countries, and therefore forbidden." Finally, in the proceedings which recently took place with regard to the revocation of the naturalisation certificate issued to Mr. P. Laszlo, it is understood that the court held that a notification made by the Foreign Office at the outbreak of the war as to the conditions under which correspondence with enemy countries should be carried on was of the nature of a general licence legalising such correspondence if in itself of an innocent character. It appears that in 1916 the Foreign Office issued a statement referring the public to certain Post Office regulations. It was further pointed out in the aforesaid notice that private letters to other persons resident in enemy countries could be forwarded through neutral countries, subject to the censorship. The result, therefore, was that the censorship authorities could allow letters to pass through or not in accordance with the policy then pursued by His Majesty's Government, which was to allow certain innocent communications to reach their destinations. A copy of the Foreign Office notification is herewith appended for your consideration.

4. It is suggested that on the outbreak of any future war the most convenient course would be for the Post Office to issue an authoritative statement laying down regulations under which correspondence with the various classes of persons in enemy countries could be permitted. A provisional draft of the directions which are thought to be appropriate in the event of an outbreak of war is transmitted herewith for your information. It is assumed that no statutory authority would be required to sanction this course, and that it would not be necessary to resort to the issue of regulations under some statute of the nature of the Defence of the Realm Act, which was passed for the purposes of the recent war.

5. The Law Officers of the Crown are, therefore, requested to advise: (1) Whether during a state of war all correspondence of whatever nature with persons actually within the territory of an enemy State is technically illegal. (2) If the answer to the first question be in the affirmative, is it within the power of the Crown to permit such correspondence in certain conditions? (3) If the answer to the second question be in the affirmative, whether the publication of regulations by the General Post Office would be a permissible way of licensing British subjects to commit what would otherwise be an illegal act? (4) Whether you consider that the form of the draft directions, which it is proposed should be issued by the General Post Office, appears to you to be generally suitable. (5) I am further to request you to furnish his Lordship with any observations of a general character which you may desire to offer.

I have, &c.

G. H. VILLIERS.

List of Papers.

- (A.)—Foreign Office Notice to the Public, 1915 [4077/File 15/1916].
(B.)—Draft Directions for Use in the Event of an Outbreak of War [W 1536/349/50/1922].

Report.

We answer the questions put to us as follows:—

- 1 and 2. Our answers are in the affirmative.
3. We are of opinion that the publication of regulations by the General Post Office, although perhaps permissible, would not be the appropriate way of licensing British subjects to commit what would otherwise be an illegal act.
4. Subject to our answer to 5 below, yes.
5. In the cases referred to, and in *Exposito v. Bowden* (7 E. and B. at pp. 781-2), it is laid down that all intercourse with enemies is prohibited on the outbreak of war,



and can thereafter be carried on only under the licence of the Crown, which is "an high act of sovereignty" (see *Cosmopolite*, 4. C. Rob. at p. 11).

We are of opinion that the licence to carry on such intercourse should be given under the authority of a Secretary of State—either for Home or Foreign Affairs.

Such licence may refer to the conditions and regulations laid down and issued by the General Post Office as the code to be followed; but the authority for the exercise of the licence ought to be given by a Secretary of State.

ERNEST M. POLLOCK.
LESLIE SCOTT.

Law Officers' Department,
March 21, 1922.

[W 3658/349/50/1922]

No. 6.

[April 27, 1922.]

Foreign Office to Law Officers of the Crown.

(Confidential.)
Gentlemen,

Foreign Office, April 20, 1922.

Correspondence in war time with (a) prisoners of war or interned civilians; or (b) other persons in enemy countries: draft licence and notice to public.

I HAVE the honour, by direction of the Marquess Curzon of Kedleston, to state that the opinion contained in your report of the 21st ultimo* has been under the consideration of the Censorship Sub-Committee of the Committee of Imperial Defence, and that it has been provisionally decided to recommend that, in case of war with a foreign Power, the Secretary of State for the Home Department should issue—

- (a.) An authority to the Postmaster-General authorising him to accept correspondence to and from certain classes of persons detained or residing in enemy territory; and
- (b.) A notice to the public that such correspondence is, under certain conditions, allowable.

2. The forms of this authority and notice are proposed to be as follows:—

(A.)

Form of Authority to permit British Subjects to communicate with Persons detained or residing in Enemy Territory (including Prisoners of War).

To the Postmaster-General and all others whom it may concern.

Whereas a state of war exists between this country and

And whereas it is unlawful for His Majesty's subjects, save under due authority, to have communication or intercourse with persons in enemy territory;

And whereas it is expedient that postal communication or intercourse should be permitted, subject to such limitations and on such conditions as may from time to time be prescribed:

Now, therefore, I, the Right Honourable , being one of His Majesty's Principal Secretaries of State, hereby authorise you, in the name and on behalf of His Majesty, to accept, for transmission through the post, letters or other postal packets addressed to, intended for, or emanating from, persons who now are, or hereafter may be, detained or residing in enemy territory or in territory occupied by the enemy, provided—

- (a.) That the transmission of such letters or other postal packets is otherwise lawful; and
- (b.) That such letters or other postal packets comply with such conditions and are submitted to such examination as may from time to time be prescribed.

And for so doing this shall be your sufficient authority.

One of His Majesty's Principal Secretaries of State.

Whitehall, S.W. 1.

* No. 5.

(B.)

Form of Authority to British Subjects to communicate with Persons detained or residing in Enemy Territory (including Prisoners of War).

Whereas a state of war exists between this country and

And whereas it is unlawful for His Majesty's subjects, save under due authority, to have communication or intercourse with persons in enemy territory;

And whereas it is expedient that postal communication or intercourse should be permitted, subject to such limitations and on such conditions as may from time to time be prescribed:

Now, therefore, I, the Right Honourable , being one of His Majesty's Principal Secretaries of State, hereby give notice, in the name and on behalf of His Majesty, that letters or other postal packets may be sent to or received from persons who now are, or hereafter may be, detained or residing in enemy territory or in territory occupied by the enemy, provided—

- (a.) That the transmission of such letters or other postal packets is otherwise lawful; and
- (b.) That such letters or other postal packets comply with such conditions as the Postmaster-General may lay down and are submitted to such examination as may from time to time be prescribed.

One of His Majesty's Principal Secretaries of State.

Whitehall, S.W. 1.

3. I have the honour to enquire, by the direction of the Secretary of State, whether you consider that these forms of authority and notice are sufficient and satisfactory for their purpose, both in consideration of your report under reference and generally.

I have, &c.
R. H. CAMPBELL

Report.

We approve the draft authority and the draft notice as altered and initialled by us.

ERNEST M. POLLOCK.
LESLIE SCOTT.

Law Officers' Department,
April 27, 1922.

ANNEX.

(A.)

Form of Authority to permit British Subjects to communicate with Persons detained or residing in Enemy Territory (including Prisoners of War).

To the Postmaster-General and all others whom it may concern.

Whereas a state of war exists between this country and

And whereas it is unlawful for His Majesty's subjects, save under due authority, to have communication or intercourse with persons in enemy territory;

And whereas it is expedient that postal communication or intercourse should be permitted, subject to such limitations and on such conditions as may from time to time be prescribed:

Now, therefore, I, the Right Honourable , being one of His Majesty's Principal Secretaries of State, hereby authorise you, in the name and on behalf of His Majesty, to accept for transmission through the post letters or other postal packets addressed to, intended for or

[9930]

E



emanating from persons who now are or hereafter may be detained or residing in enemy territory or in territory occupied by the enemy, provided—

- (a.) That the transmission of such letters or other postal packets is otherwise lawful; and
- (b.) That such letters or other postal packets comply with such conditions and are submitted to such examination as may from time to time be prescribed [by you, the Postmaster-General].

And for so doing this shall be your sufficient authority.

One of His Majesty's Principal Secretaries
of State.

Whitehall, S.W. 1.

As altered:

E. M. P.
L. S.

(B.)

Form of Authority to British Subjects to communicate with Persons detained or residing in
Enemy Territory (including Prisoners of War).

Whereas a state of war exists between this country and ;
And whereas it is unlawful for His Majesty's subjects, save under due authority, to have communication or intercourse with persons in enemy territory;

And whereas it is expedient that postal communication or intercourse should be permitted, subject to such limitations and on such conditions as may from time to time be prescribed:

Now, therefore, I, the Right Honourable , being one of His Majesty's Principal Secretaries of State, hereby give notice, in the name and on behalf of His Majesty, that letters or other postal packets may be sent to or received from persons who now are or hereafter may be detained or residing in enemy territory or in territory occupied by the enemy, provided—

- (a.) That the transmission of such letters or other postal packets is otherwise lawful; and
- (b.) That such letters or other postal packets comply with such conditions as the Postmaster-General may lay down and are submitted to such examination as are from time to time imposed and prescribed [by the Postmaster-General].

One of His Majesty's Principal Secretaries
of State.

Whitehall, S.W. 1.

As altered:

E. M. P.
L. S.

[T 11870/2549/350/1922]

No 6^A.

[Treasury Solicitor.]

[May 17, 1922.]

Case for the Opinion of the Law Officers of the Crown and Mr. H. M. Givcen.

Herewith are sent:—

Claim of
the Mozam-
bique
Whaling
Company
(Limited) in
War Com-
pensation
Court
respecting
detention of
whale oil
shipped in
steamship
"Aros
Castle."

1. Claim and documents in support.
2. Extracts from Minutes of the Contraband Committee.
3. Foreign Office correspondence.
4. Note written by Sir John Mellor re steamship "Neptunus."
5. Opinion of Counsel re steamship "Neptunus."
6. Note by Mr. Wylie on Detention.

THIS is a claim which has been put forward in the War Compensation Court by the Mozambique Whaling Company (Limited) of Sandjefjord, Norway, for damages arising out of the detention and sale in this country of whale oil shipped in the British steamship "Aros Castle" from Linga-Linga, Portuguese East Africa, in February 1915. The claim amounts to £42,011 19s. 8d.

The "Aros Castle" sailed from Linga-Linga in February 1915 with 3,283 tons 16 cwt. of whale oil, 639 tons 14 cwt. of whale guano and bone meal, and 19 cwt. of whale fins, shipped by the Mozambique Whaling Company (Limited) and

consigned to Johan Bryde, the Company's Managing Director at Sandjefjord. She arrived at Falmouth on the 30th March and was examined by the Customs Officers, who reported particulars of the cargo to the Contraband Committee.

The Bills of Lading gave the port of destination as "Falmouth for destination orders," though the consignee was Bryde of Sandjefjord. The Contraband Committee considered that this was a consignment to the United Kingdom, and that therefore whale oil and whale products could not be exported without a licence from the War Trade Department.

At this time whale oil was absolute contraband as a lubricant under the Proclamation of the 12th March, 1915 (The "Kong Inge," 16th January, 1916). When the vessel sailed, it was conditional contraband under the Proclamation of the 23rd December, 1914. The other goods were not contraband.

The reputation of the Consignee, Bryde, was none too good, and he and his Company were not thought to be reliable persons to receive in Norway a consignment of this kind. Part of the whale oil, at any rate, was originally intended for Germany, as is admitted in the correspondence, in which the claimants offered to cancel all their German contracts and to give an undertaking not to re-export the goods to any enemy destination—an offer which was not uncommon during the war, but which had little value after the goods had been detained. Bryde, in fact, was put upon the list of proclaimed enemy firms under the Trading with the Enemy (Extension of Powers) Act, 1915, which came into operation at the end of the year.

In short, there is no doubt but that a good *prima facie* case could be made on the merits to justify investigation and seizure, if not, perhaps, the ultimate condemnation of the goods.

The Contraband Committee, however, do not appear to have put forward as a ground for detaining the cargo its contraband nature and destination, and it was not formally seized and put into the Prize Court. But undoubtedly that was the real reason for its detention; and the detention was effected by the refusal of a licence to export, as above mentioned, because that appeared to be a simple and sure method.

Bryde subsequently came over to this country and arranged for the sale of the cargo. He now puts forward to the War Compensation Court a claim for loss, on the ground that the price realised here was considerably less than the market price at Sandjefjord. It will be observed in passing that there has been a most inordinate delay in proceeding with the claim, and the claimants' solicitors were warned on the 14th February, 1919, that objection would be taken on that ground.

The point upon which Counsel's opinion is desired is whether such a claim comes within the jurisdiction of the War Compensation Court or within the exclusive jurisdiction of the Prize Court.

A claim which has some points of similarity was put forward by the owners of the Dutch steamship "Neptunus," and in that case the then Attorney-General (Sir Gordon Hewart) and Mr. C. W. Lilley advised, so far as procedure was concerned, that the claim in the War Compensation Court should be allowed to take its course. They also advised, however, that on its merits the claim should be settled; and negotiations for a settlement are still in progress, no answer having been put in to the claim in the War Compensation Court. Moreover, there was a special reason in that case for allowing the claim to continue in that Court; for the claimants' solicitors, after fruitless negotiations with the Foreign Office, had asked whether His Majesty's Government would be prepared to allow the claim to be adjudicated upon by the Prize Court, and the Foreign Office had somewhat inadvisedly replied that His Majesty's Government could not agree that this was a case within the jurisdiction of the Prize Court.

The facts of the case of the "Neptunus" were as follows: In the course of a voyage from South America to Holland the vessel called at Falmouth on the 23rd May, 1917, by her owners' orders for examination, under an arrangement between the British Government and the Netherlands Oversea Trust that eastbound vessels should call at Falmouth to receive their clearance (an arrangement which was entered into for mutual convenience, to save the time and trouble that would otherwise be lost by stopping the vessels in the Downs or elsewhere and sending them back to some port for examination). The cargo in that case consisted of linseed, and complicated negotiations were then in progress between the British and Dutch Governments with regard to the import of linseed into Holland. In the result, the cargo was sold in this country, and no claim was put forward by the cargo owners. Neither vessel nor cargo was formally seized and put into the Prize Court, but the vessel was detained for three months before the cargo was discharged, and the



shipowners, The Royal Dutch Line, put forward a large claim for demurrage. After receiving the reply of the Foreign Office denying the jurisdiction of the Prize Court as above mentioned, they commenced an action in the King's Bench Division against the Customs Officers concerned. The question was then considered of applying for a transfer of the case to the Prize Court; but after consultation with Counsel it was decided to allow the case to proceed in the King's Bench Division, there being several defences, each of which seemed fatal to the claim, viz.: the Indemnity Act, Public Authorities Protection Act, and "Act of State." The Plaintiffs, however, appear to have realised those difficulties, and took no further step in that action after obtaining the Order for Directions in November 1920. Instead, they put forward a claim in the War Compensation Court in June 1921. Thereupon the opinion of the Attorney-General and Mr. Lilley was sought as to the procedure to be adopted, and they advised that no objection should be taken to the jurisdiction of the War Compensation Court, first, because of the Foreign Office letter above mentioned, and secondly, because they did not think that the objection could be sustained. A copy of their opinion is sent herewith.

With regard to their reasons under the second head, it is respectfully submitted that on further consideration, in a case not prejudged or complicated by such a circumstance as the said Foreign Office letter and which did not on its merits call for a settlement, they might modify their opinion. It is true that there is nothing in the Indemnity Act to say that no claim shall be made before the War Compensation Court in any case where proceedings might be taken in the Prize Court; but the policy of the Act seems to be to leave the Prize Court untouched, that is to say, that any case in which there is jurisdiction in prize should be dealt with by the Prize Court.

Section 2 (1b) speaks of "any prerogative right of His Majesty or any power under any enactment relating to the Defence of the Realm," &c.; and there is a possible question whether the belligerent right of visit and search can be called a prerogative right of His Majesty, inasmuch as that right can be exercised, of course, by any State, even if the State recognises no prerogative like that which is attached to His Majesty; and from the context, the Section, and the Act as a whole, would seem to apply rather to municipal than to international affairs.

Section 3 (a) contains a wide saving clause as regards any matter within the jurisdiction of the Prize Court.

A note written by Sir John Mellor in connection with the steamship "Neptunus" is sent herewith, and contains authority (supported by some of the cases referred to below) for the contention that such a case of detention falls within the jurisdiction of the Prize Court, although no formal seizure is eventually made or Writ issued. As it arises out of the belligerent right of visit and search, it should fall within the jurisdiction of the Prize Court on broad principles. That right is a pure *jus belli*, solely an incident of war; and if the search results in a decision formally to seize the vessel or any cargo, the whole procedure unquestionably comes under the jurisdiction of the Prize Court. It would seem illogical, therefore, if the exercise of the right results in the release of the vessel or goods after the delay necessary for carrying out the search, and a claim arises in respect of such delay, that such a claim should not come before the Prize Court.

In this case, in contradistinction from the case of the "Neptunus," the Claimants' Manager Bryde was referred to the Prize Court in July 1915, when he first put forward a claim to the Foreign Office. In August 1918, nothing further having been heard, he was asked whether he proposed to proceed with the claim in the Prize Court, or whether it might be regarded as abandoned. In February 1919 his Solicitors put forward their view that they could not proceed in the Prize Court, inasmuch as the goods had "never been in Prize." It will be observed, however, that in his reply the Procurator-General did not accept their view, but put it upon them to act as they might be advised.

In July 1919 a communication was made to the Foreign Office by the Norwegian Minister; and on the 28th July the Foreign Office replied that the Claimants should present their claim to the Prize Court, which was empowered to deal with all such matters, and which alone was furnished with the necessary means for investigating such claims.

There is ample authority to the effect that if the Prize Court has jurisdiction, that jurisdiction is exclusive.

In the "Corsican Prince" (1 B. and C. P.C. at pp. 182 ff) Sir Samuel Evans quotes Mr. Justice Storey to the effect that once the Prize Court has acquired jurisdiction over the principal cause, it will exert its authority as to the allowance

of freight, damages, expenses and costs in all cases of capture; and "though a mere maritime tort unconnected with capture *jure belli* may be cognisable by the Court of Common Law; yet it is clearly established that all captures *jure belli*, and all torts connected therewith, are exclusively cognisable in the Prize Court."

After quoting other authorities and examining the difference between the two different codes or systems of law administered by Prize Courts and Common Law Courts, the President held that the Prize Court *alone* had jurisdiction to deal with the claim for freight in that case, and that the matter should not be dealt with in the King's Bench Division, where some proceedings had been started by one of the parties.

In the "Roumanian" (1 B. and C. P.C. at p. 547) Lord Parker, delivering the judgment of the Privy Council, stated that "this jurisdiction (of the Court of Admiralty by virtue of its commission in prize) was exclusive whether the goods seized as prize were on land or afloat."

One other finding in that case may be useful; on p. 546, it is stated that enemy goods on British ships, whether on board at the commencement of the hostilities or embarked during the hostilities, were always, and still are, liable to be seized as prize, "either on the high seas or in the ports or harbours of the Realm." At the time of seizure, part of the oil in question in that case was still in the vessel at Purfleet, but part of it had been pumped into tanks, which were situated some 100 or 150 yds. from the wharf, but were under the control of the Customs Authorities. In the case of the "Aros Castle," the goods were still on board the vessel when the Customs Officers detained them.

In the "St. Helena" (2 B. and C. P.C. at p. 261), Lord Parker commenced his judgment in the Privy Council by stating that the jurisdiction of the Prize Court attaches in every case in which there has been a seizure in prize, and in exercising this jurisdiction the Court can, and will, deal with all incidental matters, including questions of freight or compensation in lieu of freight.

In the "St. Tudno" (3 B. and C. P.C. at p. 175), Mr. Justice Hill, sitting in Admiralty, and having to consider the jurisdiction of the Admiralty Court to entertain a suit touching this vessel, which was in the custody of the Prize Court, again referred to the difference between the law administered in the Prize Court and that administered in other Courts.

In the "Lutzw" (3 B. and C. at p. 339), the Egyptian Prize Court held that the Prize Court ousted the jurisdiction of the Egyptian Municipal Courts in all questions of prize, "the Prize Court jurisdiction being exclusive."

It is therefore submitted, upon the assumption that the original detention of the cargo arose out of the exercise of the belligerent right of visit and search, that the Prize Court is the proper Court to deal with this claim, and has exclusive jurisdiction, so that no claim before the War Compensation Court can succeed.

It is for political or rather international reasons that it is desired to have this and other similar cases dealt with by the Prize Court, which is a Court administering international law, rather than by the War Compensation Court, which is a domestic tribunal. The present Secretary of State for Foreign Affairs considers the point of considerable importance, as is shown by the letter from the Foreign Office of the 24th March last, and more fully in Sir John Mellor's note.

It is unfortunate that the letter from the Foreign Office in the case of the "Neptunus" should have prevented a clear issue upon this point in that case, for there was no question but that the detention arose in that case out of the exercise of the right of visit and search, whereas in this case a slight complication may arise from the fact that the Contraband Committee, as is shown by the extract from their minutes herewith, informed Bryde through Mr. Findlay, His Majesty's Minister at Christiania, that their reason for detention was that the consignment amounted, in their opinion, to a consignment to this country, and that once the goods had entered the port of this country to which they were consigned they could not be exported without an export licence. There is no doubt, however, that the real reason for stopping the oil was the desire that it should not reach the enemy; and the detention, in fact, arose in the exercise of the right of visit and search.

It makes no difference that the vessel came into Falmouth voluntarily. In the majority of prize cases during the war, the vessels have called voluntarily either by arrangement between the owners and His Majesty's Government, or, as in numerous cases, for bunkers and the like; in comparatively few cases since the early period of the war have the vessels been intercepted at sea.

That the Claimants understood the real point to be that of enemy destination is clear from the correspondence; and they were several times explicitly informed that



the case was considered to be one within the jurisdiction of the Prize Court. Counsel is requested to advise:—

- (a.) Whether a case of detention arising out of the exercise of the belligerent right of visit and search comes within the jurisdiction of the War Compensation Court or within the exclusive jurisdiction of the Prize Court.
- (b.) Whether this is such a case, or remains, in the circumstances of the detention, within the jurisdiction of the War Compensation Court.

Opinion of the Attorney-General and Mr. H. M. Givcen.

1. We are of opinion that in general cases of detention arising out of the exercise of the belligerent right of visit and search come within the jurisdiction of the Prize Court. But it is not possible to say that such jurisdiction is exclusive. There may be cases in which upon the facts the jurisdiction of the War Compensation Court would be open to claimants. We agree with the opinion of the late Attorney-General, dated the 27th July, 1921, that Section 3 (a) of the Indemnity Act does not in such cases exclude the jurisdiction of the War Compensation Court.

2. The loss in this case appears to us to have arisen not from the exercise of belligerent right of visit and search, but from the exercise of authority given to the Customs by their Acts. If this be so, it is open to question whether there was an exercise of any power under any enactment relating to the defence of the Realm so as to bring the claim within the Indemnity Act 2, 1 (b), and the jurisdiction of the War Compensation Court. See also the Schedule, Part II, under which nothing is to be given in respect of loss arising through the enforcement of an order of general application or arising from the conduct of the Claimant himself. The claim in the War Compensation Court will probably fail. In our opinion the points stated in this paragraph should be taken in the Court in answer to the claim.

E. M. P.
H. M. G.

*Law Officers' Department,
May 17, 1922.*

[W 4168/349/50/1922]

No. 7.

[May 17, 1922.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, May 12, 1922.

I AM directed by the Marquess Curzon of Kedleston to acknowledge the receipt of your letter of the 27th ultimo* approving, with certain alterations, a draft form of authority to be issued by the Secretary of State for the Home Department to the Postmaster-General, authorising him to accept correspondence to and from certain persons detained or residing in enemy territory in time of war, and a draft notice to the public that such correspondence is, under certain conditions, allowable.

2. These alterations proposed by you were duly considered by the Censorship Sub-Committee of the Committee of Imperial Defence, and I have the honour to submit, for your consideration, certain difficulties which would, in the opinion of the Sub-Committee, be introduced into the system of postal censorship in time of war if they were adopted.

3. It was found during the Great War essential to insist on the fact that postal and cable censorship was exercised by the military authorities, and not by the General Post Office. Not only was the elaborate organisation necessary for its efficient administration most conveniently built up and carried on under military discipline, but it was of great importance that it should be clear to the public, both British and foreign, that censorship—which is naturally repugnant to them—was exercised under military necessity alone, and for this reason the Censorship Sub-Committee have never

* See No. 6.

Correspondence in war time with (a) prisoners of war or interned civilians; or (b) other persons in enemy countries: draft licence and notice to public.

hesitated to recommend that in any future war such censorship should be under a military chief and organised on military lines, and not be conducted by the General Post Office or any civilian body or office. With this point of view the officials of the Post Office are in full concurrence.

4. The sub-committee therefore see great difficulty in the alterations in the draft forms suggested by you. They had expressly in the first refrained from stating by whom the requisite conditions and examination of the postal packets should be prescribed; in the second, they had included the words "as the Postmaster-General may lay down" in connection with the conditions of posting, because such preliminary conditions will be issued to the public through the Postmaster-General (though drawn up by the military censors); but on consideration they would even prefer to omit these words. The additions, however, which you have proposed would in effect make it necessary that all the regulations of postal censorship should be issued ("imposed and prescribed") by the Postmaster-General, and would make the public believe that he was responsible for the imposition and administration of the censorship.

5. I have therefore the honour to enquire whether you could propose a form of words not open to this objection. Prints of the previous correspondence are enclosed for convenience of reference.

I have, &c.

C. W. ORDE.

Report.

We approve the draft authority and draft notice as altered and initialled by us in red ink,* excluding all reference to the Postmaster-General, the inclusion of which had made the other modifications suggested advisable.

*Law Officers' Department,
May 17, 1922.*

ERNEST M. POLLOCK.
LESLIE SCOTT.

ANNEX.

(A.)

Form of Authority to permit British Subjects to communicate with Persons detained or residing in Enemy Territory (including Prisoners of War).

To the Postmaster-General and all others whom it may concern.

Whereas a state of war exists between this country and ;

And whereas it is unlawful for His Majesty's subjects, save under due authority, to have communication or intercourse with persons in enemy territory;

And whereas it is expedient that postal communication or intercourse should be permitted, subject to such limitations and on such conditions as may from time to time be prescribed:

Now, therefore, I, the Right Honourable , being one of His Majesty's Principal Secretaries of State, hereby authorise you, in the name and on behalf of His Majesty, to accept for transmission through the post letters or other postal packets addressed to, intended for or emanating from persons who now are or hereafter may be detained or residing in enemy territory or in territory occupied by the enemy, provided—

(a.) That the transmission of such letters or other postal packets is otherwise lawful; and

(b.) That such letters or other postal packets comply with such conditions and are submitted to such examination as may from time to time be prescribed by you, the Postmaster-General.

And for so doing this shall be your sufficient authority.

One of His Majesty's Principal Secretaries of State.

Whitehall, S.W. 1.

As altered:
E. M. P.
L. S.

* Shown by erased type.



(B.)

Form of Authority to British Subjects to communicate with Persons detained or residing in Enemy Territory (including Prisoners of War).

Whereas a state of war exists between this country and ;
And whereas it is unlawful for His Majesty's subjects, save under due authority, to have communication or intercourse with persons in enemy territory ;
And whereas it is expedient that postal communication or intercourse should be permitted, subject to such limitations and on such conditions as may from time to time be prescribed :
Now, therefore, I, the Right Honourable , being one of His Majesty's Principal Secretaries of State, hereby give notice, in the name and on behalf of His Majesty, that letters or other postal packets may be sent to or received from persons who now are or hereafter may be detained or residing in enemy territory or in territory occupied by the enemy, provided—

- (a.) That the transmission of such letters or other postal packets is otherwise lawful; and
- (b.) That such letters or other postal packets comply with such conditions as the Postmaster-General may lay down and are submitted to such examination as are from time to time imposed and prescribed by the Postmaster-General.

*One of His Majesty's Principal Secretaries
of State.*

Whitehall, S.W. 1.

As altered :
E. M. P.
L. S.

[T 7933/373/350/1922]

No. 7^A.

[Procurator-General.]

[June 22, 1922.]

*Case for the Opinion of the Law Officers of the Crown, Mr. James Wylie and
Mr. Gavin T. Simonds.*

HEREWITH are sent :—

Detained
Enemy
Ships :
Effect of
Privy
Council
judgment
in case
of the
"Blonde,"
&c.

Judgment of the Privy Council in the "Blonde" group, "Gutenfels" group
and "Kronprinzessin Cecilie" and "Prinz Adalbert."
List of ships detained by order of the English and Colonial Prize Courts.
Treaty of Peace Order in Council.
Treaty of Peace.

1. The opinion of the Law Officers is sought on various points in connection with detained enemy ships arising out of the judgment of the Privy Council in the case of the "Blonde" and other ships delivered on the 10th February, 1922.
2. The judgment in its terms only refers to—
 - (1.) "Blonde," "Prosper" and "Hercules," three ships belonging to Danzigers, under 1,600 tons, detained under a "Chile" order made by the president of the Prize Court ;
 - (2.) "Kronprinzessin Cecilie" and "Prinz Adalbert," two ships originally condemned by the president of the Prize Court but detained until further order by the Privy Council on appeal ; and
 - (3.) "Gutenfels," "Barenfels," "Rabenfels," "Werdenfels," "Lauterfels" and "Aemme Rickmers," six ships in respect of which a similar order was made by the Privy Council on appeal from the Prize Court in Egypt.
3. Of these groups the "Blonde," "Prosper" and "Hercules" were all ships under 1,600 tons. They belonged to the Danziger Rederei Aktien-Gesellschaft, a shipping company registered and carrying on business at Danzig, which city became a free city under the Treaty of Versailles. But the judgment of the Privy Council expressly stated that the contention that the appellants were in any special position on this account is groundless, and that it was not explained by the appellants why proceedings which were regular from the beginning should be frustrated as against the captors by

a stipulation in the treaty which does not deal with their rights but is directed to another and very different object. The principles laid down, therefore, are of general application to all detained ships, not merely to those owned by Danzigers ; and counsel are asked in their opinion to deal with the position created by this judgment on the assumption that it applies to all ships originally detained under a "Chile" order, not merely to those which were the subject of the recent proceedings in the Privy Council, as it is probable that the owners of all ships at one time detained under a "Chile" order will seek to reopen their cases so as to obtain the advantages given by the Privy Council to the owner of the ships before them.

4. Put quite shortly, the judgment of the Privy Council divides the classes of ships into two main categories : (1) those of 1,600 tons and over ; and (2) those under 1,600 tons.

(1.) *Those of 1,600 Tons and over.*

The judgment at p. 13 states that article 244 [sic] and Annex III of Part VIII of the treaty operated to transfer the property in all ships of 1,600 tons and upwards to the Allied and Associated Powers, and at the conclusion of the judgment, p. 16, the Board used the following language :—

"As their Lordships understand that His Majesty's Government have come to arrangements with the Allied and Associated Powers with regard to the shipping surrendered and transferred under the treaty and that no question now arises as between them in relation thereto, they think that the proper course is to discharge the orders for detention previously advised by their Lordships and to release the vessels to the Crown as the present owner."

5. All these ships were requisitioned by order of the Prize Court [whether temporarily or permanently]. Those in the Prize Court in this country were requisitioned without appraisalment on an undertaking given by the Procurator-General to pay the appraised value into court when required so to do. It is believed the same course was taken with regard to the ships requisitioned in the Colonial or Egyptian Prize Courts, though apparently in some cases the ships have been appraised.

6. With regard to the ships still in the hands of the Crown, it seems clear that, under the Privy Council judgment, they are to be released to the Crown as the present owner, as a sort of trustee for the Allied and Associated Powers, and presumably they will have to be dealt with by the Reparation Commission.

7. As to the ships no longer in the hands of the Crown, these were either—

- (a.) Sunk by enemy action or by perils of the sea ;
- (b.) Sold by the Shipping Controller ; or
- (c.) In the case of the "Prinz Adalbert," sold by the marshal, after condemnation, at the request of the Crown.

8. Of the eight ships over 1,600 tons dealt with by the Privy Council, four were sunk by enemy action. This was brought to the notice of the Board, during the argument, but they did not, in the operative part of their judgment, say what is to be the form of the order where the vessels are no longer in existence. At p. 13 of the judgment, when dealing with ships under 1,600 tons, they imply that with regard to the ships over 1,600 tons the appraised value of such ships as have been lost are in the same position as the ships themselves. The judgment says :—

"Had they been over 1,600 tons the property and rights of the owners would have been transferred by the operation of the treaty, and they would have had no *locus standi* to appeal against any order dealing with them or with the money in court, or to be brought into court after appraisalment, in substitution for them. Section 1 of the third annex to Part VIII, being a cession by the German Government, 'so as to bind all other persons interested,' not only binds the German shipowners as persons interested in appraised values brought into, or to be brought into, court, but also binds them in respect of their property in the ships, which, until duly divested by a decree having that effect, remains in them, even though it may be liable to be divested at any time ; accordingly it would be an answer both in regard to detained ships still *in specie*, whether remaining in the custody of the court or under requisition, and to the funds, which represent them under the practice of the court."

[9930]

F



9. The Reparation Commission in dealing with Annex III of the treaty have only considered ships in existence on the 10th January, 1920, the date when the treaty was ratified. Ships not in existence when the treaty was ratified have not been considered, possibly because of the view tacitly taken as to the meaning of paragraphs 1-3, and possibly as a result of paragraph 8 of Annex III, which reads as follows:—

"Germany waives all claims of any description against the Allied and Associated Governments and their nationals in respect of the detention, employment, loss or damage of any German ships or boats [in French: 'Toutes pertes ou dommages subis par lesdits navires ou bateaux'], exception being made of payments due in respect of the employment of ships in conformity with the Armistice Agreement of the 13th January, 1919, and subsequent agreements."

10. If, therefore, the money represented by the appraised values of these ships is paid into court to be delivered to the Crown in order that they may deal with it in the same manner as the ships in being, the Reparation Commission will presumably in its turn merely take the money as an ordinary receipt from Germany on account of reparation, and the British Government will thus in effect, in spite of paragraph 8 of the annex, pay without any further consideration a substantial sum on account of Germany. It will be noticed that at p. 13 of the judgment the Privy Council do not consider that paragraph 8 of this annex of the treaty affects the matter.

11. A possible view is that the value of these ships falls to be dealt with under article 297 of the treaty as being German private property, but this will not be in accordance with the views of the Privy Council.

12. It must be remembered that any money paid into court will come out of the British Exchequer, so it is very desirable, if possible, to adopt a course which would not involve any such payment. It would appear to follow from the judgment of the Privy Council that the undertakings given by the Procurator-General when the ships were requisitioned are discharged by virtue of the Privy Council Order, as would have been the case if the ships had been condemned, and it seems unnecessary for the Procurator-General to take any steps to have the undertakings formally discharged, though it might be prudent to do so.

13. There remains for consideration the case of the "Prinz Adalbert." This ship was condemned by Sir Samuel Evans while under requisition and ordered to be handed to the Crown. She was then returned to the marshal and sold by him at the request of the Procurator-General and the purchase money paid into court, this sale taking place before the judgment of condemnation had been turned into a "Chile" order by the Privy Council. It may be that the proper course is to hand this money to the custodian under article 297, but the question how to deal with this money should be very carefully considered, as it would be awkward if the principle applied to the "Prinz Adalbert" necessitated the Procurator-General paying into court the appraised values of the ships which have been lost, and the better course, from the point of view of the Crown, would be that the undertakings should be discharged and nothing done.

(2.) *Ships under 1,600 tons detained under a "Chile" Order.*

14. With regard to these ships, the judgment of the Privy Council declared that The Hague Convention is binding, and decreed that in the appeal of the "Blonde," "Prosper" and "Hercules" (which ships were only before the Board) the matter should be remitted to the Prize Court to make such orders as may be necessary for the appraisal of the "Blonde" and "Hercules," which have been lost, and to make a decree releasing those appraised values, and the "Prosper" *in specie*, to the custodian of enemy property to be delivered up to the claimants if after the lapse of six months no proceedings have been begun for an order for delivery up to the Crown, but otherwise to abide by the final determination of such proceedings.

15. Counsel will remember that during the argument before the Privy Council it was contended among other arguments that, even if the appeals by the shipowners were allowed, the ships or their values fall to be dealt with under article 297 of the Peace Treaty. In their judgment the Privy Council laid down that, while it is clear that ships of 1,600 tons and over are ceded to the Allied and Associated Powers by section 1 of Annex III of Part VIII of the Treaty, it is not so clear that the ships under 1,600 tons fall to be dealt with under article 297 of the treaty. At p. 14 of the judgment, when dealing with this point, the judgment proceeded as follows:—

"It has been urged on the one hand and denied on the other, that an answer can be found to the claim of the Danziger Rederei Aktien-Gesellschaft for the

release of these vessels in the application of this article [*i.e.*, article 297] to the ships and funds in question. Beyond observing that the contentions raised on both sides deserve full and careful consideration by the appropriate tribunal, their Lordships do not feel called upon to express any opinion about them, for they are satisfied that the Prize Court is not such a tribunal."

16. It will therefore be necessary for the Crown to take some sort of proceedings in "the appropriate tribunal" with a view to obtaining a decision whether the ships under 1,600 tons *in specie*, or the appraised values of those lost, can be dealt with under article 297 of the Peace Treaty.

17. The material sections of article 297 are (b) and (i) which are as follows:

"(b.) Subject to any contrary stipulations which may be provided for in the present treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present treaty.

"The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights or interests, nor to subject them to any charge without the consent of that State.

"German nationals who acquire *ipso facto* the nationality of an Allied or Associated Power in accordance with the provisions of the present treaty will not be considered as German nationals within the meaning of this paragraph."

"(i.) Germany undertakes to compensate its nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States."

18. It will be noticed that the last paragraph of section (b) expressly states that German nationals who acquire *ipso facto* the nationality of an Allied or Associated Power in accordance with the provisions of the treaty will not be considered as German nationals within the meaning of this paragraph. This of course does not apply to nationals in the position of the owners of the "Blonde," "Prosper" and "Hercules," as, although Danzig became a free city by the operation of the treaty, the citizens of Danzig did not acquire the nationality of an Allied or Associated Power. But the whole scheme of section 11 (pp. 59-61) of the treaty dealing with the free city of Danzig may be that persons resident in Danzig shall be able to keep their property, and that their property in Allied countries shall not be subject to the disabilities attaching to such property belonging to German nationals. For instance, article 105 (p. 61) provides that on the coming into force of the treaty German nationals ordinarily resident in the territory will *ipso facto* lose their German nationality in order to become nationals of the free city of Danzig. Article 106 enables German nationals ordinarily resident in the free city of Danzig to elect for German nationality within a period of two years from the coming into force of the treaty, and such persons will be entitled to preserve their immovable property in the territory of the free city of Danzig, and may carry with them their movable property of every description. This section of the treaty does not deal with property of Danzigers (who up to the time of the coming into force of the treaty were German nationals) within the territories of Allied and Associated Powers, which property, as far as German nationals are concerned, is dealt with in article 297 (b) of the treaty; but, having regard to the scheme of the treaty, it may be difficult to apply to the appropriate tribunal for an order that the "Prosper" and the appraised values of the "Blonde" and "Hercules" shall be dealt with under article 297.

19. The manner in which property coming under article 297 of the treaty should be dealt with is prescribed by "The Treaty of Peace Order in Council, 1919."

20. By section 1, sub-section (xvi), of this Order in Council all property within His Majesty's dominions or protectorates belonging to German nationals at the date when the treaty comes into force, and the net proceeds of their sale, liquidation or other dealings therewith are charged—

(a.) With payment of the amounts due in respect of claims by British nationals with regard to their property, rights and interests, including companies and



GENERAL

- associations in which they are interested in German territory, or debts owing to them by German nationals, &c., and that payment of claims growing out of acts committed by the German Government or by German authorities since the 31st July and before the 4th August, 1914; and
- (b.) With payment of the amounts due in respect of claims by British nationals with regard to their property, &c., in the territories of Austria-Hungary, Bulgaria and Turkey; and

sub-section (xvii) contains provisions with a view to making effective and enforcing the charge created by sub-section (xvi). Sub-section (xvii) (d) enables the Board of Trade by order to vest in the custodian any property, rights and interests subject to the charge or the right to transfer the same.

21. The Order in Council, however, does not provide any machinery or specify any court for deciding the point left open by the Privy Council after the ships, or the money representing them, have been handed over by the Prize Court to the custodian of enemy property. The whole scheme of the Order seems to be that only enemy property is transferred to the custodian, and any property in the custodian's hands must be dealt with by him in the manner laid down in the Order in Council.

22. It is therefore a little difficult to decide what proceedings are contemplated by the Privy Council in the extract from their judgment which is set out above. There is no special judge or court which has the duty of considering what property is enemy property within the meaning of the Order in Council. It is outside the scope of the duties allotted to Younger and Sargent, J.J., under the Trading with the Enemy Acts.

23. The cases which have been recently before the courts, in which the judges have decided whether or not property is enemy property within the meaning of article 297 of the treaty, are believed to have been ordinary actions in the Chancery Division for a declaration, and not therefore assigned to any special judge. It is, however, essential that the Crown, in the cases of these particular three ships, should take some action within six months, unless it is admitted that the property must be handed over to the Danziger claimants.

24. The president has already dealt with a large number of applications, made on behalf of the Procurator-General, to hand over to the custodian enemy property to be dealt with in accordance with the Treaty of Versailles, and he has made the orders asked for. The Procurator-General also applied for a similar order in the case of some securities belonging to citizens of Danzig which had previously been ordered to be detained under the Reprisals Order in Council. This was in the cases of the steamship "Nieuw Amsterdam" (No. 80) and steamship "Rotterdam" (No. 73). The application came before the president on the 21st April, 1921. The Attorney-General and Mr. Bowstead appeared for the Procurator-General and Mr. Balloch for the claimants, being a German bank carrying on business at Danzig, who claimed restitution. The president, however, on the authority of the "Blonde," held that, if these securities were Danziger-owned, it did not differentiate them in any way from the securities held by German citizens, and he made the order. The case is not reported, nor was any detailed judgment given.

As to other detained Ships generally.

25. It is necessary that the Procurator-General should decide what attitude he is to take up should the owners of German ships originally subject to a "Chile" order, but which have since been condemned, apply that their time for appealing shall be extended now that the Privy Council has decided that the orders condemning the "Blonde," "Prosper" and "Hercules" were wrongly made; or, if such owners did not appear in the Prize Court proceedings, on their application for leave to enter an appearance.

26. It may be, in some cases in the colonies, that leave to admit an appeal has been granted or the time for applying to do so extended, but no such order has been made in any case before the president in London.

27. The "Blonde," "Prosper" and "Hercules" were the last of the detained ships brought before the court for condemnation. The first case was the "Marie Leonhardt" (1921 P., p. 1), which was argued before the president in 1920. In that case the "Marie Leonhardt," a ship of 1,466 tons gross, was condemned after full argument. The owners obtained leave to admit an appeal, but they did nothing further, and on the

GENERAL

13th January, 1921, the solicitors for the owners informed the Treasury solicitor that they were instructed not to prosecute the appeal.

28. The owners of the "Marie Leonhardt" ought not now to be allowed to revive their appeal, and, on general principles, none of the other owners should be allowed to reopen their cases; but different questions of policy may apply in these international cases, and it may be that the president will give leave if asked to do so.

It should be remembered, in this connection, that it is understood all the Allied and Associated Powers, with the exception of Great Britain, have either condemned the enemy ships found in their ports at the outbreak of war, or on some pretext or other have refused to hand them back. There seems no reason, therefore, why Great Britain should consider herself bound to give to German claimants more than their strict legal rights.

Cargoes.

29. Another question to be decided is what is to be done with regard to the cargoes which were on board these detained ships at the time of capture. There are only two such cases in England: the "Kronprinzessin Cecilie" and the "Prinz Adalbert;" but the question is of great importance in the Dominions and in Egypt. The smaller ships mostly had no cargoes on board or the property in their cargo was either neutral or British and was released.

30. The "Kronprinzessin Cecilie" and "Prince Adalbert," which were originally condemned by the president, had cargo on board which was also condemned by the president, except in cases where a neutral established that the cargo was neutral owned, and such orders of condemnation were not varied by the Privy Council. It will be appreciated that only a neutral would claim that cargo was neutral owned, and no German owner appeared to ask that the "Chile" order be made in the case of the cargoes.

31. In one case of cargo on board the "Kronprinzessin Cecilie," after the Privy Council had set aside the president's judgment condemning the ship as prize, the neutral claimant of the cargo applied that the president's order condemning the cargo as enemy property should also be set aside and a "Chile" order made; but the board refused to make the order, as the neutral claimant had no right to ask for such an order. This could only be done by the German owner.

32. In the case of part cargoes *ex* "Barenfels," "Gutenfels" and "Lauterfels," the Egyptian Prize Court made an order that the cargoes—

"be pronounced to have belonged at the time of seizure thereof to enemies of the Crown, and as such or otherwise subject and liable to confiscation or detention, and that such cargo be accordingly delivered to the Crown to be dealt with and sold on the terms of the order of this court relating to enemy cargo on board the above-mentioned ship, dated the 17th day of March, 1915.

"And the Crown or any other party interested in such cargo be at liberty to apply for a final order with reference to the proceeds of the disposal of such cargo."

It is difficult to understand what was meant by this ambiguous order.

33. Messrs. Schroder, Smidt and Co., the German owners of some of the cargo *ex* "Barenfels" and "Gutenfels," appealed to the Privy Council from an order in these terms, and the board, on the 17th January, 1919, varied the Egyptian order by ordering that the proceeds of sale of the cargo be detained in court until further order. No further order has yet been made or applied for.

34. It is understood that in Egypt there are the proceeds of sale of a considerable amount of cargo *ex* detained German ships. Presumably the proper course to take with regard to this cargo is to apply that it should be dealt with under article 297 of the Treaty of Peace.

35. The Public Trustee, as the custodian of enemy property, also wishes to be advised as to his position under the "Blonde" judgment. As already stated above, the Privy Council refused to decide whether ships under 1,600 tons should be dealt with under article 297 of the treaty, but granted a period of six months within which time the Crown might apply for an order to that effect.

36. With regard to the ships of 1,600 tons and over, the Privy Council has decided that they are absolutely ceded to the Allied and Associated Powers and made orders of release to the Crown, intimating in the course of their judgment that the appraised values of the ships that were lost should be dealt with in the same way.



37. The Public Trustee wishes to be advised whether he may claim—

- (a.) That ships of 1,600 tons and over, notwithstanding the terms of the Privy Council judgment, may be claimed by him as custodian of enemy property to be dealt with under article 297 of the treaty; or
- (b.) Whether he can make a similar claim in respect of the appraised values of such of these ships as have been lost; and
- (c.) Whether he should make any application with reference to cargo, subject to a "Chile" order.

38. The Reparations Commission represent the Allied and Associated Powers, and would have to be made a party to any claim by the Public Trustee to ships or appraised values. It is not known whether the commission could properly submit, representing as it does a large number of independent States, to the jurisdiction of the British courts, and it might be preferable to attempt, at any rate, first to settle by arrangement with the commission the extent of the rights to which it is entitled.

39. One view indicated above is that the effect of the judgment of the Privy Council is to discharge the undertakings given by the proper officer of the Crown when these ships were requisitioned, and that the Procurator-General is now under no liability to pay the appraised values of such ships into court. It may be, however, that the proper view is that the Procurator-General should pay the value of these ships into court and that the custodian of enemy property should then claim them under article 297 of the treaty, but this course should be avoided, if possible.

On the assumption that the judgment in the "Blonde," &c., applies to all detained ships—

Counsel are requested to advise:

40.—(1.) What attitude should be taken if and when the German owners of ships detained under a "Chile" order and subsequently condemned—

- (a.) Apply that the time within which to admit an appeal from the order of condemnation be extended;
- (b.) In the cases where no appearance has been entered, apply for leave to appear, and for an extension of time in which to admit an appeal.

Ships of over 1,600 tons.

(2.) What should be done with ships of 1,600 tons and over still in the possession of the Crown.

(3.) As regards such ships not in the hands of the Crown, what course should be taken when—

(a.) The ship has been lost while under requisition—

- (i.) When there has merely been an undertaking to pay the value into court;
- (ii.) When in addition to the undertaking the ship has been appraised;
- (iii.) When, in addition to the undertaking, the ship has been appraised and the money paid into court;
- (iv.) When the ship, having been returned to the Marshal, has been sold by him, the proceeds of the sale are in court, e.g., the "Prinz Adalbert."

(b.) When the ship has been sold by the Government Department in the market while under requisition.

(c.) If Counsel are of opinion that in cases (a) (i), (ii) and (iii) above the appraised value should be paid into court, what application should be made to the court, and by whom, to dispose of these appraised values?

Ships under 1,600 tons.

41.—(4.) What should be done with ships of under 1,600 tons in the hands of the Crown, and whether they should be returned to the Marshal in their present condition?

(5.) If such ships are no longer in the hands of the Crown, should their appraised value as at the date of requisition be paid into court?

(6.) If this be done, should the Crown then make an application for the ships, or their appraised values, to be handed out to the custodian of enemy property, to be dealt with by him under article 297 of the treaty, or should the course directed by the judgment

of the Privy Council be taken and the Crown merely ask for an order that the ships, or their appraised values, be handed out to the custodian, leaving the disposal of this property to be the subject of some further application to "the appropriate tribunal?" If so, what application should be made, by whom and to what tribunal? How should the rights of the Reparation Commission be dealt with?

(7.) When the "Prosper" and the appraised values of the "Blonde" and "Hercules" have been handed over to the custodian of enemy property, as directed by the judgment of the Privy Council, what application should be made with regard to this property, by whom and to what tribunal?

(8.) As to cargo. Is it the case that the cargoes subject to a "Chile" order are presumably in the same position whether the carrying ship was under or over 1,600 tons?

(9.) What application should be made, and by whom, to deal with such cargo or the proceeds of sale thereof?

(10.) The Public Trustee, as custodian of enemy property, wishes to be advised—

- (a.) Whether it is incumbent upon him to take any action with regard to the ships under 1,600 tons or the appraised values thereof, or whether he should take no action until an order is made by the appropriate court.
- (b.) With regard to the ships of 1,600 tons and over, whether he should make any application—

(i.) That such ships in being should be dealt with under article 297 of the treaty instead of under Annex III of Part VIII.

If so, what steps should be taken to deal with the rights of the Reparation Commission?

(ii.) With regard to the appraised values of such ships not in existence or in the hands of the Crown, whether he should make any application for such proceeds to be handed over to him to be dealt with under article 297 of the treaty? If so, to what tribunal?

(c.) As regards cargo the subject of a "Chile" order, whether he should make any application to deal with such cargo or its appraised value, and, if so, what?

Opinion of the Law Officers of the Crown, Mr. James Wylie and Mr. Gavin T. Simonds.

Questions to Counsel.

Counsel's Answers.

(1.) What attitude should be taken if and when the German owners of ships detained under a "Chile" order and subsequently condemned—

(1.) Any such application should, in our opinion, be opposed.

(a.) Apply that the time within which to admit an appeal from the order of condemnation be extended?

(b.) In the cases where no appearance has been entered apply for leave to appear and for an extension of time in which to admit an appeal?

Ships of over 1,600 Tons.

(2.) What should be done with ships of 1,600 tons and over still in the possession of the Crown?

(2.) Ships of 1,600 tons and over still in possession of the Crown should be treated in all respects as if the condemnation order were valid.

(3.) As regards such ships not in the hands of the Crown, what course should be taken when—

(3.) (a) (i) and (ii). No steps should be taken.

(a.) The ship has been lost while under requisition—

(i.) When there has merely been an undertaking to pay the value into court?

*Questions to Counsel.*

- (ii.) When, in addition to the undertaking, the ship has been appraised?
- (iii.) When, in addition to the undertaking, the ship has been appraised and the money paid into court?
- (iv.) When the ship, having been returned to the Marshal, has been sold by him, the proceeds of the sale are in court, *e.g.*, the "Prinz Adalbert."
- (b.) When the ship has been sold by the Government Department in the market while under requisition?
- (c.) If counsel are of opinion that in cases (a) (i) (ii) and (iii) above the appraised value should be paid into court, what application should be made to the court, and by whom to dispose of these appraised values?

Counsel's Answers.

(iii) and (iv). Application should be made by the Procurator-General for payment out to him of these moneys.

(b.) No steps should be taken.

(c.) See our previous answer.

Ships under 1,600 Tons.

(4.) What should be done with ships of under 1,600 tons in the hands of the Crown, and whether they should be returned to the Marshal in their present condition?

(5.) If such ships are no longer in the hands of the Crown, should their appraised value as at the date of requisition be paid into court?

(6.) If this be done, should the Crown then make an application for the ships, or their appraised values, to be handed out to the custodian of enemy property to be dealt with by him under article 297 of the treaty, or should the course directed by the judgment of the Privy Council be taken and the Crown merely ask for an order that the ships, or their appraised values, be handed out to the custodian, leaving the disposal of this property to be the subject of some further application to "the appropriate tribunal"? If so, what application should be made, by whom, and to what tribunal? How should the rights of the Reparation Commission be dealt with?

(7.) When the "Prosper" and the appraised values of the "Blonde" and

(4.) Ships of under 1,600 tons in the hands of the Crown should, in our opinion, be treated in all respects as if the order for condemnation were valid.

(5.) In our opinion, No.

(6.) In the view that we take, this question does not arise; but, if the appraised value of any ship is paid into court, we think that an application should be made by the Procurator-General for payment out to him upon the footing that the Crown is entitled under article 243 of the Treaty of Versailles; where the ships are of 1,600 tons or over, the Procurator-General may rely on the last paragraph of the judgment of the Privy Council in the "Blonde"; where the ships are under 1,600 tons, he must base his claim on the fact that Germany has not selected the ships of under 1,600 tons to be handed over under article 243 and the Crown has, in default of such selection being made, a better title than anyone else. If the Procurator-General fails upon such an application, it will, we think, be necessary to make an application for payment out to the custodian upon the footing that the money in court is subject to the charge authorised by article 297 of the treaty and imposed by the Treaty of Peace Order, 1919.

(7.) In our opinion, as soon as the Prize Court has made an order releasing to the

Questions to Counsel.

"Hercules" have been handed over to the custodian of enemy property, as directed by the judgment of the Privy Council, what application should be made with regard to this property, by whom, and to what tribunal?

(8.) *As to Cargo.*—Is it the case that the cargoes subject to a "Chile" order are presumably in the same position whether the carrying ship was under or over 1,600 tons?

(9.) What application should be made, and by whom, to deal with such cargo or the proceeds of sale thereof?

(10.) The Public Trustee, as custodian of enemy property, wishes to be advised—

(a.) Whether it is incumbent upon him to take any action with regard to the ships under 1,600 tons or the appraised values thereof, or whether he should take no action until an order is made by the appropriate court?

(b.) With regard to the ships of 1,600 tons and over, whether he should make any application—

(i.) That such ships in being should be dealt with under article 297 of the treaty instead of under Annex III of Part VIII.

If so, what steps should be taken to deal with the rights of the Reparation Commission?

(ii.) With regard to the appraised values of such ships not in existence or in the hands of the Crown, whether he should make any application for such proceeds to be handed over to him to be dealt with under article 297 of the treaty?

If so, to what tribunal?

(c.) As regards cargo the subject of a "Chile" order, whether he should make any application to deal with such cargo or its appraised value, and, if so, what?

Counsel's Answers.

custodian the "Prosper" and the appraised values of the "Blonde" and the "Hercules," an action should be commenced by the Attorney-General in the Chancery Division claiming a declaration that they are subject to the above-mentioned charge.

(8.) In our opinion, Yes.

(9.) In our opinion, application should be made by the Procurator-General to the Prize Court for the release of such cargo or the proceeds to the custodian.

(10.) (a), (b) and (c). In our opinion, No.

ERNEST M. POLLOCK.
LESLIE SCOTT.
JAMES WYLIE.
GAVIN T. SIMONDS.

Law Officers' Department,
June 22, 1922.



[T 1430/37/350/1923]

No. 7^B.

[Procurator-General.]

[December 16, 1922.]

Case for the Opinion of the Law Officers of the Crown, Mr. James Wylie and Mr. Gavin T. Simonds.

HEREWITH are sent:—

Papers previously before counsel.
King's Order, dated the 3rd March, 1922.
Opinion of Law Officers and other counsel given the 22nd June, 1922.*
Writ in Chancery Division.
Opinion of Mr. Gavin Simonds.

Detained
Enemy
Ships:
Effect of
Privy
Council
judgment in
case of the
"Blonde,"
&c.

Counsel is referred to question 7 and counsel's reply thereto of the case submitted to the Law Officers* as a result of the judgment of the Privy Council affecting these vessels. On the 20th March, 1922, the Registrar made an order directing the Marshal to appraise the "Blonde" and "Hercules" as at date of requisition, and on the 19th April, 1922, the "Blonde" was accordingly appraised as on the 5th February, 1915, at the sum of 3,945*l.*, and the "Hercules" as on the 13th February, 1915, at the sum of 7,342*l.*

On the 17th July, 1922, the Prize Court made an order directing that the Crown do forthwith pay into court the appraised values of the "Blonde" and "Hercules," and that such appraised values together with the "Prosper" be released to the Custodian of Enemy Property to be by him dealt with as prescribed by the order of the Privy Council, dated the 3rd March, 1922, subject to retention from the appraised values of the costs of the seizure, detention and appraising of the "Blonde" and "Hercules," and to the payment of the costs of the seizure and detention of the "Prosper."

The appraised values of the "Blonde" and "Hercules" were paid into court and ultimately released together with the "Prosper" in specie to the Custodian of Enemy Property. In accordance with the opinion of the Law Officers and other counsel that an action should be commenced in the Chancery Division claiming a declaration that the appraised values of the two first-named vessels and the "Prosper" are subject to the charge authorised by article 297 of the Treaty of Peace and imposed by the Treaty of Peace Order, 1919, an action was commenced, and a writ issued claiming a declaration that the property rights and interests of the defendants in the German steamship "Prosper" and in the appraised values of the German steamships "Blonde" and "Hercules" and the moneys representing such appraised values, are subject to the charge authorised by the Treaty of Versailles and imposed by section 1 (16) of the Treaty of Peace Order, 1919.

An appearance was entered by the defendant company Danziger Rederei-Aktien-Gesellschaft. Counsel will also further recollect that in consultation with the Law Officers on the 2nd June, 1922, that suggestion, which met with approval, was that after the Chancery proceedings had been launched, negotiations should be opened with a view to coming to a settlement upon the terms of the release of the surviving ship if no claim were made for the value of the two lost ships, *i.e.*, "Blonde" and "Hercules," this being a suggestion which had previously been made by Messrs. Botterell and Roche on behalf of the owners in letters of the 13th and 31st December, 1920. As soon, therefore, as the writ in the Chancery Division had been issued, Messrs. Botterell and Roche were, by letter dated the 1st August, 1922, asked whether their clients would be prepared to consent to a settlement of the points in dispute on the above basis. Messrs. Botterell and Roche replied on the 2nd August as follows:—

"The Treasury Solicitor,

"Exchange Chambers, 24, St. Mary Axe,
"London, E.C. 3, August 2, 1922.

"Dear Sir,

"'BLONDE,' 'PROSPER,' 'HERCULES.'

"We are in receipt of your letter of the 1st instant, and will ask our clients' instructions upon your suggestion. It is true that when doubt existed as to how

* No. 7A.

[T 3177/1685/381/1924]

No. 7^{AA}

[Colonial Office.]

[November 10, 1922.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, November 8, 1922.

I AM directed by the Duke of Devonshire to lay before you the accompanying copy of a note prepared by the First Parliamentary Counsel, together with the relevant documents, regarding certain questions that will arise as to the future title of His Majesty, the Parliament of the United Kingdom and the Consolidated Fund of the United Kingdom, consequent on the establishment of the Irish Free State.

2. I am to request that you will be good enough to take these papers into your consideration and to furnish the Duke of Devonshire, at as early a date as possible, with your opinion upon the questions raised in the last paragraph of the note.

I am, &c.

L. CURTIS.

List of Enclosures.

Note.
Irish Free State (Agreement) Act, 1922.
Act (Constitution) of the Irish Provisional Parliament.

Note by Parliamentary Counsel.

The Constitution of the Irish Free State raises questions as to the use of the expression "United Kingdom" in the future, not only as respects His Majesty's Title, but also in such expressions as "Parliament of the United Kingdom of Great Britain and Ireland," "Consolidated Fund of the United Kingdom of Great Britain and Ireland," &c.

Before 1707 there were three Kingdoms: the Kingdom of England, the Kingdom of Scotland and the Kingdom of Ireland.

By "The Union with Scotland Act, 1706" (6 Ann., cap. 11), it was provided that the two Kingdoms of England and Scotland should be united into one Kingdom by the name of Great Britain, and that the United Kingdom of Great Britain should be represented by one and the same Parliament, to be styled the Parliament of Great Britain.

By "The Union with Ireland Act, 1800" (39 & 40 Geo. III, cap. 67), it was provided that the Kingdoms of Great Britain and Ireland should be united into one Kingdom by the name of the United Kingdom of Great Britain and Ireland, and that the said United Kingdom should be represented by one and the same Parliament, to be styled the Parliament of the United Kingdom of Great Britain and Ireland.

By the Articles of Agreement for a Treaty between Great Britain and Ireland it is provided that Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa, with a Parliament having powers to make laws for the peace, order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State; and, subject to the provisions thereafter set out, the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and that the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State.

By "The Irish Free State (Agreement) Act, 1922," these Articles of Agreement were given the force of law, and it was provided that no writ should be issued after the passing of the Act for the election of a member to serve in the Commons House of Parliament for a constituency in Ireland other than a constituency in Northern Ireland.

The Irish Free State Constitution provides for the establishment of a separate Parliament for the Irish Free State, and the present Parliament of the United Kingdom will have no greater jurisdiction over the Irish Free State than it has over a self-governing Dominion.



It would appear, therefore, that the union of Parliaments effected by the Irish Act of Union has been dissolved, except so far as Northern Ireland is concerned, and even with respect to Northern Ireland unless Northern Ireland exercises the option of opting out.

It is not equally clear that there is a severance of the Crowns. It was a necessary consequence of the union of Parliaments that the Crowns should be united, but it is not a necessary consequence of the severance of the Parliaments that the Crowns should also be severed.

The King's present Title is: "By the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India."

The words "Emperor of India" are due to an addition made by a proclamation issued under "The Royal Titles Act, 1876," and the words "and of the British Dominions beyond the Seas" to an addition made by proclamation under "The Royal Titles Act, 1901."

With respect to the expression "Parliament of the United Kingdom of Great Britain and Ireland" which, as has already been stated, was given by the Irish Act of Union, if Northern Ireland were not to opt out of the Irish Free State, Parliament would naturally, whether the Crowns had or had not been severed, become the Parliament of Great Britain; and presumably legislation would have to be passed abolishing the representation of constituencies in Northern Ireland in the House of Commons and abolishing the right of Irish Peers to sit in the House of Lords. If, on the other hand, Northern Ireland did opt out of the Irish Free State, though Parliament would theoretically have power to legislate with respect to any matters affecting Northern Ireland, by constitutional practice Parliament would be debarred from exercising the power except with respect to matters excluded from the jurisdiction of the Northern Ireland Parliament. Constituencies in Northern Ireland would continue to return thirteen members to serve in the House of Commons, and Irish representative Peers would continue to sit in the House of Lords.

With respect to the expression "Consolidated Fund of the United Kingdom of Great Britain and Ireland"—a title which was made statutory by "The Consolidated Fund Act, 1816" (56 Geo. III, cap. 98)—the position will be that, if Northern Ireland does not opt out of the Irish Free State, the fund will be confined solely to Great Britain, and the title of the fund will naturally become the Consolidated Fund of Great Britain. If, however, Northern Ireland does opt out of the Irish Free State, the proceeds of certain taxes (income tax, customs and excise duty, and corporation profits tax) will be paid into the Consolidated Fund of the United Kingdom, and those proceeds will, subject to certain deductions, be paid over to the Consolidated Fund of Northern Ireland.

The opinion of the Law Officers is requested as to—

1. Whether the effect of the above-mentioned Articles of Agreement for a Treaty, and the establishment of the Irish Free State in pursuance thereof, affects the union of the Crowns effected by the Act of Union.
2. If so, whether legislation will be required for the purpose of any alteration of the Royal Title that may be necessary.
3. Whether it is advisable to change the expressions "Parliament of the United Kingdom of Great Britain and Ireland" and "Consolidated Fund of the United Kingdom of Great Britain and Ireland."
4. If so, what expression should be substituted, and whether legislation is necessary for the purpose.
5. Whether, if any alterations are to be made, they should be made before it is finally ascertained whether Northern Ireland will become part of the Irish Free State or not.

Opinion of the Attorney-General.

1. The answer to the first question is in the negative.
2. The second question does not arise.
- 3 and 5. These are questions of policy rather than of law; but in my opinion it would be advisable to change the expressions referred to. I think it inadvisable to change them more often than is necessary, and therefore I should consider it better not

to make alterations until it is finally ascertained whether Northern Ireland will become part of the Irish Free State or not.

4 (a.) The expression to be substituted depends in some measure upon the decision of Northern Ireland under clauses 12 and 14 of the Treaty. If Northern Ireland elects not to join the Irish Free State, the expression "Great Britain and Northern Ireland" would seem to be suitable.

4 (b.) Since the expressions now used are established by Act of Parliament, in my opinion any alteration should be effected by legislation.

DOUGLAS MCGAREL HOGG.

*Law Officers' Department,
November 10, 1922.*



GENERAL.

43

the Privy Council would interpret The Hague Convention our clients were disposed to agree to a settlement somewhat on the lines now suggested by you, but we can hardly expect that our clients will consider such a settlement appropriate now that the Crown's contention that the ships were liable to condemnation has been definitely rejected. We daresay that when our clients made their suggestion in December 1920, the immediate delivery of the 'Prosper' presented considerable attractions; but the state of shipping is very different to-day.

"We feel sure that our clients will hear with astonishment that the Crown are seeking to have the 'Prosper' and the appraised values of the other ships dealt with as German property, as from what they have told us this movement is in absolute conflict with the policy pursued by this country towards Danzig since the date of the treaty.

"We will write you again when we hear from our clients.

"Yours faithfully,

"BOTTERELL AND ROCHE."

And, further, in reply on the 8th August and 16th October:—

"The Treasury Solicitor.

"Exchange Chambers, 24, St. Mary Axe,
London, E.C. 3, August 8, 1922.

"R.M.G.

"Dear Sir,

"'BLONDE,' 'PROSPER,' 'HERCULES.'

"We have now heard from our clients upon the subject of our letter of the 1st instant. We cannot agree to any settlement which involves a waiver of what they and we consider to be their right to the delivery over of the appraised values of the 'Blonde' and 'Hercules' and of the 'Prosper' in specie, but in order to bring about a prompt settlement of the whole matter they would be willing to agree to the Marshal's charges in connection with the custody of the ships up to the date of requisitionment being paid out of the fund, provided that such charges do not exceed 600l.

"Our clients inform us that when the Armistice was concluded, one of their steamers, which was over 1,600 tons net register, was taken over by the Allied nations on time charter, but when the Peace Treaty came into force and Danzig was created a free State they applied to the Reparations Commission for restitution of their vessel, which was granted. There seems to be no reason why a different policy should be pursued with regard to the three vessels now in question.

"As regards the Marshal's charges, if, as we presume, you contend the rule of the Prize Court is that when a ship is released the party taking the delivery must pay the Marshal's expenses, it would appear that the expenses ought to have been paid by the Requisitioning Department when these ships were released to that Department. As they were obtaining the benefit of the delivery of the ships to them, it seems only fair that they should bear the corresponding responsibilities, especially as they have not been called upon to account for the profits of the ships while under requisition. Our clients therefore are making a considerable concession when they are offering to bear these expenses. We write without prejudice, and subject to the receipt of an early reply.

"Yours faithfully,

"BOTTERELL AND ROCHE."

"The Treasury Solicitor.

"Exchange Chambers, 24, St. Mary Axe, E.C. 3.
October 16, 1922.

"S.J.H.

"Without prejudice.

"STEAMSHIP 'PROSPER'.

"Dear Sir,

"We are in receipt of your letter of the 13th instant. We cannot advise our clients to put forward any other proposal than that suggested in our letter of the 8th August. We hope you will let us have your answer with regard to the question of the form of the bail bond as soon as possible.

"Yours faithfully,

"BOTTERELL AND ROCHE."



GENERAL.

Communications took place between the Procurator-General and the Public Trustee with reference to the advisability of proceeding with the Chancery action, and the following letters passed between these Departments:—

"Storey's Gate, St. James's Park, S.W. 1,
"August 10, 1922.

"Dear Millar,

"DETAINED SHIPS.

"I am in receipt of yours of the 3rd instant, and the only observation I have to offer on the minutes of conference forwarded therewith is that I do not find in paragraph 1 any reference to the proceedings which we are taking for a charging order against 'Prosper' and appraised values of 'Blonde' and 'Hercules' under the Treaty of Peace. As I explained, my intention is, after having launched the proceedings, to endeavour to negotiate a compromise under which we let the 'Prosper' go and keep the appraised values, or at worst get the Marshal's expenses. I hope, if possible, to save the Exchequer from parting with any money in this way. I understand that this action was approved by the Treasury at the meeting, and that the Public Trustee had no objection.

"In paragraph 5 add 'and Foreign Office' to cover Egypt.

"Yours sincerely,

"E. W. H. Millar, Esq.,

"R. W. Woods.

"Treasury, S.W. 1."

"Treasury Chambers, Whitehall,
"August 11, 1922.

"Dear Woods,

"Your letter of the 10th instant as to the conference on detained ships. I do not understand that you were actually taking any proceedings with regard to the three Danzig ships. I understood you to suggest that we ought to be able to withhold payment of the appraised values on the ground that the Danzigers were hostile ex-enemies, and should not be treated in the same way as friendly ex-enemies like the Czechoslovaks.

"The general opinion of the conference was that such a distinction could not be drawn. You suggested, however, that we might at least be able to recover the Marshal's expenses, and I have put a note to that effect at the top of p. 3 of the minutes.

"I do not understand what precisely is meant by a charging order under the Treaty of Peace; but so far as I understand it means an order under article 297 in favour of the Public Trustee as against the private owner. These proceedings are presumably the natural sequel to the judgment; but in any case, as I understand, the Exchequer will have to pay over the appraised values to the Public Trustee. It is for him to decide whether or not he will release them to the owners. His view is, I think, that there was no ground for not doing so. But even if he decides not to release them, the money will not return to the Exchequer, but will go either to meet the claims of British creditors or to increase his surplus, which I think would have to be handed over to the German Government. So far as appraised values are concerned, therefore, I do not understand how there can be any question of saving the Exchequer from parting with any money.

"As regards Marshal's expenses, these, if deducted by Public Trustee, would presumably be repaid to us. I am accordingly sending out the minutes unamended on this point.

"Yours sincerely,

"E. W. H. MILLAR."

It was ultimately decided that the question of pressing the proceedings should stand over until the Public Trustee had been further advised by counsel, and the opinion of Mr. Gavin Simonds is herewith. Reference may also be made to paragraph 18 of the case submitted to the Law Officers.

It may be added that as regards the ownership of the "Blonde," nine 64th shares appear to be held by British subjects (see Privy Council appellants' case record, p. 14), and the appellants' solicitors have now stated that two 64th shares in this vessel, formerly held by Carl Eschert (who died some fifteen years ago), are now held as his successor by Dr. Paul Eschert (a Senator of Danzig and a Member of the Government), who has not opted for German citizenship under the Peace Treaty.

GERMANY.

Counsel is requested to further consider and advise whether the terms of settlement offered by Messrs. Botterell and Roche be accepted, or, alternatively, whether the Chancery proceedings should be pressed forward.

Opinion of the Law Officers of the Crown, Mr. James Wylie and Mr. Gavin T. Simonds.

In our opinion the terms of settlement proposed by Messrs. Botterell and Roche should be accepted, except that their clients should, if it can be arranged, be required to pay the whole of the costs and charges of seizure and detention and appraisal. We understand that these charges do not exceed 800*l.*, and by their letter of the 8th August, 1922, they have offered to pay them up to 600*l.*

The Public Trustee should further inform Messrs. Botterell and Roche that he has notice of outstanding claims for necessities supplied to the ships, and that before he can hand over the "Prosper" or the appraised values of the "Blonde" and "Hercules," these claims must be provided for.

ERNEST M. POLLOCK.

LESLIE SCOTT.

JAMES WYLIE.

GAVIN T. SIMONDS.

Law Officers' Department

December 16, 1922.

GERMANY.

[C 17791/99/18/1922]

No. 8.

[December 28, 1922.]

Case for the Opinion of the Solicitor-General.

1. DOES the expression "in general such other measures" in paragraph 18 of Annex II to Part VIII of the Treaty of Versailles signify any measures other than measures such as "economic and financial prohibitions and reprisals" which fall within the limits of the sovereignty of the individual Governments?

2. Is it for the Reparation Commission, under paragraph 12 of Annex II to Part VIII of the Treaty of Versailles, to interpret paragraph 18 of that annex?

Foreign Office, December 28, 1922.

Opinion of the Solicitor-General.

1. I think paragraph 18 of Annex II to Part VIII of the treaty contemplates action by an individual Government only within its own jurisdictional limits. The fact that each Government is given a separate discretion as to the measures it may deem necessary in the circumstances indicates clearly to my mind an intention to restrict "other measures" to such measures as come within the above description.

2. I think it is the duty of the Reparation Commission to interpret the provisions of paragraph 18. I see no warrant for the view that there is a distinction, for the purposes of paragraph 12, between interpretation as against the German Government and interpretation as between the Allied Governments. The explicit language of paragraph 12 in giving the Reparation Commission authority to interpret the provisions of Part VIII appears to exclude the possibility of a rival authority, even in a case under paragraph 18 (if such could ever arise), in which the interests of the German Government were not affected.

T. W. H. INSKIP.

December 28, 1922.



[A 4373/963/45/1922]

No. 9.

[August 4, 1922.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 12, 1922.

Right of
New
Zealand or
United
States to
establish
preferential
tariffs, &c.,
in Samoa.

I HAVE the honour, by direction of the Earl of Balfour, to lay before you, for your consideration, the papers noted on the accompanying list respecting the question whether the Government of New Zealand is entitled, in view of existing treaty rights, to extend to Western Samoa the Dominion tariff, under which preference is given to goods of Imperial origin, and whether the United States Government is entitled to restrict to United States merchant vessels the trade between Tutuila and United States ports.

2. In 1899 an agreement (Paper (A)) was entered into between the United States, Germany and Great Britain, article 3 of which provides that the "signatory Powers shall continue to enjoy, in respect of their commerce and commercial vessels, in all islands of the Samoan group, privileges and conditions equal to those enjoyed by the sovereign Power in all ports which may be open to the commerce of either of them."

3. Article 288 of the Treaty of Versailles provides that "the special rights and privileges granted to Germany by article 3 of the Convention of the 2nd December, 1899, relating to Samoa, shall be considered to have terminated on the 4th August, 1914." The provisions of this article of the 1899 treaty are thus clearly terminated as far as Germany is concerned, and the German possessions in Samoa are now administered by New Zealand under mandate (Paper (B)), the New Zealand Government having applied the New Zealand preferential tariff system to this mandated area.

4. At the end of 1920 the United States Embassy in London, acting on instructions from the United States Government, communicated to Lord Curzon a memorandum (Paper (C)) maintaining that the convention of 1899 was still in effect as far as Great Britain and the United States were concerned, and that any discrimination against imports from the United States would be a violation of article 3 of that convention. It appeared difficult to dispute the view taken by the United States Government that the treaty of 1899 was operative, and, as a result of communications with the Colonial Office, a despatch (Paper (D)) was addressed to the Governor-General of New Zealand indicating this view.

5. The New Zealand Government were, however, of opinion that they were within their legal rights in establishing a preferential tariff in Western Samoa, the ground for this opinion being set forth in a memorandum from the Acting Prime Minister, dated the 4th June, 1921 (Paper (E)); and since the date of this communication the United States Government have again indicated their view that the introduction of the preferential tariff is contrary to the rights still enjoyed by them under the treaty of 1899, though no further arguments on the point were advanced. Advantage has, however, been taken of the presence in this country of Sir Francis Bell, the Attorney-General for New Zealand, to discuss the matter with him, and a memorandum prepared by him on the subject is enclosed (Paper (F)). It may be added, as bearing upon the point raised by Sir Francis Bell in paragraphs 6 and 10 of this memorandum, that it appears from the volume of "Colonial Tariff Policies" recently issued by the United States tariff commissioners, p. 616, that the United States Merchant Marine Act of the 5th July, 1920, provided for the application to Samoa as an island territory or possession of the United States of the laws restricting trade between United States ports to vessels of United States registry (Paper (G)).

6. Sir Francis Bell produces no new arguments wherewith to combat the contention of the United States Government to the effect that the treaty of 1899 is still operative as between Great Britain and the United States, and that its effect must be to prevent the introduction of a preferential tariff in Western Samoa. On the other hand, he shows good grounds for holding that article 3 of the convention must also prevent the United States Government from extending to United States ships any preference at Tutuila. In connection with this latter point, I am to observe that in 1911 it was alleged that the United States authorities had exercised some discrimination against British ships trading between Pago Pago and Leone, in Tutuila. Enquiries were made of the United States Government, who stated that Leone was not a port of entry; but in the course of the correspondence which took place at that time, the United

States Government admitted that British ships were entitled to the same treatment as United States and German ships in this respect (Papers (H), (J) and (K)). In the same year a complaint was also made by a British firm that bills of health were being issued gratis by the United States Consul at Apia to United States vessels trading between Apia and Pago Pago (Tutuila), while a charge was made for similar bills of health issued to British vessels trading on the same route. This complaint being brought to the notice of the United States Government, it was decided by the State Department in 1913 that the exaction of fees from British vessels, while United States vessels were exempt, was contrary to article 3 of the treaty of 1899, and instructions were accordingly given for the collection of such fees to be discontinued (Papers (L) and (M)). The United States authorities were thus in 1913 of opinion that the treaty prevented preference in this respect being given to United States ships trading with American Samoa.

7. I am now directed by Lord Balfour to request that you will be good enough to favour him with your opinion generally, and, in particular, on the following questions:—

- (1.) Is article 3 of the treaty of the 2nd December, 1899, still in force as between the United States and the British Empire?
- (2.) If so, is it possible to support the claim of the New Zealand Government to establish a preferential tariff in Western Samoa, from the benefits of which the United States would be excluded?
- (3.) If the treaty is still in force, is His Majesty's Government entitled to claim thereunder that the United States Government may not introduce any system of preference for United States shipping trading to Tutuila, and especially may not assimilate Tutuila to those overseas possessions of the United States the trade between which and the mainland ports of the United States is confined to United States vessels?

I have, &c.

R. SPERLING.

List of Papers.

- (A.) Convention between the United Kingdom, Germany and the United States, December 2, 1899 (T. 1081).
- (B.) Mandate for German Samoa ("Parliamentary Paper" 5061).
- (C.) United States Embassy memorandum, November 18, 1920 (A 8131/8131/45/1920).
- (D.) Secretary of State for the Colonies to Governor-General of New Zealand, January 3, 1921 (A 171/171/45/1921).
- (E.) Prime Minister of New Zealand to Governor-General of New Zealand, June 4, 1921 (A 5897/171/45/1921).
- (F.) Memorandum by Sir F. Bell, June 10, 1922 (A 3890/963/45/1922).
- (G.) Extract from "Colonial Tariff Policies," p. 616.*
- (H.) Despatch to His Majesty's Ambassador at Washington, No. 76, Commercial, June 9, 1911, with enclosures (18593/145/1911).
- (J.) Department of State, Washington, to His Majesty's Ambassador, Washington, February 5, 1912 (7164/145/1912).
- (K.) Governor of American Samoa to Secretary of the Navy, Washington, March 26, 1912 (25146/7164/145/1912).
- (L.) Samoa Shipping and Trading Company to United States Consul, Apia, November 23, 1911 (42432/7164/145/1912).
- (M.) Department of State, Washington, to His Majesty's Ambassador at Washington, October 15, 1913 (49597/145/1913).

* Paper (G).

Extract from "Colonial Tariff Policies" (p. 616).

The Merchant Marine Act of 5th July, 1920, (section 21), provides for the application to Samoa, as an island territory or possession of the United States, of the laws restricting trade between American ports to vessels of American registry. Vessels owned by Samoans are not entitled to American registry, but are entitled to fly the American flag.

*Report.*

(1.) We are of opinion that article 3 of the Convention of the 2nd December, 1899, is still in force as between the United States and the British Empire.

(2.) In our opinion, No.

The construction of article 3 is not free from difficulty. We think that its true effect is to impose upon His Majesty the obligation to accord to the United States in respect of its commerce and commercial vessels in all islands of the Samoan group, in which it lies within his power to do so, equal privileges to those enjoyed by British commerce and commercial vessels in those ports of the Samoan group which are under British sovereignty.

This obligation is binding upon the New Zealand Government as representing His Majesty, and precludes that Government from contravening article 3 in any part of the Samoan group which is under its authority, from whatever source derived.

(3.) In our opinion, Yes.

ERNEST M. POLLOCK.
LESLIE SCOTT.

*Law Officers' Department,
August 4, 1922.*

[T 104/104/345/1923.]

No. 9^d.

[Home Office.]

[October 24, 1922.]

Case for the Opinion of the Law Officers of the Crown.

National
status of
child born
in the
United
States,
whose
father
became,
during the
child's
minority,
naturalised
in United
States on or
after
March 2,
1907.

IN connection with the Law Officers' Opinion dated the 7th April, 1921,* on the subject of the status of Mr. D. B. S. Wharton, a child born in the United States of America of a natural-born British subject, who during the minority of the child became a citizen of the United States, the Secretary of State desires to obtain the further opinion of the Law Officers in the following circumstances:—

In the case (copy herewith*) on which the Law Officers gave their opinion, reference was made to section 2172 of the Revised Statutes of the United States, of which an extract was set out as follows:—

"The children of persons who have been duly naturalised under any law of the United States . . . , being under the age of 21 years at the time of the naturalisation of their parents, shall, if dwelling in the United States, be considered as citizens thereof"

The complete section from which this extract was taken is as follows:—

"The children of persons who have been duly naturalised under any law of the United States, or who, previous to the passing of any law on that subject by the Government of the United States, may have become citizens of any one of the States under the laws thereof, being under the age of 21 years at the time of the naturalisation of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who are now, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any State, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the legislature of the State in which such person was proscribed."

Since this case was laid before the Law Officers it has been ascertained, as a result of enquiries made unofficially through the United States Embassy, that the first part of the section 2172, that is, the part preceding the first semicolon, which includes the extract as quoted above, was replaced by section 5 of the Citizenship Act of the 2nd March, 1907 (Public No. 193, copy herewith), which is as follows:—

"That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalisation of

* Confidential 11,933, p. 43.

or resumption of American citizenship by the parent: *Provided*, That such naturalisation or resumption takes place during the minority of such child; *and provided further*, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

It will thus be seen that the provisions of United States law, upon which the opinion of the Law Officers, dated the 7th April, 1921, was based, though in force at the material time so far as Mr. D. B. S. Wharton was concerned, and therefore presumably effective for the purpose of determining his status, ceased to be in force on the 2nd March, 1907. The new provision introduced by section 5 of the Act of 1907, as above quoted, appears to relate only to children born outside the United States of alien parents. It appears to have no application to children born in the United States of America of alien parents, *e.g.*, natural-born British subjects, who subsequently become naturalised citizens of the United States of America; and there appears to be no other enactment of United States law dealing with the naturalisation of such children.

The question on which the Secretary of State desires the opinion of the Law Officers is—

Whether a British subject born in the United States, whose father became, during that person's minority, naturalised in the United States on or after the 2nd March, 1907 (the date when the United States law of that year came into force), can be regarded as having lost his British nationality under section 10 (3) of "The Naturalisation Act, 1870," or (where the naturalisation of the father in the United States of America took place after the 1st January, 1915) under section 12 (1) of "The British Naturalisation and Status of Aliens Act, 1914."

Home Office, August 17, 1922.

Opinion of the Law Officers of the Crown.

It appears that a child born in the United States of British parents does not, by American law, "become naturalised" in the United States on the naturalisation there of the father. Under these circumstances we do not think that the child loses his British nationality either under section 10 (3) of "The Naturalisation Act, 1870," or under section 12 (1) of the Act of 1914.

It seems, however, probable that the reason why the child does not "become naturalised" by American law is that he was an American national from birth, and that the intention of the Acts of 1870 and 1914 was that a child of dual nationality should, in the case of his father becoming naturalised in the United States of America, lose his British nationality. It is, we think, arguable that section 10 (3) of the 1870 Act and section 12 (1) of the 1914 Act did not in fact carry out such an intention, and, in our view, it would be permissible for the Secretary of State to grant a special certificate under section 4 of the 1914 Act in such a case.

ERNEST M. POLLOCK.
LESLIE SCOTT.

*Law Officers' Department,
October 24, 1922.*



1923

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office.

CONFIDENTIAL

(12470)

LAST COPY.

5

Nothing mutilated or removed. Admin.

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1923.



LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked *I^a*, &c.

CHINA.

No.		Date.	SUBJECT.	Page.
1	Law Officers ..	May 17, 1923	Russian issue of Chinese 5 per cent. Reorganisation Loan of 1913 ..	1

GENERAL.

<i>I^a</i>	Law Officers .. [Colonial Office]	Apr. 11, 1923	Proposed amendment of British North America Act: powers of extra-territorial legislation for Canadian Parliament ..	3
<i>I^b</i>	Law Officers .. [Colonial Office]	July 21,	Extra-territorial effect of certain Imperial statutes in their application to the Irish Free State ..	5
<i>I^c</i>	Law Officers .. [Colonial Office]	Dec. 31,	Extra-territorial effect of certain Imperial statutes in their application to the Irish Free State ..	7

GERMANY.

2	Law Officers ..	Feb. 3, 1923	Withdrawal of British troops from Rhine territories: effect ..	8
3	Law Officers ..	Apr. 11,	Validity under Treaty of Versailles, 1919, of Franco-Belgian advance into the Ruhr Valley ..	10
4	Law Officers ..	July 30,	Interpretation of Treaty of Versailles, 1919, paragraphs 17 and 18 of Annex II to Part VIII; and of the Rhineland Agreement ..	15

PALESTINE.

<i>I^a</i>	Law Officers .. [Colonial Office]	Jan. 3, 1923	Preferential treatment in United Kingdom of goods imported from Palestine ..	17
----------------------	--------------------------------------	--------------	--	----

RUSSIA.

5	Law Officers ..	Sept. 19, 1923	Immunity of Soviet official agents from processes of British courts ..	18
---	-----------------	----------------	--	----

TURKEY.

<i>5^a</i>	Law Officers and Mr. Gavin T. Simonds [Board of Trade]	Dec. 27, 1923	Disposal of German and Austrian funds sequestered in Constantinople by Allied Powers ..	21
----------------------	---	---------------	---	----

(iii)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1923.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

ARM—FUN.

A.

Army, British: withdrawal of troops from Rhine Territories; effect, 8-10.
Attorney-General v. MacLeod, 7.
Austria: disposal of funds sequestered in Constantinople by Allies, 21-23.

B.

Banque de France, 21.
Baxendale v. Bennett, 3.
Belgium: validity under Treaty of Versailles, 1919, of Franco-Belgian advance into Ruhr Valley, 10-15.
Bonds. *See* Loan.
British North America. *See* Canada.
Bull and Bull, Messrs., 18, 19.

C.

Canada: amendment of British North America Act, 3, 4.
" powers of extra-territorial legislation for Parliament, 3, 4.
China. *See* Loan.
Constantinople: Austrian and German funds sequestered by Allied Powers; disposal of, 21-23.
Council of Foreign Bondholders, 2.
Courts, British: immunity of Soviet official agents from processes of, 18-21.
Customs: preferential treatment in United Kingdom of imports from Palestine, 17, 18.

D.

Deutsche Bank, 21.
Deutsche Orient Bank, 21.
Diplomatic privilege: immunity of Soviet official agents from processes of British courts, 18-21.

E.

Extra-territoriality: proposed powers of extra-territorial legislation for Canada, 3, 4.
" extra-territorial effect of certain Imperial statutes in their application to Irish Free State, 5-8.

F.

Fenton Textile Association, 19, 20.
France: validity under Treaty of Versailles, 1919, of Franco-Belgian advance into Ruhr Valley, 10-15.
Funds. *See* Property.

GER—PRO

G.

Germany: withdrawal of British troops from Rhine Territories; effect, 8-10.
" withdrawal of British member of Rhine-land Commission; effect, 8-10.
" Franco-Belgian advance into Ruhr Valley; validity under Treaty of Versailles, 1919, 10-15.
" Funds sequestered in Constantinople by Allies: disposal of, 21-23.

H.

Hongkong and Shanghai Banking Corporation, 2.

I.

Ingham v. Primrose, 3.
Ireland: extra-territorial effect of certain Imperial statutes in their application to Irish Free State, 5-8.

K.

Kogan, Mr. M., 18.
Krassin, L. B., 18-20.

L.

League of Nations: territories under mandates; preferential treatment in United Kingdom of imports from, 17, 18.
Linklaters and Paines, Messrs., 18, 19.
Loan: Russian issue of Chinese 5 per cent. Reorganisation Loan, 1913; liability of Chinese Government on bonds seized by Soviet Government, 1-3.
London Joint Stock Bank (Limited) v. MacMillan, 3.
Luther v. Sagor, 18.

M.

Mandates: preferential treatment in United Kingdom of imports from territories placed under, 17, 18.
Moscow Narodny Bank, 1.

N.

Nash v. De Freville, 3.

P.

Palestine: preferential treatment in United Kingdom of imports from, 17, 18.
Patey, Messrs. H. W. and S., 18, 19.
Preferential treatment. *See* Customs.
Property: German and Austrian funds sequestered in Constantinople by Allied Powers; disposal of, 21-23.



1923

(iv)

REP—SOV.

R.

Reprisals: interpretation of paragraphs 17 and 18 of Annex II to Part VIII of Treaty of Versailles, 1919, 10-17.

Rhine Territories: withdrawal of British troops; effect, 8-10.

" " withdrawal of British member of Rhineland Commission; effect, 8-10.

" " interpretation of Rhineland Agreement, 1919, 15-17.

" " interpretation of paragraphs 17 and 18 of Annex II to Part VIII of Treaty of Versailles, 1919, 15-17.

Ruhr Valley: Validity of Franco-Belgian advance into, 10-15.

Russia. *See* Soviet Union.

Russo-Asiatic Bank, 1.

S.

Sequestration. *See* Property.

Smith and Prosser, 3.

Soviet Union: Russian issue of Chinese 5 per cent. Reorganisation Loan, 1913: liability of Chinese Government on bonds seized by Soviet Government, 1-3.

SOV—WIE.

Soviet Union: immunity of official agents from processes of British courts, 19-21.

T.

Treaty of Peace (Austria): application of article 249^e to Austrian funds sequestrated in Constantinople by Allied Powers, 21-23.

" " (Germany): Effect of withdrawal of British troops from Rhine Territories, 8-10.

" " (Germany): validity of Franco-Belgian advance into Ruhr Valley, 10-15.

" " (Germany): interpretation of paragraphs 17 and 18 of Annex II to Part VIII, 10-17.

" " (Germany): application of article 297^e to German funds sequestrated in Constantinople by Allied Powers, 21-23.

Treaty of Saint-Germain. *See* Treaty of Peace (Austria).

Treaty of Versailles. *See* Treaty of Peace (Germany).

W.

Wiener Bankverein, 21.

Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c : 1923.

CHINA.

[F 1537/371/10/1923]

No. 1.

[May 17, 1923.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, May 7, 1923.

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to request the favour of your observations on the following matter:—

1. Under an agreement with the Chinese Government dated the 26th April, 1913, five banks (British, German, French, Russian and Japanese) issued in their respective capitals, on behalf of the Chinese Government, a loan of 25,000,000*l.* The bonds of each of the five issues ranked concurrently, and all the coupons were payable at any of the five banks at a fixed rate of exchange.

2. The present case concerns the Russian issue of this loan, issued by the Russo-Asiatic Bank.

3. Owing to the outbreak of war, the exchange of the provisional scrip certificates for definite bonds proceeded slowly, and when the Bolshevik revolution broke out in November 1917 certain of the subscribers to the Russian issue were still in possession of the scrip certificates. The bonds to be issued in return for the scrip had been prepared, and were lying at the Russo-Asiatic Bank in Petrograd awaiting delivery to the parties entitled. When the banks were nationalised in Russia these bonds passed into the power of the Soviet Government.

4. In 1920 the Soviet Government obtained permission from His Majesty's Government to purchase supplies of drugs in this country, and, in payment, to sell bonds of the Russian issue of the 1913 Chinese Government loan to the value of 150,000*l.* The facts stated in the preceding paragraphs were at that time unknown to His Majesty's Government, who had no reason to doubt that the bonds offered for sale by the Soviet Government would be genuine bonds, of which the Soviet Government were entitled to dispose in the ordinary course. On the strength of this permission the Moscow Narodny Bank, on behalf of the Soviet Government, sold in London bonds which had been seized at the Russo-Asiatic Bank, Petrograd, and which were bonds destined for issue in exchange for the scrip certificates.

5. The title to, and authenticity of, these bonds does not appear to have been questioned till 1922, and interest was duly paid on them up to the 1st January of that year. In June 1922 the Chinese Government, having discovered that they were in effect being required to pay interest on two instruments issued in respect of the same obligation (*i.e.*, on the scrip certificates and on the definitive bond), published a notice that payment of the coupons of bonds of the Russian issue would henceforth only

2161 [11557]

B



be made on proof that such bonds had been delivered prior to December 1917. At the same time, holders still in possession of the provisional scrip certificates received in exchange bonds of a new series called "green bonds" which were recognised as valid by the Chinese Government. These measures have been taken by the Chinese Government at the instance of the consortium of bankers which now controls in great measure the loan operations of the Chinese Government, and a copy of a letter from the Hong Kong and Shanghai Banking Corporation explaining the steps taken is enclosed.

6. The result of these measures has been to confirm the rights of the holders of the scrip certificates, and to invalidate the rights of purchasers of the bonds placed on the market by the Soviet Government in the circumstances set out in paragraph 4. These purchasers have protested to the Foreign Office, and request that representations should be made to the Chinese Government to secure recognition of these bonds. Copies of two letters from the Council of Foreign Bondholders are transmitted herewith for your information.

7. The Secretary of State is not aware of any precedents which show whether a bond, which, though good and complete on the face of it, having been deposited with a bank of issue for delivery in return for the scrip certificates, is placed on the market without the fulfilment of this condition, and is then purchased in good faith, constitutes a valid obligation against the party liable under the bond. If it does so it would appear that the Chinese Government may properly be pressed to pay interest on the bonds seized and sold by the Soviet Government irrespective of the liability of the Chinese Government to pay interest on the scrip still held by the original subscribers or on the green bonds now issued to replace that scrip. In this case the Chinese Government would presumably be entitled to claim repayment by the Soviet Government in due course of the sums which they have had to pay on the bonds seized and sold by the latter Government.

8. I am to request that you will be so good as to take this question into your consideration and to favour the Secretary of State with your opinion as to whether, in the circumstances indicated above, the Chinese Government are liable on the bonds seized by the Soviet Government and sold on the London market and purchased in good faith by their present holders.

9. The Secretary of State would also be grateful for any observations of a general character which you may be good enough to offer.

I have, &c.

B. C. NEWTON.

List of Papers.

- (A.) Hong Kong and Shanghai Banking Corporation to Foreign Office, June 30, 1922 (F 2218/1196/10/1922).
- (B.) Council of Foreign Bondholders to Foreign Office, February 9, 1923 (F 371/371/10/1923).
- (C.) Council of Foreign Bondholders, March 5, 1923 (F 659/371/10/1923).

Report.

1. The bonds in question in this case are bearer bonds, and by English law are undoubtedly negotiable instruments. The payor is an independent sovereign Government, and, therefore, is under no legal liability unless it chooses to waive its sovereignty and to submit to the jurisdiction of a municipal court. We assume, for the purposes of this opinion, that we are desired to treat the question as if no point as to independent sovereignty were being taken.

2. If the bonds had been issued by the Chinese Government to the various banks the question would, in our opinion, have been free from doubt. A holder in due course of a negotiable instrument is not affected by any defect of title in his transferor, and even if the instrument be stolen he acquires a good title against the parties liable on the instrument.

3. The difficulty in this case arises from the fact that the bonds never were issued by the Chinese Government. It is apparent from the agreement of the 26th April, 1913, that the bonds were received at the banks as agents of the Government in order that the banks might issue them to the persons subscribing to the loan. The bonds now in question were seized by the Soviet Government before they had ever been issued, and the position is, in our opinion, the same as if they had been stolen while in

the custody of the Chinese Government. This gives rise to a point of considerable difficulty. It was laid down in *Ingham v. Primrose*, 7, C.B.N.S. 82, that if a completed negotiable instrument was stolen before issue a holder in due course did acquire a good title, and the parties of the instrument would have no defence to a claim by such a holder. But this decision was doubted by Lord Esher in *Baxendale v. Bennett*, 3, Q.B.D. 525; and the actual decision in the case was stated by Vaughan Williams, L. J., in *Smith v. Prosser*, 1907 (2), K.B. 735, to be no longer law. On the other hand, Lord Collins, in *Nash v. De Freville*, 1900 (2), Q.B. 72, speaks of the judgment in *Ingham v. Primrose* as at all events sound in principle; and the case is referred to by Lord Finlay and discussed without disapproval in *London Joint Stock Bank (Limited) v. Macmillan*, 1918, A.C. 777. Byles, on Bills in the 1923 edition, at p. 159, is inclined to think that *Ingham and Primrose* was correctly decided. By section 21 (2) of "The Bills of Exchange Act, 1882," valid delivery of a Bill is conclusively presumed in favour of a holder in due course; and by section 2 of the same Act issue means the first delivery of a Bill complete in form to a person who takes it as a holder.

In these circumstances, we have come to the conclusion that the law is correctly stated in *Ingham v. Primrose*, and that by English law a party to a Bill is liable on it to a holder in due course, although it has been stolen from him or from his agent before issue. The present case is further complicated by the fact that the bond was presumably intended to be issued in Russia, and that it was in Russia that the theft took place; but the negotiation of the bond took place in England, and we have come to the conclusion that the liability of the parties upon it to the English holder depends upon English law. For these reasons we answer the question submitted to us in the affirmative.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
May 17, 1923.

GENERAL.

[W 3763/3763/50/1924]

No. 1^A.

[Colonial Office.]

[April 11, 1923.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, January 26, 1923.

WITH reference to your predecessors' Report* of the 5th August, 1921, regarding the proposed amendment of the British North America Act, respecting extra-territorial legislation, I am directed by the Duke of Devonshire to transmit to you a copy of a despatch on the subject from the Governor-General of Canada.

2. The Duke of Devonshire would be obliged if you would advise him whether, in your opinion, the modifications suggested by the Canadian Government in the formula proposed in your predecessors' Report are such as to render the formula open to the objection that it goes beyond the expressed wishes and intentions of the Canadian Government, and, if so, in what respects.

I am, &c.

C. T. DAVIS.

Enclosure.

Governor-General of Canada to the Duke of Devonshire.

My Lord Duke,

Government House, Ottawa, December 19, 1922.

WITH reference to Mr. Churchill's Secret Despatch of the 18th August, 1921, I have the honour to transmit herewith copies of an Approved Minute of the Privy Council for Canada relative to the proposed amendment of the British North America Act respecting extra-territorial legislation.

I have, &c.

BYNG OF VIMY.

* Confidential 11938, p. 24.



GENERAL

Sub-Enclosure.

Certified Copy of a Report of the Committee of the Privy Council, approved by His Excellency the Governor-General on December 11, 1922.

(P.C. 2494.)

THE Committee of the Privy Council have had before them a Report, dated the 16th November, 1922, from the Minister of Justice, representing that he has had under consideration the Despatch (Secret) of the Right Honourable the Secretary of State for the Colonies of the 18th August, 1921, with regard to the proposed amendment to "The British North America Act, 1867," respecting extra-territorial legislation. Mr. Churchill states that he has been in communication with the Law Officers of the Crown with a view to the advisability of submitting an alternative form of enactment, and that, after careful consideration, they propose the substitution of the following, viz. :—

"An enactment of the Parliament of Canada may operate extra-territorially, provided that, and in so far as such extra-territorial operation is ancillary to, and necessary for, its enforcement as a law for the peace, order and good government of Canada."

The Minister observes that the amendment originally proposed and as set out in the Order in Council of the 5th February, 1920, is expressed as follows :—

"An enactment of the Parliament of Canada otherwise *intra vires*, shall operate, and be deemed to have operated, extra-territorially according to its intention in the like manner and to the same extent as if enacted by the Parliament of the United Kingdom."

The Minister, upon careful consideration, finds himself unable to realise the force of the objection to the last-quoted draft which was entertained by the Law Officers of the Crown, and, moreover, he considers the alternative form submitted by Mr. Churchill's despatch unacceptable principally because the validity of the legislation under a power so expressed may be said to depend upon whether the judicial tribunals would consider the legislation necessary; but, adopting the outline of the draft submitted by the Law Officers of the Crown, it would appear to answer the purpose if modified to read as follows :—

"An enactment of the Parliament of Canada, if expressed to operate extra-territorially, shall have, and be deemed to have had, that operation if and in so far as it is a law for or ancillary to the peace, order and good government of Canada."

The Minister, therefore, while expressing his preference for the form of enactment as originally framed, submits, by way of compromise, and in order to avoid further discussion, that the draft last herein quoted may be adopted as giving sufficient legislative expression to the extra-territorial authority of the Dominion.

The Committee concur in the foregoing, and submit the same for your Excellency's approval.

RODOLPHE BOUDREAU,
Clerk of the Privy Council.

Report.

In our opinion the modifications suggested by the Canadian Government do not materially affect the formula proposed by our predecessors, and they may properly be accepted.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

*Law Officers' Department,
April 11, 1923.*

GENERAL

[W 3763/3763/50/1924]

No. 1^B.

[Colonial Office.]

[July 21, 1923.]

*Colonial Office to the Law Officers of the Crown.**Downing Street, June 29, 1923.*

Gentlemen,

I AM directed by the Duke of Devonshire to request you to take into your consideration the position resulting from article 73 of the Constitution of the Irish Free State, which is set out in the schedule to "The Irish Free State Constitution Act, 1922 (Session 2)," with regard to the extra-territorial effect of existing Imperial legislation which is thereby continued in force, and in particular with regard to "The Steam Trawling (Ireland) Act, 1889," and "The Fisheries (Ireland) Act, 1901."

2. Under "The Steam Trawling (Ireland) Act, 1889," bye-laws might be made, and have in fact been made, by the Department of Agriculture and Technical Instruction for Ireland prohibiting steam trawling within areas specified in such bye-laws outside the 3-mile limit, and the landing in Ireland of any fish caught in contravention of any such bye-laws was made an offence; and under "The Fisheries (Ireland) Act, 1901," penalties were imposed for the contravention of any such bye-laws, irrespective of whether the fish was landed in Ireland, and summonses in respect of offences against the bye-laws might be served anywhere within the United Kingdom.

3. These Acts and the bye-laws made thereunder were in force in the Irish Free State at the date of the coming into operation of the Constitution, and therefore, in accordance with article 73 of the Constitution, until they have been repealed or amended by the Free State Parliament, they remain of full force and effect in that State to the extent to which they are not inconsistent with the Constitution.

4. Section 2 of the Constitution of "The Irish Free State ('Saorstát Éireann') Act, 1922," which is set forth in the schedule to "The Irish Free State Constitution Act, 1922 (Session 2)," provides that the Constitution shall be construed with reference to the Articles of Agreement for a treaty between Great Britain and Ireland, and that, if any provision of the Constitution, or of any law made thereunder, is in any respect repugnant to any of the provisions of the treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative.

5. The Articles of Agreement referred to provide that Ireland shall have the same constitutional status as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa, and that the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada.

6. I am to enclose a memorandum which has been prepared in this Department as to various points which arise in the present connection, and to ask for the favour of your report at your early convenience on the following questions :—

- (1.) Whether the Act of 1889, together with the bye-laws made thereunder before December 1922, and the Act of 1901 are continued in force in the Irish Free State under article 73 of the Constitution with the same extra-territorial effect as before the establishment of the Irish Free State.
- (2.) If the answer to the preceding question is in the affirmative—
 - (a.) Whether the Ministry of Agriculture of the Irish Free State (to which Department the functions of the Department of Agriculture and Technical Instruction have been transferred) has power under the Act of 1889 to make further bye-laws with extra-territorial effect;
 - (b.) Whether the Irish Free State Parliament can either amend the Acts of 1889 and 1901 or pass any new legislation *in pari materia*, in either case with extra-territorial effect.
- (3.) If the answer to question No. (1) is in the negative, what is the present position with regard to the Acts and bye-laws in question.
- (4.) Generally as to the power (if any) of the Irish Free State Parliament under the Articles of Agreement and the Constitution to legislate with extra-territorial effect.

Extra-territorial effect of certain Imperial statutes in their application to the Irish Free State.



7. In this connection I am to refer to your Report of the 11th April* regarding the proposed amendment of the British North America Act respecting extra-territorial legislation, and to enquire what bearing in your opinion the proposed concession to Canada would, in view of the terms of the Articles of Agreement, have upon the powers of the Parliament of the Irish Free State.

I have, &c.
M. STURGIS.

Enclosure.

"The Steam Trawling (Ireland) Act, 1889," and "The Fisheries (Ireland) Act, 1901."

AN important general question is raised in connection with these Acts as to the position with regard to existing Imperial legislation having extra-territorial effect which is continued in force in the Irish Free State by article 73 of the Irish Free State Constitution.

It seems difficult to contend that the Irish Free State Courts would not have jurisdiction to administer that existing legislation (including bye-laws already made thereunder) with the same extra-territorial effect as before the establishment of the Irish Free State.

But two other questions then arise:—

- (a.) Can the Irish Free State executive authority, which has replaced or will replace the "Inspectors of Irish Fisheries," continue to make bye-laws with extra-territorial effect under the first of the two Fishery Acts in question?
- (b.) Can the Irish Free State Parliament either amend these Acts or pass any new legislation *in pari materia*, in either case with extra-territorial effect?

It is submitted that the Irish Free State Parliament has only the powers of a Dominion Legislature, and that it would be contrary to the treaty that that Parliament should deal with Imperial legislation continued in force in the Irish Free State under article 73 of the Constitution as if it possessed the powers of the Imperial Parliament, and that if it passed any legislation of such a character it would be void under section 2 of the "Constituent Act."

It would, however, be difficult to conceive a more extraordinary anomaly than that the Statute Law which the Irish Free State takes over under article 73 of the Constitution should continue to have the same "Imperial" effect, whilst if the Irish Free State wishes to repeal or amend it it can only substitute Statute Law having "Dominion" effect.

It might perhaps be contended that the executive of the Irish Free State cannot have wider power as to the issue of future statutory rules and orders under the continued legislation than the Irish Free State Legislature could give them by fresh legislation of its own, so that the answer to both questions (a) and (b) is in the negative; but if the answer to question (a) were held to be "yes" and the answer to question (b) to be "no," the anomaly would be even more glaring.

It may be that questions (a) and (b) are unlikely to arise with regard to the Fisheries Acts and bye-laws, and that the Irish Free State will be content to carry on with them as they stand subject to any necessary adaptations; but similar questions seem bound to arise sooner or later with regard to other Acts or rules which are continued in force in the Irish Free State under article 73 of the Constitution, and it would appear expedient for the Secretary of State to consult the Law Officers on the subject.

Report.

1. Our answer is in the affirmative. The Acts in question were enacted by the Imperial Parliament, and there is nothing in the creation of the Irish Free State which prevents their remaining as part of the law of that country.

2 (a). This question has given us considerable difficulty. It may be contended that, since the Imperial Parliament conferred the power to make bye-laws in respect of

* No. 1A.

extra-territorial waters on the Department of Agriculture for Ireland, and since the powers of that Department have now been transferred to the Ministry of Agriculture of the Irish Free State, that Ministry has now, by virtue of the Imperial enactment, the power to make such bye-laws, and that, if the Imperial Parliament does not desire those powers to continue, the remedy is to repeal or modify the Act conferring them. We have, however, come to the conclusion that this not the true view, and that the answer to this question is in the negative. The Irish Free State executive has only authority to act within the limits of that Dominion, and we think that the only powers transferred to the Irish Free State Ministry must be powers to make bye-laws within the limits of the Irish Free State.

2 (b). Our answer to this question is in the negative. Dominion Parliaments have only jurisdiction to legislate for matters occurring within the territorial limits of the Dominion (see *A.G. v. McLeod*, 1891, A.C. 455).

3. This does not arise.

4. In our opinion there is at present no such power.

5. The proposed concession to Canada would alter our answer to question 2 (b). If the proposed concession were made, the Canadian Parliament would have the right to legislate with extra-territorial effect, so long as the particular enactment was a law for or ancillary to the peace, order and good government of Canada. Since the position of the Irish Free State is that of the Dominion of Canada, the Irish Free State would be entitled to claim that it had the same power.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
July 21, 1923.

[W 3763/3763/50/1924].

No. 1^c.

[Colonial Office.]

[December 31, 1923.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, November 13, 1923.

I AM directed by the Duke of Devonshire to refer to the letter from this Department of the 29th June last and your Report* of the 21st July last with reference to the extra-territorial effect of certain Imperial Statutes in their present application to the Irish Free State, in paragraph 5 of which Report you expressed the view that, if the proposal to confer power on the Canadian Parliament to legislate with extra-territorial effect were carried out, the Irish Free State, since its position under the Articles of Agreement for a Treaty between Great Britain and Ireland (which may for convenience be called the Treaty) is that of the Dominion of Canada, would be entitled to claim that it had the same power.

I am to say that the question which was raised by implication in paragraph 7 of the reference from this Department of the 29th June, and which the Secretary of State would now desire to put in an express form, is whether, under Article 2 of the Treaty, the constitutional position of the Irish Free State is to be that of Canada at the date when the Treaty was signed (6th December, 1921), or whether the constitutional relations between the United Kingdom and the Irish Free State are to be affected legally and constitutionally by every change taking place after that date in the constitutional relations between the United Kingdom and Canada.

I am to explain that his Grace is informed that at the time when the negotiations for the Treaty were being carried on it was a fundamental part of the intended settlement that the constitutional relations between the United Kingdom and the Irish Free State should be those actually at that time existing between the United Kingdom and Canada.

It was for this reason, to give one illustration, that, with the concurrence of Lord Hewart (then Attorney-General), the British delegates did not press for any provision in the Treaty as to appeals to the Privy Council, since, in Lord Hewart's opinion, there was no doubt that the then existing position as to appeals from Canada to the Privy Council would be maintained with regard to the Irish Free State, even if appeal to the Privy Council from Canada should at any future time be abolished.

* No. 1B.

Extra-territorial effect of certain Imperial Statutes in their application to the Irish Free State.



It is true that this particular point does not arise on the construction of Article 2 of the Treaty, since the prerogative of the Crown to grant special leave to appeal to the Privy Council has been expressly provided by the proviso to Article 66 of the Irish Free State Constitution, but the question of construction does arise with regard to the proposed extension of the power of the Canadian Parliament, and may arise from time to time with other changes in the constitutional relations between the United Kingdom and Canada.

It is, therefore, one of the greatest possible importance, and I am directed by the Secretary of State to request you to take the construction of the Treaty again into your consideration, and to report whether, on such further consideration, you are able to modify the opinion expressed in paragraph 5 of your Report of the 21st July.

I am, &c.

J. E. MASTERTON SMITH.

Report.

The question raised in the letter of the 13th November is one of great constitutional importance, and also one of considerable difficulty.

We have, however, come to the conclusion, after carefully considering the problem, that the view expressed by Lord Hewart is the true one, and that the opinion expressed in paragraph 5 of our Report of the 21st July should be altered accordingly.

The relevant words occur in Article 2 of the Treaty that "the law, practice and constitutional usage governing the relationship of the Crown, or the representative of the Crown, and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State." It is of the essence of the British Constitution that the practice and constitutional usage governing the relationship of Great Britain to the self-governing Dominions are growing and developing from year to year; and at first sight it seems very startling to hold that in the case of Southern Ireland the practice and constitutional usage are stereotyped as if existing on a particular date, while with the rest of the Empire they are constantly altering.

We think, however, that the answer to this difficulty is to be found in the reflection that although the Treaty gives to Southern Ireland the practice and constitutional usage as existing between Great Britain and Canada at the date of the Treaty, there is nothing to prevent the development from time to time of that practice and constitutional usage in the same way as it has developed in the past, and will no doubt develop in the future, between Great Britain and the other self-governing Dominions.

The contrary view as to the construction of the Article would involve the difficulty that in theory at least Canada might hereafter surrender some of her present rights of self-government, and that it is very improbable that Southern Ireland can have agreed that her rights should depend upon arrangements made in the future between Great Britain and Canada with regard to which she might not be consulted at all.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
December 31, 1923.

GERMANY.

[C 2266/313/18/1923]

No. 2.

[February 3, 1923.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 31, 1923.

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to request the favour of your immediate observations on the following matter:—

With-
drawal of
British
troops from
Rhine
Territories:
Effect.

1. Article 428 of the Treaty of Versailles provides that, "as a guarantee for the execution of the present treaty by Germany, the German territory situated to the

west of the Rhine, together with the bridgeheads, will be occupied by Allied and Associated troops for a period of fifteen years from the coming into force of the present treaty.

It will be noticed that this article provides only for an occupation by "Allied and Associated troops," and makes no specific mention of British troops.

Articles 429 and 431 enumerate the conditions under which the occupation may in certain circumstances be restricted in extent and duration. Article 430 lays down the circumstances in which any part of the occupied territory which has been evacuated may be reoccupied.

Article 432 provides that "all matters relating to the occupation and not provided for by the present treaty shall be regulated by subsequent agreements which Germany hereby undertakes to observe."

2. The only relevant agreement of this nature is the "agreement with regard to the military occupation of the territories of the Rhine," signed by representatives of the United States, Belgium, the British Empire, France and Germany on the 28th June, 1919. Article 1 of this agreement provides that "in accordance with article 428 and the following articles of the treaty of even date, the armed forces of the Allied and Associated Powers will continue in occupation of German territory (as such occupation is defined by article 5 of the Armistice Convention of the 11th November, 1918, as extended by article 7 of the additional convention of the 16th January, 1919) as a guarantee of the execution by Germany of the treaty." Article 2 of this agreement provides that "there shall be constituted a civilian body, styled the Inter-Allied Rhineland High Commission, which, except in so far as the treaty may otherwise provide, shall be the supreme representative of the Allied and Associated Powers within the occupied territory. It shall consist of four members, representing Belgium, France, Great Britain and the United States." Articles 3 and 5 of this agreement provide that "the High Commission shall have the power to issue ordinances so far as may be necessary for securing the maintenance, safety and requirements of the Allied and Associated forces." These ordinances are to "have the force of law," and are to be "recognised as such by all the Allied and Associated military authorities and by the German civil authorities." The civil administration of the occupied areas is to "remain in the hands of the German authorities," and to "continue under German law and under the authority of the Central German Government, except in so far as it may be necessary for the High Commission by ordinance to adapt that administration to the needs and circumstances of military occupation."

3. Owing to the situation which has arisen in the territories occupied under article 428 of the Treaty of Versailles and under the Rhineland Agreement, as a result of the independent action taken by the French and Belgian Governments against Germany, it may become necessary for His Majesty's Government at short notice to weigh the arguments for and against the retention in these territories of the British army of occupation and of the British member of the Rhineland High Commission.

4. In these circumstances your opinion is requested on the following points:—

- (1) In view of the wording of article 428, referred to above, would the withdrawal of the British troops involve a breach of any obligations accepted by His Majesty's Government under that article and under article 1 of the Rhineland Agreement?
- (2) Would the withdrawal of the British member of the Rhineland High Commission involve a breach by His Majesty's Government of article 2 of the Rhineland Agreement?
- (3) Would the withdrawal of the British member of the Rhineland High Commission affect the validity of the Rhineland Agreement as between Germany on the one hand, and France and Belgium on the other?

5. I am also to invite the favour of your observations on any matter which arises generally in the consideration of these questions.

6. Copies of the Treaty of Versailles and of the Rhineland Agreement are enclosed for your information and guidance.

I have, &c.

MILES W. LAMPSON.

[11557]

*Report.*

IN our opinion the withdrawal of the British troops from the territories of the Rhine would not form a breach of any obligation accepted by His Majesty's Government under the Treaty of Versailles or under the Rhineland Agreement of the 28th June, 1919. The treaty and the agreement gave to the Allied and Associated Powers the right to occupy certain German territory; they did not impose upon any of the Powers an obligation to continue occupation unless they so desired.

2. In our opinion the withdrawal of the British member of the Rhineland High Commission would not involve a breach by His Majesty's Government of article 2 of the Rhineland Agreement. That agreement was not an agreement of the four Allied Powers *inter se*, but was an agreement between the four Powers jointly on the one hand and Germany on the other. Article 2 and the following articles amount to a grant by Germany of certain defined powers to the body called the Inter-Allied Rhineland High Commission, and article 2 defines the composition of that body. In our opinion there is no obligation on the part of the four Powers to set up the commission or to continue its existence.

3. The withdrawal of the British member of the Rhineland High Commission would not affect the validity of the Rhineland Agreement, but it would destroy the existence of the Inter-Allied Rhineland High Commission. The result would be that there would no longer be any right under the agreement to issue ordinances, since the only body that can issue such ordinances is the High Commission, and that body will no longer exist. It would not be competent to the representatives of France and Belgium under the agreement to issue ordinances authorised by article 3, since they are not the High Commission, which must, by virtue of article 2, consist of the four members representing the four Allied Powers.

4. Ordinances already issued by the High Commission would not be invalidated by the withdrawal of the British commissioner.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
February 3, 1923.

[C 4535/313/18/1923]

No. 3.

[April 11, 1923.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 4, 1923.

Validity
under
Treaty of
Versailles,
1919, of
Franco-
Belgian
advance
into the
Ruhr.

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to transmit to you herewith certain papers connected with the French and Belgian advance into the Ruhr, as it seems to his Lordship necessary that the validity of this action on the part of these two Governments and the question whether their action can be reconciled with the Treaty of Versailles should now be considered.

2. On the 23rd February the German Ambassador in London handed to Lord Curzon a lengthy note (Paper (A)) regarding the illegality of the action of the French and Belgian Governments. It is understood that copies of this note were handed to all the Allied Governments. On the 9th March the French Government transmitted to the British Embassy in Paris a memorandum in answer to the German note (Paper (B)).

3. The German note (Paper (A)) deals not only with the legality of the advance into the Ruhr by France and Belgium, but also with the action taken by those Governments within the territory which they have occupied. Questions relating to such action within the Ruhr will, if necessary, be made the subject of a separate reference at a later date. At the present stage your advice is sought only with regard to the questions of the right of one or more of the Allied Governments to take independent action in the nature of a further occupation of German territory and of the right of France and Belgium to take such action in this specific case.

4. The first section of the German note raises three points, of which the first is less important than the others. It is that the decision taken by the French and Belgian Governments and notified to the German Government on the 10th January

(see Paper (D)) that they had decided to march into the Ruhr was based on the default declared by the Reparation Commission as having been committed by Germany in the execution of the Reparation Commission's programme for the delivery of timber and coal to France. The note of the Reparation Commission, however, in which this programme was embodied, dated the 21st March, 1922, contained a statement (see concluding paragraph of section 1 of Reparation Commission's note of the 21st March, 1922, p. 57 of 11968—Paper (C)) that any failure on the part of Germany to fulfil these deliveries would entail the payment of additional sums in cash by Germany by the end of 1922 in lieu of the deliveries in kind. The Germans therefore maintain that default on the part of Germany to make the deliveries in accordance with the programme could not justify the application of coercive measures in the form of an occupation of territory, but should be limited to the exaction of sums of money in cash.

5. The French reply on this point is that, as on the 12th July, 1922 (see p. 76 of 11968—Paper (C)), Germany had asked for a moratorium in respect of all cash payments throughout the year 1922, and had made a further application on the 14th November, 1922 (see p. 40 of 12071—Paper (E)), for a moratorium for 1923 and 1924, it was obvious that Germany could not make the further cash payments contemplated in the concluding sentences of the Reparation Commission's decision of the 21st March, 1922, and the Allied Governments were, therefore, entitled to resort to such measures of coercion as the Treaty of Versailles contemplated.

6. The second point raised in the first section of the German note is that even if Germany defaulted in timber and coal deliveries to such extent as to bring into operation paragraphs 17 and 18 of Annex II to the Reparation Section of the treaty, the occupation of further German territory would not be justified.

7. The German argument is set out on p. 2 of the printed memorandum (Paper (A)), and is, put briefly, that in view of the provisions of Part XIV of the treaty, and particularly of article 430, it is clear that paragraph 18 of the annex cannot have contemplated occupation of territory as one of the "other measures which the respective Governments might determine to be necessary in the circumstances."

8. The French reply on this point is very concise. It is that on two occasions the Allied Powers informed the German Government that in certain events the Allies would proceed to a further occupation of German territory, and that the Germans did not protest.

9. This statement in the French note is true, but it may be well to explain the circumstances in which these notifications were made to the Germans.

10. The first notification was contained in article 7 of the Spa Coal Protocol of the 16th July, 1920, of which the text will be found on p. 7 of Paper (F) (12030). The circumstances in which this coal agreement was signed were that Germany was falling seriously into default with her coal deliveries at that time, and was alleging that the principal cause was the shortage of food in the mining districts which rendered it impossible for the miners to work up to their proper capacity. Accordingly, the Allied Powers agreed to make certain advances to the German Government for food for the miners, and the German Government undertook to make increased coal deliveries. Germany was a party to this agreement and, therefore, accepted the provisions of article 7.

11. The second occasion was in article (d) of the Allied ultimatum of the 5th May, 1921 (see p. 1 of 11968—Paper (C)). Upon this occasion the German Government did not, as in the case of the Spa Coal Protocol, formally accept the Allied threat to occupy the Ruhr (see German Ambassador to Mr. Lloyd George, 11th May, 1921, p. 8 of 11968—Paper (C)). Lord Curzon, however, is advised that failure to protest against the inclusion of the provisions about the occupation of the Ruhr in the above two agreements cannot be treated as an admission on Germany's part that mere failure to carry out a reparation obligation under the Treaty of Versailles justifies an occupation of German territory outside the Rhineland.

12. The view hitherto acted upon by this Department is that as the occupation of German territory provided for in Part XIV of the Treaty of Versailles as a guarantee of the execution of the treaty was a joint occupation, and as article 430 provides that a refusal on the part of Germany to observe any part of the reparation obligations justifies only the reoccupation by the Allies as a joint operation of territory evacuated under article 429, a failure on the part of Germany to observe her reparation obligations could not justify an individual Allied Power in proceeding to the independent occupation of German territory outside those parts specified in Part XIV of the treaty. This view is confirmed by the opinion given by the Solicitor-General on the 28th December, 1922 (Paper (M)). Stress has not, however, been laid upon this construction

[11557]

c 2



of the treaty for the reason that His Majesty's Government when raising objection to the French advance upon Frankfurt in 1920, did so not on the ground that it was contrary to the treaty (see Papers Nos. 61 and 64, pp. 41 and 46 of 11957—Paper (G)), but merely on the ground that it was a violation of M. Millerand's promise that no such action should be taken by the French, except in co-operation with the other Allies. (It should be recorded in passing that the recent Franco-Belgian independent action in the Ruhr and Rhineland is an even more glaring breach of this promise.) Similarly, when the towns of Ruhrort, Duisburg and Düsseldorf were occupied, towns which still remain in Allied occupation, Great Britain was herself a party to the occupation (see pp. 26 and 27 of 11956, Paper (H)), and Lord Curzon's advisers have always assumed that at the time when such occupation was acquiesced in by His Majesty's Government the question whether such occupation was compatible with article 430 was not considered.

13. The third point raised in section 1 of the German note is that the non-fulfilment by Germany of her reparation obligations cannot give rise on the part of the Allies to measures of coercion which are out of all proportion in their severity to the extent of the German default. The French answer to this point is to deny the allegation that the German default is only modest in extent, and to lay stress on the general failure of Germany to carry out the reparation obligations in the treaty, and maintains in addition that, in any case, on the 26th January of this year the Reparation Commission declared Germany's default to be general (see Paper (J)).

14. The fourth point raised by the German note is that paragraphs 17 and 18 of Annex II to Section VIII of the Treaty of Versailles do not justify separate action by individual Allied Governments. The French answer on this point consists very largely of a reference to the action taken by His Majesty's Government on the 29th October, 1920, as indicating the right of Allied Governments to act independently in matters relating to reparations (see p. 2 (b) of Foreign Office memorandum of the 10th January, 1922—Paper (K)).

15. The action taken by His Majesty's Government at that time consisted in announcing that if the contingency arose of action being required under paragraph 18, they would not attempt to seize property acquired by German nationals in the United Kingdom after the coming into force of the treaty. It will be remembered that under the terms of the Treaty of Versailles a charge on all property in Allied territory belonging to German nationals at the date of the coming into force of the Treaty of Peace was imposed for certain purposes, the property being made available for the payment of German debts owing to Allied nationals and of certain claims arising out of the injury to Allied property in Germany during the war owing to the war measures of the German Government. It was for the purpose of encouraging trade that His Majesty's Government decided to make the above announcement. They did so without previous consultation with the Allies. From this incident, the French note argues that as Germany made no protest against the British announcement, she thereby accepted the view that the Allied Governments were entitled to take individual action.

16. The Foreign Office have hitherto acted upon the assumption that the word "respective" in paragraph 18 indicated that the action to be taken under that paragraph was action by the individual Government and was to be taken in the discretion of each such Government. It will be noticed that in paragraph 17 the Reparation Commission is to give notice of default to *each* of the interested Powers, and paragraph 18 provides that the measures which the Allied and Associated Powers have the right to take may include economic and financial prohibitions and reprisals and such other measures as the respective Governments may determine to be necessary. The appendix to Paper (L) contains a memorandum by the legal adviser to this department, dated June 1922, giving what he believes to be the proper interpretation of these provisions, an interpretation on which the Foreign Office had since that date acted. In his opinion the presence of the word "respective" showed that action must be taken by the individual Governments, but the fact that it was to be taken by individual Governments itself curtailed the type of action which was legitimate.

17. In any case the Foreign Office have always held that in this matter the final decision respecting the interpretation of the treaty rested with the Reparation Commission, who, under paragraph 12 of Annex II, to the reparation clauses, were specially entrusted with the duty of interpreting them. In this view the Foreign Office were confirmed by the opinion given by the Solicitor-General on the 28th December, 1922 (Paper (M)). In the light, however, of the further considerations advanced since that date by the legal adviser to the British delegation to the Reparation Commission (Paper (N)), it appears desirable that this point should again be considered.

18. I am accordingly to request that you will favour the Secretary of State with your opinion on the following points:—

- (1.) Whether in view of the terms of the Reparation Commission's note of the 21st March, 1922, Germany is entitled to claim that her default in making the deliveries stipulated therein only justified the exaction of further cash payments.
- (2.) Whether Germany's default in fulfilling her reparation obligations justifies the occupation, under the treaty, of German territory, in addition to that provided for in article 428 of the Treaty of Versailles and in the Rhineland Agreement.
- (3.) Whether, assuming that the answer to (2) is in the affirmative, such further occupation must, under the treaty, be a joint Allied occupation or may be undertaken separately by one or more individual Allied Governments.
- (4.) Whether the absence of any specific protest by the German Government against the terms of article 7 of the Spa Coal Agreement and article 4 of the Allied ultimatum of May 1921 constitutes an admission by Germany that the occupation of further German territory on the part of the Allies is rendered legitimate by a new reparation default.
- (5.) Whether the German contention is well founded that any steps taken by the Allies because of Germany's reparation default must be in proportion to the extent of the default.
- (6.) Whether paragraphs 17 and 18 of Annex II to Part VIII of the Treaty of Versailles justify action by individual Allied Governments when the Reparation Commission notify a default.
- (7.) Whether, if such action by an individual Allied Government is legitimate, the action taken must be of the type which individual Governments could take within the limits of their own sovereignty.
- (8.) Whether it is for the Reparation Commission, acting under paragraph 12 of Annex II, to interpret paragraph 18 of that annex.

19. I am to add that any other papers, materials or explanations which you may desire in order to elucidate any of the above points shall be supplied.

20. Lord Curzon would be glad to receive any general observations which you may desire to offer with your answers to the above questions.

21. I am to ask for the favour of an early reply in view of the fact that a debate on the situation in the Ruhr may be expected to take place in the House of Commons very soon after its reassembly on the 10th April.

I have, &c.
MILES W. LAMPSON.

List of Papers.

- (A.) M. Sthamer to Lord Curzon, February 23, 1923. [C 3938/313/18/1923.]
- (B.) Lord Crewe, No. 600, March 10, 1923. [C 4535/313/18/1923.]
- (C.) Confidential No. 11968.
- (D.) Lord Crewe, No. 52, January 10, 1923. [C 572/313/18/1923.]
- (E.) Confidential No. 12071.
- (F.) Confidential No. 12030.
- (G.) Confidential No. 11957.
- (H.) Confidential No. 11956.
- (J.) British Delegation, Reparation Commission, to Treasury, January 27, 1923. [C 1795/1/18/1923.]
- (K.) Memorandum on French pledge respecting separate action against Germany, January 10, 1923. [C 529/529/18/1923.]
- (L.) Memorandum on the Sanctions of March 1921, June 20, 1922. [C 10280/99/18/1922.]
- (M.) Opinion of the Solicitor-General, December 28, 1922.
- (N.) Sir J. Bradbury to Mr. Niemeyer, January 17, 1923. (Extract.)

Report.

1. Our answer to the first question is in the negative. If Germany had made the whole of the cash payments stipulated in the Reparation Commission note of the 21st March, 1922, and had tendered, in addition, cash payments equivalent to the short deliveries in kind made up to the end of September 1922, she might perhaps



have claimed that the terms of the note of the 21st March, 1922, had misled her into believing that she was entitled to pay cash instead of making deliveries. But these are not the facts; Germany has already intimated her inability to make the payments in cash required by the Reparation Commission, and it seems to us impossible seriously to contend that she is entitled to make voluntary default in the deliveries in kind and then to claim that she is discharged from all responsibility if she adds to the cash liabilities, which she has already stated she cannot pay, a sum equivalent to these deliveries.

In our opinion, the default in making the deliveries stipulated in the Reparation Commission note of the 1st March, 1922, gives to the Allied and Associated Powers the right to take the measures stipulated in paragraph 18 of Annex II of Part VIII of the treaty.

2. This question raises a point of great difficulty; but we have come to the conclusion that the answer is in the negative. In our opinion the words "economic and financial prohibitions and reprisals" indicate the kind of measures that the paragraph has in view, and the general words following must be interpreted in the light of those words and must be limited to measures of the kind so indicated.

We think that this view is greatly strengthened by the provisions contained in article 430 of the treaty, since it would be idle to stipulate expressly for reoccupation of the occupied territories in event of default if the Allied and Associated Powers had unlimited right of occupation of any German territory already.

3. This question does not arise.

4. The answer to this question is in the negative. The rights of the Allied and Associated Powers depend upon the language of the treaty, and the fact that Germany, when threatened with occupation of part of her territory, did not specifically protest against the threatened action as an infraction of the treaty cannot, in our opinion, give to the Allied and Associated Powers greater rights than the treaty confers.

5. The answer to the fifth question is in the negative. By virtue of paragraph 18 of Annex II it is for the respective Governments of the Allied and Associated Powers to determine what measures are necessary in the circumstances. So long as the measures are within the rights conferred by that paragraph Germany has no right to protest; her remedy is to make good her default.

6. This question is again a very difficult one, but we have come to the conclusion that the answer is in the affirmative. It seems to us that the scheme of the annex is for the Reparation Commission to give notice to the interested Powers in the event of default, and for the respective Governments of those Powers to take such measures within paragraph 18 as they may determine to be necessary. We do not think that they must all agree or act in concert. The contrary view would involve that no Government could take any measures of reprisal within the limits of its own sovereignty to redress a voluntary default by Germany unless all the other Governments concurred in its action. The answer to this question fortifies the conclusion at which we have arrived in answer to the second question, since it is difficult to imagine that each separate Government has an independent right to occupy any, or all, of the territory of Germany without regard to the wishes of the other Governments concerned.

7. Our answer to the seventh question is in the affirmative, in the sense that the measures must be limited to those areas over which the Allied Government is exercising sovereignty. We do not regard measures within the area of the German territory occupied under article 428 as outside the limits of paragraph 18.

8. In our opinion the Reparation Commission has authority to interpret paragraph 18 of Annex II by virtue of the provisions of paragraph 12 of that annex. We do not think that it can be compelled to exercise that authority, and any decision to be effective must be unanimous; but we think it is taking too narrow a view of the authority of the commission to limit its powers of interpretation to cases in which it is actually exercising powers of administration.

9. We would point out that the opinion which we have expressed seems to be inconsistent with the arguments of the present Lord Chief Justice in his speech in the House of Commons on the 17th March, 1921; and that it is difficult to reconcile it with the action threatened by Great Britain in conjunction with other Allied Powers in March and May of that year. It would seem, therefore, that an attempt to base any protest upon our view of the meaning of paragraph 18 of the annex would be open to the criticism that we were quite willing to treat the paragraph as having the wider meaning claimed for it so long as we desired ourselves to put pressure on Germany by occupation of territory, and that it is only when we object to another Allied Power taking that course that we set up this limited construction of its meaning.

It would therefore be better, so far as possible, to avoid laying stress upon the legal standpoint, although for the reasons stated we believe it to be sound.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
April 11, 1923.

[C 13098/313/18/1923]

No. 4.

[July 30, 1923.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 12, 1923.

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to transmit to you herewith certain papers connected with Ordinances Nos. 153 and 154 adopted by the Rhineland High Commission on the 15th March, and empowering the High Commission to seize in the occupied Rhineland territory certain material, goods and property due for delivery to the Allied Governments and to Allied nationals on reparation and restitution account and under private contracts.

2. It will be seen from the enclosed correspondence that His Majesty's Government have contested the validity, under the Rhineland Agreement, of the High Commission's action in this matter, and that the French Government, in their note of the 25th May, have claimed that, by reason of the voluntary default notified to the Allied Governments by the Reparation Commission under paragraph 17 of Annex II to the reparation clauses and in virtue of the rights thereby accruing to the Allied Governments under paragraph 18 of that annex, measures justified under paragraph 18 may, in conformity with the treaty, be taken by the High Commission, acting by a majority vote, within the territory occupied under the Rhineland Agreement.

3. With regard to this claim, the following observations appear to be relevant: Paragraph 17 of Annex II to the reparation clauses requires the Reparation Commission to give notice of default to each of the Allied Governments, and under paragraph 18 the measures against Germany are to be decided on and taken by the respective Governments. But the Rhineland Commission is, under the Rhineland Agreement, a joint Allied body representing Belgium, France and Great Britain, and it is only by reason of an Inter-Allied Agreement that it takes decisions by a majority. The logical conclusion to be drawn from the French Government's argument on this point would appear therefore to be that, notice of German default having been given to Great Britain as one of the Powers interested in reparation, France and Belgium would, in the Rhineland, be entitled to take action on behalf of Great Britain, irrespective of whether or not Great Britain concurs.

4. This conclusion seems so contrary to the language of paragraphs 17 and 18 of Annex II to the reparation clauses, as well as to that of the Rhineland Agreement, that it appears difficult, if not impossible, to accept it. As, however, it would appear to be, at least to some extent, supported by the second sentence of paragraph 7 of your opinion of the 11th April, wherein it is stated that, measures taken under paragraph 18 having to be limited to areas over which the Allied Government is exercising sovereignty, measures within the area of the German territory occupied under article 428 cannot be regarded as outside the limits of paragraph 18, I am to invite a further examination of this question and to say that the Secretary of State would be grateful for a fuller expression of your views.

5. Lord Curzon desires to add the following observations with regard to this passage in your opinion: In the first place, whilst it is clear that an act taken by the representative of an Allied Government within the Rhineland territory might be within the powers of a sovereign, it does not seem to follow that it would necessarily be within the powers conferred by the Rhineland Agreement upon the Rhineland Commission as representing the three occupying Governments—powers which are limited by article 3 of the Rhineland Agreement to "securing the maintenance, safety and requirements of the Allied and Associated forces." In the second place, the occupation contemplated by article 428 of the treaty (and by the Rhineland Agreement) was a joint occupation, and action by individual Governments in the Rhineland does

Interpreta-
tion of
Treaty of
Versailles:
Para-
graphs 17
and 18 of
Annex II to
Part VIII;
and of the
Rhineland
Agreement.



GERMANY.

not seem to have been contemplated at all. All action was to be taken by, and in the name of, the Rhineland Commission, which was to be the supreme representative of the Allied and Associated Powers within the occupied territory.

6. I am to request that you will be good enough to favour the Secretary of State with a further expression of opinion on the point whether action not covered by the Rhineland Agreement, but taken within the territory occupied under article 428 of the treaty (and under the Rhineland Agreement), can be held to be within the limits of paragraph 18.

I have, &c.
ALEXANDER CADOGAN.

List of Papers.

- (A.) Lord Kilmarnock to Lord Curzon, No. 121, March 16, 1923 [C 5094/708/18/1923].
- (B.) Lord Kilmarnock to Lord Curzon, No. 123, March 16, 1923 [C 5095/708/18/1923].
- (C.) Lord Curzon to Mr. Phipps (Paris), telegram No. 141, March 23, 1923 [C 5498/313/18/1923].
- (D.) Mr. Phipps (Paris) to Lord Curzon, No. 790, March 28, 1923 [C 5837/313/18/1923].
- (E.) Lord Curzon to Lord Crewe (Paris), No. 1627, May 11, 1923 [C 8035/313/18/1923].
- (F.) Lord Crewe (Paris) to Lord Curzon, No. 1261, May 28, 1923 [C 9404/313/18/1923].
- (G.) Foreign Office to Law Officers, April 4, 1923 [C 4535/313/18/1923].
- (H.) Law Officers to Lord Curzon, April 11, 1923 [C 4535/313/18/1923].
- (I.) Memorandum approved by the Council of the Principal Allied and Associated Powers on June 13, 1919.
- (J.) Rhineland Agreement, June 28, 1919.

Report.

1. By virtue of article 428 of the treaty the occupation of the Rhineland by Allied and Associated troops is prescribed as "a guarantee for the execution of the present treaty by Germany." By paragraph 18 of Annex II of the reparation part of the treaty the Allied and Associated Powers have the right to take such measures as the respective Governments may determine to be necessary in the circumstances, in the case of voluntary default by Germany. It seems to us an undue limitation of the language of the treaty to exclude from paragraph 18 measures taken within the territory which is occupied as guarantee for the execution of the treaty.

2. If the Allied and Associated Powers have the right to take measures in the occupied territory the question arises how such measures are to be taken. This is a question of very great difficulty, because the framers of the treaty do not seem to have contemplated, or provided for, the necessity arising, and we regret that we have not been able to arrive at a joint conclusion. By article 2 of the agreement made pursuant to article 432 of the treaty the High Commission is the supreme representative of the Allied and Associated Powers in the occupied territory.

In the view of the Attorney-General it is the High Commission which, by reason of this article, must take the necessary measures within that territory on behalf of the Allied and Associated Powers. By the memorandum of the 13th June, 1919, the Allied and Associated Powers have agreed that the decisions of the High Commission shall be reached by a majority of votes. If, therefore, a majority of those voting on the High Commission carry a resolution, that resolution becomes the decision not of the members voting for it, but of the High Commission itself acting as the supreme representative of the Allied and Associated Powers.

In the view of the Solicitor-General the provisions of article 2 are only applicable when action is necessary to maintain an effective occupation; and the provisions of article 3 which gives the High Commission power to "issue ordinances so far as may be necessary for securing the maintenance, safety and requirements of the Allied and Associated forces," points to the limitation of the powers of the High Commission in these matters. It follows in his view that the decision with regard to measures to be taken under paragraph 18 of Annex II remains with the respective Powers, and therefore that each of the Powers can take such measures as are authorised by that paragraph in any part of the occupied territory.

Our joint view is that when voluntary default has been declared by the Reparation Commission the Allied and Associated Powers may take such measures as are contemplated by paragraph 18 of Annex II in the occupied territory. We differ as to whether these powers have to be exercised by a majority decision of the High

GERMANY.

Commission or by each occupying Power according to its own discretion. In view of the fact that the majority of the High Commission represents the same two Powers as desire to put in force the provisions of paragraph 18, the difference between us is probably not material in existing circumstances.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
July 30, 1923.

PALESTINE.

[E 825/825/65/1923]

No. 4^A.

[Colonial Office]

[January 3, 1923.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, October 27, 1922.

I AM directed by the Secretary of State for the Colonies to refer to the Report of your predecessors in office of the 18th February, 1921,* addressed to the Secretary of State for Foreign Affairs (a copy of which is enclosed for convenience of reference), on the question of the possibility of extending to Palestine the privileges of Imperial preference, and to transmit to you herewith a copy of a despatch on the subject which has been received from the Officer Administering the Government of Palestine, in which he requests that this matter may be reconsidered.

2. In this connection I am to invite your attention to the letter from this Department of the 14th July (33068/1922), transmitting, for your consideration, draft instruments designed to provide for the establishment of a constitutional Government in Palestine.

3. From these documents, and also from the Mandate for Palestine as approved by the Council of the League of Nations, a copy of which accompanies this letter, there appears to the Secretary of State to be some force in the argument that, as the terms of the Mandate provide for the exercise by Great Britain of full powers of legislation and of administration in Palestine, and as the provisional recognition of that country as an independent State or foreign country is not contemplated, the status of Palestine would not seem to be that of a foreign country. In the Mandate as approved the reference which appeared in article 1 of the draft to the exercise by the mandatory of all the powers inherent in the Government of a sovereign State, save as limited by the Mandate, has been excised, but the words substituted in article 1 do not appear to the Secretary of State materially to weaken the force of this argument.

4. I am, therefore, to request you to give this question your further consideration and to be good enough to report whether you adhere to the previous opinion expressed in the report of your predecessors in office to the Secretary of State for Foreign Affairs, or whether, in view of the terms of the draft Mandate for Palestine and of the nature of the Constitution designed for that country, you consider that it would be possible for this country, and any of the dominions, colonies and protectorates that may so desire, to extend to Palestine, either in part or in whole, the preference to certain goods consigned from and grown, produced or manufactured in the British Empire, without infringing the obligations arising from the "most-favoured-nation" clause of commercial treaties.

5. I am to remind you that the question of Imperial preference in connection with the territories administered in the "B" and "C" Mandates was submitted to your predecessors in office in 1921, and copies of the letter from this Department of the 22nd August and of their report of the 21st September† are enclosed for convenience of reference.

I am, &c.
(For the Under-Secretary of State),
H. YOUNG.

* Confidential 11933, p. 35.

† Confidential 11933, p. 30.



PALESTINE.

List of Papers.

- (A.) Law Officers to Foreign Office, February 18, 1921 [Confidential 11933, p. 35].
 (B.) Officer Administering Government of Palestine to Colonial Office, June 14, 1922.
 (C.) Mandate for Palestine.
 (D.) Colonial Office to Law Officers, August 22, 1921 [Confidential 11933, p. 30].
 (E.) Law Officers to Colonial Office, September 21, 1921 [Confidential 11933, p. 30].

Report.

We adhere to the previous opinion expressed in the Report of our predecessors in office to the Secretary of State for Foreign Affairs.

Palestine is clearly one of the communities referred to in the fourth paragraph of article 22 of the Covenant of the League of Nations. It may be open to argument whether the Mandate, as approved by the Council of the League, and the Constitution of Palestine provided for by the Palestine Order in Council, give full effect to the status contemplated by the fourth paragraph of article 22. But we are of opinion that the position of Palestine both under the Mandate and the Order in Council is not so closely assimilated to that of a territory under British sovereignty as to enable Imperial preference to be extended to Palestine without infringing the obligations arising from the "most-favoured-nation" clause of commercial treaties.

DOUGLAS MCGAREL HOGG.
 T. W. H. INSKIP.

Law Officers' Department,
January 3, 1923.

RUSSIA.

[N 7790/550/38/1923]

No. 5.

[September 19, 1923]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 23, 1923.

Immunity
 of Soviet
 official
 agents from
 processes of
 British
 courts.

I HAVE the honour to transmit herewith, for your consideration, a copy of a memorandum (Paper A) from the Russian trade delegation, suggesting that a letter should be furnished to the official agent of the Soviet Government in this country to the effect that, in the view of His Majesty's Government, he is a person entitled to immunity from the processes of the British courts. The previous history of this question is as follows:—

2. In July 1920 Messrs. Bull and Bull addressed the Foreign Office, on the instructions of M. L. Krassin, in connection with proceedings instituted against him by Mr. Maxim Kogan. A reply was returned on the 26th July, 1920, and contains the following passage:—

"Whether M. Krassin is a public Minister of the foreign State of Russia within the meaning of the Diplomatic Privileges Act of 1703 depends on the interpretation of that statute, and is not a question upon which Lord Curzon feels able to express an opinion, but his Lordship regards M. Krassin as a foreign representative, who should, in view of the privileges which have been granted to him for the purpose of the negotiations with which he is charged, be exempt from the processes of the courts."

The proceedings did not, however, as far as is known, finally come before the courts.

3. In November 1920 Messrs. H. W. and S. Patey consulted the Foreign Office in connection with the intention of clients of theirs to subpoena M. Krassin to give evidence in impending litigation. A reply was returned on the 20th November in a sense similar to the letter addressed to Messrs. Bull and Bull.

4. On the 19th November, 1920, Messrs. Linklaters and Paines addressed the Foreign Office in connection with the impending case of *Luther v. Sagor*, and

requested various information relative to the status of the Russian trade delegation and of M. Krassin. The Secretary of State consulted the then Attorney-General, before whom a statement of the position was laid. This statement (in which copies of the correspondence referred to in paragraphs 2 and 3 above will be found), with Sir Gordon Hewart's opinion,* is enclosed (Paper B), together with a copy of the reply returned to Messrs. Linklaters and Paines in accordance with the recommendations of the Attorney-General (Paper C). In consequence of the view expressed by the Attorney-General, the reply addressed to Messrs. Linklaters and Paines was couched in more guarded terms than the previous letters to Messrs. Bull and Bull and to Messrs. H. W. and S. Patey. The letter states that—

"for a certain limited purpose His Majesty's Government has regarded M. Krassin as exempt from the processes of the courts."

5. You will observe that the above incidents occurred before the signature of the Anglo-Russian Trade Agreement, and that at that time M. Krassin's position depended on the conditions under which he had come to this country, as explained in the first paragraph of the statement submitted to Sir G. Hewart (Paper B).

6. When the question next came before the courts the Anglo-Russian Trade Agreement (Paper F) had been signed (the 16th March, 1921), and His Majesty's Government had thereby extended *de facto* recognition to the Soviet Government. This case was an action brought by the Fenton Textile Association against M. Krassin and others. A conditional appearance to the writ was entered by M. Krassin on the 17th July, 1921, and he then applied to the Master in Chambers for an order setting aside service of the writ on him, on the ground that he was the authorised representative of a foreign State and was entitled as such to immunity from process of the courts. On the 28th July the master made an order that the service of the writ be set aside. The plaintiff appealed to the Judge in Chambers, and on the 2nd August Mr. Justice Branson made an order allowing the appeal and extending the notice for the conditional appearance until the hearing of the appeal. An appeal was brought against Mr. Justice Branson's decision, and Lord Justice Bankes wrote to the Foreign office on the 25th October a letter (Paper D) containing various enquiries, and a reply (Paper E) was returned to his Lordship on the 7th November. This reply which was submitted to the then Attorney-General, was based on a Cabinet decision that the reply was to set out the facts without any specific attitude being adopted with regard to the question whether or not M. Krassin was entitled to immunity from the process of the courts. In giving judgment the Court of Appeal held that the position of M. Krassin was the peculiar one of official agent as defined in the Trade Agreement, and pointed out that, while the agreement provided for immunity from arrest and search, it did not provide for immunity from civil processes. Judgment was accordingly given against M. Krassin; the case is reported in XXXVIII "Times Law Reports," at p. 259.

7. In view of the decision in the Fenton Textile Association case, since which date nothing has occurred to modify the position in this respect of the Russian trade delegation or the official agent of the Soviet Government in this country, the Secretary of State is advised that it would not be proper for the Foreign Office to furnish the Russian trade delegation with such a letter as is requested, and even if this were to be done, it seems very doubtful whether the courts would attach any weight to the letter, in the absence of any information that the circumstances had changed.

8. There is, however, one practical consideration which has to be taken into account. This arises on the last paragraph of the Russian trade delegation memorandum of the 6th July, where it is pointed out that whatever attitude is adopted by His Majesty's Government in this country, similar treatment will be accorded by the Soviet Government to the British agent in Moscow. The conditions in Russia at the present day are, of course, widely different from those which prevail in this country, and though it seems unlikely that the British agent in Moscow would ever be involved in legal proceedings in Russia, considerable inconvenience is likely to result if he is to be held liable to the process of the Russian courts, and his position in the event of his being obliged to appear before the Soviet courts might become exceedingly difficult.

9. There is also a further point as to which his Lordship would be grateful for your advice, although it does not immediately arise on the present communication from the Russian trade delegation. Under paragraph 5 of the Trade Agreement

* Confidential, 11810, p. 66.



(Paper F) the official agents appointed in accordance with that paragraph are to enjoy immunity from arrest and search. The Secretary of State has some doubts whether, in view of the decision of the Court of Appeal referred to above, it will be possible without legislation to ensure to the Russian official agents such immunity from arrest and search, at any rate in the case where the law was set in motion by a private prosecutor. On the other hand, you will observe that in his judgment Lord Justice Bankes pointed out that in the Trade Agreement immunity from arrest and search is provided for, although immunity from civil process is not, and did not suggest that there would be any difficulty as to conferring the former immunity on M. Krassin.

10. In these circumstances his Lordship would be grateful if you would take the annexed papers into your consideration and favour him with your opinion on the following questions:—

- (1.) As to the nature of the reply which should be returned to the memorandum from the Russian trade delegation of the 6th July, 1923.
- (2.) As to the position of the Russian official agents appointed under the Trade Agreement in relation to the immunity from arrest and search provided for by that document, and as to the steps, if any, which, in your opinion, could and should be taken to ensure such immunity.

11. His Lordship would also be grateful for any observations of a general nature which you may be good enough to offer.

I have, &c.
ESMOND OVEY.

List of Papers.

- (A.) Russian Trade Delegation to Foreign Office, July 6, 1923. [N 6285/550/38/1923.]
 (B.) Confidential No. 11810. No. 9.
 (C.) Foreign Office to Messrs. Linklaters and Paines, November 27, 1920. [N 2852/2852/38/1920.]
 (D.) Lord Justice Bankes to Foreign Office, October 25, 1921. [N 12333/216/38/1921.]
 (E.) Foreign Office to Lord Justice Bankes, November 7, 1921. [N 12333/216/38/1921.]
 (F.) Trade Agreement with Russian Soviet Republic, March 16, 1921. [Cmd. 1207.]

Report.

1. In our opinion it would be improper, and, indeed, impossible, for the Foreign Office to give such a letter as the Russian trade delegation request, so long as the position of the Soviet official agent remains unchanged. It is for the Foreign Office to certify what is the character in which the agent of a foreign Government comes into this country; it is for the courts to determine what immunity the law of England confers upon a person filling that character. In the present case a certificate was given by the Foreign Office in the Fenton Textile Association litigation; and the courts have determined that a person in this country under the circumstances described in that certificate is not entitled to the immunity which the Russian trade delegation require. It is not suggested that there has been any change in the position occupied by the Soviet official agent since that decision was given; and, therefore, the Foreign Office is really being asked to certify that the court was wrong in law in the conclusion which it reached. This the Foreign Office has no power to do. It is perfectly open to the Foreign Office to negotiate a change in the position of the Soviet official agent of such a character as to constitute him the public minister of a foreign Government, or such a diplomatic representative as to be entitled to full diplomatic privileges; but we do not gather that it is desired to embark upon such a negotiation. Unless and until this is done, in our opinion the Foreign Office should reply that by English law the question of the extent of the immunity enjoyed by any person in this country is a matter within the exclusive competence of the English courts; that the Foreign Office is advised that it has no power to overrule the decision already arrived at in regard to the official agents of the Soviet Government; and that in view of that decision, such a letter as is suggested would not have any operative effect.

2. In the Fenton Textile Association case, both Bankes and Scrutton L.J.J. treated it as clear that the official agent of the Soviet Government did have the immunity which the Trade Agreement stipulates. Atkin L.J. is less definite; but

he seems to suggest at the end of his judgment that the true view may be that this agent is really a representative of a foreign Government who would, in the absence of express agreement, have been entitled to complete immunity at common law, but with regard to whom the Soviet Government had by the Trade Agreement given up any claim to immunity beyond that provided by the agreement. We think that the matter is one of some obscurity and doubt; but that in all probability the courts would uphold the claim to such immunity as is conferred by the Trade Agreement, on some such ground as is suggested by Atkin L.J. If the immunity were successfully challenged, it could be established either by legislation, or by the recognition of the official agent by His Majesty's Government as the diplomatic representative of a *de facto* Government. We do not advise any action being taken at present.

3. We have nothing to add to the observations set out in our answer to the first question.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
September 19, 1923.

TURKEY.

[E 708/175/44/1924]

No. 5^A.

[Board of Trade.]

[December 27, 1923.]

Case for the Opinion of the Law Officers of the Crown and Mr. Gavin T. Simonds.

A QUESTION has arisen upon which it is desired to obtain the opinion of the Law Officers and Mr. Simonds with regard to the disposal of certain German and Austrian funds sequestered in Constantinople by the authority of the Allied Governments. One of these funds consisted of the sum of 590,000 gold francs, the property of three ex-enemy banks—namely, the Deutsche Bank, the Deutsche Orient Bank and the Wiener Bankverein. This fund was sequestered during the year 1919, and, along with other sequestered funds, was transferred to France early in the present year and there deposited in the Banque de France in the joint names of the Allied Governments.

The question which has now arisen and upon which it is desired to obtain the opinion of the Law Officers is whether the particular sum referred to in this case is or is not subject to the charge created under the provisions of article 297 (e) of the Treaty of Versailles, so far as it is the property of the German banks, and article 249 (e) of the Treaty of Saint-Germain-en-Laye, so far as it is the property of the Austrian bank. It has been suggested by the French Government that the sum should be paid to the Allied Clearing Offices in accordance with the provisions of the treaties referred to as being the property of German and/or Austrian nationals under the "control of the claimant's State" (see article 297 (e)), and as such charged with the payment of compensation under that article, leaving it to the directors of the various Allied Clearing Offices to decide upon the manner in which the amount is to be divided between the different Clearing Offices.

The view taken by the British Clearing Office was that the fund, so far as it could be shown to be the property of the two German banks, comes within the express words of article 297 (e) of the Treaty of Versailles and within article 249 (e) of the Treaty of Saint-Germain-en-Laye so far as it could be shown to be the property of the Austrian bank—namely, "the property of German nationals" (or nationals of the former Austrian Empire) under the control of the claimant's State, and as such is charged with the payment of compensation under that article. It is true that the fund is not within the more limited description of property referred to in paragraph 4 of the Annex to Section IV of Part X of each of the treaties and is not, therefore, subject to the general charge which may be imposed under the permissive provisions of that paragraph, but that would not, in the view of the British Clearing Office, exclude the claims for compensation from the additional benefits accorded to them under the articles in question. This view was supported by an opinion of the Law Officers and the late Mr. Austen Cartmell dated the 24th December, 1920, when they were advising the

Disposal of
German and
Austrian
funds
sequestered
in Constantinople by
Allied
Powers.



Board of Trade as to the validity of the China Order in Council, so far as it purported to charge the property of German nationals in China. Whilst being of the opinion that the Order in Council was *ultra vires* so far as it purported to charge enemy property in China with the payment of debts due to British nationals, they gave it as their opinion that the Order was *intra vires* so far as it related to claims for compensation referred to in article 297 (e) of the treaty and so far as the property in question was under the control of Great Britain at the date of the coming into force of the treaty.

It is questionable whether the fund in this case can properly be described as having been at the date of seizure "under the control of the claimant's State." The seizure took place during the period of the armistice when Constantinople was in the joint occupation of the Allied Powers, and from that time onwards the fund has been under their joint control. The fact that it is recognised that the other Allied Powers have just as much right as Great Britain to be heard on the question of the division of the fund (if such a right exists at all) favours the contention that it was not "under the control of the claimant's State."

It is necessary to call the attention of the Law Officers to article 72 (Section III, Economic Clauses) of the Treaty of Lausanne, which is as follows:—

"In the territories which remain Turkish by virtue of the present treaty, property, rights and interests belonging to Germany, Austria, Hungary and Bulgaria or to their nationals, which before the coming into force of the present treaty have been seized or occupied by the Allied Governments shall remain in the possession of these Governments until the conclusion of arrangements between them and the German, Austrian, Hungarian and Bulgarian Governments or their nationals who are concerned. If the above-mentioned property, rights and interests have been liquidated, such liquidation is confirmed.

"In the territories detached from Turkey under the present treaty, the Governments exercising authority there shall have power, within one year from the coming into force of the present treaty, to liquidate the property, rights and interests belonging to Germany, Austria, Hungary and Bulgaria or to their nationals.

"The proceeds of liquidations, whether they have already been carried out or not, shall be paid to the Reparation Commission established by the Treaty of Peace concluded with the States concerned, if the property liquidated belongs to the German, Austrian, Hungarian or Bulgarian State. In the case of liquidation of private property, the proceeds of liquidation shall be paid to the owners direct.

"The provisions of this article do not apply to Ottoman limited companies.

"The Turkish Government shall be in no way responsible for the measures referred to in the present treaty."

This article would appear to raise a somewhat difficult question with regard to the money question.

If the money is to be regarded in the light of property belonging to German and Austrian nationals seized by the Allied Governments before the coming into force of the treaty, it is to remain in the possession of these Governments until the conclusion of arrangements made between them and the German and Austrian Governments or their nationals who are concerned. If, on the other hand, what has been done is to be regarded as liquidation of private property, then, according to paragraph 3 of the article, proceeds of liquidation are to be paid to the owners direct, assuming that this paragraph applies to all liquidations referred to in the article and not merely to the liquidations mentioned in the second paragraph.

The Law Officers are also referred to article 137 of the Lausanne Treaty, which is of a more general nature, but which provides that "decisions taken and orders issued between the armistice and the coming into force of the treaty by or in agreement with the authorities of the Powers who have occupied Constantinople, concerning the property, rights and interests of . . . foreigners or of Turkish nationals . . . shall be regarded as definitive, and shall give rise to no claim against these Powers or their authorities."

The Law Officers and Mr. Gavin Simonds are therefore requested to advise whether, in their opinion, the particular funds referred to in the case are subject to the respective charges made under the Treaties of Versailles and Saint-Germain, having regard to the circumstances in which they were sequestered and to the provisions of article 72 of the Treaty of Lausanne, assuming that the last-mentioned treaty will be ratified at an early date.

Opinion of the Law Officers of the Crown and Mr. Gavin T. Simonds.

In our opinion, the fund of 590,000 gold francs which belonged to three ex-enemy banks and was sequestered in Constantinople in the year 1919 was at the date of the coming into force of the Treaties of Versailles and Saint-Germain-en-Laye "property under the control of the claimant's State" within the meaning of article 297 (e) and article 249 (c) of those treaties respectively. It was, in fact, under the control of two or more of the Allied Powers, but it would, we think, be an unreasonable construction of the relevant articles to exclude German property from the operation of the charge thereby authorised because it was under the control not of one State but of several States. The Allied Powers which are interested have, we think, the right to determine how the benefit of the charge should be apportioned as between their respective nationals.

Article 72 of the Treaty of Lausanne is not easy to reconcile with article 25 (by which Turkey undertakes to recognise the full force of the treaties concluded by the Allied Powers with the Powers who fought on the side of Turkey) and with article 137, to the terms of which we are referred. For, whatever may be its true construction, it appears to have the effect, in some cases at least, of agreeing with Turkey to restore to (e.g.) German nationals property or proceeds of liquidation of property which, under the Treaty of Versailles, remained in the disposition of the Allied Powers. It is, we think, open to doubt whether article 72 has any operation in regard to enemy property removed before the coming into force of the treaty from the territories that remain Turkish; but, in any event, we think that a fund removed in specie from Constantinople cannot be regarded as "proceeds of liquidation" of enemy property rights or interests, and that, if any obligation is imposed on the Allied Powers by article 72 in respect of this fund, it is that they must remain in possession of it until the conclusion of the arrangements contemplated by the article.

Having regard to the fact that by the relevant treaties which bind Germany and Austria and their respective nationals the property of such nationals is made subject to the charge, we think that the Allied Powers are entitled to act upon the footing that, whatever arrangements may have to be made in respect of property which, remaining in Turkey, remains subject to Turkish jurisdiction, no further arrangement is necessary in regard to property which has already been removed from Turkey and is in all respects within the control of the Allied Powers, and to assume that such property remains subject to the charge.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.
GAVIN T. SIMONDS.

*Law Officers' Department,
December 27, 1923.*



1924

This Document is the Property of His Britannic Majesty's Government.

Printed for the use of the Foreign Office.

CONFIDENTIAL

(12786)

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1924.



(ii)

LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked *I*^a, &c.

EGYPT.

No.		Date.	SUBJECT.	Page.
1	Law Officers ..	Aug. 14, 1924	Liquidation of Austrian and German property in Egypt	1
2	Lord Chancellor ..	Oct. 1,	The Sudan question and the League of Nations ..	4
3	Lord Chancellor ..	Nov. 2,	Egypt and the League of Nations	16
4	Lord Chancellor ..	Nov. 17,	Egypt and the League of Nations	17

GENERAL.

4 ^a	Law Officers and Mr. C. W. Lilley [Ministry of Labour]	Apr. 3, 1924	International Labour Conventions: interpretation of article 421 of the Treaty of Versailles, 1919 ..	19
4 ^b	Law Officers and Mr. C. W. Lilley [Ministry of Labour]	June 2,	International Labour Conventions: obligations under the Treaty of Versailles, Part XIII, Labour Clauses	22
5	Lord Chancellor ..	June 24,	Transmission of information to judges of High Court in cases affecting the rights of foreign Governments	26
5 ^a	Law Officers .. [Home Office]	July 8,	Resumption of British nationality under "British Nationality and Status of Aliens Act, 1914" ..	28
6	Lord Chancellor ..	July 21,	Compulsory acceptance of jurisdiction of Permanent Court of International Justice.	30
6 ^a	Law Officers, Mr. G. W. Ricketts and Mr. H. M. Giveen [War Office]	Nov. 21,	Official Secrets Acts, 1911 and 1920: supply of munitions to foreign Governments	45

GERMANY.

6 ^b	Law Officers and Mr. Gavin T. Simonds [Clearing Office (Enemy Debts)]	Apr. 3, 1924	Claims under article 296 of the Treaty of Versailles by German nationals against British nationals for the price of goods sold and delivered which, after the property in the goods had passed, were seized and condemned in prize	47
7	Law Officers ..	May 27,	Interpretation of Treaty of Versailles: paragraphs 17 and 18 of Annex II to Part VIII; and of the Rhineland Agreement	50

(iii)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1924.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

ALI—GOV.

A.

Aliens: resumption of British nationality under "British Nationality and Status of Aliens Act, 1914," 28-30.
"Argo," 47.
Arms: Official Secrets Acts, 1911 and 1920, and supply of, to foreign Governments, 45-47.
Assurantie Compagnie Excelsior v. Tom Smith, 26.
Austria: liquidation of Austrian property in Egypt, 1-4.

B.

Belgium: validity under Treaty of Versailles, 1919, of Franco-Belgian advance into Ruhr Valley, 50-54.

C.

Claims: of German nationals against British nationals for price of goods sold and delivered and subsequently seized and condemned in prize, 47-50.
Colonies: application of international labour conventions, 19-22.
Compañia Mercantil Argentina v. United States Shipping Board, 26.
Conventions. *See* Treaties.
Court of International Justice: compulsory acceptance of jurisdiction of, 30-44.
Courts, British: transmission of information to judges of High Court in cases affecting rights of foreign Governments, 26-28.

E.

Egypt: liquidation of Austrian and German property, 1-4.
" and the League of Nations, 16-19.

F.

France: validity under Treaty of Versailles, 1919, of Franco-Belgian advance into Ruhr Valley, 50-54.

G.

Germany: liquidation of German property in Egypt, 1-4.
" claims of nationals against British nationals for price of goods sold and delivered and subsequently seized and condemned in prize, 47-50.
" Franco-Belgian advance into Ruhr Valley; validity under Treaty of Versailles, 1919, 50-54.
Governments, foreign: transmission to judges of British High Court of information in cases affecting rights of, 26-28.

GOV—RHIL.

Governments, foreign: Official Secrets Acts, 1911 and 1920, and the supply of munitions to, 45-47.

J.

Jurisdiction: Court of International Justice; compulsory acceptance of, 30-44.
Justice, International. *See* Court.

L.

Labour: international conventions; interpretation of article 421 of Treaty of Versailles, 19-22.
" international conventions; British obligations under Part XIII of Treaty of Versailles, 22-25.
Lang, Jules and Son, 47.
League of Nations: and Egypt, 16-19.
" and the Sudan, 4-16.
Liquidation. *See* Property.

M.

Munitions: Official Secrets Acts, 1911 and 1920, and the supply of munitions to foreign Governments, 45-47.

N.

Nationality: resumption of British nationality under "British Nationality and Status of Aliens Act, 1914," 28-30.

O.

Official Secrets. *See* Secrets.

P.

Prize Court: claims of German nationals against British nationals for price of goods sold and delivered and subsequently seized and condemned in prize, 47-50.
Property: Austrian and German in Egypt; liquidation, 1-4.
" goods sold and delivered by German nationals to British nationals and subsequently seized and condemned in prize; German claim for price, 47-50.
Protectorates: application of international labour conventions, 19-22.

R.

Reiber, Josef, 47.
Reprisals: interpretation of paragraphs 17 and 18 of Annex II to Part VIII of Treaty of Versailles, 1919, 50-54.
Rhine Territories: interpretation of Rhineland Agreement, 1919, 50-54.
" " interpretation of paragraphs 17 and 18 of Annex II to Part VIII of Treaty of Versailles, 1919, 50-54.



1924

(iv)

RUH—TRE.

Ruhr Valley: validity of Franco-Belgian advance into, 50-54.

S.

Secrets, official: acts of 1911 and 1920; and supply of munitions to foreign Governments, 45-47.
Sudan: and the League of Nations, 4-16.

T.

"The Odessa," 50.
"The Parchim," 50.
Treaties: application of international labour conventions to colonies and protectorates, 19-22.
"International Labour Conventions; British obligations under Part XIII of Treaty of Versailles, 22-25.
Treaty of Peace (Austria): application of article 249 (h) (2) to liquidation of Austrian property in Egypt, 1-4.
"Germany): application of article 297 (h) (2) to liquidation of German property in Egypt, 1-4.

TRE.

Treaty of Peace (Germany): interpretation of article 421; international labour conventions, 19-22.
" (Germany): British obligations under Part XIII. Labour clauses, 22-25.
" (Germany): claims under article 296 of German nationals against British nationals for price of goods sold and delivered and subsequently seized and condemned in prize, 47-50.
" (Germany): effect of article 440 as regards claims of German nationals for price of goods sold and delivered to British nationals and subsequently seized and condemned in prize, 47-50.
" (Germany): interpretation of paragraphs 17 and 18 of Annex II to Part VIII, 50-54.
Treaty of Saint-Germain. See Treaty of Peace (Austria).
Treaty of Versailles. See Treaty of Peace (Germany).

Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN. &c.: 1924.

EGYPT.

[E 7001/66/16/1924]

No. 1.

[August 14, 1924.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 27, 1924.

I HAVE the honour by direction of Mr. Secretary Ramsay MacDonald to request that you will be so good as to favour him with an expression of your opinion on certain questions regarding the liquidation of German and Austrian property in Egypt. It was hoped that this case might have been presented to you in the form of a reply to the actual arguments advanced by the German or Austrian Governments, either in challenging the accounts of the liquidation or in some other definite manner, but it now seems probable that the questions at issue will be raised by the Austrian Government in a less definite manner, and Mr. Ramsay MacDonald therefore feels it necessary to obtain your opinion before the matter goes further.

Liquidation
of Austrian
and German
property in
Egypt.

2.—(a.) The Public Custodian in Egypt has, since 1916, been engaged in liquidating German and Austrian property in that country, and has collected the assets from this partly in Egyptian currency and partly in French francs. His Majesty's Government justified their action in this respect in a memorandum, of which a copy is enclosed and which was handed to the German Ambassador on the 17th April, 1923 (Paper 1). Under article 147 of the Treaty of Versailles, Germany recognised Egypt as a protectorate, and under article 153 all movable and immovable property in Egypt belonging to German nationals is to be dealt with in accordance with sections III and IV of Part X (economic clauses) of the treaty. The similar articles in the Treaty of Saint-Germain are articles 102 and 108.

(b.) German and Austrian property in Egypt has accordingly been charged under article 297 (b) and paragraph 4 of the annex of the Treaty of Versailles and the corresponding provisions of the Treaty of Saint-Germain-en-Laye with the payment firstly of the claims of Egyptian nationals and British nationals in Egypt, and secondly of the claims of other British nationals—that is to say, any surplus remaining after satisfaction of the claims in Egypt will, in effect, be brought into the United Kingdom pool.

(c.) The question hereinafter raised refers to proceeds of liquidation of Austrian as well as German property, but for the sake of brevity reference will only be made to the Treaty of Versailles, the Treaty of Saint-Germain-en-Laye containing corresponding provisions.

(d.) It will be remembered that, under the combined effect of article 297 (h) (1) and article 296 (paragraph immediately following 4) of the Treaty of Versailles, the Allied Powers who have adopted section III of Part X of that treaty are under the necessity of crediting to Germany the proceeds of liquidated enemy property in Allied currency at the pre-war rate of exchange.

[13086]

B



(e.) In the case of Egypt, however, an intimation was given to Germany and Austria that section III was not adopted, and it is accordingly apprehended that the position may have to be governed by article 297 (h) (2), which is as follows:—

“As regards Powers not adopting section III and the annex thereto, the proceeds of the property, rights and interests, and the cash assets of the nationals of Allied or Associated Powers held by Germany, shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights and interests, and the cash assets of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations, and may be applied in payment of the claims and debts defined by this article or paragraph 4 of the annex hereto. Any property, rights and interests or proceeds thereof, or cash assets not used as above provided, may be retained by the said Allied or Associated Power, and if retained the cash value thereof shall be dealt with as provided in article 243.”

(f.) The question, therefore, arises whether the proceeds of liquidation fall to be dealt with under article 297 (h) (1) or article 297 (h) (2) of the Treaty of Versailles. In the event of (h) (2) being the paragraph applicable, the further questions arise: firstly, whether there is any treaty obligation to render an account to Germany for the proceeds of liquidation, and, if so, whether in such account credit must be given in pounds Egyptian or pounds sterling at the pre-war rate of exchange, or whether the proceeds need only be accounted for at the actual value at the date of their application, either for the purposes of the charge or for those of reparation?

(g.) Alternatively, on the true construction of (h) (2) need only the “cash value” of the residue (if any) of the liquidated proceeds after payment of the debts and claims defined by article 297 and the annex be accounted for, and is it only this residue that must be valorised?

In this connection reference must be made to paragraph 14 of the annex to section IV, Part X, of the treaty, which is as follows:—

“The provisions of article 297 and this annex relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, section III regulating only the method of payment.

“In the settlement of matters provided for in article 297 between German and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt section III, and between their respective nationals, the provisions of section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present treaty notify Germany that the said provisions are not to be applied.”

(h.) The Anglo-Bulgarian Mixed Arbitral Tribunal have already given effect to the argument of the British Government agent that, as between British nationals and Bulgarian nationals, notwithstanding that section III has not been adopted in the case of Bulgaria, settlements of pre-war debts, having regard to paragraph 14 of the above-mentioned annex, must be in sterling at the pre-war rate of exchange.

A similar decision has been given by the Anglo-Austrian Tribunal in the case of a claim by an Egyptian national against an Austrian national.

(i.) It will, therefore, doubtless be contended by Germany that for the purposes of article 297 (h) (2) it is essential that this country should render some form of account of the proceeds arising from liquidation of German property in Egypt, if only for ascertaining the ultimate balance, if any, to be dealt with as provided in article 243—i.e., for reparation purposes—and that this accounting comes within the expression “in the settlement of matters provided for in article 297 between Germany and the Allied or Associated States, their colonies or protectorates.” If this contention is correct, it may be that the British Exchequer will be faced by a serious loss by reason of the fall in exchange of the value of the francs, which constitute a considerable part of the proceeds of liquidation in Egypt.

3. It is thought that you may be assisted by a short account of what steps have been taken to put into operation this portion of the treaties with regard to Egypt.

4. The Egypt Treaty of Peace Order in Council, 1920 (Paper 2), came into force at the date of the ratification of the Treaty of Versailles, i.e., the 10th January, 1920, and upon the 9th March, 1920, Lord Allenby, by proclamation under martial law

(Paper 3), gave effect to the Order in Council in Egypt. The Egypt Treaty of Peace (Austria) Order in Council, 1920 (Paper 4) came into force at the date of the ratification of the Treaty of Saint Germain, i.e., the 16th July, 1920, and upon the 24th November, 1920, Lord Allenby issued a similar proclamation (Paper 5), which had the effect of putting the Order in Council into force in Egypt. Upon the 23rd January, 1920, the German Government were informed (Paper 6) that the provisions of section III and the annex thereto, i.e., the clearing office, were adopted by His Majesty's Government and the dominions, colonies and protectorates generally, but Egypt was specifically excepted. The German Government upon the 27th January, 1920 (Paper 7), formally acknowledged this notification. A similar notification was sent to the Austrian Government on the 27th August, 1920 (Papers 8 and 9), and that Government notified in September of that year its acceptance of the exclusion of Egypt from the provisions of section III of Part X of the Treaty of Saint-Germain (Paper 10). It will thus be seen that whereas Great Britain in some respects may be held to be a Power which has adopted section III and the annex thereto, nevertheless, so far as Egypt is concerned, the provisions of that section do not apply.

5. It may be relevant to take into consideration the fact that the property in question has been liquidated by His Majesty's Government, acting under martial law, and not by the Government of Egypt; and if the expression “Powers,” contained in sub-sections (h) (1) and (2) of article 297, means the Power which actually effected the liquidation, it would then seem probable that these cases fall to be dealt with under the provisions of sub-section (h) (1). It has, however, been suggested that there is some force in the argument that the expression “Powers,” in paragraph (h) (1) and (2) means, in relation to protectorates, “protecting Powers,” and that inasmuch as Great Britain as protecting Power has not adopted the clearing office provisions for Egypt, therefore the proceeds of liquidations and sales in Egypt fall to be dealt with under paragraph (h) (2) rather than under (h) (1).

6. An expression of your opinion, therefore, is requested on the following points:—

- (1.) Should the German property vested in the custodian under the various Orders in Council and proclamations referred to above be credited or accounted for under article 297 (h) (1) or under article 297 (h) (2) of the Treaty of Versailles?
- (2.) If under article 297 (h) (2), must an account be rendered in such a form as to make it necessary to account for the liquidated proceeds in (a) Egyptian pounds or (b) pounds sterling, converting such proceeds, where originally in other currencies, into pounds Egyptian or sterling at the pre-war rate of exchange, or is it only the actual balance that must be so accounted for after paying the claims and debts defined by article 297 and paragraph 4 of the annex, and in that case, does the “cash value” mean the actual value of the balance of the proceeds as it stands at the time of its application to reparation purposes?

7. Mr. Ramsay MacDonald would further be glad to be favoured with any observations of a general nature which may occur to you.

8. A list of the relevant documents above referred to, together with copies of the documents themselves, is annexed.

I have, &c.

D. G. OSBORNE.

List of Papers.

- (I.) Memorandum for German Ambassador, April 17, 1923 (E 3476/9/16/1923).
- (II.) Egypt (Treaty of Peace) Order in Council, 1920 (Confidential, 10472*—1263).
- (III.) Egyptian Proclamation enforcing Treaty of Peace with Germany, March 9, 1920 (E 2366/657/16/1920).
- (IV.) Egypt (Treaty of Peace, Austria) Order in Council, 1920 (Confidential, 10472*—1281).
- (V.) Egyptian Proclamation enforcing Treaty of Peace with Austria, November 24, 1920 (Svo. 9235/1920—21).
- (VI.) Lord Kilmarnock to German Minister for Foreign Affairs, January 23, 1920 (179721/F 120154/1919).
- (VII.) German Minister for Foreign Affairs to Lord Kilmarnock, January 27, 1920 (179721/F 120154/1919).
- (VIII.) Earl Curzon to Mr. R. F. O. Bridgeman, No. 555, August 20, 1920 (C 3966/211/3/1920).
- (IX.) Mr. R. F. O. Bridgeman to Earl Curzon, No. 676, September 29, 1920 (C 7842/211/3/1920).
- (X.) Mr. R. F. O. Bridgeman to Earl Curzon, No. 649, September 21, 1920 (C 7348/211/3/1920).

*Report.*

1. In our opinion the German property vested in the Custodian under the various Orders in Council and proclamations relating to the Germany property rights and interests in Egypt should be credited or accounted for under article 297 (h) (2) of the Treaty of Versailles.

2. In our opinion the provisions respecting currency and rates of exchange and interest referred to in paragraph 14 of the annex to section IV of Part X of the Treaty of Versailles apply only to the settlement of matters *inter partes*, and have no application to the administrative operations of the officers of an Allied Power in the course of liquidating enemy property under that section and annex. Thus all cash claims must be collected and all cash liabilities must be settled in the currencies and according to the rates of exchange provided for by the paragraph (those in Egypt being collected and settled in £ E. and those in Great Britain in sterling), but the necessary currencies must be provided at the discretion of the officers of the Allied Powers in the course of liquidating and administering the fund without reference to the provisions of that paragraph, and the paragraph would have no application to such an administrative operation as a sale of property for a price payable in francs followed (immediately or after an interval) by the conversion of the francs into Egyptian or English currency.

The ultimate surplus proceeds (if any) must, in our opinion, be converted into and credited or accounted for in sterling.

PATRICK HASTINGS.
HENRY H. SLESSER.

Law Officers' Department,
August 14, 1924.

[E 8839/735/16/1924]

No. 2.

[October 1, 1924.]

Foreign Office to the Lord Chancellor.

My dear Schuster,

Foreign Office, September 29, 1924.

The Sudan
question
and the
League of
Nations.

I ENCLOSE a copy of a memorandum on the Sudan question and the League of Nations by Colonel Schuster, the Financial Secretary to the Sudan Government. It was written as a result of consultations with the department of the Foreign Office concerned and with Malkin.

The Prime Minister regards the subject as of such importance that he is anxious to obtain the Lord Chancellor's opinion.

M. SHEARMAN.

(Secret.)

Memorandum communicated by Colonel Schuster, Financial Secretary to the Sudan Government, September 23, 1924.

PART I.—PRACTICAL CONSIDERATIONS.

THE suggestion has been made on various occasions recently that, in the event of failure to arrive at an agreed settlement of the Sudan question with the Egyptian Government, the dispute should be referred for settlement to the League of Nations.

Those who have made this suggestion have never gone beyond the formulation of the general idea, and have not attempted any detailed statement of the exact questions which they propose should be so referred, nor any examination of the technical manner in which the reference should be made, that is to say, under which section of the covenant, &c.

Thus, Mr. Johnston, in his speech in the debate in the House of Commons on the 10th July ("Hansard," Vol. 745, No. 104, p. 2522) after

proposing "that the British Government should face the facts frankly and offer the Egyptian Government a joint reference of the dispute to the League of Nations," went on to say, "I do think the British Government cannot simply ask the Egyptian Government to maintain the *status quo*, and we have still to face the fact that something has got to be done to disabuse the Egyptian people of their fears that their water supplies are in other hands. I trust the Under-Secretary for Foreign Affairs will be able, on behalf of the Government, to reassure the Egyptian people, and agree to a joint reference of the matter in dispute between this country and Egypt, in so far, at any rate, as the water supplies are concerned, to the League of Nations, and that we should abide by the decision."

It is clear that there were, in the mind of Mr. Johnston, two very different ideas. A submission to the League of Nations of the question of how Egypt's material interests are to be secured is a course which the British Government might view with sympathy, while refusing to allow its right and responsibility to provide for the good administration of the Sudanese peoples to be questioned.

The idea has also been urged by Mr. Brailsford in the "New Leader," chiefly on the ground that the issues involved are so complex, and the determination of the best course so difficult, and in fact that whatever course is chosen now is unlikely to avoid troubles in the future, that the British Government should prepare defences against criticism by leaving that determination to the League of Nations.

An argument for a reference to the League on this ground is not very convincing. The essence of the difficulty lies in the complexity of the problem, and a reference to the League is no solution. No doubt it is important that the British Government should be able to justify itself before the world, but it is still more important to find a right solution, and to steer the best course in the interests primarily of the people of the Sudan, and also of all others who are interested in this question. It is far more probable that the British Government with its intimate knowledge of the situation can arrive at a right solution, than a composite international body like the Council of the League, whose judgment would almost certainly represent a compromise of conflicting opinions. Moreover, the problem is one which the British Government is responsible for solving, and it cannot escape its responsibility by shifting the task to other shoulders and hiding behind the League of Nations. It may be argued that one of the chief difficulties in the future situation will be the hostility of Egyptians, and that they would accept with good grace and co-operate with goodwill under a decision given by the League of Nations, whereas they would offer nothing but trouble and opposition to a similar course decided upon by the British Government. The hope on which such an argument is based is illusory. The Egyptian public would construe every point to which they objected as the result of British influence with the Council of the League, and would oppose it just as strongly as though it has been decided by the British Government. But quite apart from this the argument is based on an unreal view of the situation. The Egyptian agitation about the Sudan is not based upon any genuine national feeling, except to the extent of fears about their water supply. It is agreed by all sections of British opinion that these fears must be allayed by the most positive guarantees by the British Government, and, as is pointed out below, there is no objection to accepting the supervision of the League of Nations in order to secure fair play in this matter.

There is, moreover, another party to be considered, the Sudanese themselves. From statements which have already been made there is evidence that the responsible citizens and leaders would most strongly resent the idea that the fate of their country should be decided by an alien council—like the question of the ownership of some material chattel—or a dispute between the British and Egyptian Governments, nor is there any means by which they could themselves be properly represented in the dispute. They would probably far prefer that it should be left in the hands of the British whom they know, provided that they are at the same time assured that the British accept the principle of gradually advancing them to the state of governing themselves. The net result appears to be that nothing would be

Practically this is certainly so, but technically the statement is open to criticism from the Egyptian side.—H. W. M.

I sympathise, but this criticism applies to every case where a territorial dispute has been decided by arbitration, mediation, &c.—H. W. M.



gained by a reference to the League of the general political issue except the possible justification of the British position before the world at large. For this the British Government should rely rather on the righteousness of its own action.

2. There are, moreover, other serious considerations of a practical nature:—

I would emphasise that it would be contrary to the conditions attached to Egyptian independence; it is only because Egypt was declared independent by us that any question of going to the League arises, except possibly under article 11.—H.W.M.

(a.) A reference to the League of a dispute with Egypt as to the political status of the Sudan would be contrary to the declared policy of the British Government.

Mr. Lloyd George in his speech in the House of Commons on the 28th February, 1922 ("Hansard," Vol. 151, No. 16, the 28th February, 1922), in which he expounded the declaration of British policy with regard to Egypt, contained in the White Book submitted to Parliament, used the following words:—

"The final clause of the declaration defines the special relation between His Majesty's Government and Egypt. It declares that the following four points are absolutely reserved to the discretion of His Majesty's Government:—

"(a.) The security of the communications of the British Empire in Egypt.

"(b.) The defence of Egypt against all foreign aggression or interference, direct or indirect.

"(c.) The protection of foreign interests in Egypt and the protection of minorities.

"(d.) The Sudan.

"We are prepared to make agreements with the Egyptian Government upon these matters in the spirit of mutual accommodation, whenever a favourable opportunity arises for the conclusion of such agreements. *But until such agreements satisfactory both to ourselves and to the Egyptian Government are concluded, the status quo will remain intact.*

"I must make another point clear. We regard the special relation between ourselves and Egypt, defined in this clause, as a matter concerning only ourselves and the Government of Egypt. *Foreign Powers are not concerned, and we propose to state this unmistakably when the termination of the protectorate is notified to them.*

"The welfare and integrity of Egypt are necessary to the peace and safety of the British Empire, which will, therefore, always maintain as an essential British interest the special relations between itself and Egypt long recognised by other Governments. *The definition of these special relations is an essential part of the declaration recognising Egypt as an independent sovereign State.*"

The present Prime Minister, in the debate on the Sudan question in the House of Commons on the 10th July of this year, expressed himself as follows:—

"My position is this: An agreement ought to be come to between the Governments of Egypt and Great Britain directly in contact with each other, and no attempt should be made to bring in any outside authority, the League of Nations or some other body. *It is much more in the nature of a domestic problem.* We have been in partnership up to now, and it is not a matter like a dispute, say, between Turkey and ourselves. If you maintain goodwill following an agreement, and if that agreement is one which is not imposed upon both of us by an outside party, but one which we take upon ourselves of our own free will, it is much better."

These statements are clear, and the conclusion is obvious that it would be exceedingly embarrassing for the British Government to depart from its position that this is a "domestic issue."

(b.) The strongest practical objection to a reference of the general political question to the League is however to be found in the local situation. In short, the local situation would not stand it.

The following passage from a memorandum recently prepared by the Foreign Office sets out the view of the Governor-General of the Sudan:—

"A reference to the League could only be construed by the public as a formal ratification, accepted by the British Government, that a state of extreme uncertainty does, in fact, exist as to the future of the Sudan. As such it would not only be extremely dangerous in itself, but would appear totally inconsistent with the declarations already made by the British Government, and published in the Sudan, to the effect that under no circumstances will His Majesty's Government retire from the *status quo* or hand over to others its trust for the good government of the Sudan. Quite apart from this inconsistency with previous declarations, it would be impossible to make the natives understand the motive prompting the British Government to place the final decision in the hands of others, and it could only be regarded as a sign of weakness.

"What, then, would be the situation? Consideration of the matter by the Council of the League would almost inevitably involve local investigations by commissioners appointed by the League, who would be forced to attempt to collect some evidence as to the wishes of the people. A delay of six to twelve months would be required. I need not elaborate a description of the effects of this on the minds of a primitive and excitable people. The feeling of unrest which would be created would provide the most fertile opportunities for a Mahdist movement or a religious rising.

"It must not be forgotten that while the Egyptian Government might officially agree to a reference to the League, a movement could simultaneously be carried out backed by Egyptian influence to stir up trouble in the Sudan. The reference to the League could be represented by local agitators in the Sudan as an act which would place their fate as a nation in the hands of an alien council. The possibilities of such an agitation are obvious. It is my considered opinion that in such circumstances, even if all the measures which I have recommended for clearing up the army situation are taken, it might be impossible to prevent the local situation getting out of control."

3. To sum up, the conclusion seems to be clear, that to ask the League of Nations to settle the future political status of the Sudan is a course which is open to very grave practical danger and objections. It might create such unrest as to make the future peaceful administration of the Sudan impossible, it is inconsistent with British policy as regards Egypt and with legitimate British interests, it is a shirking of British responsibility, it would be contrary to the interests and wishes of the Sudanese themselves, and it offers no reasonable hope of securing the best solution of the present problems nor of improving our relations with the Egyptians.

4. As against these objections must be set the following considerations:—

(a.) The endorsement of the League would justify British action in the eyes of other nations.

(b.) A large section of British public opinion—particularly among the supporters of the present Government—would postulate as a condition of its support for insistence by the British Government on the maintenance of British control of the administration of the Sudan, a sure guarantee that such control is to be exercised in a disinterested way for the benefit of the Sudanese themselves and without any violation of Egypt's material rights to her water supply and otherwise. Such a guarantee might be afforded by the endorsement and supervision by the League of British policy.

(c.) It is on general grounds desirable that the British Government should miss no opportunity of proving the reality of its belief in and support of the League.

These general considerations can hardly be held to counter-balance the practical objections urged above to the course of putting in the hands of



EGYPT.

the Council of the League the power to decide the future political status of the Sudan.

On the other hand, they are of sufficient weight to make it necessary to consider whether there is any other method of introducing League supervision as a guarantee that the British Government will exercise its predominance in a fair and disinterested manner. Various proposals in this direction are worth examination.

(a.) For example, it has been suggested that the British Government should take the following line: That it is *de facto* responsible for the administration of the Sudan, and that as the official attitude of the Egyptian Government has made a partnership under the 1899 convention unworkable, the British Government must continue with sole responsibility, but that, as a guarantee of its disinterestedness in the matter, it is prepared to accept the position of a Power on whom a mandate for the Sudan has been conferred by the League of Nations.

There is, however, no provision in the Covenant of the League under which a reference of this kind could be made. The council would probably feel bound to regard the situation as being already provided for by the 1899 convention, and refuse to recognise any other status, unless that convention has been technically brought to an end by some official act on the part of the Egyptian Government. Even so, there is no provision in the covenant for granting a mandate in such a case, as it could hardly be argued that the Sudan is, in the meaning of article 22, a territory "which, as a consequence of the late war, has ceased to be under the sovereignty of the States which formerly governed" it.

If the Egyptian Government had formally repudiated the 1899 convention, a "dispute likely to lead to a rupture" might be said to have arisen, and in that case the British Government might submit the matter to "enquiry by the council" under article 12. But in that case the council would undoubtedly require a free hand to decide one way or the other, and would not consider an *ex parte* application by the British Government to have a mandate conferred upon it.

In fact, there seems no safe way of getting the matter before the League on the lines of the suggestion now under consideration. Possibly, however, it might nevertheless provide a convenient formula for defining the British position before the world.

(b.) A more practicable and acceptable method of securing the intervention of the League as a guarantee of British motives might be to limit such intervention to the protection of the material advantages which should be secured to Egypt. Thus, the League might be asked to nominate the independent chairman to a commission to control the distribution of the waters of the Nile between Egypt and the Sudan—which commission would be further composed of one representative of the Egyptian Government and one representative nominated by the British Government.

Or again, if it is impossible to settle by agreement the amounts and conditions for the debt owed by the Sudan to Egypt, the Finance Committee of the League of Nations would be a very suitable body to adjudicate on this matter.

Such limited references to the League of Nations would be in every way desirable, and ought, if properly understood, to satisfy British and foreign public opinion and counteract Egyptian apprehensions.

PART II.—LEGAL CONSIDERATIONS.

1. If the arguments and conclusions set out in Part I of this memorandum are accepted, the British Government must clearly, if possible, avoid a reference of the *political* issue to the League of Nations. But is it a matter in which the British Government has a free choice?

There are three questions which require examination:—

- (1.) Is the British Government bound under the covenant itself to refer the matter to the League?
- (2.) Could the Egyptian Government force a reference to the League?
- (3.) Could a third party force such a reference?

The difficulty about these proposals is that they postulate either (a) a settlement agreed with Egypt, or (b) the willingness of the League to take a hand in working a solution imposed against the will of Egypt.—H. W. M.

EGYPT.

2. As regards the first question, if—

- (a.) Egypt were a member of the League, and
- (b.) The dispute with Egypt is to be regarded as a "dispute likely to lead to a rupture,"

then clearly, under articles 12 and 15, the British Government would be bound to refer the matter to the council.

But Egypt is not a member of the League. Does this make any difference?

Apparently the intention of article 17 is that it should not make any difference, as it lays down that in the event of a "dispute" (presumably this must be taken to cover a "dispute likely to lead to a rupture" within the meaning of article 12, and, also, a "dispute suitable for submission to arbitration which cannot be satisfactorily settled by diplomacy" within the meaning of article 13) between a member and a non-member, the non-member is to be invited to become a member for that particular purpose. But who is responsible for raising the question before the League so that the invitation to the non-member is issued? Is it the other party to the dispute, who is a member? This might indeed be argued—in which case it would be the duty of the British Government to give notice of the dispute to the Council of the League, at the same time asking that Egypt should be invited to become a member of the League for this purpose. But then, is it a "dispute likely to lead to a rupture"? It might perhaps be argued that the question of a rupture between Great Britain and Egypt is impossible in the sense that with British troops in occupation of Egypt there could be no question of *war* between the two countries. On purely technical grounds this argument would not be very convincing.

There is, moreover, the other alternative that the dispute, even if it cannot be regarded as one likely to lead to a "rupture" in the sense of a war, might be regarded as one coming under article 13; that is to say, as a dispute which is "suitable for submission to arbitration and which cannot satisfactorily be settled by diplomacy." Article 13 enumerates some of the kinds of disputes to be regarded as suitable for arbitration, and if the dispute with Egypt is to be regarded as one as to the interpretation of the 1899 convention, which has, in fact, the force of a treaty, it would certainly be one of the special cases enumerated in article 13.

It might again be argued that the issue is, as has been already declared by Mr. Lloyd George and the present Prime Minister, "a domestic one," and therefore not suitable for submission to the League. That plea might justify the British Government in refraining from taking the initiative in raising the question, although if raised by others it would not keep the matter from consideration by the council.* It is, however, to be noted that no provision is made for such a plea in the case of disputes coming under article 13 as suitable for arbitration.

On the whole it would seem very questionable if the case is argued on a literal interpretation of the clauses of the covenant as they stand, whether it could be held that it is not the duty of the British Government to refer the matter to the League.

On the other hand, the clauses of the covenant are so vague and wide, that they must be interpreted to some extent with reference to the intentions of the parties in particular cases. When the covenant was entered into by the British Government, Egypt was a British protectorate, and there can have been no idea in the minds either of the British Government or of the other signatories, that a dispute between Great Britain and Egypt could come before the League. When the protectorate was removed by the act of the British Government, it was done distinctly on the understanding that its removal was subject to the discussion of the four reserved questions as *purely domestic questions* between Great Britain and Egypt. This is clear from the declaration of Mr. Lloyd George quoted above.

On the whole it would appear that on broad grounds the British Government would be justified in taking the line that it had never been its

* It is expressly laid down in article 15 that it is for the council to find whether such a plea is justified, and it is only if the dispute is found by the council "to arise out of a matter which by international law is solely within the domestic jurisdiction" of the party raising the plea that it will hold good.



intention in signing the covenant to submit to the League, a possible dispute between itself and Egypt which might arise out of the termination of the British protectorate over Egypt.

3. The second question for consideration was: "Could the Egyptian Government force a reference to the League?"

On this Mr. Malkin has written the opinion, copy of which is attached.

4. The third question is: "Could some other member of the League bring the question of the Sudan before the League for consideration?"

It seems clear that this question must be answered in the affirmative. Article 11 contains the following passage: "It is also declared to be the friendly right of each member of the League to bring to the attention of the assembly or of the council any circumstance whatever affecting international relations which threaten to disturb international peace or the good understanding on which international peace depends."

The wording of this clause is very wide. It is not confined merely to "disputes," whether these be disputes "likely to lead to a rupture," as under articles 12 and 15, or to disputes "suitable for submission to arbitration" under article 13, or "disputes" between members and non-members under article 17.

If the matter was brought up in a general way it would presumably be open to the British Government to argue on general grounds (and not only on the narrow technical grounds defined in article 15) that it is not a matter "threatening to disturb international peace," &c.

On the other hand, if the matter were brought in this way before the council, that body would presumably classify it as a dispute within the meaning of one or other of the articles referred to above. The subsequent procedure would then follow on the lines already indicated in the preceding paragraph.

PART III.

1. It is next necessary to consider, on the supposition that the matter is to be referred to the League, on what lines such reference could be made so as to avoid as far as possible the objections explained in Part I above, and what tactics the British Government should adopt in order to ensure developments following these lines.

It is necessary to consider this contingency for the following reasons:—

- (a.) The British Government may disagree with the arguments advanced in Part I above, and decide on general grounds that the matter should be referred to the League.
- (b.) The British Government may take the view that, as on the strength of the legal opinion expressed in Part II above, Zaghul or a third party could, in any case, force the question before the League, therefore it would be the wisest course for the British Government, making a virtue of necessity, to take the initiative itself, in offering a reference to the League. The possibility of one or other of two alternative advantages might thereby be secured. Either that Zaghul would be forced to take the onus of refusing the proposal for the League's intervention, or that the British Government would at least ensure that the reference was made in the form most suitable to its own point of view.

Before being influenced by reason (b) it appears desirable to endeavour to get Zaghul to "show his hand," which might be done in the forthcoming conversations.

2. Assuming that the British Government has some power to direct the manner in which the reference to the League is made, the following line had been suggested in the course of one of the discussions at the Foreign Office:—

"That Zaghul should be informed that His Majesty's Government is perfectly willing to submit the matter for decision by the League, but that His Majesty's Government stands by the 1899 convention; that, therefore, Zaghul must, as a preliminary to submission to the League, not only accept the 1899 convention, but also publicly disclaim his declarations in Cairo in June which had been made in such terms as to make any 'partnership' impossible."

He should at the same time be informed that pending the result of the reference to the League, His Majesty's Government would continue to regard itself as responsible for the maintenance of order in the Sudan, and would be forced to take any action necessary to preserve such order.

It is quite possible that the assumption of such an attitude on the part of His Majesty's Government would effectively deter Zaghul from any attempt to secure a reference to the League. On the other hand, if he, or a possible successor to him, were to accept the British offer, it has been argued by Mr. Malkin, in his opinion referred to above, that a reference to the League on these lines might be somewhat inconvenient to the British Government. It would probably be treated by the League as a question suitable for arbitration under article 13, as being a question on the interpretation of a treaty, and a court of arbitration seeking to give the Egyptian Government a practical share in the administration of the Sudan might make embarrassing proposals. The International Court of Justice, considering the matter from a legal point of view, would hardly appreciate the practical reasons which would make it impossible to admit Egyptians into responsible posts in the Sudan.

On the other hand, there is nothing in the actual wording of the 1899 convention to prevent all the Government posts being filled by British or other non-Egyptian officials. This is a matter left entirely to the discretion of the Governor-General. Nor is there anything to prevent the Sudan Government organising its own defence force and asking for the removal of the Egyptian army. If such a step had actually been taken, it may be asked whether the International Court of Justice or any other arbitrator could, on legal grounds, decide that it was to be reversed. It might further be argued that the appointment of Egyptian officials, or the provision of a garrison by the Egyptian army are matters which have nothing to do with a "share in the Government of the country." That would rather be secured by some power (to be exercised by the Egyptian Government jointly with the British Government) of outside control over the *policy* of the Sudan Government. As long as it is *outside* control it might be possible to find some means of giving the Egyptian Government a share, *e.g.*, the appointment of a joint Anglo-Egyptian supervisory council or commission. (A proposal on these lines has already been made by the Sudan Government in its memorandum of the 25th May, 1924.)

On the whole, if reference to the League is to be made, there seems much to be said (in spite of the objections urged by Mr. Malkin) for the British Government taking the line of refusing to allow the 1899 convention to be called in question, and that the only question which it can admit as open to dispute is as to how that convention is, under the altered circumstances of Egyptian independence, to be applied. It must always be remembered that there are strong grounds for arguing that Egyptian independence is an occasion for diminishing and not increasing the Egyptian share in the Government.

An alternative line of argument is that if a reference is to be made to the League it would be better to take a bolder line and play for stakes of "double or quits." The British Government's line would then be, that as the dispute has arisen because Zaghul claims complete ownership of the Sudan, then a reference to the League implies that the 1899 convention has broken down and must be replaced by some other system. The question to be referred would then be whether His Majesty's Government should alone fulfil the function of trustee for the Sudanese (it might possibly be suggested that this should be done under League control) or whether Zaghul's contention should be accepted and the Sudan handed over to Egypt "to dispose of as a proprietor disposes of his property." His Majesty's Government would, in that case, make it plain that it could not accept any intermediate solution under which it would be possible for Egypt to interfere in and hinder British administration.

A reference on these lines would be much more possible for Zaghul to accept, as it would involve no retreat from the position he has already taken up. In favour of taking such a line it may be argued that the Council of the League, in view of the success of twenty-five years under British administration could hardly decide that the British should withdraw altogether.

Surely; if the argument was that the action taken was inconsistent with the convention. Of course, the court could not enforce its decision, but we should be bound to carry it out under the last paragraph of article 13.—H. W. M.

As put, this would not be a question of the interpretation of the convention, and would be more a question for the council than for the court. I am not sure whether this is intended.—H. W. M.



The tactics to be pursued by the British Government in this matter require most careful consideration and the best legal advice.

The questions to be answered are:—

- (a.) Which is the better of the two alternative lines outlined above to adopt?
- (b.) Could the British Government effectively insist on the adoption of the one or the other, and, in particular, in regard to the second alternative, could the British Government say, "we will accept no intermediate solution"?

This would largely depend on how our case was handled before the council.
—H. W. M.

This would largely depend on how our case was handled before the council.
—H. W. M.

All experience of previous references to the League have shown that it is just the "intermediate solution" which the council is most likely to give, *i.e.*, a compromise. If that is what they do in the present case, can the British Government say "a compromise is unworkable" and refuse to carry out the council's award?

PART IV.

In conclusion, it must be emphasised that nothing which has been said in any of the preceding parts of this note in any way affect the necessity for the British Government supporting the Sudan Government in taking such action as may be necessary to maintain order in the Sudan. This action might have to include the removal at an early date of all elements of the Egyptian army from the Sudan, and the taking over by the Sudan Government, as part of its own force, of the Arab and Sudanese units of the Egyptian army now stationed in the Sudan.

It would be exceedingly dangerous for the British Government to commit itself in any way to preserve the *status quo* as regards the Egyptian army pending the League's award. The Egyptian Government has already upset the *status quo*, *inter alia*, by making the position of the Sirdar and other British officers with the Egyptian army impossible.

PART V.

On the whole, after considering the various pros and cons set out above, the following course is recommended: This recommendation is based on the assumption (which must now be regarded as a practical certainty) that it will be impossible to reach any agreed settlement with the Egyptian Government, and that the future course must be determined by unilateral decisions on the part of His Majesty's Government. In order to justify His Majesty's Government's position before the world, and to secure a proper understanding of His Majesty's Government's motives and policy, not only by the people of the Sudan, but also by the Egyptian public—a large section of which is, though temporarily silenced, fully alive to the realities of the situation and the value of British backing, it will be necessary that His Majesty's Government's policy should be made clear in a declaration to be made to the Egyptian Government and to be published before the world.

It is recommended that this declaration should be approximately on the following lines:—

"That conversations with Zaghlul have only served to confirm the position disclosed in his previous public utterances, and to demonstrate that for the present any *partnership* between His Majesty's Government and the Egyptian Government in the internal administration of the Sudan is impossible.

"That, in the meanwhile, the duty of preserving order in the Sudan rests in fact on His Majesty's Government, which must accordingly take practical steps in view of the new situation which has been created and has made the friendly partnership of the past twenty-five years impossible.

"That His Majesty's Government regards this responsibility as a trust for the natives of the Sudan, and that as a guarantee that they intend to carry it out in this spirit, they will welcome a system of

control and supervision by the League of Nations as though they held a mandate under article 22 of the covenant should the League see fit to introduce such a system.

"That, at the same time, His Majesty's Government recognises that Egypt has certain material interests which must be guaranteed and safeguarded—these being chiefly as regards her share of the Nile water and the satisfaction of any financial claims which she has against the Sudan Government, that His Majesty's Government is prepared to refer both these questions to the League of Nations to decide the extent of Egypt's just claims and how they can be satisfied."

The technical difficulties dealt with in Parts II and III of the memorandum are fully recognised, particularly as regards the declaration that the British Government is willing to accept the position of a mandatory Power. Very possibly the League may find itself on technical grounds unable to consider the question and to accept the supervisory and controlling position offered to it.

On the other hand, in making such a declaration, His Majesty's Government would, by taking the initiative in bringing in the League of Nations, largely disarm criticism, even if the League could not, for technical reasons, accept the position offered. In particular, all the feelings which have prompted the suggestions made by members of the Labour party (quoted in Part I) would be satisfied. The real force of the proposal, however, is that the policy outlined is *fundamentally right*. It is right that the administration of the Sudan should remain in British hands, and that the position of the British Government should be that of holding a mandate, and it is right that the British Government should, as regards Egypt's material interests, place its action under the control of an independent body.

No sane critic could ask for more, and the fundamental justice of this course ought to satisfy, not only the opinion of the world, but, ultimately, of Egyptian public opinion.

No doubt there are disadvantages in the course. It will, in many ways, prove embarrassing to the British Government as compared with complete freedom of action, and it may also mean the assumption by the British Government of heavy financial obligations. But in view of the possibility that in any case the British Government may be forced before the League, it would appear better to take the initiative.

Further, whatever the financial obligations, the alternative of a complete evacuation of the Sudan is unthinkable.

Note by Mr. Malkin.

I understand that I am asked to advise as to the possibilities of Zaghlul's bringing the Sudan question before the League against our will.

If Zaghlul decided to do this, there are, Egypt not being a member of the League, two courses open to him.* He may induce some member of the League to bring the question to the attention of the assembly or the council under the second paragraph of article 11 of the covenant. It may be doubted whether any member of the League would be willing to do this, unless it thought its own interests were affected by the dispute, or unless it wanted to make trouble for us. But if this were done, the covenant does not lay down any such procedure for such cases, and I cannot forecast what action the council would be likely to take; but it may be assumed that there would, at any rate, be a discussion at Geneva in which both Egypt and ourselves would take part. If the result of such discussion were, in the opinion of the council, to show the existence of a dispute with which the council was competent to deal, the council would probably take much the same action as it would if the matter were brought before it by Egypt by the second method which is open to Zaghlul.

This method would be to take action under article 17. I am not aware of any case in which action under that article has been taken by the party to the dispute who is not a member of the League, but there seems no reason why it should not be.

* I think that the possibility of action under article 19 can be disregarded.



If Zaghlul were to call the attention of the League to the existence of a dispute between Egypt and Great Britain, and were to intimate Egypt's willingness to accept an invitation under article 17, I think there can be little doubt that the invitation would be given, and the council would then institute an enquiry under the second paragraph of the article.

If, in these circumstances, we wanted to prevent further action by the League, we should have either to show that there was no dispute in existence to which article 17 applies, or to persuade the council that the dispute arose out of a matter, which, by international law, was solely within our domestic jurisdiction (article 15, paragraph 8). In either case the argument would be much the same: it would, I suppose, be that Egypt was a British protectorate, that the protectorate was only terminated by an instrument in which we reserved the question of the Sudan to be settled between Egypt and ourselves, and that, in these circumstances, a dispute between Egypt and us about the Sudan cannot be regarded as an international question which is proper for submission to the League. Such an argument is not without weight, but I doubt whether it would prevail in the atmosphere of Geneva; and it must be remembered that it would not be a case of our refusing to allow the matter to be brought before the League on the grounds suggested, but of our persuading the council that the matter which was before it was not one with which it could properly deal. There would have to be a discussion at Geneva in any case, and in such a discussion the odds are always against the party which is challenging the jurisdiction of the League; and in such cases it is always open to the council to refer the preliminary point to the Permanent Court for an advisory opinion.

I should point out that it is not clear whether the word "dispute" in article 17 is to be read as equivalent to a "dispute likely to lead to a rupture" in article 15. But even if it is it would not be safe to assume that the dispute would not be regarded as one likely to lead to a rupture for the purposes of the articles in question. The tendency is against restricting the class of disputes to which the machinery of the covenant is to be applied.

If Zaghlul succeeds in getting the matter before the League he will be in rather a difficult position. For he must either admit that the 1899 convention is, and is to remain, the governing instrument, and that his complaint is against the way in which that instrument has been interpreted and administered, or attempt to demonstrate that the convention ought to be terminated and replaced by some other system. If he adopts the first course he will get into difficulties in Egypt, while if he adopts the second he will (assuming that we can take the line that we are quite prepared to carry on under the 1899 convention) find it difficult to persuade the League to deprive us of our rights under that convention. From this point of view, therefore, it is important to avoid any action which would enable Zaghlul to contend with some show of reason that we ourselves had in effect terminated the convention or made its future operation impossible. We want to leave Zaghlul with the onus of making a case for the termination of the present system.

If Zaghlul decides to stand on the 1899 convention, it is probable that the council would consider that there was a dispute as to the interpretation of that instrument, and would refer it to the Permanent Court. It does not seem that such a course would suit us, as the best that we could hope for would be a finding which would justify our action up to date, but would in all probability not cover any action which we may find it necessary to take in view of the changed conditions in Egypt.

If he adopts the second course, it would seem that our position would be a good deal easier. He will be in the position of trying to induce the League to terminate a system established under a treaty which is still in force, and if he seems likely to succeed we ought to be able to make it plain that as, on his own showing, the Anglo-Egyptian partnership has broken down, it is necessary to set up some new system which will work. In that case, the alternative would seem to be either that His Majesty's Government should alone fulfil the functions of trustees for the Sudanese (which we might well suggest should be done with League control), or that Zaghlul's contention should be accepted, and the Sudan handed over to Egypt "to dispose of as a proprietor disposes of his property." We ought to be able to prevent the institution of any intermediate solution under which it would be possible for Egypt to interfere in and hinder our administration.

September 17, 1924.

Opinion of the Lord Chancellor.

THE question is on what basis of right and expediency the British Government ought to deal with the Egyptian Government as regards the future control of the Sudan.

The first observation to be made is that the British Government had, before 1899, no juridical title to be in either Egypt or the Sudan. Britain was there in virtue of her army of occupation. This occupation survived to her alone after the French refusal to co-operate in intervention at Alexandria in 1882. The title of the British Government to be in Egypt is none the less a strong one, for without the presence of its agents and troops, order could not have been preserved in Egypt in the past.

This memorandum is concerned with the Sudan alone, but it is obvious that the question of the Sudan cannot be disentangled from that of Egypt, with which it is inextricably bound up. The dominant document is now the Boutros-Cromer Convention of 1899. This document expressly recognises the right accruing to the British Government by the conquest of the Sudan to share in its future government. The two flags are to be used together, and the supreme military and civil command of the Sudan is to be vested in a Governor-General to be appointed by Khedivial decree on the recommendation of the British Government. The Governor-General is to make the laws, and no Egyptian law is to apply to the Sudan without his consent, nor are consular agents to reside in the Sudan without such consent.

Egypt, by financial regulations made about the same time, was to balance the Sudan budget.

The present situation is that two battalions of Egyptian infantry and three batteries of artillery are quartered in the Sudan. In addition to this, there is other Egyptian military personnel of the Military Works Department, &c. Besides these, there are about 11,000 locally recruited Sudanese and Arab troops which form part of the Egyptian army. The commanding officers of the Sudanese and Arab units are British, but the junior officers are Egyptian, and Sudanese and Arab natives of the Sudan.

Apart from this, there are now in the Sudan two battalions of British infantry and some small detachments of other arms.

There is, of course, a large contingent of civil administrators, some of whom are British and others Egyptian—all under the Governor-General. All the senior officials are British.

Under the circumstances, the British may be said to be in occupation subject to such rights as are preserved to Egypt by the convention of 1899. It may be said that such powers of supervision over the administration of the Sudan as Egypt retained were in the past always exercised through British officials. In particular, the rights of financial control reserved to the Egyptian Government under the financial regulations have always been exercised through the British financial adviser in Cairo.

Under these circumstances, the proper inference appears to be that Britain is in occupation of the Sudan in substance, although the paper title is theoretically qualified by the convention of 1899. Any pretension on the part of Egypt to supersede this condition of things would therefore be contrary to the provisions of the convention.

If no satisfactory new arrangement can be come to by agreement, a dispute arises, which would be, I think, cognisable by the League of Nations if Egypt chooses to take it there, because, although Egypt is not a member of the League, she could probably get herself made one under article 17 of the covenant, and possibly under article 4. Articles 12 to 16 would then apply. Article 19 authorises the assembly to advise "the reconsideration by members of the League of treaties, which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world." The words of this are wide, and I do not think that it would be safe to rely for the exclusion of their operation on article 21, which states that nothing in the covenant "shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace."

It seems, therefore, that it is necessary to watch for any indication of an intention on the part of the Egyptian Government to bring the question of the Sudan before the League.

It would, no doubt, be safer to keep the case outside the League of Nations. If



1924

16

EGYPT.

we could simply adhere to the 1899 convention, it may well be that the League would not wish to entertain the case.

But unfortunately, by the claims which it has recently put forward publicly, the Egyptian Government seems to have indicated an intention to supersede the provisions made by the convention.

This attitude on the part of the Egyptian Government may force His Majesty's Government to take action going beyond the *status quo*. Under such circumstances it may be that the wisest course would be to assert our obligations to the people of the Sudan, to show that the discharge of these obligations would be imperilled if the Egyptian Government got its way, and to express our willingness to accept the position of an exclusive mandatory of the League on the footing of carrying out the substance of the policy defined by the convention.

HALDANE.

London, October 1, 1924.

[E 9544/9316/16/1924]

No. 3.

[November 2, 1924.]

Foreign Office to the Lord Chancellor.

My dear Schuster,

Foreign Office, October 29, 1924.

Egypt and
the League
of Nations.

YOU will remember that some weeks ago we asked the Lord Chancellor to give us the benefit of his advice in the matter of the expediency of referring to the League of Nations the question of the future control of the Sudan.*

We are now confronted with a further problem arising out of our relations with Egypt. The Secretary-General of the League of Nations wrote a letter to Cadogan on the 10th October, enquiring whether the Protocol for the Pacific Settlement of International Disputes should be communicated to Egypt. Copies of Sir Eric Drummond's letter, of the protocol in question and of the minutes written on the paper in this Department are enclosed herein. From these last you will see that Cadogan has telegraphed to Sir Eric Drummond requesting him to defer further action for the present.

The Prime Minister is most anxious that Lord Haldane should advise as to whether, having regard to the British declaration to Egypt of the 28th February, 1922, and of our notification to foreign Powers of the 15th March of that year (copies of both papers are annexed), His Majesty's Government can justifiably argue that Egypt, pending the settlement in the manner prescribed in the declaration of the four questions reserved to the discretion of His Majesty's Government, is not a fully independent State, notably in so far as the limitation of armaments is concerned, and that in consequence a copy of the protocol should not be sent to her.

H. W. MALKIN.

List of Papers.

- (1.) Sir E. Drummond to Mr. Cadogan, October 10, 1924. [E 9316/9316/16/1924.]
- (2.) Protocol for the Pacific Settlement of International Disputes. [W 8487/134/98/1924.]
- (3.) Minutes on E 9316/9316/16/1924.

Opinion of the Lord Chancellor.

THE principles and procedure of the League of Nations appear to me to give rise to considerable difficulties for the British Empire, and these difficulties are not diminished by the form assumed by this protocol. Questions of a new order, on which existing public international law throws but little light, arise upon the terms of the protocol.

By Resolution I of the assembly it was decided that the protocol was not merely to be opened for signature by representatives of the League who were already in a position to sign it, but was to be held open for signature by all other States. This is in accordance with the initial heading of the protocol itself, which expressly includes non-members of the League.

Into the terms of the protocol it is not necessary for me to enter. The present question is not whether these may prove embarrassing for the British Empire, or

• No. 2.

EGYPT.

17

whether the object of the policy of the League is not so great that such embarrassment ought to be faced. The question is simply whether we can oppose the communication, by the secretary-general, of the protocol to Egypt. Primarily this is purely a legal question of the interpretation of the documents of the League, including the whole of the protocol and the first resolution of the assembly on the 2nd October, 1924.

Is Egypt a "State" within the meaning of the words used? I think that, as matter of law, when we issued the declaration to Egypt in February 1922, we recognised her as an independent sovereign State. It is true that certain matters were "absolutely reserved to the discretion of His Majesty's Government until such time as it may be possible by free discussion and friendly accommodation on both sides to conclude agreements in regard thereto." These matters were—

1. The security of the communications of the British Empire in Egypt;
2. The defence of Egypt against all foreign aggression or interference, direct or indirect;
3. The protection of foreign interests in Egypt and the protection of minorities; and
4. The Sudan.

It was provided that, "pending the conclusion of such agreements, the *status quo in all these matters* shall remain intact."

But are these reservations such as to prevent Egypt being a State within the meaning of the words in question? Or are they more than declaratory of our intention to insist on agreements being come to with Egypt on the points stated, treating her as a *pro tanto* foreign and independent nation? That on these points she is not to have complete control of her own affairs does not seem to me to conclude the matter. None of them is logically or legally inconsistent with Egypt being in the position of a "State." The case is an unusual one, but the circumstances of the true status of Egypt being unusual does not seem to me to be sufficient in days in which international relations are assuming new and modified forms. A "State" may mean a State with full sovereignty, although restricted on special points.

I have had the advantage of discussing the question with Mr. Murray and Mr. Malkin. Sir C. Hurst I have not seen, but I have read his memorandum, and have considered its reasoning. I feel compelled to say that I am unable to come to a different conclusion from that in his memorandum. Egypt was not independent when she was in the occupation of our troops and under the Turkish Sultan. Now we have declared her to be in a new position.

The secretary-general is the official of the League itself, and he is bound to bring the protocol to the notice of the Egyptian Government if the Egyptian State comes within the language used in the protocol and the first resolution of the assembly. We could not prevent Egypt from receiving the protocol if the assembly decided that it should go to her. All we could do is to prevent her from taking action upon it by using, if necessary, force against her. She would probably complain that we were trying to deprive her of her power to co-operate in enforcing the sanctions in proper cases, by restricting, for instance, her export of cotton to an aggressor. Our position might bring us into sharp conflict with the League, as well as with Egypt.

It would be said that all we were entitled to do was, while recognising Egypt as an independent State, to insist on her coming to an agreement with us on four important points, which might be the subject of a treaty. If she refused we might have to go to war, but it would be into war with another State.

HALDANE.

November 2, 1924.

[E 9996/9316/16/1924]

No. 4.

[November 17, 1924.]

Foreign Office to the Lord Chancellor.

THE Secretary of State for Foreign Affairs presents his compliments to the Lord Chancellor, and begs to transmit the accompanying documents relating to the question of the communication by the League of Nations of the Geneva Protocol to Egypt.

2. As his Lordship will observe, Lord Haldane, in a written opinion, expressed the view that his successor should be asked at once, if there was still time, to consider

[13086]

D



the matter *de jure*. A copy of this opinion is included amongst the enclosures which accompany this letter.

3. It is understood that Sir Eric Drummond will be obliged in a week's time to take steps for the distribution of the protocol, and in these circumstances it is hoped that the Lord Chancellor may be able to consider the question and express his opinion as to whether it is possible to maintain the thesis that the protocol should not be sent to Egypt, and, if so, on what grounds Sir E. Drummond should be urged to refrain from communicating it.

Foreign Office, November 10, 1924.

List of Papers.

- (1.) Opinion of Lord Chancellor, October 1, 1924. [E 8839/735/16/1924.]
- (2.) Sir E. Drummond to Mr. Cadogan, October 10, 1924. [E 9316/9316/16/1924.]
- (3.) Protocol for the Pacific Settlement of International Disputes. [W 8487/134/98/1924.]
- (4.) Minutes on E 9316/9316/16/1924.
- (5.) Foreign Office to Lord Chancellor, October 29, 1924. [E 9316/9316/16/1924.]
- (6.) Opinion of the Lord Chancellor, November 2, 1924. [E 9544/9316/16/1924.]

Opinion by the Lord Chancellor.

I HAVE considered the subject-matter of this reference, and have had the advantage of discussing the questions raised with the Secretary of State for India and the Attorney-General, who concur in the following conclusions. We have been assisted by hearing the views of Sir Cecil Hurst and Mr. Murray.

It is impossible not to agree cordially with the opinion expressed by Lord Haldane that the difficulties created for the British Empire by the principles and procedure of the League of Nations are "not diminished" by the form assumed by the protocol of the 1st October, 1924, and this is notably true as to the relations between this country and Egypt. But, on the other hand, there are obvious difficulties in maintaining the position that Egypt cannot be invited to sign the protocol. By the declaration of 1922 the British protectorate over Egypt was terminated and Egypt was solemnly declared to be "an independent sovereign State." It is true that by the same instrument certain matters of great importance were absolutely reserved to the discretion of His Majesty's Government, and that the declaration (like all other documents) must be read as a whole; but many instances might be quoted where States which have entered into engagements seriously detracting from their independence have nevertheless been held to remain sovereign States, and it appears to me that it would be extremely difficult for this country, in face of the solemn declaration above quoted, to maintain the position that Egypt is not a State to which, under the resolution of the assembly dated the 2nd October, 1924, the protocol is open for signature.

At the same time, I do not think that His Majesty's Government should acquiesce without qualification in an invitation to Egypt to sign the protocol. If no caveat were now entered, it might hereafter be said that we had assented to the admission of Egypt as a party to the protocol without reserve and must accept the consequences. Having regard to this consideration, I think it desirable that an official communication should be made to the secretary of the League to the effect (1) that we understand that it is proposed to send a copy of the protocol to the Egyptian Government with a view to its being signed by them; (2) that, in this connection, we think it desirable to remind the Council of the League that the British protectorate over Egypt came to an end by virtue of the declaration made by His Majesty's Government on the 28th February, 1922, and that, under the terms of that instrument, certain questions were absolutely reserved to the discretion of His Majesty's Government until such time as an agreement might be come to regarding them with the Egyptian Government; (3) that it will be for the council to determine whether, in the circumstances, the Egyptian Government should be invited to sign the protocol; and (4) that, in any event, we are unable to admit that the protocol, if signed by Egypt, will enable the Egyptian Government to invoke the intervention of the League in the settlement of the matters reserved by the declaration to the discretion of His Majesty's Government.

In making the above suggestions I do not, of course, attempt to prescribe the precise form of the communication which should be made to the League, which will be determined by the Secretary of State for Foreign Affairs; but if he should wish

us to consider the draft of the letter proposed to be sent we shall of course be ready to do so.

On receipt of the letter, Sir Eric Drummond will, no doubt, consider whether he should communicate the protocol to the Egyptian Government forthwith or should await the instructions of the Council of the League.

CAVE.

November 17, 1924.

GENERAL.

[W 3512/59/98/1924]

No. 4^A.

[Ministry of Labour.]

[April 3, 1924.]

Case for the Opinion of the Law Officers of the Crown and Mr. C. W. Lilley.

THE opinion of the Law Officers of the Crown and Counsel is desired on certain points which have arisen in regard to Article 421 of the Treaty of Versailles. This Article reads as follows:—

"The Members engage to apply Conventions which they have ratified in accordance with the provisions of this part of the present Treaty to their colonies, protectorates and possessions which are not fully self-governing—

- "1. Except where owing to the local conditions the Convention is inapplicable, or
- "2. Subject to such modifications as may be necessary to adapt the Convention to local conditions.

"And each of the Members shall notify to the International Labour Office the action taken in respect of each of its colonies, protectorates and possessions which are not fully self-governing."

The Law Officers and Counsel will no doubt recollect that Article 405 of the Treaty lays down the procedure by which proposals which are brought before the International Labour Conference may take the form of draft International Conventions for ratification by the Members, and Article 408 provides that each of the Members shall make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party.

All the draft Conventions which have been adopted by the Conference and ratified by the Members contain certain formal articles, and amongst these are the following:—

- (A.)—A provision that the Convention shall come into force at the date on which the ratifications of two Members of the International Labour Organisation have been registered by the Secretary-General; and
- (B.)—A provision that a Member which has ratified the Convention may denounce it after the expiration of ten years after the date on which the Convention came into force by an act communicated to the Secretary-General of the League of Nations for registration, such denunciation not to take effect until one year after the date on which it has been registered at the Secretariat.

Considerable doubt has been felt as to the exact nature of the obligation which is imposed upon the Member by Article 421. The two particular questions which have arisen are—

1. If a member applies a duly ratified Convention to a colony, protectorate or possession which is not fully self-governing, with or without modification, will such Convention remain unalterable so far as that colony, &c., is concerned for the whole period of eleven years during which the Convention must of necessity remain in force? Or can it be argued that, even if a Member has applied a Convention to a colony, &c., with or without modification, if the local conditions so alter that the Member considers that an initial or a further modification of the Convention is necessary,



GENERAL

such initial or further modification can be made at any time, although the time for denunciation of the Convention has not arrived?

2. Is any formal instrument required to be issued by the Member in testimony of the application of a Convention to a colony, &c., which is not fully self-governing, and is that instrument required to be registered with the Secretariat of the League of Nations in accordance with Article 18 of the Covenant?

The answers to these questions appear to depend on the interpretation placed upon the word "apply" in Article 421 of the Treaty:—

1. As regards the meaning of the word "apply" in Article 421 of the Treaty, two interpretations seem possible:—

(a.) It may be argued that the "application" of a Labour Convention to a colony is a formal act (corresponding to His Majesty's "accession" to a Treaty in respect of the colony) whereby His Majesty's Government undertake that the provisions of the Convention will be carried out in that colony. As the obligations of His Majesty's Government in respect of the colony would depend upon this formal act of "application," it would appear that His Majesty's Government could only be freed from their obligations by a further formal act, corresponding to the "denunciation" of a Treaty, and, as neither the Conventions themselves nor Article 421 of the Treaty of Versailles contain any provision for such separate denunciation in respect of colonies, presumably His Majesty's Government would be bound by their obligations in respect of the colony concerned for the whole period of duration of the Convention. The position would in fact be similar to that of a Treaty containing provision for separate accession of colonies, but no provision for separate termination in respect of colonies which have acceded. (Such Treaties are now exceptional.)

(b.) It may be argued that the "application" is merely the process of legislative and administrative action whereby His Majesty's Government give effect in any of the colonies to the general obligation, which they have already assumed by the act of "ratifying" the Convention, that action in accordance with its provisions will be taken in any colony where local circumstances render such action possible, and to the extent to which circumstances render action possible. On this interpretation the obligations of His Majesty's Government in respect of any colony would follow from the act of "ratification," but the extent of the process of "application" whereby effect is given to those obligations would depend entirely upon the circumstances of the colony and could be varied with any variation in those circumstances. Thus, if at the moment of ratification the circumstances of a colony were such that the provisions of the Convention could be carried out there, the necessary legislative and administrative action would be taken to carry them out, but if subsequently circumstances changed and it became impossible to carry out the provisions of the Convention in the colony, action could be suspended forthwith without any formal "denunciation" being given. Equally, if at the time of ratification the circumstances of a colony were such that the provisions of the Convention could not be carried out, no action would be taken in the colony, but, if subsequently circumstances changed and it became possible to carry out its provisions, the necessary action would forthwith be taken without any formal act in the nature of "accession" to the Convention being effected.

In support of the former interpretation, it may be possible to rely on the use of the words "to apply" (in the French, "appliquer") at the beginning of the Article. It might be inferred from the use of these words that the power to modify relates to the application, and that a modification subsequent to application would not, in fact, be the application of a modified Convention, which alone is permissible. It may also be possible that the use of the words "the action taken" (in the French, "la décision qu'il se propose de prendre") supports this interpretation, more especially the way the words are rendered in French, and that this phrase imports one single action, and does not appear to contemplate more than one action.

On the other hand, it is thought that it is dangerous to attempt to interpret the Articles of the Treaty in the light of isolated phrases which may appear in various parts of the Articles. It must of course be remembered that there was great difficulty

in rendering the provisions of the Treaty both in English and in French, and that in a number of cases the real meaning of the Articles may be somewhat obscured by the actual words used. It is suggested that Article 421 was drawn in this way for the purpose of allowing a very free hand to the Members in the application of Conventions to their colonies, &c., which are not fully self-governing, and that modifications subsequent to the original decision as to application must have been contemplated, because of the difficulty of envisaging at the date of the original decision changes in the local conditions throughout the colony during the next eleven years, which might render the Convention quite inapplicable.

In this connection it is thought that the attention of the Law Officers and Counsel should be called to a declaration made by the British Delegates on the Commission on International Labour Legislation which was set up in Paris for the purpose of preparing the draft of Part XIII of the Treaty of Versailles, and which was presided over by Mr. Samuel Gompers. At the 22nd meeting of the Gompers Commission the British Delegates caused a declaration to be recorded in the minutes of the Commission that "The decision taken by a State as to the measure in which it will apply a Convention to its colonies should be taken with full independence and without the control of the International Conference." This declaration has been quoted by the Ministry of Labour in official correspondence with the International Labour Office and has not been challenged. It is felt on general grounds, however, that it is better that an interpretation of any of the Articles of the Treaty should not be based upon the minutes of this Commission, or indeed upon any "travaux préparatoires."

It can no doubt be said that if the "application" is to be regarded as a single formal act any difficulty can easily be got over by inserting a modification in the application of the Convention providing that the Convention shall only remain in force as far as that particular colony is concerned for one, two or more years, and that after that period of time the application shall be reconsidered.

This of course is quite true; but this line of reasoning does not seem to be really material in considering the true implication of the provisions of the Article.

It may also be argued that it is undesirable to import into a discussion of the position in relation to Labour Conventions such conceptions as that of "accession," which apply to treaties proper, having regard to the special nature of Labour Conventions, which are negotiated by conferences composed not only of Government delegates, but also of delegates representing the employers and workers of the Member States, which do not bear the signature of the delegates who have negotiated them, and which are ratified not by a formal ratification by His Majesty, but by Orders of the Lords of the Council confirming and approving them. A specimen of such an Order is sent herewith.

2. As regards the question whether any formal instrument is required to be issued by the member in testimony of the application of the Convention to a colony, &c., which is not fully self-governing, and, further, whether that instrument is required to be registered with the Secretariat of the League under article 18 of the Covenant, the answer would seem to depend upon whether the Law Officers and Counsel advise whether the application is in the nature of an "accession" to a treaty or not. It is submitted that, if the application is not in the nature of an "accession," nothing more than a letter to the Secretary-General of the League notifying the fact of the application would be required; but if, on the other hand, the application is in the nature of an "accession," it would seem that some formal instrument is necessary. If the Law Officers and Counsel advise that a formal instrument is necessary, it is suggested that this would best take the form of a declaration signed either by the Secretary of State for Foreign Affairs (as the Minister concerned with the Treaty relations of this country) or the Secretary of State for the Colonies (as the Minister responsible for the carrying out of the Convention in the colonies).

Article 18 of the Covenant is as follows:—

"Every Treaty or international engagement entered into thereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such Treaty or international engagement shall be binding until so registered."

The Law Officers of the Crown and Counsel are requested to advise:—

1. Whether the "application" of a draft Convention to a colony, protectorate, or possession which is not fully self-governing is in the nature of an "accession" to a Treaty, or merely of a legislative and administrative process.



2. Whether such "application" can be revoked or modified at any time during the currency of the Convention, or whether an initial modification alone is permissible.
3. Whether a formal instrument is required to be issued by the Member in testimony of the "application" of a Convention to a colony, &c., which is not fully self-governing; what form such instrument should take, and whether such instrument is required to be registered in accordance with the provisions of Article 18 of the Covenant.

Opinion of the Law Officers of the Crown and Mr. C. W. Lilley.

IN our opinion the formal incidents of a Treaty, such as "accession" thereto in respect of a colony are not appropriate to the Conventions now under consideration. We think that the "application" intended by Article 421 of the Treaty of Versailles involves merely an administrative or legislative process.

2. Such application can be modified or revoked if the local conditions alter within the meaning of the proviso of Article 421 at any time during the currency of the Convention.

3. We think that no formal instrument is required for the purpose of notifying to the International Labour Office the action taken. In our opinion the communication made to that Office is not required to be registered.

PATRICK HASTINGS.
HENRY H. SLESSER.
CECIL W. LILLEY.

*Law Officers Department,
April 3, 1924.*

[W 6251/59/98/1924]

No. 4ⁿ.

[Ministry of Labour.]

[June 2, 1924.]

Case for the Opinion of the Law Officers of the Crown and Mr. C. W. Lilley.

HEREWITH—

Inter-
national
Labour
Conven-
tions:
obligations
under
Treaty of
Versailles,
Part XIII,
Labour
Clauses.

1. Case submitted to Law Officers of the Crown and Counsel in 1921.
2. Opinion of the Law Officers of the Crown and Counsel 1921.*
3. Copy pamphlet entitled "Labour and the Peace Treaty."
4. Copy draft conventions and recommendations adopted by the International Labour Conference at its first annual meeting.

The Law Officers of the Crown and Counsel are requested to advise as to the nature and extent of the obligations incurred by the Crown in connection with draft conventions under article 405 of Part XIII of the Treaty of Versailles.

1. In 1921 the Law Officers of the Crown and Counsel (being the present Lord Chief Justice of England, the present Master of the Rolls and Mr. C. W. Lilley) advised on certain matters arising out of the labour clauses (Part XIII) of the treaty. The case then put to the Law Officers and Counsel and their opinion thereon are forwarded herewith.*

2. Some time has now elapsed since that opinion was given, and its interpretation of the obligation incurred by the Crown in relation to draft conventions has in the meantime been the subject of criticism and controversy. It may, however, be remarked that the practice of the late Governments in connection with draft conventions has not in fact confined itself to the action which is alone obligatory on the Crown according to the opinion given in 1921 and outlined in paragraph 3 hereof. In fact the following course has been followed:—

The draft conventions adopted at an International Labour Conference have been laid on the tables of both Houses in the form of a White Paper. Further, after deciding whether it was desirable to ratify any or all of such draft conventions, the Government has moved the House of Commons that that House approves of its policy in relation to those draft conventions. On this motion, the Government has explained its decision to the House with regard to the draft conventions, and an opportunity has thus been given for discussion and criticism of the attitude so defined.

* Confidential 11933, p. 8.

In spite of the action indicated above, critics of the late Governments have asserted, and still assert, that the obligations of the Crown under article 405 have not and are not being fulfilled, and in consequence the present Government feel that they are called upon to give fresh consideration to the matters arising out of the labour clauses of the treaty, and accordingly the question of the nature of the obligation of the Crown in regard to draft conventions is re-submitted to the present Law Officers and Counsel.

3. The view of the Law Officers and Counsel in 1921 and the arguments (not repeated here), which may have had an influence on that view, will be found respectively in their opinion and in the case submitted to them; that opinion was to the effect that the only obligation resting on the Crown with regard to a draft convention is an obligation to consider it for the purpose of deciding whether or not the Crown will ratify it. The alternative interpretation which has been urged necessitates an obligation of a much wider nature—namely, that the Crown has undertaken to bring *all* draft conventions before Parliament whether it proposes to ratify them or not.

4. These interpretations are called here for convenience "the limited", and "the extended."

The limited interpretation is based, at least in part, on the broad assumption that the Treaty of Versailles could not and indeed was not intended to alter the domestic law and constitutional practice of this country or involve any infringement or limitation of the Crown's prerogative.

It is argued by those who contend for the extended interpretation that it is more consistent with the spirit of the labour clauses of the treaty and with what appears, from the marked passages on pp. 12 and 13 of the pamphlet entitled "Labour and the Peace Treaty" (forwarded herewith), to have been in the minds of those concerned with the framing of those clauses.

5. There seems little doubt that the limited interpretation is more in accord with what has hitherto been the constitutional practice, for the extended interpretation would mean that an obligation rests on the Crown to bring before the Houses of Parliament every draft convention, including even a draft convention which might have been opposed by the delegates of the British Government and which that Government might not wish to apply to this country, thus implying a restriction on the prerogative hitherto unknown to the Constitution.

6. Against these considerations, however, it has been contended that a draft convention under the treaty is a new sort of international instrument, and that it is consequently necessary to admit some modification of the existing practice since that practice was formed on the basis of an international system which possessed points of difference from that embodied in the treaty. It has been argued, therefore, that the proper attitude for the Crown to take as to its obligation with respect to a draft convention is not so much to endeavour to fit the provisions of article 405 into the existing practice, which was necessarily adapted to a different state of things, but rather to interpret them in the light of the general intentions of the framers of Part XIII of the treaty as explained by the pamphlet above referred to. It is, of course, for the consideration of the Law Officers and Counsel whether such a method of interpretation is in the circumstances admissible, and, if so, to what extent; but if it is permissible, so far as this country is concerned, to pay regard in construing the treaty to matters extraneous to the document itself, there can be little doubt that those who framed article 405 did have in mind that draft conventions should be brought before the Legislature by each Member.

As the Law Officers and Counsel are no doubt aware, the law and practice of the Constitution relating to treaties in this country differs in important particulars from such law and practice in other countries who were signatories to the Treaty of Versailles. It is possible that this difference may have been overlooked by the persons responsible for framing the words of this article and therefore it is hardly a matter of surprise that difficulties have arisen in applying the words of the article to the machinery of the Constitution in this country.

7. The terms of article 405 of the treaty expressly confer upon each Member an obligation to "bring the . . . draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action," and the crucial questions arising here appear to be—

(a.) What is meant by "the matter"? and

(b.) Who in Great Britain is "the authority within whose competence the matter lies"?



8. On the one hand it is argued in support of the limited interpretation that by the words "the matter" the article is referring to the *ratification* of the draft convention, and that the authority within whose competence the matter of ratification lies is in this country the Crown acting upon the advice of the Executive Government. The Crown acting upon the advice of the Executive Government is indisputably the treaty-making authority in this country, and as such it is the competent authority for the ratification of all international agreements: it would therefore follow from this view that the Crown having "brought a draft convention before itself" for consideration whether or not it should be ratified, if the Crown does not wish to ratify the draft convention, it is under no further obligation; if, however, it wishes to ratify a draft convention that can only become effective through legislation, then, presumably, the Crown would endeavour to secure the legislation from Parliament before communicating the formal ratification.

9. The alternative considerations urged in support of the extended interpretation may be summarised as follows:—

- (a.) By article 405 the Crown has undertaken to bring a draft convention before an authority or authorities with a particular purpose in view, namely, "for the enactment of legislation or other action."
- (b.) The only authority in this country which is competent to enact legislation is the King in Parliament.
- (c.) In respect therefore of any draft convention which would entail legislation, it cannot be said that the Crown has satisfied the obligation resting on it until it has brought that draft convention before both Houses of Parliament.

In support of this view it is urged that where article 405 speaks of "the authority . . . within whose competence the matter lies," it is referring by the words "the matter" not to the power of ratification, but rather to the application of the terms of the draft convention to the labour conditions of this country; and it is argued that this is borne out when the objects of the machinery set up in Part XIII of the treaty are considered. Put shortly, these objects as set out in the preamble to the labour clauses are to alter and improve the conditions of labour; and it is said therefore that since a draft convention embodies a particular proposal or proposals to this end, the obligation resting on the Crown is an obligation to refer to the body which is responsible for the conditions of labour in this country the question whether the draft convention shall or shall not be applied to those conditions. This body is the King in Parliament.

If the interpretation of the article is approached from an extrinsic point of view, these considerations are of undoubted weight, but in testing them by examination of the treaty itself it is important to bear in mind the paragraph of article 405 which (except for a short paragraph dealing only with recommendations) follows next upon the paragraph now in dispute:—

"In the case of a draft convention the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General, and will take such action as may be necessary to make effective such provisions of the convention."

It will be observed that in this paragraph the same phrase—viz., "the authority or authorities within whose competence the matter lies"—is again employed, and it seems indisputable that, in this paragraph at any rate, the "matter" referred to is the matter of ratification, and accordingly that the authority or authorities within whose competence the matter lies means the authority or authorities within whose competence it is to ratify. It can hardly be suggested that Parliament is the authority within whose competence it is to ratify, for that would mean that, by the general and somewhat obscure words of article 405, the Crown had abdicated its established and hitherto incontrovertible position as the treaty-making power of this country and consented to become no more than the channel of communication between the conferences set up under Part XIII of the treaty and the two Houses of Parliament. If that intention were indeed in the minds of the persons responsible for the framing of the treaty, it could presumably only have been because their minds were addressed to countries where the constitutional position is different from that obtaining in Great Britain.

It seems therefore to be almost beyond dispute that, in this latter paragraph at any rate, the phrase "the authority or authorities within whose competence the matter lies" means, with reference to Great Britain, not Parliament but the Crown.

In a document drafted under the conditions which prevailed at the making of the Peace Treaty, it is not impossible that words should have been used even in successive paragraphs of the same article, in different senses, but it is for consideration whether there is sufficient extraneous evidence here to rebut the presumption that the language used means the same thing in both places.

Moreover, in all other matters arising out of the Peace Treaty wherein a Member is concerned, there is no doubt that the decisive responsibility is the responsibility of the Member. As far as this country is concerned the "Member" is the Crown acting on the advice of the Executive, and as the Member, it is for the Crown (of course, on the advice of the Executive) to decide the policy of this country and the international commitments that this country is prepared to undertake. It seems difficult therefore to contend that the status of the Member can be said to have undergone a diminution by virtue of anything that is expressed or implied in article 405. It would mean that the Member, whose decision is final on every other matter arising out of the treaty, ceases to have any voice in deciding the international policy of this country in the case of a draft convention. No discretion or control is thereby left in the Member, but the decisive voice is transferred to a body that is not a Member under the Peace Treaty; and the Member can be compelled to undertake obligations in regard to a draft convention of which it disapproves.

Further, if indeed there is an obligation on the part of the Member to bring a draft convention before Parliament, it is not easy to see what is the precise extent of the obligation. To take a single instance, in the case of a draft convention requiring legislation, Parliament might approve of the general terms of the draft convention itself. If such approval constitutes "the consent of the authority" under article 405, it would seem that such approval would itself constitute ratification, or if that be constitutionally impossible, there would at least be an obligation on the Crown to ratify the draft convention. Having ratified the draft convention, a further obligation would fall on the Crown to promote legislation in accordance with the ratified convention. Apart from the fact that this would mean that the Government might thus find itself under an obligation to introduce a measure which it did not approve, the further difficulty might arise that Parliament, when confronted with the matter of a convention in the form of a detailed Bill applying to the labour conditions of this country, might refuse to pass such Bill into law. It would be almost impossible to unravel the entanglements which might arise in these circumstances.

The Law Officers of the Crown and Counsel are therefore requested to advise as follows:—

1. Whether there is an obligation on the Crown under article 405 of the Treaty of Versailles to bring all draft conventions before Parliament.
2. If "Yes," what is the procedure to be adopted, especially with regard to the position that would arise were His Majesty's Government opposed to the application of the particular draft convention in question?

Opinion of the Law Officers of the Crown and Mr. C. W. Lilley.

In our opinion the terms of article 405 of the Treaty of Versailles do not impose an obligation to bring all draft conventions before Parliament.

In this country the Crown, acting through the executive Government, is the only authority which can ratify a draft convention, and in our view a draft convention under the terms of article 405 has to be considered by that authority, and not in the first instance by Parliament.

The Government, if it decides that the draft convention should be ratified, must then proceed to secure, in so far as it can, the enactment of whatever legislation may be necessary, or take the necessary administrative action if legislation be not necessary.

2. This question does not arise.

PATRICK HASTINGS.
HENRY N. SLESSER.
CECIL W. LILLEY.

*Law Officers' Department,
June 2, 1924.*



[T 6445/1806/377/1924]

No. 5.

[June 24, 1924.]

Foreign Office to the Lord Chancellor.

Trans-
mission of
information
to judges of
High Court
in cases
affecting
rights of
foreign
Govern-
ments.

HIS Majesty's Principal Secretary of State for Foreign Affairs presents his compliments to the Lord Chancellor, and would be much obliged if his Lordship would be so good as to advise him in the following circumstances.

2. A question has arisen as to the appropriate method by which information should be conveyed to the judges of the High Court in cases affecting the rights of foreign Governments and their property.

3. An action was recently commenced in the High Court (King's Bench Division) by the Compañía Mercantil Argentina against the United States Shipping Board. In due course a motion to dismiss the action was made on behalf of the Shipping Board upon the ground that the Shipping Board was a branch of the United States Government and that its vessels were, therefore, not subject to the jurisdiction of the court. The solicitors for the defendants submitted in support of the motion a statement to this effect from the United States Ambassador. Mr. Justice Roche refused to receive the certificate from the solicitors, and said that he could only receive it if it was sent to him through the Foreign Office. The proceedings were accordingly adjourned for a few days in order to enable this to be done, and in due course the certificate by the Ambassador was handed to the Secretary of State for Foreign Affairs, who transmitted it to the judge. The question is whether the Foreign Office constitutes the proper channel for the transmission of documents of this character.

3. In 1919 certain cases arose in the Probate, Divorce and Admiralty Division, in the course of which similar questions arose. Correspondence took place at the time between the Foreign Office and the president of that division upon the subject, and it was explained to the president that the Secretary of State for Foreign Affairs considered that the more appropriate procedure would be that statements of this kind should be made direct to the court by the representative of the Government concerned through the legal practitioners who were conducting the proceedings. The President of the Admiralty Division accepted this view, and in no further cases has any application been made by the judges of that division for certificates of the character in question to be sent through the Foreign Office. On the other hand, a letter which the Secretary of State has now received from Mr. Justice Roche in the case first mentioned above (Compañía Mercantil Argentina v. the United States Shipping Board) leads him to infer that the judge considers that the judicature of this country cannot properly receive communications from a Government through a diplomatic representative of a foreign Power direct, but that all communications must reach them through the medium of the Foreign Office.

4. This view appears to place the Foreign Secretary in a somewhat embarrassing position. He has no means of judging of the accuracy of the statements contained in the communication, whereas if it is he who transmits the certificate to the court, it is inevitable that the court should regard the certificate as vouched for by him. Transmission of the document in such circumstances cannot be regarded merely as a legalisation of the Ambassador's signature. The immunity of property from the jurisdiction of the courts on the ground that it is Government property is primarily a question of fact. The fact of Government ownership requires to be proved to the court, and the responsibility for establishing the facts should rest upon the representatives of the Government concerned. It is not a matter upon which the Foreign Secretary has any special knowledge, and there does not appear to be any reason why he should be brought into the question at all, even as a channel of communication.

5. On the other hand, a case occurred recently in which the High Court, without reference to the Foreign Office, acted upon evidence supplied by the defendant in a matter peculiarly within the province of the Foreign Office and upon which it is the Foreign Secretary alone who is entitled to express an opinion. In the case of *Assurantie Compagnie Excelsior v. Tom Smith* (reported in the "Times" of the 21st November, 1923), the defendant pleaded that he was on the staff of the United States Embassy in London, and therefore was entitled to diplomatic immunities and to the benefits of the Statute of Anne. Mr. Justice McCardie, before whom the case came, accepted the statement of the defendant on this point without any reference to the Foreign Office. The case subsequently came before the Court of Appeal and the dismissal of the suit on the ground of the diplomatic immunity was upheld. Whether

or not a particular individual is borne on the diplomatic list recognised by the Foreign Office appears to be a question upon which the Foreign Office and the Foreign Office alone is entitled to speak. With some of the representatives of the minor Powers there might be great opportunity for abuse if they were allowed to claim the privileges of diplomatic immunity for any person they pleased. The Foreign Office claims and always has claimed the right to supervise the list, though in normal cases it accepts without question the statements made by the foreign Ambassador or Minister concerned. It is only because the question whether an individual is borne on the diplomatic list in London is a matter peculiarly within the knowledge of the Foreign Office that if the question arises in litigation in the courts it seems desirable that application should be made to the Foreign Office on the subject.

6. Copies of the recent letter from Mr. Justice Roche and of the correspondence between the Foreign Office and the President of the Probate, Divorce and Admiralty Division in 1919 are enclosed for the Lord Chancellor's information.

7. The Lord Chancellor is requested to inform the Secretary of State for Foreign Affairs—

- (1.) Whether he thinks that, in cases such as that covered by the correspondence of 1919 and the recent letter from Mr. Justice Roche, there is any need for statements from the foreign Ambassador or Minister concerned to be communicated to the court through the Foreign Office;
- (2.) Whether he concurs with the view of the Secretary of State that, in any case in which a question arises whether a particular person is borne on the diplomatic list in this country, the court should require the fact to be proved by reference to the Foreign Office; and
- (3.) Whether his Lordship would have any objection to communicating the views which he may be good enough to express to His Majesty's judges.

Foreign Office, March 24, 1924.

List of Papers.

- (A.) Foreign Office to Probate, Divorce and Admiralty Division, November 25, 1919. [152151. F 139415/1919.]
- (B.) Probate, Divorce and Admiralty Division to Foreign Office, December 22, 1919. [164429. F 139415/1919.]
- (C.) United States Ambassador to Foreign Office, February 19, 1924. [T 1806/1806/377/1924.]
- (D.) Foreign Office to Mr. Justice Roche, February 20, 1924. [T 1806/1806/377/1924.]
- (E.) Mr. Justice Roche to Foreign Office, February 21, 1924. [T 1903/1806/377/1924.]
- (F.) *Assurantie Compagnie Excelsior v. Tom Smith*. ("Times," November 21, 1923.)

Opinion of the Lord Chancellor.

House of Lords, June 24, 1924.

THE Lord Chancellor presents his compliments to His Majesty's Principal Secretary of State for Foreign Affairs, and, in reply to Mr. Secretary Ramsay MacDonald's communication of the 24th March, directs me to enclose a copy of a letter received from the private secretary to the Lord Chief Justice and to say that the Lord Chancellor concurs in the views expressed in that letter.

Enclosure.

Private Secretary to the Lord Chief Justice to Sir Claud Schuster.

*Royal Courts of Justice, London,
June 23, 1924.*

Dear Schuster,

I AM desired by the Lord Chief Justice, with reference to your letter of the 2nd April, to say that he is of opinion—

1. That in cases such as those covered by the correspondence of 1919, and the letter from Mr. Justice Roche referred to in the communication from the Foreign Office, he agrees with the view of the Secretary of State that there is no

[13086]

E 2



- need for statements from the foreign Ambassador or Minister concerned to be communicated to the court through the Foreign Office; and
2. That he agrees with the view of the Secretary of State that in any case in which a question arises whether a particular person is borne on the diplomatic list in this country, the Foreign Office should be referred to for information on the point, but that the view of the Foreign Office as to whether a person is entitled to immunity in any particular case should not necessarily be regarded by the court as conclusive.

Yours very truly,
W. BOWSTEAD.

[T 7511/832/378/1924]

No. 54.

[Home Office.]

[July 8, 1924.]

Case for the Opinion of the Law Officers of the Crown.

Resumption
of British
nationality
under
"British
Nationality
and Status
of Aliens
Act, 1914."

CASES have arisen from time to time in which persons who, prior to the 1st January, 1915, when "The Naturalisation Act, 1870," ceased to be in force, have lost their British nationality during their minority in consequence of the operation of section 10 (3) of that Act desire to resume that nationality by making a declaration to that effect within one year of attaining majority in accordance with the procedure provided by sub-section (2) of section 12 of "The British Nationality and Status of Aliens Act, 1914." It has hitherto been considered that this procedure is not available for persons who lost their British nationality before the commencement of the Act of 1914 (the 1st January, 1915), and applications for the registration of declarations in such cases have accordingly been refused. The correctness of this view has been questioned, however, and the opinion of the Law Officers is desired as to whether this view is right.

2. The relevant enactments are as follows:—

Naturalisation Act, 1870.

"Section 6. Any British subject who has at any time before, or may at any time after, the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalised in such State, shall, from and after the time of his so having become naturalised in such foreign State, be deemed to have ceased to be a British subject and be regarded as an alien."

"Section 10 (3). Where the father, being a British subject, or the mother, being a British subject and a widow, becomes an alien in pursuance of this Act, every child of such father or mother who, during infancy, has become resident in the country where the father or mother is naturalised, and has, according to the laws of such country, become naturalised therein, shall be deemed to be a subject of the State of which the father or mother has become a subject, and not a British subject."

British Nationality and Status of Aliens Act, 1914.

"Section 12 (1). Where a person, being a British subject, ceases to be a British subject, whether by declaration of alienage or otherwise, every child of that person, being a minor, shall thereupon cease to be a British subject, unless such child, on that person ceasing to be a British subject, does not become by the law of any other country naturalised in that country."

"Provided that, where a widow who is a British subject marries an alien, any child of hers by her former husband shall not, by reason only of her marriage, cease to be a British subject, whether he is residing outside His Majesty's dominions or not."

"(2.) Any child who has so ceased to be a British subject may, within one year after attaining his majority, make a declaration that he wishes to resume British nationality, and shall thereupon again become a British subject."

("The Naturalisation Act, 1870," was repealed by the Act of 1914 as from the 1st January, 1915, when the latter Act came into operation.)

3. The short point for consideration appears to be whether section 12 of the Act of 1914, and in particular the expression "Any child who has so ceased to be a British subject" in sub-section (2), can be construed in a retrospective sense so as to include cases where the child had ceased to be a British subject before the Act of 1914 came into operation, or whether the expression means simply "any child who has lost British nationality under sub-section (1) of this section."

4. "The British Nationality and Status of Aliens Act, 1914," is a consolidating as well as an amending enactment, and it may be argued—with special reference to the words "or otherwise" in section 12 (1)—that the language of section 12 is quite wide enough to extend to any children who have lost their British nationality in circumstances similar to those specified in sub-section (1) of section 12, viz., in the circumstances provided in section 10 (3) of the repealed Act. The provisions of section 12 of the Act of 1914 might, on that basis, be regarded as a recognition by Parliament of the desirability of putting an end to the previous disability attaching to such children of British birth. Further, the more limited interpretation of the section may be said to involve an unfair discrimination between two categories of British-born children who have lost British nationality in circumstances which are substantially similar, and it is to be observed that the class of children which might have lost British nationality under section 10 (3) of the former Act of 1870 are, where they have lost British nationality on or after the 1st January, 1915, eligible to resume British nationality under section 12 (2) of the Act of 1914.

5. On the other hand, to hold that those who have lost their British nationality under the Act of 1870, before the Act of 1914 came into force, enjoy the benefits of section 12 of the latter Act would appear to involve some strain upon the language used in section 12. Thus it would appear to be necessary to read the word "ceases" in the first line of sub-section (1) of section 12 as including "has ceased at any time before that Act came into operation," with corresponding interpretations of the other verbs in the sub-section. Further, it may be observed that section 10 (3) of the Act of 1870 is not identical either in phraseology or effect with section 12 (1) of the Act of 1914. In particular there is, in section 12 (1) of the Act of 1914, no mention of the residence of the child in the country where the father or mother is naturalised; whereas such residence is a condition necessary to the operation of section 10 (3) of the Act of 1870. Nor is there in section 10 (3) any reference such as there is in section 12 (1) to the effect upon the child of a declaration of alienage which the parent could, in certain circumstances, make under section 4 of the same Act.

6. Under the Act of 1870 the only means by which the children of British subjects who have lost their British nationality under section 10 (3) of that Act could regain their British nationality was by readmission under section 8—a process which was hardly distinguishable in practice from the grant of a certificate of naturalisation—and the facilities available to them under the latter section have been preserved and increased by sections 2 and 5 (2) of the Act of 1914. Under the latter section the Secretary of State has absolute discretion in any special case to grant a certificate of naturalisation to any minor whether or not the conditions required by the Act (e.g., as to residence) have been complied with, although in practice it has been thought desirable as a general rule to restrict the grant of such certificates to those minors who are in fact resident in the United Kingdom or some other part of His Majesty's dominions. Such children are therefore in a slightly better position than they were before the passing of the Act of 1914, irrespective of the question whether or not they are eligible to make the declaration contemplated by section 12 (2).

7. In the absence of anything in the course of this legislation which necessarily leads to the inference that the Legislature must have intended to extend the benefits of section 12 of the Act of 1914 to children who had lost their British nationality under an earlier repealed Act, the difficulties in the way of interpreting the language of section 12 in this sense appear to be great.

The Law Officers are requested to advise—

Whether a person who has lost his British nationality by the operation of section 10 (3) of "The Naturalisation Act, 1870" can make a valid declaration in pursuance of section 12 (2) of "The British Nationality and Status of Aliens Act, 1914," and thereupon again become a British subject?

Home Office, June 19, 1924.

*Opinion of the Law Officers of the Crown.*

In our opinion, a person who has lost his British nationality by the operation of section 10 (3) of the Naturalisation Act of 1870 cannot make a valid declaration in pursuance of section 12 (2) of "The British Nationality and Status of Aliens Act, 1914," and cannot thereupon again become a British subject.

PATRICK HASTINGS.
HENRY H. SLESSER.

Law Officers' Department,
July 8, 1924.

[W 6062/338/98/1924]

No. 6.

[July 21, 1924.]

Memorandum respecting Compulsory Jurisdiction of the Permanent Court of International Justice.

Compulsory
acceptance
of Jurisdic-
tion of
Permanent
Court of In-
ternational
Justice.

THE Permanent Court of International Justice was set up in accordance with article 14 of the Covenant of the League of Nations, which reads:—

"The council shall formulate, and submit to the members of the League for adoption, plans for the establishment of a Permanent Court of International Justice. The court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The court may also give an advisory opinion upon any dispute or question referred to it by the council or by the assembly."

Article 36 of the statute of the court reads:—

"The jurisdiction of the court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force."

"The members of the League of Nations and the States mentioned in the annex to the covenant may, either when signing or ratifying the protocol to which the present statute is adjoined, or at a later moment, declare that they recognise as compulsory, *ipso facto*, and without special agreement, in relation to any other member or State accepting the same obligation, the jurisdiction of the court in all or any of the classes of legal disputes concerning:—

"(a.) The interpretation of a treaty;

"(b.) Any question of international law;

"(c.) The existence of any fact which, if established, would constitute a breach of an international obligation;

"(d.) The nature or extent of the reparation to be made for the breach of an international obligation."

"The declaration referred to above may be made unconditionally, or on condition of reciprocity on the part of several or certain members or States, or for a certain time."

"In the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the court."

It is urged by Mr. Lowes Dickinson that the optional declaration provided for in this article should be made by His Majesty's Government.

This declaration has so far been made by—

Austria.	Finland.	Norway.
Brazil.	Haiti.	Panamá.
Bulgaria.	Latvia.	Portugal.
China.	Liberia.	Salvador.
Costa Rica.	Lithuania.	Sweden.
Denmark.	Luxemburg.	Switzerland.
Esthonia.	Netherlands.	Uruguay.

and ratified by—

Austria.	Esthonia.	Norway.
Brazil.	Finland.	Portugal.
Bulgaria.	Haiti.	Sweden.
China.	Lithuania.	Switzerland.
Denmark.	Netherlands.	Uruguay.

Acceptance is, in some cases, for five years only, and it is generally subject to reciprocity.

The question of accepting compulsory jurisdiction of the court for this country was considered in relation to a draft statute earlier than the statute actually adopted; the earlier draft made jurisdiction compulsory without option. The decision of the Cabinet (the 18th October, 1920) was adverse, on the grounds—

1. That compulsory jurisdiction went far beyond article 14 of the covenant, which only contemplates a scheme for a court to hear disputes which the parties thereto may voluntarily submit to its jurisdiction.
2. The scheme was detrimental to us as a sea Power, since it would enable predominantly land Powers to build up a code of international law which would fetter the exercise of our sea power. Unless precautions were taken to prevent its application being made retrospective, it would even enable appeal to be made against the decision of our prize courts in the late war.
3. Even if it were generally recognised that decisions of the court in particular cases did not constitute future precedents, the fact that the court had given a decision might seriously hamper Great Britain in a future war and strengthen the position of neutral States against her.

Sir Eyre Crowe wrote of the early draft:—

"The most dangerous provision is an article under which the court will have power to decide any question of international law which any State thinks fit to bring before it."

"To judge of the merits of such a provision, the best means is to consider what might and would have happened in the time of our greatest national peril—during the late war—if this provision had been in force."

"Every single point which either our enemies or any neutral State had chosen to raise against us in regard to the blockade, or any of the special measures we took which interfered with neutral trade, would certainly have been brought before the court. The United States would undoubtedly have taken a strong and leading part in obtaining decisions adverse to our interests. It is more than doubtful whether we should have got judgments in our favour on any issue so raised. The effect of adverse decisions, coupled with the infliction of heavy penalties (which are also to be within the powers of the court), would have been to cripple us, probably beyond recovery. We should have had to choose between losing the war or defying the International Court."

"I cannot believe that any scheme is sound which created such a situation."

Sir C. Hurst wrote:—

"Under article 33 one State can, in case of a dispute, be brought against its will before the tribunal by another, and under article 34 between States which are members of the League the court shall have jurisdiction (without any special agreement) to determine any case of a legal nature concerning a question in international law. The effect of these two articles appears to be such that, if the tribunal existed during a great war in which the British Empire was taking part, any neutral nation, one of whose ships or cargoes had been seized by the British fleet and which was dissatisfied with such British belligerent action as being unjustified by international law, would be entitled, if His Majesty's Government declined to accord satisfaction, to bring the case before this new permanent court. It reproduces, in fact, in an even balder manner, all which the scheme for the creation of an international prize court would have achieved. That scheme for an international prize court, which was worked out in 1907 after the experiences of the Russo-Japanese war, was rejected by Great Britain, and most people now think wisely rejected. So far as I can see, this scheme for the Permanent Court of International Justice contains no safeguards or limitations which would exclude the court from dealing with matters as to which the national prize courts should be final."

A memorandum by the Lord Chancellor and the Law Officers of the Crown contained the passage:—

"In our opinion there are good grounds for apprehending that the establishment of such a court as is suggested—at all events at the present time—would be contrary to the interests of this country. Under articles 33 and 34 a State can, in



GENERAL.

case of a dispute, be brought, against its will, before the court by another, and as between States which are members of the League the court is to have jurisdiction, without any special agreement, to determine any case of a legal nature concerning a question in international law. It may, we think, be gravely doubted whether it would be politic for Great Britain in any circumstances to bind herself to refer any disputes which might arise in the future within this very wide jurisdiction to a tribunal of whose impartiality she has no assurance. It may be asked, perhaps, whether it is reasonable to expect impartiality from any permanent international court. And there are special reasons why this country should not be a party to such an engagement now. It is well known that some neutral nations (*e.g.*, Sweden and Holland) are dissatisfied with our proceedings during the war, and also with some of the decisions of our prize courts. If the proposed court were established it would be open to these and other States to make claims based on such proceedings, and, if they were not settled diplomatically, to carry them before the new court, with the result that we might, and probably should, have to pay very heavy compensation, and various decisions of the prize courts might, in effect, be reversed."

The question of sanctions for the judgment of the court becomes of particular importance in cases where a party appears before it with reluctance. On this point Sir Eyre Crowe wrote in connection with the earlier draft:—

"There is nothing in the draft scheme, so far as I can see, to regulate the execution of any judgment given by the International Court. Such judgments are bound, in many cases, to call for action by the defeated Government which may require parliamentary sanction. What guarantee is there that such sanction will invariably be forthcoming? It may be argued that each Government pledges itself to carry the necessary legislation, and that this corresponds to what happens when a Government signs a treaty the provisions of which can only be carried out in virtue of special legislation to be passed."

"But the position is not strictly analogous. A Government when signing a treaty or even when advising the King to ratify a treaty, may consider itself to be in a position to ensure that the particular treaty is approved by Parliament. In the last resort, a treaty signed, but not ratified, can be nullified by refusing ratification. This is what happened to the Prize Court Bill after its defeat in the House of Lords."

"But a judgment rendered in the International Court is final. It cannot be repudiated. At the same time, no Government can foretell what kind of claim against it may some day form the subject of an international judgment. At the moment when the judgment is given, the Government against whom it is given may realise that in no case would the national Parliament pass the necessary legislation to give effect to it. But it will then be too late."

"This difficulty is likely to arise in an acute form in the United States. I very much doubt whether any American Government or President could give a really effective pledge that a judgment given against an American Government will be executed, especially if the consent of the Senate should be required."

"Hitherto the United States have invariably adopted the attitude of strongly advocating international courts, arbitrations, compulsory adjudications, &c., and then blandly explaining that the Constitution of America was so peculiar as to require that all the obligations specially binding upon other countries must be modified in favour of the United States."

"I think Great Britain should never agree to any international jurisdiction unless at least the United States are equally and fully bound by it. So long as the United States are not members of the League of Nations, I think His Majesty's Government should firmly resist to submit to it."

"All our best expert opinion, after all, is that we have everything that is practically required and practically valuable, in the existing Permanent Court at The Hague."

We are already under extensive obligations under article 13 of the Covenant of the League, which reads as follows:—

"The members of the League agree that, whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration."

GENERAL.

"Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration."

"For the consideration of any such dispute the court of arbitration to which the case is referred shall be the court agreed on by the parties to the dispute or stipulated in any convention existing between them."

"The members of the League agree that they will carry out in full good faith any award that may be rendered and that they will not resort to war against a member of the League which complies therewith. In the event of any failure to carry out such an award, the council shall propose what steps should be taken to give effect thereto."

Foreign Office, March 17, 1924.

Memorandum by Sir C. Hurst

THE question under consideration is whether His Majesty's Government would gain or lose by acceding to the optional clause in the statute creating the Permanent Court of International Justice at The Hague, whereby the signatories accept an obligation to submit to the court all disputes on legal matters which may arise between them. The actual text of the provision in article 36 is as follows:—

"The members of the League of Nations and the States mentioned in the annex to the covenant may, either when signing or ratifying the protocol to which the present statute is adjoined, or at a later moment, declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other member or State accepting the same obligation, the jurisdiction of the court in all or any of the classes of legal disputes concerning:—

"(a.) The interpretation of a treaty."

"(b.) Any question of international law."

"(c.) The existence of any fact which, if established, would constitute a breach of an international obligation."

"(d.) The nature or extent of the reparation to be made for the breach of an international obligation."

"The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain members or States, or for a certain time."

"In the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the court."

I can only advise on the subject from the legal point of view, but the subject is, of course, one on which political considerations may well outweigh legal considerations.

So far as regards the type of dispute which arises between this Government and a foreign Government in normal times, *i.e.*, times of peace, it is noticeable that where a suggestion for reference of the dispute to arbitration is made, it almost always emanates from the British side. It is not the foreign Power which asks His Majesty's Government to arbitrate and His Majesty's Government who hesitate; it is His Majesty's Government who seek arbitration as the mode of settling the dispute.

The reason is not far to seek. I doubt whether there has ever been a case in the last fifty years in which a British Government has deliberately acted in a manner which it knew to be contrary to the rules of international law as understood in this country. Consequently, where a dispute has arisen and has bid fair to be troublesome, resort to arbitration is welcomed as the best way out of what might develop into a tiresome situation. No Government which has had experience of the inconvenience of a diplomatic deadlock and is faced with a dispute with another Government on a matter which is legal in character and, therefore, susceptible of settlement by arbitration, and on which it believes itself to be in the right, is likely to prefer the continuance of the dispute to its solution.



It seems to follow almost logically that so long as British Governments continue to be actuated by the same motives as those which have moved preceding Governments, there is no appreciable risk in accepting an obligation to submit any dispute of this character which may arise to the jurisdiction of the Permanent Court.

Positive advantage would only accrue from the increased facility for obliging a foreign Government to submit a dispute to the jurisdiction of the International Court. It must be confessed that for some little time to come this advantage would be slight. It is with the more important Powers that disputes generally occur, and these Powers are not likely at present to enter into similar obligations. Nevertheless, if the concrete gain is likely to be small for some years, so is the risk, as British acceptance of the compulsory jurisdiction of the court would only operate in respect of Powers which entered into similar obligations.

The net result is, to my mind, that in respect of disputes which arise in peace time His Majesty's Government would gain more than they lose by signing the optional clause, and thereby accepting the system of compulsory submission to the jurisdiction of the Permanent Court of disputes of a legal character.

It is not peace time disputes, however, which are the real problem in connection with compulsory arbitration. It is in connection with disputes which may arise out of British belligerent action in time of war.

No democracy is going to allow itself to become engaged in war if it can help it, and when it does become involved in war it is going to fight with its back to the wall. This is particularly true of Great Britain; and of Great Britain's belligerent operations, the most important will be at sea. Naval operations bring a belligerent into conflict with neutral Powers far more than military operations on land, and the problems surrounding the submission to arbitration or international judicial settlement of disputes arising out of belligerent measures are, therefore, more difficult and the risks greater for Great Britain than for other great Powers whose strength is devoted to fighting on land.

It has been the policy of this Government for more than a century to resist any attempt to define in a rigid code the limits of lawful naval action against neutral seaborne commerce assisting the enemy, except so far as the body of our own prize court decisions establish such definitions. Consequently, when war breaks out and Great Britain strives to attain the mastery of the sea, she is bound to incur the ill-will of neutral Powers. It is the moment when neutral commerce can reap large profits out of the needs of the enemy; and the greater the struggle the more pressing will be the needs of the enemy, and the larger the anticipated profits of the neutral; more determined also will be the British measures to repress that commerce, and the more certain, therefore, the friction with neutral Powers.

Is it safe in such circumstances to agree to a system under which the neutral Power would have the right in future to bring the legality of British action at sea before an international tribunal?

In actual practice what acceptance of the obligatory jurisdiction of the court at The Hague would mean in this connection would be that a neutral who failed to get satisfaction in the prize court would, after exhausting his right of appeal to the Privy Council, be entitled to question the legality of the British action in the court at The Hague and demand compensation. The International Court would then decide whether or not British action was in accordance with international law. If it decided that it was so, the action would be upheld; if it decided that it was not, His Majesty's Government would have to give compensation. The question, therefore, would narrow itself down to the issue whether or not the British belligerent action was a violation of international law.

The risk involved in submission to international judicial decision is undoubtedly great, but it is very easy to exaggerate it. Naval struggles come at rare intervals, and the precedents of one war are no safe guide as to what is legitimate in the next. The prize court decisions as to what is legitimate belligerent action given in one war always show a great advance on those given in a preceding war, because novel applications must be made of the basic principles. The British belligerent measures at sea during the recent war seemed to constitute very startling developments, but I doubt whether any of them were inconsistent with the old principles; and if they were not, there is no reason to assume that an international court would have condemned them. That, however, must necessarily be a matter of speculation.

In the past the potent check on belligerent excesses has been found in the fear that the neutral Power will join the enemy. It is better to submit to some inconvenient arbitrations than to be faced with a new enemy.

A good example of the working of this principle may be seen in our relations with the United States of America at the end of the 18th and the beginning of the 19th century.

The parent of all forms of international review of belligerent prize court decisions was the commission under article 7 of Jay's Treaty of 1794. The Caribbean captures, under the Orders in Council of June and November 1793, had produced such exasperation in the United States that, when Jay was sent over by Washington in the hope of effecting a settlement, the situation from the British point of view was precarious. Firstly, Great Britain was faced with a possible renewal with American co-operation of the Armed Neutrality of 1780. Secondly, there was appreciable risk of an American declaration of war, which would have diverted British energies from the French war and would have weakened the British financial position. Thirdly, the embargo already imposed by the United States had complicated the food position in the West Indies.

None of these were risks which Great Britain could face, and at an early stage Grenville decided that the advice of the British Minister in the United States must be acted on, and that satisfaction must be given in respect of the Order in Council of November 1793. The commission under article 7 of the treaty was the result, and in the end 478 awards were given in favour of American claimants and compensation was paid to the extent of over 2½ millions.

Fifteen years later Great Britain was at the height of the struggle against the continental system of Napoleon, and was issuing and enforcing the retaliatory Orders in Council, against the Berlin and Milan decrees. American commerce was neutral and was feeling the effect of the Orders in Council. The United States took measures in reply, and ultimately, driven to desperation, in part by the impressment of American seamen, in part by the seizures under the Orders in Council, embarked on the war of 1812.

Clearly the course pursued in 1794 was the wiser. It is better to risk some adverse arbitration awards than to face another war.

If I read the signs of the times aright, however, there is a new factor, which will vitally affect this problem in the future. The League of Nations is not likely to eliminate war from the world, but it is practically certain that any belligerent, forced, as Great Britain will be forced, to take measures, and, perhaps, novel measures, at sea, will endeavour to secure the concurrence of the League in those measures. If that concurrence is secured, neutral protests (if there are any neutrals) are only likely as to questions of fact involved in the prize court decisions which are the subject of protest. If the neutral protests are directed against the principles adopted, *i.e.*, against the terms of the Orders in Council directing what ships or cargo are liable to capture, it is improbable that the court at The Hague would uphold the protests, or would condemn as inconsistent with international law measures which were taken with the concurrence of the League.

The reason which makes me assert with some confidence that the belligerent, particularly if it is Great Britain, will endeavour to secure the concurrence of the League in measures which involve any departure from the admitted rules of international law, is the fact that the neutral who protests is bound to come to the League before he takes any forcible measures in support of his protest. He is prevented by the terms of the covenant from going to war without complying with the elaborate machinery set out in the covenant. Up till now the neutral's power of decision as to whether he would declare war in defence of his rights has been unfettered. Now he must go to the council and comply with the formalities of article 15. Consequently, the reasonableness and the legality of the belligerent's measure are, in case of acute conflict, bound sooner or later to come before the League. The belligerent, therefore, if he is well advised, will see the advantage of getting the League's approval of the particular measures he contemplates at the moment when he can urge the necessity for them, and before a neutral who desires to oppose them can bring forward a piteous tale of woe of the intolerable injury which the measures are doing. It is true the League may refuse to sanction the measures which the belligerent desires to take, but if the war has been sanctioned by the League it is not likely that the League will take the responsibility of refusing to sanction belligerent measures for which a good case can be made out.

I admit that this is an unforeseen result of the working of the covenant; but, nevertheless, I think that it is what will happen.

If it is sound, it is manifest that it reduces substantially the risk involved in accepting, so far as belligerent measures are concerned, the obligatory jurisdiction of the Permanent Court.



The result seems to be that from the legal point of view no serious risk would be entailed so far as concerns (a) peace time disputes, and (b) disputes arising out of future belligerent measures, by British acceptance of the obligatory jurisdiction of the Permanent Court.

This is not so, however, with regard to disputes arising out of past belligerent measures, *i.e.*, out of British naval measures in the late war. With regard to these there might be serious risk. At any rate, the Admiralty would probably be alarmed at the proposal and would oppose it.

If the idea of accepting the compulsory jurisdiction at all is adopted, it would be well to limit the acceptance to disputes arising out of events subsequent in date to that of the signature. This would exclude disputes arising out of belligerent seizures during the late war. It would be a reasonable condition for a new Government to attach, and would be defensible on the ground that its members cannot be expected to undertake any such responsibility in respect of the acts of their predecessors.

Another prudent limitation to attach would be to fix a time limit and accept the obligation only for five years. It will then be possible to see whether other powerful States seem disposed to follow Great Britain's lead. Article 36 provides specifically for acceptance for a specified time only, and Denmark has signed for five years.

The general conclusion at which I arrive is that as regards peace time disputes Great Britain would gain a little by accepting the obligatory jurisdiction, and that as regards disputes arising out of future wars there is no serious risk in accepting it.

CECIL J. B. HURST.

June 18, 1924.

Memorandum by Mr. Malkin.

THIS note is only an attempt to indicate the consequences, from the legal point of view, of an acceptance by His Majesty's Government of the compulsory jurisdiction of the Permanent Court of International Justice in the cases provided for by article 36 of the protocol establishing the court. No attempt is made to deal with the political side of the question.

The first point to note is that the sphere in which any acceptance of the compulsory jurisdiction of the court would operate is somewhat limited. It would not provide an additional means of settling serious international disputes by measures other than war; for we are already bound, under article 15 of the covenant, to submit any dispute likely to lead to a rupture either to arbitration or to the Council of the League, and therefore, if the compulsory jurisdiction is accepted, the only result as regards disputes of this nature will be that a certain number of cases, which would otherwise have gone to the council, will go to the Permanent Court. Further, we have already a considerable number of arbitration treaties with foreign Powers which provide for the submission to arbitration of differences of a legal nature, or relating to the interpretation of treaties, provided that they do not affect the vital interests, independence or honour of the contracting States. Thus, the only disputes for which the acceptance of the compulsory jurisdiction of the court would provide a remedy which does not exist at present are those which (a) are not of such a nature as to be likely to lead to a rupture, and (b) either arise with a State with which we have not an arbitration treaty, or affect the vital interests, independence, or honour of the States concerned.

These cases may be divided into two classes:—

1. The minor differences which arise in the everyday intercourse of States, and
2. Those arising in time of war.

As regards the first class, I do not think that, from the legal point of view, either the advantages or disadvantages of accepting the compulsory jurisdiction of the court are very great. It would enable us to get a certain number of cases submitted to the court where at present we are not in a position to insist on arbitration, but I doubt whether the number of such cases is very large. In cases of the sort with which article 36 of the protocol deals, we can generally obtain

arbitration if we really want to,* and the recent dispute with France over the Tunis nationality decree shows that the existence of the League of Nations may sometimes enable us to obtain arbitration in a dispute which the other party is not legally bound to settle in that way. On the other hand, we should, no doubt, be forced to arbitrate a certain number of cases where at present we should be in a position to refuse arbitration, and as it may fairly be said that in such matters honesty is the policy of the British Government, such cases would probably be ones where we really had a strong case, and ought to be fairly certain of winning, if the court could be depended upon; though at the same time it is unfair and, in cases where colonial Governments are concerned, sometimes very inconvenient, that we should be put to the trouble and expense of an arbitration where the other side have really no case. This is, however, not a very important consideration.

The second class of cases, however, is of vital importance. I do not propose to say anything about matters arising in the course of land warfare; there are always a certain number of these (cases of requisitioning, damage done by troops, &c.), but the rules applicable to them are reasonably well settled, and there is not usually much difficulty in disposing of such cases, especially as it is a common practice for belligerents to set up commissions to deal with claims of this nature after the war. From our point of view the question can really be considered exclusively in relation to naval warfare.

In cases where this country is a neutral, the acceptance of the compulsory jurisdiction of the court would enable us, as against a belligerent who had also accepted it, to obtain the submission to the court of claims by British subjects arising out of that belligerent's action at sea—a result which in the past we have almost invariably been unable to obtain. From the point of view of the claimant (who in most cases is an underwriter) this would, no doubt, be an advantage, and it would no doubt be convenient for His Majesty's Government to be able to dispose in this way of an extremely troublesome class of cases. But there is another side to the question. If we have a legal right to bring the action of a belligerent before the court, we shall find it very difficult to avoid doing so in any case where the British claimant can make anything of a case against the action of the belligerent, and we shall be responsible for the arguments by which the case would be supported before the court. Now it must always be remembered that, especially in these matters, international law is not a fixed code, so that it is impossible at any given moment to know definitely what rules are to be applied in considering the legitimacy of belligerent action; and, especially towards the end of a period in which no great naval war has taken place, it may be found that many of the rules which have been admitted in the past are obsolete. If, therefore, we have to take up and argue any apparently well-founded complaints against belligerent action, we may find ourselves committed to rules which are no longer applicable, and which might be extremely injurious, or even fatal, to ourselves if we found ourselves subsequently at war. I can well conceive, for instance, that if during the Russo-Japanese and Italo-Turkish wars we had been in a position to insist on a reference to the court of the claims by British subjects arising out of belligerent action, we should have committed ourselves to principles which might have had serious consequences to us in the recent war.

In cases where we are belligerent, I can see nothing but disadvantage from accepting the compulsory jurisdiction of the court, and the only question would appear to be how serious those disadvantages are. This question is to a large extent not a legal one. It is, however, material to observe that the idea that there is an established rule of international law that a neutral may require the decisions of a belligerent prize court to be submitted to arbitration (or, which is much the same thing, that claims based on such decisions may be so submitted) is not really supported by history. So far as I am aware there is only one case in which we have submitted the decisions of our prize court to international arbitration, and only one case in which we have obtained such submission of cases dealt with by a belligerent when we were neutral. The first case is, of course, the Jay Treaty of 1795. The reasons which led the British Government of that day to agree to arbitration in 1795 are somewhat obscure, but the impression left on my mind is that, owing to the absence of notice of the coming into force of certain Orders in Council affecting trade with the French West Indian Islands, and irregularities committed by the British prize courts in the West Indies, it was generally admitted

* A certain proportion of cases of this nature are not sufficiently important to be submitted to arbitration in any case.



here that some form of restitution or compensation must be accorded to American claimants, and that the only question was whether they should be left to their remedy before the Privy Council or if a special Anglo-American tribunal should be set up at once to deal with these cases. The latter course was adopted—probably for reasons of policy—and so far as I can make out, what the tribunal did, in at any rate the great majority of these cases, was not to discuss whether the Prize Court decision was right, but to assume that in the special circumstances the claimant was entitled to something, and that the only question was how much.* The only case in which we obtained arbitration in British claims arising out of the decisions of a belligerent prize court was the Anglo-American Commission of 1871; this was agreed to as a sort of counterpoise to the "Alabama" arbitration, in order to deal with British claims arising out of the war, and out of the 478 British claims presented to the commission, less than a dozen arose out of the decision of an American prize court.

It is, of course, in connection with the possibility of arbitrating claims arising out of our belligerent action at sea that the point referred to above, as to the absence at any given moment of any definite rules of international law, becomes so important. It is very difficult for a court composed of international lawyers, when dealing with cases of this nature, to realise that what they have got to do is not to apply the rules which they will find in the text books, based as they are entirely on the experience of the past, but to endeavour to discover what should be regarded as the applicable rules of international law in the circumstances of the present. If, for instance, a really serious attempt had been made to test before an arbitral tribunal the validity of the decisions of the American prize courts in the civil war in relation to contraband and blockade, I think there can be little doubt that these decisions would at that time have been condemned; but even before the last war there was almost general agreement that the development of the old rules embodied in those decisions was sound.

The real question which has to be decided is how far the certainty (for this is what it would really amount to) of having to submit our action to the decision of an international court would hamper a British Government in taking measures which they may consider legitimate in the circumstances of the time. It is not merely the possible financial consequences which would have to be considered, important though these might be; for it cannot safely be assumed that the neutral Powers concerned would be content to allow our measures to continue until the end of the war, subject to demands for pecuniary damages afterwards; they might well claim, if political conditions permitted such action, that the question of the legitimacy of the British measures should be submitted to arbitration at once, in order that our right to continue to carry them into effect might be decided. And a point which requires to be taken into consideration—although it is very difficult at present to form an opinion upon it—is the extent to which, at the time when the case actually arose, confidence could be felt in the ability of the Permanent Court to deal with cases of this nature.

Another point which has an important bearing on the question, but which it is difficult to deal with at present, is the extent to which the situation may be affected by the existence of the League of Nations. If we could be certain that in any future war in which we may be engaged we should have the League behind us, and if we could be certain that at that time no important States would not be members of the League, the situation would obviously be different and the above considerations might lose much of their force. But any consideration of this point must at present partake to a considerable extent of the nature of conjecture.

I assume that if it were decided to accept the compulsory jurisdiction of the court, it would be possible to do so in such a manner as to confine it to cases arising in the future, so as to exclude the possibility of any cases arising out of our action in the late war being brought before the court. This seems to be essential in any case; it looks as if the neutrals, including the United States, realise that it is not practical politics to expect us now to submit the legitimacy of our action at sea to arbitration, but there is a certain amount of correspondence still passing with Holland, and it would be almost impossible for a country which was in the position to bring us before the court to resist the pressure which would be put upon it to do so.

The whole question must, of course, be considered in consultation with the

* It is material to note that cases arising under the Orders in Council of 1805 were never submitted to arbitration.

fighting departments, and any other departments concerned, and also with the dominions, since it does not seem practically possible for us to accept the compulsory jurisdiction of the court unless all the dominions are prepared to do so too.

H. W. MALKIN.

Foreign Office, May 21, 1924.

Memorandum respecting Compulsory Arbitration.

THE question at issue is ably argued in the two opinions submitted by Sir C. Hurst and Mr. Malkin, and dated respectively the 18th June and the 21st May last. I may at once state that my own view harmonises with the opinion of Mr. Malkin and dissents from that of Sir C. Hurst. As the point is of supreme practical importance I submit in explanation of the view I favour the following observations:—

2. The objections to entering into a solemn engagement to submit to arbitration any disputes arising under the four heads set out in article 36 of the Statute creating the Permanent Court of International Justice at The Hague are twofold. One is concerned with the degree of confidence which can be placed in the impartiality and competence of the tribunal. The other arises from the doubt whether it is right to accept the risk of an adverse award, possibly in cases where the carrying out of such award would present insurmountable obstacles, so that the undertaking to be bound by the award, whatever it be, could not in fact be honoured.

3. The first objection is not seriously discussed by either Sir C. Hurst or Mr. Malkin. This is the more remarkable in that it has largely influenced the situation in which the question as now raised presents itself. When the constitution of the International Court was considered in 1920, the draft scheme then prepared contained articles (Nos. 33 and 34) providing for compulsory arbitration in the very cases now under discussion. Attention was then called to the danger involved in the acceptance of those provisions, and in due course the question was referred to the highest legal authorities in this country. A considered and unanimous opinion was pronounced on the 14th October, 1920, and signed by the then Lord Chancellor, Attorney-General and Solicitor-General (Lord Birkenhead, Sir Gordon, now Lord Hewart, and Sir Ernest Pollock).^{*} It declared decidedly against the acceptance of the two articles in the draft scheme on several grounds, one of which was the grave doubt "whether it would be politic for Great Britain to bind herself in any circumstances to refer any disputes which might arise in the future within the very wide jurisdiction to a tribunal of whose impartiality it has no assurance."

4. This doubt has always been felt. It does not necessarily throw discredit on the personal honour of the fifteen individual judges forming the Court, although the circumstances in which its present members were selected by the League of Nations certainly justify some scepticism as to the standing and competence of some of them. The apprehension which may legitimately be entertained is that, as happened in important cases of arbitration in the past, political considerations of expediency and hesitation to wound the so-called susceptibilities of particular Powers, will always influence the votes of some if not most of the judges, so that a really impartial judgment given strictly on the merits of the case cannot be counted upon with any degree of certainty. It is clear that failing such confidence, statesmen having the honour and vital interests of their country at heart, must hesitate to subscribe blindly and in advance to an undertaking to submit to such a Court any and every dispute over a question of international law in which the country may become involved.[†]

5. In any case the opinion of our high legal authorities prevailed. It was as a result of our opposition that the provisions of articles 33 and 34 of the draft Statute were ultimately so modified by the League as to assume the form in which they now stand as article 36 of the Statute. That is to say, it is now optional for a State to undertake the obligation of compulsory arbitration under the four heads. It is therefore well to realise that the present proposal that His Majesty's Government should, by exercising this option, agree to compulsory arbitration on the four points

^{*} See Annex 1.

[†] This view was expounded in a speech delivered by Lord Balfour as First British Delegate at the 1st Assembly of the League of Nations on December 13, 1920. See Annex 2.



is nothing less than a demand for a deliberate reversal of the decision taken by the Cabinet in 1920 on the advice of the Lord Chancellor and the Law Officers.

6. I pass to the second objection, which arises in connection with the carrying out of adverse awards. The difficulties which here present themselves may be general or specific. As Mr. Malkin points out, the essence of the new obligation which it is now sought to impose upon us is that we should waive the reservation as to the vital interests, independence or honour of the State in generally agreeing to arbitration in regard to all questions otherwise suitable. No doubt the object in advising withdrawal of this reservation is to prevent other countries, acting in bad faith, from putting forward such a plea merely as a dishonest subterfuge in order to avoid arbitration. But it would be wrong to go on the assumption that there may not be cases where the reservation can and will be pleaded in perfect good faith and quite legitimately. Sir C. Hurst in his opinion rather implies than states that, so far as the British Government is concerned, it would, except as regards cases arising out of acts of war, never wish to refuse arbitration.

7. I would recall a very important case, not so long ago as to have lost its force as a notable precedent, in which His Majesty's Government had to contemplate the possibility of refusing to submit to arbitration a dispute over a grave political issue with France. It arose out of the Newfoundland fisheries settlement which formed part of the Agreements constituting the *Entente* of 1904. It was in 1908 when France insistently demanded what was practically a reopening of the principal point supposed to have been settled in 1904. She revived her claim for the exemption of French fishermen from the colonial jurisdiction in Newfoundland waters, basing herself on an alleged possible interpretation of the clauses of the agreement. Now, the Government of Newfoundland had made it an absolute condition of any agreement negotiated with France that the colony would recover complete and unrestricted sovereign rights within her waters, and His Majesty's Government had given a solemn and written pledge to the colony that this point was definitely conceded by France under the terms which had been finally negotiated. The French argued that the wording did not amount to this, and failing our accepting their thesis, demanded arbitration.

8. The view taken here was that, in the circumstances, the Government of Newfoundland might find it impossible to agree to arbitration, and that His Majesty's Government would accordingly have to base a rejection of the demand for arbitration on the ground that a vital interest of the Empire was involved. Fortunately, France did not pursue the controversy, and the matter dropped.

9. It would be rash to assume that similar cases will never arise again, and it is highly significant that the United States Government have always attached the highest importance to maintaining the exemption from arbitration of any cases touching the vital interests, independence or honour of the State.

10. There is a more specific reason which militates against an unconditional acceptance of any possible arbitral award, and that is the impossibility of any constitutional government in modern times guaranteeing that the national parliament will agree to pass the legislation required to give effect to an arbitral award where the vital interests, independence, or honour of the country are adversely affected. For no Government could foresee what kind of claim against it might some day form the subject of a judgment by the International Court. At the moment when judgment is pronounced, the Government against which it is given may realise that in no case would the national parliament pass the necessary legislation to give effect to it. But it would then be too late. This difficulty might well arise in Great Britain as well as in other countries. In the United States it may be counted upon to arise almost with certainty. So much is this understood at Washington, that the State Department notoriously puts every obstacle in the way of arbitrations for the very reason that the United States could not be considered bound except with the express consent of the Senate, which that body would never give in hypothetical cases in advance.

11. Sir C. Hurst and Mr. Malkin deal at length with the question how this country would be affected by compulsory arbitration when cases arising out of rights of belligerents and of neutrals are at issue. Mr. Malkin is clearly alarmed by the danger to which this country would be exposed when belligerent. Sir C. Hurst now tries to minimise this danger, though his view was very different in 1920, when the question was referred by the Cabinet to the Lord Chancellor and the Law Officers, as will be seen by reference to his minute written at that time, which is quoted in the Foreign Office memorandum of the 17th March, 1924. Sir C. Hurst's former

objections cannot have altogether lost force even in his own estimation, since he continues, agreeing in this with Mr. Malkin, that we must in any case make sure that compulsory arbitration, however freely applied in future wars, must not be allowed to extend to anything that happened during the late war. If we cannot afford running the risk of our belligerent action in the late war becoming the subject of arbitration, how can it be seriously maintained that such risk would be negligible as regards all future wars?

12. I must own to not being much impressed by Sir C. Hurst's contention that since we have the League of Nations (which, it may be said in passing, did already exist in 1920) all fear of our belligerent rights being whittled away or paralysed by the International Court may be put aside. He admits that his argumentation on this point is in some measure necessarily speculative. I cannot but feel that the risks are too grave to be neglected on such merely speculative grounds, as to which, to say the least, profound differences of opinion are permissible.

13. Nor is it easy to agree with Sir C. Hurst's reading of history when he discusses the war between Great Britain and the United States in 1812. He suggests that, in order to induce the latter not to declare war, we should have consulted our best interests by agreeing to have our differences as to the legality of our famous Orders in Council submitted to arbitration. I might invoke, as against this opinion, the authority of the great American writer Admiral Mahan, who has recorded his considered opinion that the British policy and the refusal to compromise with the United States on it were both right in themselves and necessary in order to win in the life-and-death struggle with Napoleon. But it must be doubted whether any non-British arbitrator at the time would have taken that view. In all probability an arbitral award would have pronounced against the legitimacy of the Orders in Council, and this would have rendered a continuance of the policy which played a decisive part in breaking the power of Napoleon, if not absolutely impossible, at least exceedingly difficult and costly.

14. It remains to consider what advantages we or anyone else would reap from our now reversing our policy on the subject of compulsory arbitration. Those who advocate it do so largely, if not exclusively, on purely theoretical and abstract sentimental grounds. In their eyes arbitration all round and in all circumstances is a panacea for all ills. The claim is surely exaggerated. It might, perhaps, be urged that the various parties who in all countries have written the battle-cry of compulsory arbitration in international affairs on their banners, offer as a rule determined resistance to compulsory arbitration in their own home affairs, such for instance as trade union disputes, which may be taken to imply an acknowledgment that there are certain classes of difficulties in regard to which arbitration may not necessarily be the proper remedy. However this may be, no evidence has so far been adduced by anybody that the introduction of unrestricted compulsory arbitration in international disputes would meet any really felt need. We have all the existing advantages and facilities of the League of Nations to deal with grave international conflicts. Of course it yet remains to see the League machinery tested in a real and important crisis. But if that machinery should prove inadequate to meet such a crisis, the introduction of fresh guarantees for settling by arbitration deep-seated conflicts that might otherwise lead to war, will hardly advance matters, but may rather increase the feeling of scepticism with which all such paper guarantees are still regarded in many quarters. There is a strong conviction, widely held, that there is nothing to gain from unnecessarily hurrying the pace of further development, and that pacifist energies would be better spent on fostering and spreading what in modern jargon is called the will to peace, rather than on concentrating on the erection of more machinery for dealing with hypothetical problems.

15. I have ventured in the above to express my own opinions. It would not be right to omit calling attention to the strong popular feeling aroused in our country when the attempt was made after The Hague Conference of 1907 to carry a measure of compulsory arbitration in the shape of an International Prize Court. Sir C. Hurst himself as late as 1920 declared that the country rightly and decisively rejected it. It is likely to do so again if the same scheme is once more brought forward and this time on a much more extended scale.

E. A. C.

Foreign Office, July 13, 1924.



ANNEX 1.

Memorandum by the Lord Chancellor and the Law Officers of the Crown.

In our opinion there are good grounds for apprehending that the establishment of such a Court as is suggested—at all events at the present time—would be contrary to the interests of this country. Under articles 33 and 34 a State can, in case of a dispute, be brought against its will before the Court by another, and as between States which are members of the League the Court is to have jurisdiction, without any special agreement, to determine any case of a legal nature concerning a question in international law. It may, we think, be gravely doubted whether it would be politic for Great Britain in any circumstances to bind herself to refer any disputes which might arise in the future within this very wide jurisdiction to a tribunal of whose impartiality she has no assurance. It may be asked, perhaps, whether it is reasonable to expect impartiality from any permanent international Court. And there are special reasons why this country should not be a party to such an engagement now. It is well known that some neutral nations (*e.g.*, Sweden and Holland) are dissatisfied with our proceedings during the war, and also with some of the decisions of our Prize Courts. If the proposed Court were established it would be open to these and other States to make claims based on such proceedings, and, if they were not settled diplomatically, to carry them before the new Court, with the result that we might, and probably should, have to pay very heavy compensation, and various decisions of the Prize Courts might, in effect, be reversed.

Another serious objection to the setting up of the Court at the present time is that America is not yet a member of the League of Nations, and would therefore have no influence on the election of the judges. Nor would America or other States outside the League be bound in any way by the rulings of the Court, so that there would be a set of rules of international law growing up which would be binding on some of the Great Powers as well as the smaller States members of the League, but not on the Great Powers and the States outside the League.

Law Officers' Department,
October 14, 1920.

B.
G. H.
E. M. P.

ANNEX 2.

Speech by Lord Balfour at the 1st Assembly of the League of Nations on December 13, 1920.

Mr. President, I should not have intervened, even for the very few moments during which I propose to detain you, had it not been that by implication, and sometimes I think by more than implication, it has been suggested that some of the Great Powers—France, I think, has been mentioned and Great Britain has been mentioned—have proved themselves an obstruction in the full development of the court of justice which we all desire to see established. I have no right to speak, and I do not propose to speak in defence of France. M. Bourgeois has himself to-day admirably spoken in defence of the project now before you; but on behalf of my own country I desire to say that those who will look back on the history of the last generation or two generations in an impartial spirit will, I think, admit that no country has done more to promote the whole principle of arbitration and legal or quasi-legal decisions upon matters of international differences than have the various members of the British Empire.

That being so, I do not think any defence is required for the attitude which we have taken up in this matter. It is quite true that we are ardent supporters of the idea of an International Court of Justice. It is quite true that we desire to see the applications to that Court made voluntarily and not compulsorily. That is not because we desire to discourage the movement in which we have taken part, not because we desire to check its extension to the furthest practicable fields, but because we are convinced, as the eloquent speaker who has just preceded me and others have pointed out, that if these things are to be successful they must be allowed to grow. If

they are to achieve all that their framers desire for them, they must be allowed to pursue that natural development which is the secret of all permanent success in human affairs, and not least in that part of human affairs which deals with politics.

Remember that this Court is set up to administer a system of international law. International law itself is a changing and a growing subject. There is no provision—fortunately, perhaps—within the limits of the covenant for changing and reforming international law, and this Court is brought into existence not to change it or to reform it but simply to administer it. Therefore you may find yourselves, or some nation in the course of time may find itself, in the position that a rigid interpretation of what may be an antiquated system of international law, which would never be accepted or embodied in any authoritative code or authoritative work if all the circumstances were understood, nevertheless has to be administered by a Court which, in administering it with strict regard to the laws with which it has to deal, but without any power of achieving that larger vision which is sometimes given to statesmen and politicians, may affect interests so profoundly concerning the very existence of that State that your whole machine would be destroyed before that State would submit itself voluntarily to legal destruction.

I do not think such cases are likely, but who among you will venture to say that they are impossible? Who among you will venture to say that if this system be made compulsory such a case as I have indicated might not occur?

The very thought that it might occur will throw discredit on your system unless you allow some possible safety valve. Proceed, therefore, in this case as in all other cases, with care and with caution. Look back upon the past, and take encouragement from the past for the future. What does the past show you? More and more new classes of cases are being brought within the jurisdiction of such a Court as that which you wish to establish. Why not leave that natural wholesome process to develop itself? More and more you will find that as this Court gains the public confidence, the confidence of nations in all parts of the earth, more and more classes of cases will be brought within its jurisdiction: more and more readily will the various countries of the world be glad to put their disputes before it, whereas if in a spirit too hasty and too impetuous you try and force into this mould, as yet imperfectly framed, the whole fabric of what you conceive to be a completed and perfect system, the result will be that the mould itself will break under the stress of new circumstances and changing conditions. So far from having served the interests of international justice, you will have inflicted what may prove to be a fatal blow upon the greatest instrument which the world has ever yet been able to contrive for seeing that international justice is carried out.

These observations of mine, I am sure, will not be misunderstood. They are uttered by the representative of a country which, I boldly say, has been in the very forefront of this movement. They are uttered, not with the desire of checking the growth of this great movement in favour of international justice, but because I conscientiously believe, and I speak for a country which conscientiously believes, that the true path of progress is the path of gradual, steady, wise and wholesome development, and I trust the Assembly of the League of Nations will never allow itself, in a moment of impatience, to depart from the only true path of safety and success.

Opinion of the Lord Chancellor.

THE question is whether His Majesty's Government should recognise as compulsory, *ipso facto* and without special agreement, in relation to any other member or State accepting the same obligation (article 36), the jurisdiction of this Court. The subjects which would be submitted to the jurisdiction are—

- (a.) The interpretation of a treaty.
- (b.) Any question of international law.
- (c.) The existence of any fact which, if established, would constitute a breach of an international obligation.
- (d.) The nature or extent of the reparation to be made for the breach of an international obligation.

The article further provides that the declaration may be made either unconditionally or on condition of reciprocity on the part of other members or States, or



for a certain time, and that, in the event of a dispute as to jurisdiction, the matter is to be settled by the decision of the Court.

At first sight it appears natural to give the Court compulsory authority in as many cases as possible, for it looks as though it were by doing so that disputes which might lead to war will be most effectually avoided. In the instances of small States with unitary Constitutions this seems true, for the jurisdiction could strengthen their position against more powerful nations.

But in the instance of the British Empire it is not so clear that this is true. In substance the Constitution of our Empire is not unitary, and it is perilous for the Imperial Government to proceed as if it were. We have to secure the assent of the Dominions and of India at every step. An analogous difficulty has confronted the United States. The Executive does not dare to give undertakings unless the President is sure—which he rarely is—that the Legislature will adopt his action. That is the real reason why the President, however disposed to an arbitrary treaty, will rarely join in one.

In the cases of Great Britain and the United States alike it is thus, for reasons which although not the same are analogous, undesirable to give unqualified undertakings which it afterwards may prove unpracticable to fulfil. The condition of things in the event of failure is apt to show itself more provocative of unsolvable dispute than if no unqualified undertaking had been given.

There is therefore more to be considered in connection with the present proposal than its *prima facie* desirability on grounds only of international policy or public morality. Even on these grounds it may be perilous to give an undertaking which, under a Constitution which is in substance non-unitary, we cannot be sure of being able to fulfil. At a later stage in the evolution of the unwritten Constitution of the Empire it may be easier to get over this difficulty. Lord Balfour seems to have hinted so much in the speech he made to the Assembly of the League in December 1920.

But there are also other reasons for hesitation which require consideration. The words of article 36 are wide enough to extend to disputes arising out of past events in the course of the late war. Now the nation rejected the Declaration of London, although approved by their Government, and consequently it is not clear that the principles applied by an international court would harmonise with all of those actually adopted during our actual conduct of that war. In addition there may well be other points on which the decisions of our prize courts might be set aside. I think that we should thus be compelled to exclude a number of questions to which the article as it stands may well extend.

Sir C. Hurst, whose opinions on a matter of this kind always carry much weight, is inclined to think that, so far as legal points are concerned, the risk of accepting compulsion would not be great. It may be that this is true. But it is not possible to predict it with certainty, and I am myself inclined to believe that if we acceded to the other view we should be free from the real danger of raising a question of principle within the Empire which we should not be able to control. Speaking for myself, I think it safer in the present state of the Constitution of our Empire to avoid trying to go further than article 13 of the Covenant of the League of Nations. This article binds us to refer to arbitration any matter which is suitable and which diplomacy cannot satisfactorily settle, including the interpretation of treaties, questions of international law, the existence of facts constituting a breach of international obligations and the extent of the reparation to be made. The language used in this article is less stringent than that in article 36 of the protocol of 1920, and gives rise to less embarrassment. I agree with Lord Balfour, in his suggestion of 1920, that resort to the Permanent Court is likely by degrees to become more and more general. In the end I think it will probably become compulsory. But this requires time to enable a firm conception to mature fully and to become familiar to our own people. For the present I am adverse to the explicit acceptance of a principle which will probably give rise, if so accepted, to keen controversy.

H. OF C.

July 21, 1924.

[E 151/5/44/1925]

No. 64.

[War Office.]

[November 21, 1924.]

Case for the Opinion of the Law Officers of the Crown, Mr. G. W. Ricketts and Mr. H. M. Givern.

THE Law Officers and Counsel are requested to advise the Admiralty, Army Council and Air Council—

I.—Whether or not paragraph 1A, introduced into section 2, sub-section (1), of "The Official Secrets Act, 1911," by section 9 of "The Official Secrets Act, 1920," constitutes the communication of any sketch, plan, model, article, note, document or information which relates to munitions of war to a foreign Power a misdemeanour, notwithstanding that it cannot be shown to be prejudicial to the safety or interests of the State.

II.—Whether or not the expression "sketch, plan, model, note, document or information which relates to munitions of war" contained in paragraph 1A includes and covers an actual munition of war as well as a sketch, plan, model, article, note, document or information relating thereto so as to make it a misdemeanour to supply such a munition of war "to any foreign Power or in any other manner prejudicial to the safety or interests of the State."

III.—Whether or not the expression "munitions of war" as defined in section 12 of "The Official Secrets Act, 1911," as amended by section 9 of "The Official Secrets Act, 1920," includes and covers articles or things, such as aeroplane engines, which could equally be used for a peaceful and non-military purpose or for a military purpose. Whether or not, if the answer to this question depends in any case upon the particular facts of the case, any general test can be applied to determine the question in each case. If so, what that test should be, and, generally, whether the Law Officers and Counsel agree with the tests suggested by the Air Ministry and the views expressed in the third paragraph of the letter from the Air Ministry to the War Department of the 7th May, 1923.

IV.—Whether or not the provisions of paragraph 1A of section 2, sub-section (1), of "The Official Secrets Act, 1911," as amended by section 9 of "The Official Secrets Act, 1920," render it a misdemeanour under the Acts (a) to supply, communicate or disclose to any corporation, firm or individual in this country (i) any munition of war (as defined by the Official Secrets Acts), or (ii) any sketch, plan, model, article, note, document or information which relates to a munition of war (as defined by the Official Secrets Acts) which it can be shown it is prejudicial to the safety or interests of the State should be supplied, communicated or disclosed; or (b) in connection with any application for a patent or otherwise to file or lodge with the Patent Office any specification or other document which ascribes, depicts or gives particulars of (i) any munition of war (as defined by the Official Secrets Acts), or (ii) any sketch, plan, model, article, note, document or information which relates to a munition of war (as defined by the Official Secrets Acts) which it can be shown it is prejudicial to the safety or interests of the State should be made public.

V.—(i.) Whether or not the provisions of "The Official Secrets Act, 1911," as amended by "The Official Secrets Act, 1920," by reason of their nature or effect involve or require the assumption of control by the appropriate Government Department of the export trade with foreign countries in arms and munitions of war by the granting of licences to export or otherwise, and, if so, to what extent.

(ii.) Whether or not it is within the power of the appropriate Government Department, by reason of the provisions of "The Official Secrets Act, 1911," as amended by "The Official Secrets Act, 1920," or otherwise, to exercise such control of the export trade with foreign countries as is above referred to.

(iii.) Whether or not it is within the power of the appropriate Government Department, by reason of the provisions of "The Official Secrets Act, 1911," as amended by "The Official Secrets Act, 1920," or otherwise, to license or grant permission for the supply or communication of any munition of war (as defined by the Official Secrets Acts) or of any sketch, plan, model, article, note or information relating to munitions of war to (a) any foreign Power, or (b) any corporation, firm or individual, in any particular case.

VI.—If the answers to question V (i), (ii) or (iii), or any of them, are in the affirmative, whether or not the exercise by the appropriate Government Department of the measure of control indicated as respects (a) the export trade with foreign

Official
Secrets
Acts, 1911
and 1920;
supply of
Munitions
to Foreign
Govern-
ments.



countries generally, or (b) the licensing or granting permission for particular transactions, could in the event of war be made a ground of complaint that a breach of neutrality had been committed by the Government of this country.

VII.—If the answer to question I is in the affirmative and the answers to question V (ii) or (iii), or either of them, are in the negative, whether the matter can be satisfactorily dealt with by relying on the consideration that the Attorney-General would not prosecute if a Service Department had consented to the supply of the munition of war or the giving of the information.

VIII.—Whether, having regard to the difficulties and requirements of the Service Departments as indicated in the memorandum prepared by the Service Departments, and in the case, it would be practicable and, if practicable, desirable to formulate a statement as to the effect of the Official Secrets Acts and the requirements of the Departments thereunder which could be promulgated to manufacturers of munitions in this country as an authoritative statement for their guidance, and generally what is the best course to take under the existing legislation.

IX.—Whether the Law Officers and Counsel recommend any, and, if any, what, amending legislation as being necessary or desirable to give effect to the requirements and present intentions of the Service Departments and the Government; and

X.—Generally upon the case.

Opinion of the Law Officers of the Crown, Mr. G. W. Ricketts and Mr. H. M. Giveen.

Our answers to the questions put to us are:—

I.—Yes. We do not think that any different answer would give due effect to the word "other" in the context in which it appears in sub-section (1A) introduced by section 9 of "The Official Secrets Act, 1920," into section 2 of the Act of 1911.

II.—Yes.

III.—In order to come within the definition, it is not enough, in our opinion, that the thing in question should be capable of use in war. The observations of Atkin J. in *Shaw v. Lincoln Waggon Company* (I, "Munitions Appeals," at p. 23): "I think the word denotes fitness, in some high degree to be determined on the facts in each particular case," indicate the proper considerations. If the thing is more suitable for use in war than in peace, it would clearly come within the definition. If it is equally suitable for peace or for war, it may be tested by asking whether it has qualities or characteristics or accessories which would not be required in an article intended solely for use in peace. Many cases are certain to occur which are very near the line. We do not exclude the consideration of circumstances showing that, though not specially or more suitable for use in war, the article in question is in truth required for such use, but we think such considerations are much less likely to arise under the Official Secrets Acts than under the several enactments forbidding or regulating the exportation of arms and military and naval stores. The above observations show that, in our opinion, the view expressed in the Air Ministry's letter of the 7th May, 1923, requires modification.

IV.—Our answer to both parts, (a) and (b), of this question is in the affirmative, but we think that in time of peace it would be difficult to induce a jury to find that an offence had been committed by filing an application for a patent without very strong evidence that the applicant was consciously prejudicing the national safety.

V.—(i.) No. The Official Secrets Acts do not provide for the grant of a licence by a Government Department to any person to do that which under the Acts is a breach of the law. If no breach is committed no licence is required.

(ii.) No. In our opinion the appropriate Government Department can only, so far as the Official Secrets Acts are concerned, control the export trade in munitions of war by enforcing the criminal law.

(iii.) No. See our answer to the first part of this question.

VI.—In consequence of the answers we have given to the three parts of question V above, there is no necessity for us to give an answer to this question.

VII.—We see no objection to an expression of opinion by a Service Department as to whether the use or communication of any particular information is prejudicial to the interests or safety of the State, and it is hardly conceivable that the Attorney-General would overlook such an opinion if any question of prosecution arose. But we do not think it would be at all satisfactory to make use of the Attorney-General's

discretion by deliberately making it part of a system for licensing the communication of information or the supply of munitions.

VIII.—This is not so much a question of law as of policy and administration, upon which we are reluctant to express an opinion. If it is thought desirable in the interests of trade or otherwise to formulate such a statement, care must be taken to make it clear that the statement is not intended to relieve manufacturers or traders from the duty of strictly observing the provisions of the Acts.

IX.—To carry out principle (a) in the Services memorandum would involve an amendment of the Patents Act, which would not be easy to carry in Parliament; it should not be undertaken unless the Services have found in practice that the existing law contained in the Patents Act is insufficient to give them the priority which they naturally desire. In order to carry out the working principles (b) and (c) in the memorandum, there should be an amending Act giving power to a Government Department to issue licences for export of arms or munitions of war and providing that the export of articles under such a licence shall not constitute a breach of the Official Secrets Acts. It will be necessary to define the phrase "Government Department" if these words be used, and it will be very advisable that there should be a standing Committee of the Departments concerned, whose duty it will be to deal with or advise as to the issue of licences. The new Act might clear up the present ambiguities of sub-section 1A of section 2 added to the Act of 1911 by the Act of 1920.

X.—We have nothing to add.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.
G. W. RICKETTS.
H. M. GIVEEN.

Law Officers' Department.
November 21, 1924.

[T 3745/3745/370/1924]

No. 6^B.

[April 3, 1924.]

[Clearing Office
(Enemy Debts).]

Case for the Opinion of the Law Officers and Mr. Gavin T. Simonds.

THE Law Officers and Mr. Gavin Simonds are requested to advise the Controller of the Clearing Office on a question which has arisen in regard to claims made by German nationals against British nationals under the provisions of article 296 of the Treaty of Versailles for the price of goods consigned by German nationals to British nationals prior to the outbreak of war, which were seized in transit and condemned in prize after the declaration of war.

Article 440 of the treaty provides as follows:—

"Germany accepts and recognises as valid and binding all decrees and orders concerning German ships and goods and all orders relating to the payment of costs made by any Prize Court of any of the Allied or Associated Powers, and undertakes not to put forward any claim arising out of such decrees or orders on behalf of any German national."

Several claims by German nationals against British nationals have been received by the Controller of the Clearing Office in respect of goods sold and delivered to British nationals, the property in which goods according to the terms of the contract between the parties passed to the purchaser prior to the goods being seized by the British authorities and condemned in prize. A typical case is that of a claim by the German national, Josef Reiber, against the British partnership firm of Jules Lang and Son. The circumstances of that case are that the contract provided for the goods being consigned "free at works." The goods in question left the works of the German vendor and were shipped from Germany on the British steamship "Argo" prior to the date of the declaration of war. The steamship "Argo" reached Swansea, where the goods were

Claims under article 296 of the Treaty of Versailles by German nationals against British nationals for the price of goods sold and delivered which, after the property in the goods had passed, were seized and condemned in prize.



seized by the British authorities and subsequently condemned in prize on the 2nd June, 1915. No claim for release was made and no documents were submitted either to the Procurator-General or the Prize Court, and the goods were condemned in the absence of any claim.

The above-mentioned claim for the price of goods, which after the conclusion of the war was put forward by the German sellers, was contested by the British Clearing Office with the German Clearing Office on the ground that the goods in question were seized and condemned in prize, but the German Clearing Office has declined to accept the contest and contends that as the goods were consigned at the risk of the consignees the fact of their seizure cannot affect the vendor's right to claim for the price of the goods under article 296 of the treaty. The German Clearing Office also contend that ownership in the goods passed to the consignee, so that the authorities seized not German but English goods. The British Clearing Office is inclined to agree with the contention of the German Clearing Office, and takes the view that, having regard to the terms of the contract for the purchase of the goods, the goods were British and not German at the date of the seizure, and, therefore, that the provisions of article 440 of the treaty do not apply and that the German vendor is entitled to claim for the price of the goods under the provisions of article 296. The British debtors admit that the goods were sold "free at works," and it would therefore appear to be clear that the property in the goods passed to the debtors prior to the goods being shipped. Had the debtors been aware that these goods were amongst those seized they state that they would have claimed the goods and had them released, as they did in the case of other goods so seized. In that case there could, it is submitted, be no doubt that the present claim would have been a perfectly good one. The debtors have paid the amount of the claim to the Clearing Office with interest at the rate of 5 per cent. on the principal sum from the 5th August, 1914, but the Procurator-General does not agree that the claim is one which should be dealt with under article 296 and admitted to the German Clearing Office in accordance with the provisions of that article, and he holds the view, in which it may be stated that the Foreign Office concur, that the contest of the claim should be maintained on the ground that the claim is barred by the terms of article 440 of the treaty, which, in his view, effectively prevents any claim being put forward by any German national for goods seized in prize, even although the property in the goods had in fact passed to a British national previous to the seizure. It has been pointed out to the Procurator-General that the decrees and orders which are by the terms of article 440 recognised by Germany as valid and binding concern only German ships and German goods, but he considers that as the British Prize Court has held that the goods in question were the property of an enemy and condemned them as such, the German vendors could only assert that the property in the goods was British by going behind the order of the Prize Court, which they are precluded from doing by the terms of the said article 440. The Procurator-General submits that article 440 would be deprived of all virtue if German owners were to be entitled to say that the article does not apply in cases in which goods have been condemned as prize, because upon some view of the facts or the law different from that upon which the Prize Court proceeded they arrive at a conclusion that the finding of the British Prize Court was erroneous, and it is suggested that if the German contention is conceded it would be open to enemy nationals to challenge the decision of the Prize Court in practically every case in which ships or goods have been condemned as enemy property. The Procurator-General's view, therefore, appears to involve the contention that where there has been a sale of goods by a German to a British national, and the property in the goods has passed to the British national, who thereupon has become liable to pay the price to the German, the fact that an order of the Prize Court has been made without knowledge of the true position, deprives the German owner of the right which previously existed to claim the price of the goods and releases the British purchaser from his liability to pay. It is contended by the Procurator-General that this is the true effect of article 440 so long as the decree of condemnation of the Prize Court stands, but it does not of course follow that the German or British claimant cannot apply to the Prize Court to reopen the decree or avail himself of any right he may have of appealing against it, and if such an application or appeal were successful the decree would be set aside, and if the property were found to have passed to the British firm, the German sellers would then be entitled to proceed to recover the price of the goods through the medium of the Clearing Office.

The view of the British Clearing Office is that this contention involves a construction of article 440 which is somewhat strained and one which it is unlikely the Mixed Arbitral Tribunal would adopt. It would appear that the only way

in which the British argument could be put forward would be that the order of the Prize Court condemning the goods involved the finding that the goods were German goods for all purposes at the time of their capture and that accordingly so long as the decree of the condemnation of the Prize Court stands, no claim based upon any other state of facts, however conclusively proved, can lie on the part of a German subject. The Controller of the British Clearing Office does not think that the Tribunal would be likely to accept this argument, and he considers that in the event of a claim being referred to the Mixed Arbitral Tribunal a decision in favour of the German Clearing Office would appear to be almost inevitable as the debtors themselves are in agreement with the view held by the German Clearing Office, and the British Clearing Office has no facts upon which to base a defence. As to the suggested right of appeal from the decision of the Prize Court, the view of the British Clearing Office is that the German seller's rights could hardly be made to depend on the willingness of the British buyer to appeal from that decision, even if such right of appeal was still available, and if the property in the goods had passed prior to the war it is not easy to see what interest the German seller himself would have entitling him to appeal.

The amount in the particular case above referred to is small, but there are several other similar cases, and the question involves a principle which is of much importance, particularly in relation to very valuable cargoes pledged to British financial houses as security for advances which were seized and condemned as enemy property during the war.

Accordingly, before any further answer is given to the German Clearing Office it is desired to have the opinion of the Law Officers on the matter, and unless they are prepared to maintain the contest of the claim when it comes before the Tribunal the Treasury will have to be informed of the position and their instructions obtained.

It should be mentioned that in some cases British purchasers to whom the property in goods had passed prior to the date of seizure have paid to the proper officer of the Crown the value of the goods seized, and there are other cases in which the British purchaser has never received the goods at all, they having been purchased from the Crown by some other person. If therefore the British purchaser has in these cases to pay to the Clearing Office the price of the goods under the provisions of article 296 of the treaty the result will be that he has either paid twice over for the goods or that he has to pay for goods which he has never received. Further, there is the additional liability for the payment of the interest imposed by the provisions of the treaty. The question, therefore, arises as to how such purchasers are to be reimbursed the amount paid by them for the goods to the officers of the Crown or how they are to be compensated for the loss of the goods where they have never obtained them at all, and it should be borne in mind that the amounts realised for goods condemned in prize have long ago in certain cases been adjudged to the Fleet.

The Law Officers and Mr. Gavin Simonds are requested to advise—

1. Whether, having regard to the provisions of article 440 of the Treaty of Versailles, a German national can, so long as a decree of condemnation of a Prize Court stands, properly claim against a British national under article 296 of the treaty for the price of goods seized and condemned by that Court, the property in which goods had passed to the British national prior to the war and prior to the date of seizure?
2. If in the opinion of the Law Officers and Mr. Gavin Simonds British nationals are, in the circumstances set out in question 1, liable to pay under article 296 of the treaty, would the proper procedure be for them to apply to the Prize Claims Committee for a grant in cases where they have already paid the officer of the Crown for the goods and in cases where they have never received the goods at all, or, if not, what is considered would be the rights of such persons and the appropriate procedure to establish such rights?

Opinion of the Law Officers of the Crown and Mr. Gavin T. Simonds.

1. In our opinion article 440 of the treaty does not preclude a German national from claiming under article 296 against a British national for the price of goods condemned by a British Prize Court, if the property in those goods had passed to the British national. We think that the words "German ships and goods" in article 440 can refer only to ships and goods which were in fact the property of German nationals



at the date of seizure and do not cover ships and goods which, since the property in them had passed, did not belong to German nationals and would not have been condemned if the whole of the facts had been known to the Prize Court (see case of *The Odessa* 1916, I, A.C., 145, and of *The Parchim* 1918, A.C., 157).

2. We do not think that it is for us to advise what course should be taken by British nationals who may be called on to pay for goods that they have never received or (in certain cases) to pay twice over for their goods. But we may say that any case in which the British national can establish that it was through no default on his part that the Prize Court was allowed to condemn his goods in ignorance of the material facts appears to be worthy of the consideration of the Prize Claims Committee, if that body is still in existence.

PATRICK HASTINGS.
HENRY R. SLESSER.
GAVIN T. SIMONDS.

Law Officers' Department,
April 3, 1924.

[C 8695/2339/18/1924]

No. 7.

[May 27, 1924.]

Foreign Office to the Law Officers of the Crown.

Gentlemen.

Foreign Office, May 12, 1924.

Interpreta-
tion of
Treaty of
Versailles:
paragraphs
17 and 18 of
Annex II to
Part VIII;
and of the
Rhineland
Agreement.

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to transmit to you herewith a memorandum prepared in this Department, with the collaboration of the legal adviser to the British delegate on the Reparation Commission, on certain legal questions arising out of the independent coercive action against Germany undertaken by the French and Belgian Governments in the Rhineland and the Ruhr as a consequence of defaults declared by the Reparation Commission in the execution of Germany's reparation obligations under the Treaty of Versailles.

2. I am to recall in this connection the opinions given at Lord Curzon's request by your predecessors on the 11th April* and 30th July† last year, copies of which are enclosed for convenience of reference.

3. The present memorandum is confined to those legal questions arising out of the Franco-Belgian action which directly concern the Reparation Commission. For instance, the question whether the Rhineland Commission has acted in accordance with the Rhineland Agreement in putting into execution the pledges policy of the French and Belgian Governments is *not* included, as it is irrelevant to the main reparation issue.

4. The memorandum has been drawn up in view of the possibility that the Reparation Commission might be called upon to adjudicate concerning the allocation of the proceeds of the pledges policy, but there is now some ground for hope that the question of the allocation of the proceeds of the pledges policy may be settled as part of a general reparation settlement resulting from the recent report submitted to the Reparation Commission by the committee of experts, presided over by General Dawes, and that the raising of the issue in an acute form may thus be avoided. It is only in the eventuality that the matter may not be settled in this way that the present memorandum will be utilised. In such an eventuality it is intended to serve as an expression of the British point of view, which the British delegate on the Reparation Commission might transmit to the commission on behalf of His Majesty's Government.

5. In the event, however, of the question coming before the Reparation Commission, Mr. Secretary Ramsay MacDonald thinks it very important that your advice should have been obtained with regard to the memorandum, and I am therefore to enquire whether you concur in its terms or consider any amendments necessary, and to invite any general observations on the subject which you may desire to offer.

I have, &c.

MILES W. LAMPSON.

* Confidential 12470, p. 10.

† Confidential 12470, p. 15.

Memorandum.

I.—Treaty Provisions.

Paragraph 17 of Annex II to Part VIII of the Treaty of Versailles reads as follows:—

"In case of default by Germany in the performance of any obligation under this part of the present treaty, the commission will forthwith give notice of such default to each of the interested Powers, and may make such recommendations as to the action to be taken in consequence of such default as it may think necessary."

2. According to paragraph 18 of the same annex—

"The measures which the Allied and Associated Powers shall have the right to take, in case of voluntary default by Germany, and which Germany agrees not to regard as acts of war, may include economic and financial prohibitions and reprisals and in general such other measures as the respective Governments may determine to be necessary in the circumstances."

II.—French and Belgian Action.

3. On the 26th December, 1922, the 9th January, 1923, the 16th January, 1923, and the 26th January, 1923, the Reparation Commission declared Germany in default in regard to reparation deliveries and payments. The French Government, availing themselves of the rights which they believed these declarations of the Reparation Commission to give them, under paragraph 18 of Annex II to Part VIII of the treaty, proceeded to the military occupation of the Ruhr and to the seizure of certain property and revenues in the Ruhr and in the Rhineland. Among the property and revenues seized were coal, coke, coal bye-products, dyes and other material, goods and property; the funds received from the levy of coal tax, customs duties and fees for the issue of export and import licences; the produce arising out of the management of state and communal forests; and the proceeds of fines, seizures of funds and property confiscated for non-payment of any of the above requisitions and levies. The French and Belgian control was subsequently extended to the railways and various industrial undertakings.

4. The action of the French and Belgian Governments was formally based on an interpretation of paragraphs 17 and 18 of Annex II to Part VIII of the treaty with which His Majesty's Government do not agree, and, in consequence, His Majesty's Government contest the right of those Governments to take the measures specified above.

5. A right to interpret those paragraphs is given to the Reparation Commission under paragraph 12 of Annex II to Part VIII of the treaty, which reads as follows:—

"The commission shall in general have wide latitude as to its control and handling of the whole reparation problem as dealt with in this part of the present treaty and shall have authority to interpret its provisions."

6. According to paragraph 13 (f) of Annex II, the interpretation of Part VIII of the treaty by the commission requires unanimous decision. If the required unanimity cannot be reached, His Majesty's Government have, for their part, already indicated their willingness to refer the matter to the Permanent Court of International Justice at The Hague.

III.—Views of His Majesty's Government on the Legality of the Occupation of the Ruhr by France and Belgium.

7. In the opinion of His Majesty's Government, the intention of paragraphs 17 and 18 was that, in the event of a declaration by the Reparation Commission to each of the interested Powers of a voluntary German default, and in the absence of any common agreement by the Allied Powers as to the action to be taken within the limits of their own authority—an agreement which would be the usual course under the treaty—each separate Power concerned would, within the proper sphere of its own authority, have discretion as to the action it would take. The phrase "economic and financial prohibitions and reprisals" indicates the type of action which was contemplated under the treaty, and such prohibitions and reprisals constitute measures which would naturally be taken within the territory of the individual Allied States concerned. The phrase "such other measures" clearly implies other measures of the same type. If the phrase had meant that the respective Governments had the right to take any measures whatsoever regardless of their



scope or nature, the words "economic and financial prohibitions and reprisals," would become a meaningless redundancy. The proper deduction to be drawn from the presence of the word "respective," and the mention of "economic and financial prohibitions and reprisals" is that the "other measures" referred to are measures of the nature of prohibitions and reprisals which individual Governments can properly take within the limits of their own authority. The type of action which each Government concerned could take individually and separately is illustrated by the declaration made by His Majesty's Government on the 15th October, 1920, to the German Government: that they "do not intend to exercise their rights under paragraph 18 of Annex II to Part VIII of the Treaty of Versailles, to seize the property of German nationals in this country in the case of voluntary report by Germany. This applies to German property in the United Kingdom or under United Kingdom control, whether in the form of bank balances or in that of goods in British bottoms or of goods sent here for sale."

8. This contention does not depend solely upon the well-recognised rule that where, as in the case of the relevant passages of the Treaty of Versailles, general words follow an enumeration of specific objects all belonging to a single class, the general words must be interpreted as indicating objects of the same nature as those specifically indicated, but also upon the wider principle that the whole of the language of a document must be given an interpretation consistent with the scope and purpose of the instrument. An interpretation of the language of paragraph 18 of Annex II to Part VIII of the Treaty of Versailles which would allow any one or more Powers acting independently outside the scope of their own jurisdiction to take in any part of German territory whatever measures they severally pleased against the joint debtor and against the assets which are the security for the common debt, would admit of consequences so unreasonable as to render it impossible to suppose that such a construction can represent the intentions of the high contracting parties.

9. In the opinion of His Majesty's Government, article 428, which provides for a joint Allied occupation of a specified area of German territory as a guarantee for the execution of the treaty by Germany, excludes any right on the part of an Allied Power to proceed to a further occupation of German territory under paragraphs 17 and 18 of Annex II to Part VIII. This view is confirmed by article 430, which provides for the reoccupation of any evacuated part of the territory covered by article 428 on a finding by the Reparation Commission that Germany refuses to observe the whole, or part, of her reparation obligations under the Treaty of Versailles. It would be superfluous to stipulate expressly, as does article 430, for reoccupation of the occupied territories in the event of default if, under an earlier part of the treaty, each Allied Power already had a right to proceed to the occupation of German territory.

10. This interpretation is in no way incompatible with the action taken by the Allies in 1921, when, with the full concurrence of His Majesty's Government, further German territory was occupied by the Allied Powers in March of that year. The Allies acted on that occasion, not under any specific faculty reserved by the terms of the treaty itself, but under the general liberty which one party to a treaty possesses to take such action as may be necessary, in the last resort, to compel observance of the treaty by the other party. Where a treaty has been concluded by several States acting together as one party, this right can only be exercised by all these States acting jointly, a principle which was frankly recognised in the pledge given by M. Millerand, then President of the French Council, on the 11th April, 1920, to His Majesty's Ambassador in Paris, in the following terms:—

"As regards the future, the Government of the Republic repeat that, in all inter-Allied questions raised by the execution of the treaty, they have no intention of acting save in accordance with their Allies."

11. Reparation is a matter of common interest to the Powers, and the action of a single Power may well impair the reparation interests of the other Powers concerned. This view was accepted by the French Government in 1919. For the French Government participated in a note from the Supreme Council to the Roumanian Government on the 23rd August, 1919, of which the relevant passages are given in Annex (A)* to the present memorandum.

12. If, as His Majesty's Government hold, the occupation of the Ruhr cannot be justified under any provision of the Treaty of Versailles, it follows that the seizures effected and the sanctions imposed in that territory are also devoid of treaty justification.

* Not printed.

IV.—*Legality of the Action in the Rhineland.*

13. Further, if it be admitted that the phrase "such other measures," referred to in paragraph 18 of Annex II to Part VIII, denotes only measures which it is proper for Governments to take within the sphere of their own authority, no action can properly be taken within the occupied area of the Rhineland which is subject to joint Allied occupation, unless all the Allied Powers participating in the occupation are parties to it.

V.—*Position of the Reparation Commission.*

14. Whether or not the Rhineland Commission was acting in conformity with the Rhineland Agreement in taking the measures in question is not a matter which the Reparation Commission is called upon to discuss, but the interest of the Reparation Commission in the action of the High Commission arises from the wording of paragraph 12 of Annex II to Part VIII, which reads as follows:—

"Subject to the provisions of the present treaty, the commission is constituted by the several Allied and Associated Governments referred to in paragraphs 2 and 3 above as the exclusive agency of the said Governments respectively for receiving, selling, holding and distributing the reparation payments to be made by 'Germany' under this part of the present treaty."

15. All the ordinances therefore promulgated by the Rhineland High Commission and any other action taken by them or under their instructions for the appropriation or control of assets or property in the Rhineland with the view of applying them for purposes of reparation or restitution, infringe the rights of the Reparation Commission.

16. After the cessation of passive resistance the Franco-Belgian Mission of Control of Factories and Mines (known as the M.I.C.U.M.) signed a number of agreements for reparation deliveries with German industrial combinations in the Ruhr. As a type of these agreements, the agreement with the so-called Commission of Six, signed at Düsseldorf on the 23rd November, 1923, may be taken. (See Annex (B)* to the present memorandum.) The Inter-Allied Rhineland High Commission has also concluded agreements for reparation deliveries with industrial combinations in the Rhineland. Of these agreements the one signed on the 10th November, 1923, with the Rhineland dye-stuffs industries may be taken as a type. (See Annex (C)* to the present memorandum.) The effect of these agreements is to determine the amounts of reparation deliveries and coal tax which the interested firms shall pay to the Franco-Belgian authorities. In certain agreements subsequently concluded, a new element has been introduced, whereby contracting firms undertake to contribute a cash payment to a special common fund destined for the reimbursement of deliveries ordered "for the purpose of reparation or restitution in kind," either from the contracting firms themselves or from other industrial groups which have subscribed to similar arrangements. The form of this contribution varies. In some cases it is fixed at a lump sum; in others it is a fixed percentage of the gross receipts of the contracting firms; and yet in others a percentage of the value of goods exported abroad or sent to non-occupied Germany. An example of this system is provided by article 2 of the agreement signed at Coblenz on the 30th January, 1924, between the High Commission and the representatives of the refractory products industry in the occupied territory. (Annex (D)* to the present memorandum.)

17. The obligation to make reparation deliveries rests, under Part VIII of the treaty, upon the German Government, while the Reparation Commission is the exclusive agent of the Allied Powers for receiving, selling, holding and distributing them. Any intervention by German industrial firms or by bodies such as the Franco-Belgian Mission of Control in the Ruhr or the Rhineland High Commission, purporting to hold a special commission from individual Allied Governments, or groups of Allied Governments, is *prima facie* irregular. Such intervention cannot be accepted unless the interveners are recognised either by the German Government or by the Reparation Commission as their accredited agents.

18. Whatever may be the relations between the German Government and the industrial undertakings concerned, there can be no foundation for a claim that the Rhineland High Commission or the Franco-Belgian Mission of Control have received from the Reparation Commission any mandate or authority of any kind whatever. When the Reparation Commission found Germany in default, it confined its action to notifying that default to the Allied Governments. It did not recommend any course of action, and it has never been called upon to approve the action that was taken.

* Not printed.



GERMANY.

Further, it abrogated none of its functions, and it has never recognised either the Franco-Belgian Mission of Control or the Rhineland High Commission (a body constituted for limited purposes not connected with reparations) as its agents for the purpose of paragraph 12 of Annex II to Part VIII of the treaty.

VI.—*Cost of the Operations in the Ruhr and Rhineland.*

19. Although the occupation of the Ruhr commenced on the 11th January, 1923, no accounts of the results of the operations of the French and Belgian Governments have so far been presented to the Reparation Commission. It would, therefore, be premature for His Majesty's Government to seek to discuss the questions which may in the future arise upon an examination of any such accounts. His Majesty's Government will confine themselves to indicating that, in their view, a claim by the French and Belgian Governments to a credit in the accounts of the Reparation Commission for costs or losses incurred in operations which are not sanctioned by the treaty would not be admissible. When these transactions are brought into the accounts of the commission, the German Government will necessarily be credited, and the French and Belgian Governments debited, with the gross value of all assets, moneys and property received, seized or occupied, whether in the Rhineland or the Ruhr.

VII.—*Summary.*

20. To sum up, the view of His Majesty's Government is that the measures taken independently by France and Belgium against Germany derive no legal authority from any clause of the Treaty of Versailles. In executing these measures, the French and Belgian Governments and their agents have assumed functions which they had no right to assume, and which properly belong to the Reparation Commission alone. His Majesty's Government therefore, contend that the Reparation Commission cannot in any circumstances permit the French and Belgian Governments to be credited in the accounts of the commission with the expenses of action for which the treaty gives no warrant.

Foreign Office, April 10, 1924.

Report.

We agree with the terms of the memorandum, and do not consider any amendment thereto necessary.

*Law Officers' Department,
May 27, 1924.*

PATRICK HASTINGS.
HENRY H. SLESSER.



1925

This Document is the Property of His Britannic Majesty's Government.

Printed for the use of the Foreign Office.

CONFIDENTIAL.

(13004)

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1925.



(ii)

LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked S^a, &c.

CZECHOSLOVAKIA.

No.		Date.	SUBJECT.	Page.
1	Law Officers ..	Apr. 27, 1925	Expropriation of Baron de Forest's estates in Czechoslovakia	1

EGYPT.

2	Law Officers ..	Jan. 5, 1925	Arrest by British military authorities in Egypt for political crimes	4
3	Law Officers ..	Jan. 20,	Egyptian tribute loans: liability of Egypt to pay interest	7
4	Law Officers ..	Apr. 7,	Arrests by British military authorities in Egypt	12
5	Lord Chancellor	July 22,	Egypt and the League of Nations	13

GENERAL.

6	Law Officers ..	Mar. 13, 1925	Law Officers' opinions down to 1878: question of allowing public to have access	16
7	Law Officers ..	May 23,	Communication of Law Officers' opinions to other Government Departments and to His Majesty's representatives abroad	16
8 ^a	Law Officers (Colonial Office)	Apr. 8,	Prerogative of the Crown as regards cessions of territory. 16A.	

GERMANY.

8	Law Officers ..	Jan. 16, 1925	Investigation of Germany's military situation by Council of League of Nations	17
---	-----------------	---------------	---	----

ITALY.

8 ^a	Law Officers ..	July 10, 1925	Italian restrictions on carriage of emigrants by British vessels; position as regards Anglo-Italian Commercial Treaty of 1883	20
----------------	-----------------	---------------	---	----

MEXICO.

9	Law Officers ..	Aug. 4, 1925	Validity of certain Mexican bond issues of 1913 and 1914	21
---	-----------------	--------------	--	----

MOROCCO.

10	Law Officers ..	Mar. 16, 1925	Export from Great Britain of aeroplane for use of Riff tribes in revolt against Spanish Government	27
----	-----------------	---------------	--	----

(iii)

PALESTINE.

No.		Date.	SUBJECT.	Page.
10 ^a	Law Officers ..	Apr. 7, 1925	Constitutional position of Palestine Government	28
	[Colonial Office]			
10 ^b	Law Officers ..	June 19,	Preferential treatment in United Kingdom of goods imported from Palestine	30
	[Colonial Office]			

PERSIA.

11	Law Officers ..	June 30, 1925	Expansion of note circulation of Imperial Bank of Persia	32
----	-----------------	---------------	--	----

ROUMANIA.

12	Law Officers ..	Nov. 4, 1925	Standard Oil Company's claim against His Majesty's Government in respect of the destruction of Roumanian oil wells in 1916	33
----	-----------------	--------------	--	----

7A Law Officers Dec. 17, 1925.
[Air Ministry]Power of the Crown to
restrict or prohibit by Order
under Air Navigation Act 1920
photography from foreign
aircraft over Great Britain
and Northern Ireland.

TURKEY

12^A Law Officers and
Mr. J. H. Stamp
(Clearing Office) | July 13, 1925 | Claims of British Nationals
against Turkish Govt. | 38



(iv)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1925.

The figures refer to the numbers of the pages.

Cases cited are indicated by italics.

Aircraft: **photography from and carriage of photographic apparatus in, 16C - 16H.**

AER—EGY.

EMI—LOA.

A.
Aeroplane: export of, from Great Britain to Riff tribes in Morocco, 27, 28.
Allenby, Field-Marshal Viscount, 4-6, 14.
Arbitration: right of United States to claim, in connection with Standard Oil Company's claim against Great Britain, 33-37.
Arms: aeroplane sent from Great Britain to Riff tribes in Morocco, 27, 28.
Army: British in Egypt; arrests for political crimes, 4-6, 12, 13.
" British in Egypt; anomalous position, 6, 13.
" German; investigation of position by Council of League of Nations, 17-19.
Arrests: by British military authorities in Egypt for political crimes, 4-6, 12, 13.
Australia: discrimination against Italian vessels in carriage of passengers from Italy, 20, 21.

B.
Bank of Montreal, 25.
Bank of Persia: expansion of note circulation, 32, 33.
Banque de Paris et des Pays-Bas, 23.
Bennett, Captain J. G., 25.
Bonds. *See* Loans.
Bryan, Mr. W. J., 22.

C.
Carranza, General, 22.
Claim of Standard Oil Company of New Jersey for destruction of Roumanian oil wells, 33-37.
Claims: of foreign companies; right of a State to support, against a third State, 35-37.
Commerce: meaning of, 21.
Companies: foreign; right of a State to support claims of, against a third State, 35-37.
Crimes: political; arrests by British military authorities in Egypt for, 4-6, 12, 13.
Customs: preferential treatment in United Kingdom of imports from Palestine, 30-32.
" Palestine unable to give preferential treatment to Great Britain, 32.
Czechoslovakia: expropriation of Baron de Forest's estates, 1-4.
Claims: British against Turkey; rights under Peace Treaties, 38-40
Declaration of Martial Law: meaning of expression, 6.
Deligou Bay Railway Arbitration, 36.
Diplomatic Intervention: not allowed until legal remedies are exhausted, 37.
Drapella, Franz, 2.

E.
Egypt: arrests by British military authorities, 4-6, 12, 13.
" anomalous position of British army in, 6, 13.
" and the League of Nations, 13-15.
" liability to pay interest on tribute loans, 7-12.

Emigration: Italian restrictions on carriage of emigrants by British vessels, 20, 21.
Estates: Baron de Forest's, in Czechoslovakia; expropriation, 1-4.
Expropriation: Baron de Forest's estates in Czechoslovakia, 1-4.

F.
Foreign Enlistment Act: application in case of export of aeroplane for use of Riff tribes in Morocco, 27, 28.
Forest, Baron de, 1-4.
Freshfields, Messrs., 9.

G.
Germany: investigation of military situation by Council of League of Nations, 17-19.
Government: right of lawful Government to refuse to recognise acts of a usurper, 27.
Guarantee Trust Company of New York, 23.

H.
Haking, General, 4.
Huerta, President, 21-27.

I.
Imperial Bank of Persia: expansion of note circulation, 32, 33.
Italy: restrictions on carriage of emigrants by British vessels, 20, 21.
" Australian discrimination against Italian vessels in carriage of passengers from, 20, 21.

K.
Kay, John de, 23-27.

L.
Lascourain, Señor, 22.
Law Officers' Opinions: public access to those down to 1878, 16.
" " communication to other Government Departments and to His Majesty's representatives abroad, 16, 17.
League of Nations: position of Egypt, 13-15.
" investigation of Germany's military situation by Council of, 17-19.

Loans: Egyptian tribute; liability of Egypt to pay interest, 7-12.
" validity of certain Mexican ("Huerta") bond issues of 1913 and 1914, 21-27.
" refusal of Constitutional Government to recognise bonds issued by a usurper, 27.

*Air Navigation Act 1920: **powers of the Crown, to prohibit or restrict by Order under, photography from foreign aircraft over Great Britain and Northern Ireland, 16C - 16H**

(v)

MAD—SUA.

TAF—ZAG.

M.

Madero, General, 21, 22.
Mandates: preferential treatment in United Kingdom of imports from territories placed under, 30-32.
Marek, Jeronym, 2.
Marital Law: declaration of; meaning of expression, 6.
Mexican National Packing Company, 23-26.
Mexico: validity of certain ("Huerta") bond issues of 1913 and 1914, 21-27.
Military. *See* Army.
Morgan, Grenfell and Co. (Limited), 23-25.
Morocco: export of aeroplane from Great Britain to Riff tribes in, 27, 28.

N.

National Bank of Mexico, 22.
Navigation: meaning of, 21.
Norton-Griffiths, Sir John, 33.

O.

Oil wells: destruction of. *See* Roumania.

P.

Palestine: constitutional position of Government, 28-32.
" preferential treatment in United Kingdom of imports from, 30-32.
" unable to give preferential treatment to Great Britain, 32.

Paso, Señor del, 23, 25, 27.

Peat, Messrs. W. B. and Co., 23.

Preferential treatment. *See* Customs.

Prerogative, Royal. *See* Royal Prerogative. R

Reuter's Bank (Limited), 23-26.
Romana Americana: right of United States to support claim of, against Great Britain, 33-37.

Rothschild, Messrs., 9, 11.
Roumania: destruction of oil wells in 1916; Standard Oil Company's claim against Great Britain, 33-37.

Royal Prerogative: as regards cessions of territory, 16A, 16B.

Stack, Major-General Sir L., 4. *S*
Standard Oil Company of New Jersey: claim against Great Britain for destruction of Roumanian oil wells in 1916, 33-37.
Suarez, Vice-President Pino, 22.

Photography: from foreign Aircraft. *See* Aircraft.

Prohibited Areas: photography of from foreign aircraft, powers of the Crown to prohibit 16D.

[14641]

T.

Taft, President, 22.
Treaty: Anglo-Italian Commercial, 1883; and Italian restrictions on carriage of emigrants by British vessels, 20, 21.
" Anglo-Italian Commercial, 1883; and discrimination by Australia against Italian vessels in carriage of passengers from Italy to Australia, 20, 21.
" Anglo-United States Arbitration, 1908; right of United States to claim arbitration in regard to Standard Oil Company's claim against Great Britain, 33-37.

Treaty of Peace (Austria): question of breach of article 249 in relation to Baron de Forest's estates in Czechoslovakia, 1-4.
" (Germany): right of investigation into Germany's military situation conferred by article 213, 17-19.

Treaty of Saint-Germain. *See* Treaty of Peace (Austria).

Treaty of Versailles. *See* Treaty of Peace (Germany).
Treaty of Peace (Germany): provisions of as regards claims against Turkey & British nationality (Turkey).

United States: right of, to support claim of Roumanian company against Great Britain, 33-37.

V.

Vessels: British; Italian restrictions on carriage of emigrants by, 20, 21.
" Italian; Australian discrimination against, in carriage of passengers from Italy to Australia, 20, 21.

W.

Wilson, President W., 22, 24.
Witham, Roskell, Munster and Weld, Messrs., 1.

Z.

Zaghlul, Saad Pasha, 8, 12.

Territory: Royal Prerogative as regards cessions of, 16A, 16B.

38-40

b



Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1925.

CZECHOSLOVAKIA.

[C 5654/707/12/1925]

No. 1.

[April 27, 1925.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 16, 1925.

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to request the favour of your opinion on the following matter:—

2. The question is, whether Czechoslovakia has, in the circumstances herein-after mentioned, committed a breach of article 249 of the Treaty of Saint-Germain with relation to an estate which is the property of Baron de Forest, a British subject. The solicitors of Baron de Forest, Messrs. Witham, Roskell, Munster and Weld, are of the opinion that a breach has been committed and urge that compensation should be demanded by His Majesty's Government on his behalf from the Czechoslovak Government, and that, in the event of that Government being unwilling to accede to this demand, the matter should be referred to the Permanent Court of International Justice at The Hague. The Secretary of State, on the other hand, is advised that there has been no breach of article 249, and that there is no case for submission to the court.

Expropriation of Baron de Forest's estates in Czechoslovakia.

3. Article 249 reads as follows:—

"The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this section and to the provisions of the annex hereto.

"(a.) The exceptional war measures and measures of transfer (defined in paragraph 3 of the annex hereto) taken in the territory of the former Austrian Empire with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners."

Paragraph 8 of the annex to Section IV of Part X reads as follows:—

"The restitution provided in article 249 will be carried out by order of the Austrian Government or of the authorities which have been substituted for it. Detailed accounts of the action of administrators shall be furnished to the interested persons by the Austrian authorities upon request, which may be made at any time after the coming into force of the present treaty."

The Treaty of Saint-Germain-en-Laye was signed on the 10th September, 1919, and came into force on the 16th July, 1920. It was signed and ratified by Czechoslovakia.



4. Baron de Forest was before the war the owner of large estates situated at Rossitz-Eichhorn, near Brünn, in Moravia, in territory formerly part of the Austro-Hungarian Empire, and now within the Czechoslovak Republic. Baron de Forest contends that the Czechoslovak Government, being the authority substituted for the Austrian Government, as provided in paragraph 8 of the annex, has failed to fulfil an obligation imposed on it by article 249 to restore to him as owner this property and his rights and interests therein.

5. The estates consist of 5,025 acres of arable land and 25,250 acres of forest land, and in addition thereto a castle and some factories. Baron de Forest states that the value of the estate was in 1914 about £1 million.

During the war the estate was sequestered and administered as enemy property by the late Austro-Hungarian Government. In January 1919 Baron de Forest heard that the sequestration of his property had been raised, and requested the Czechoslovak Government temporarily to take over the administration of this estate for the reason that he was unable at the time to make arrangements for its management. On the 18th March, 1919, the Czechoslovak Government, in deference to this request, appointed one Jeronym Marek compulsory administrator of the estate. In March 1920 Baron de Forest intimated to the Czechoslovak Government that he wished to take over the administration himself, and on the 1st April the compulsory administration was cancelled by that Government, and on the 31st May, 1920, one Franz Drapella, acting for Baron de Forest, took over the administration of the estate.

6. The Czechoslovak Government have adopted an agrarian policy under which large estates are to be split up and the land held in small holdings. In pursuance of this policy, a decree, No. 32, was enacted on the 9th November, 1918, and came into force on the 18th November, 1918 (Paper (A)), by virtue of which a "distrain" was placed on large estates, which deprived their owners of the power of alienation or of charging such estates, except by the consent of the Government. Subject to this restriction the owners were left in possession to administer and enjoy the profits of their estates.

This policy was continued by Law No. 215, passed on the 16th April, 1919, and coming into force on the 24th April, 1919 (Paper (B)). By this law large estates were defined as all estates belonging to one person in area over 150 hectares of agricultural, or 250 hectares of forest or other kinds of land, and all large estates were placed under "distrain." The State, acting through a Land Office, created by this decree, was given power to take over and dispossess the owners of "all property under distrain," subject to the right of the dispossessed owners to be assigned at their choice a portion of such property not exceeding the amounts above stated. All sales, leases, or mortgages of distrained property were prohibited and all agreements for sale, lease or mortgage effected after the 28th October, 1918, rendered void. Subject to this restriction and an obligation enforceable by law to administer in an efficient way, the owners of distrained property were left in the administration and enjoyment of their estates unless and until they were taken over by the Land Office.

It was further provided that all estates which came under distrain under this law should be entered in the land register, and that notice should be given to the persons managing such estates of the intention of the Land Office to take them over, and that such compensation should be paid for the property taken over as should be laid down by a later legislation. Law No. 329 of the 8th April, 1920, as modified by Law No. 220 of 13th July, 1922, Decree No. 53 of the 21st January, 1921, and Decree No. 221 of the 7th August, 1922, lay down the principles on which such compensation shall be assessed. The essential clauses of the above laws and decrees are attached (Paper (C)).

7. The estate of Baron de Forest was entered in the land registry and came under distrain under Decree No. 32 and Law No. 215 before the signature of the Treaty of Saint-Germain, and in the case of the decree before the sequestration placed on it by Austro-Hungarian legislation had been raised. Baron de Forest has, therefore, never obtained the free power of disposition over his estate since the war. Subject to the restrictions on alienation above mentioned, Baron de Forest, however, remained in control of the whole of his estate, with the exception of certain small portions which he has been obliged to dispose of; and, so far as is known, received the profits thereof. The Land Office has now notified a further transfer amounting to 60 per cent. of the arable land, or 9 per cent. of the whole estate.

8. It is contended by the solicitors for Baron de Forest that, by reason of the operation of the Decree No. 32 and Law No. 215, the estate has never been restored

to him as is required by article 249 of the Treaty of Saint-Germain. Their arguments are set out in Parts III and IV of a memorandum, dated the 12th January, 1922, and submitted by Baron de Forest (Paper (D)).

9. The Secretary of State has been advised: (1) that the obligation on Czechoslovakia created by article 249 (a) and paragraph 8 of the annex is confined to the revocation of transfers of property (now within her territory) carried out by the late Austro-Hungarian Government after the commencement of the war with respect to the property of the nationals of States at war with Austria-Hungary and in pursuance of its war-time legislation or policy respecting enemy property; (2) that the property of Baron de Forest was never subjected to any "measure of transfer" by the Austro-Hungarian Government, and that, therefore, no obligation on Czechoslovakia has ever come in being by reason of this article with reference to this property; (3) that the legislation of Czechoslovakia, and the Decrees No. 32 and No. 215 in particular, are not within the purview of article 249 of the Treaty of Saint-Germain.

10. In explanation of the advice mentioned in the preceding paragraph, heading (1), the Secretary of State desires to draw your attention to the following considerations:—

- (a.) The only obligation created against Czechoslovakia is derived from paragraph 8 of the annex.
- (b.) This obligation is confined to ordering "the restitution" of property.
- (c.) Reference to paragraphs (a) and (f) of article 249 shows that by "restitution" in paragraph 8 of the annex is meant "the reversion in the original owner of the legal right of ownership in property of which he was divested by a 'measure of transfer.'"
- (d.) It is provided by article 249 (a) that "exceptional war measures" are to be discontinued or "stayed," and by article 249 (e) that Austria shall pay compensation for damage suffered by Allied nationals by reason of the application of "exceptional war measures" to them. In no part of the treaty is any obligation placed on Czechoslovakia with regard to property subjected to exceptional war measures only.
- (e.) Paragraph 3 (second sub-paragraph) of the annex defines the expression "measures of transfer" as used in article 249 (a) as "measures which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner."

Article 249 (e) provides for compensation to be paid by Austria for damages inflicted upon property subjected to "measures of transfer."

11. And with regard to heading (2) of paragraph 9 to the following considerations:—

- (1.) The sequestration to which the estate of Baron de Forest was subjected during the war did not involve a transfer of ownership. It was not therefore a "measure of transfer."
It was on the other hand an "exceptional war measure" as defined in paragraph 3 of the annex. It was discontinued in January 1919. Baron de Forest has claimed against Austria compensation for the damage inflicted on his estates by the sequestration.
- (2.) Baron de Forest was, at the time when the Treaty of Saint-Germain was signed and at the time when it came into force, possessed of the legal ownership of all his estates.

12. And lastly, with regard to heading (3) of paragraph 9 hereof to the following consideration:—

The Decrees No. 32 and No. 215 of the Czechoslovak Republic are not "measures of transfer" or "exceptional war measures" within the meaning of article 249 (a) as defined by paragraph 3 of the annex, since they are not directed against "enemy property," but are the decrees of a Government never at war with Great Britain, applied equally against owners of property of whatever nationality.

Article 249 (e), which provides that Austria shall pay compensation for damage inflicted by such measures, shows that the expressions are limited to measures of the late Austro-Hungarian Government.



EGYPT.

13. I am to request that you will be so good as to take the question into your consideration and to favour the Secretary of State with your opinion whether a claim arising out of article 249 of the Treaty of Saint-Germain could be presented on behalf of Baron de Forest against Czechoslovakia before the Permanent Court of International Justice with any reasonable chance of success.

I have, &c.

MILES W. LAMPSON.

List of Papers.

- (A.) Translation of Decree No. 32 of the Czechoslovak Republic, dated November 9, 1918.
[C 4999/707/12/1925.]
(B.) Translation of Law No. 215 of the Czechoslovak Republic, dated April 16, 1919.
[C 4999/707/12/1925.]
(C.) Translations of Law No. 329, dated April 8, 1920, as modified by Law No. 220 of July 13, 1922; Decree No. 53 of January 21, 1921, and Decree No. 221 of August 7, 1922.
[C 4999/707/12/1925.]
(D.) Parts III and IV of Memorandum presented by Baron de Forest, dated January 12, 1922.
[C 4999/707/12/1925.]

Report.

WE answer this question in the negative. In our opinion it is not possible to hold that the measures of which Baron de Forest complains are exceptional war measures, or measures affecting the ownership of enemy property; and it is only these with which article 249 of the Treaty of Saint-Germain is concerned.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

*Law Officers' Department,
April 27, 1925.*

EGYPT.

No. 2.

[J 48/32/16/1925]

[January 5, 1925.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, December 24, 1924.

I HAVE the honour, by direction of Mr. Secretary Chamberlain, to request the favour of your advice on the following point:—

2. Shortly after the murder of Sir Lee Stack, Lord Allenby received information (Paper (A)) that three Egyptian Deputies had taken an oath to continue the murder of Englishmen. He was instructed (Paper (B)) that, if he was satisfied that there was reasonable ground for the report, he should inform the Egyptian Prime Minister and call upon him to confine the men to a place where they could do no harm. If the Prime Minister declined to act, Lord Allenby was authorised to cause them to be arrested and confined in a fortress or elsewhere under British guard. The Prime Minister, however, was particularly anxious (Paper (C)) that the arrest should be made by the British authorities, on the ground that the Egyptian Government could not make such an arrest without declaring Egyptian martial law. Lord Allenby accordingly instructed General Haking to arrest the men and confine them in the citadel, and this was done.

3. Subsequently, the Director-General of the European Department and the Commandant of the Cairo Police represented to Lord Allenby (Paper (D)) that the arrest and temporary detention of some forty persons was urgently essential if the murder of Sir Lee Stack was to be elucidated and the considerable probability of more murders being committed diminished. Lord Allenby reported that, in the event of the Egyptian Prime Minister's declining to instruct the authorities to arrest the persons concerned, he proposed to have them arrested by the British military

Arrests by
British
military
authorities
in Egypt
for political
crimes.

EGYPT.

5

authorities. Lord Allenby stated that he was advised that there were precedents for arrest by the army of occupation in the time of Lord Cromer, and that the existence or non-existence of martial law was legally irrelevant.

4. The Attorney-General, however, who was consulted at this point, was of opinion (Papers (E) and (F)) that the British army of occupation had no right to proceed to the proposed arrests. The proper procedure would be, if the military authorities wished to proceed in virtue of their powers of an army of occupation, to take over the civil administration of the territory to such an extent as to proceed to the arrest of individuals, and to issue some indication of their intention so to take over the administration and of the limits within which it would be taken over. This would be tantamount to a declaration of martial law. If the arrest were made as proposed, it would amount to such a supersession of the civil authorities by the military as to be itself an act of martial law, and it might be very difficult to terminate such supersession of the civil authorities when this particular incident had been completed. Lord Allenby was informed accordingly (Paper (G)), and instructed that no effort should be spared to overcome the reluctance of the Egyptian Prime Minister to declare Egyptian martial law.

5. On learning of the arrest of the three Deputies, however, the Egyptian Prime Minister at once realised that, from the point of view of Egyptian public opinion, he had made a political mistake in leaving the initiative to the British military authorities. He accordingly expressed his willingness to take over the prisoners and deal with them according to Egyptian criminal procedure (Paper (H)), and the three men were therefore handed over to the Egyptian authorities. The Egyptian Government similarly agreed (Paper (I)) to arrest the forty persons referred to in paragraph 3.

6. Lord Allenby subsequently reported (Paper (J)) that the possibility of a further political murder remained not improbable, and it was necessary to take thought for the position. He particularly wished not to declare British martial law, and was unwilling to empower the military authorities to make arrests and searches, though this was less objectionable than introducing the whole apparatus of martial law, and might be necessary. He considered that the best course would be to induce the Egyptian Government to declare a state of siege. He further reported that one fairly sure preventive measure would be the arrest of about 300 known individuals; the arrest of about 100 of these would be a less sure preventive, but still of considerable value.

7. On the 9th December, Lord Allenby reported (Paper (K)) that the evidence against the persons under arrest was slow in accumulating, and the time might shortly come when the Egyptian Government would not feel able to renew the period of detention under the law of criminal procedure. Lord Allenby considered that it would be intolerable that the three Deputies, who were originally arrested by the British authorities, should regain their freedom in the near future. He therefore proposed, in the first instance, to do his utmost to induce the Egyptian Government to find justification for keeping these persons under arrest in the ordinary way; if this failed, to press them strongly to declare a state of siege, and in the last resort to order the arrest of the persons concerned by the British military authorities.

8. Lord Allenby was informed, in reply (Paper (L)), that the Secretary of State was advised that the arrest and detention of the persons in question by the British military authorities was, in fact, martial law, and could be justified and maintained only by proclamation of martial law. In the event of Lord Allenby's legal adviser taking a different view, his reasons were to be telegraphed fully. These views have now been received, and will be found in Paper (M), and the present position as regards the detention of the individuals concerned is described in Paper (N).

9. A memorandum giving such information as exists in this Department on the subject of political arrests by the British military authorities in Egypt before the war is enclosed (Paper (O)), and it will be seen that it hardly bears out Lord Allenby's statement as to precedents contained in Paper (D).

10. In these circumstances, I am to request that you will take the enclosed papers into consideration and favour Mr. Chamberlain with your opinion as to whether, in the event of the British military authorities in Egypt effecting the arrest of persons suspected of being likely to encourage or perpetrate political crimes, their action would amount to a declaration of martial law, or whether, as contended by Lord Allenby's legal adviser, such action can be regarded as within the normal powers of self-protection which are of necessity inherent in the Commander-in-chief of an army of occupation. Mr. Chamberlain would also be grateful for any observations of a general character which you may be good enough to offer.



EGYPT.

11. It may be necessary to send instructions to Lord Allenby on the subject at any moment, and Mr. Chamberlain would therefore be grateful if he could be favoured with your opinion at a very early date.

I have, &c.
D. G. OSBORNE.

List of Papers.

- (A.) Lord Allenby's telegram No. 396, November 24, 1924. [E 10195/368/16/1924.]
 (B.) Lord Allenby's telegram No. 390, November 24, 1924. [E 19185/368/16/1924.]
 (C.) Lord Allenby's telegram No. 433, November 26, 1924. [E 10417/368/16/1924.]
 (D.) Lord Allenby's telegram No. 434, November 26, 1924. [E 10418/368/16/1924.]
 (E.) Note by Sir C. Hurst, November 27, 1924. [E 10521/368/16/1924.]
 (F.) Minute by Sir C. Hurst, November 28, 1924. [E 10522/368/16/1924.]
 (G.) To Lord Allenby, telegram No. 252, November 27, 1924. [E 10418/368/16/1924.]
 (H.) Lord Allenby's telegram No. 446, November 27, 1924. [E 10486/368/16/1924.]
 (I.) Lord Allenby's telegram No. 447, November 27, 1924. [E 10478/368/16/1924.]
 (J.) Lord Allenby's telegram No. 518, December 9, 1924. [E 11099/368/16/1924.]
 (K.) Lord Allenby's telegram No. 519, December 9, 1924. [E 11100/368/16/1924.]
 (L.) To Lord Allenby, telegram No. 298, December 15, 1924. [E 11100/368/16/1924.]
 (M.) Lord Allenby's telegram No. 556, December 20, 1924. [E 11484/368/16/1924.]
 (N.) Lord Allenby's telegram No. 538, December 14, 1924. [E 11268/368/16/1924.]
 (O.) Library memorandum, December 23, 1924. [10004.]

Report.

1. Before answering the question submitted to us, we think it convenient to consider what is meant by the expression "a declaration of martial law." Strictly speaking, there is no such thing as martial law known to the law of England; what is popularly so termed is really the defiance and disregard by the Executive of legal rights and obligations. It follows that "a declaration of martial law" is merely an intimation to the public that the Executive intends to disregard the law and to ignore legal rights. It follows also that the Executive can decide to what extent it intends to defy the law, or, in other words, how far "martial law" is to extend. In some foreign countries a legal right is given by the Constitution to the Executive to suspend the ordinary law by declaring a state of siege, and we gather that Egypt is one of these countries. But the declaration of a state of siege is the act of the Egyptian Executive, conferring on that Executive certain powers. The difficulty of the present situation lies in the anomalous position of the British army of occupation in Egypt. The army owes allegiance only to the British Sovereign, and is the instrument of the British Government; but, since Egypt is a friendly nation and is an independent sovereign State, the army must be treated as being in Egypt with the consent of that State, and the law governing the relations of the army or its members in Egypt to the Egyptian population must be the Egyptian law. We assume that there is no provision in the Egyptian law giving to the British army any right to arrest or imprison Egyptians, and the Khedivial Decree of 1895 and the despatch of the 22nd February, 1895, both seem to us to recognise that the legal position is as we have stated it.

2. In our opinion, it follows from the considerations set out above that the arrest by the British military authorities of persons suspected of being likely to encourage or perpetrate political crimes is an illegal action, or, in other words, is a declaration of martial law. If it were intended to exercise such a power, it might be well to make a public declaration to this effect, defining and limiting the extent to which the military authorities intended to go in disregarding the ordinary law. This would no doubt prevent the Egyptian public or foreign nations from supposing that we intended to resume the administration of the country or to re-establish the régime existing before March 1922. At the same time, it must be remembered that it is not always easy to limit or prevent the extension of "martial law" when it has once been established. For instance, if an arrested person were to appeal to an Egyptian court and that court were to accept jurisdiction, we might be compelled very largely to extend our arbitrary rule. These, however, are matters for political rather than for legal decision.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP

*Law Officers' Department,
January 5, 1925.*

[J 203/52/16/1925]

No. 3.

[January 20, 1925.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 9, 1925.

I HAVE the honour, by direction of Mr. Secretary Chamberlain, to submit to you the papers listed below relating to the question whether Egypt is liable to pay the interest on what are known as the tribute loans. The whole of the sums required for the service of two of these loans (those of 1891 and 1894) and a part of the sum required for the interest on the third loan (that of 1855) have hitherto always been paid by Egypt, but in the summer of this year a note (Paper (I)) was received from the Egyptian Minister in London to the effect that payments due on the 12th July would be effected, but that after that date the service of the tribute loans would be suspended and the sums required for the service of the loans would be paid into the National Bank of Egypt until a decision on the question at issue had been arrived at. 2. Detailed information with regard to the tribute loans will be found in the two Treasury papers prepared in 1916—"The Egyptian Tribute Loans" and "The Turkish Guaranteed Loan, 1855" (Paper (A)). The position may be shortly stated as follows:—

The tribute loans were loans contracted by the Ottoman Government, and for the security of the bondholders the Ottoman Government made assignments of the Egyptian tribute to the extent required for the service of the loans now represented by the loans of 1891 and 1894 and to the extent of a contribution of £72,000 per annum towards the service of the loan of 1855.

The tribute loans now consist of three loans:—

- The 4 per cent. Guaranteed Loan of 1855, raised by the Turkish Government at the time of the Crimean War, and guaranteed as regards interest but not as regards sinking fund by the British and French Governments (see 18 & 19 Vict., cap. 99). The interest on this loan is payable on the 1st August and 1st February in each year. The sinking fund of 1 per cent. has been in default since 1875. The interest (now £153,752 per annum) has been met as to £72,000 from the tribute and as to £81,752 from the "Cyprus tribute" owing to circumstances explained in Paper (A). There is of course no question of default on the interest, as it is guaranteed by the British and French Governments. The interest due on the 1st August was (except for a small amount) covered by payments made before the 15th July. If Egypt does not pay the interest due on the 1st February, it will have to be found by His Majesty's Government and by the French Government.
- The $3\frac{1}{2}$ per cent. loan of 1894, representing the original loans of 1854 and 1871. The annuity for interest and sinking fund (49 per cent. per annum) on this loan is due on the 15th April and the 15th October in each year and default occurred on the 15th October last.
- The 4 per cent. loan of 1891, representing the original loan of 1877. The annuity for interest and sinking fund (42 per cent. per annum) on this loan is due on the 10th April and the 10th October in each year, and default occurred on the 10th October last.

3. Egypt was originally a province of the Ottoman Empire and paid tribute to the Sultan as such. As the autonomy of Egypt gradually became more pronounced the position of the tribute was regularised, and in 1841 the amount was fixed at the equivalent of £363,635 annually. In 1866 the Khedive Ismail obtained certain further privileges from the Porte, and the tribute was raised to the equivalent of £681,820 per annum (altered to £681,872 in 1875). At this figure it remained until 1914, when the connection between Egypt and Turkey was severed, and Egypt was declared to be a British protectorate. The text of the announcement then made by His Majesty's Government will be found at p. 3 of Paper (A). The protectorate continued until 1922, when His Majesty's Government issued a declaration (Paper (B)) to the effect that Egypt was recognised to be a sovereign independent State, but that certain questions were reserved to the absolute discretion of His Majesty's Government. Fuller information with regard to the Egyptian tribute up to 1916 will be found on



EGYPT.

8

pp. 2 and 3 of Paper (A). I am also to draw your attention to a memorandum by the legal adviser to the Foreign Office, dated the 7th November, 1922 (Paper (E)), on the question whether the Egyptian tribute must necessarily be regarded as having ceased to be payable in 1914.

4. The tribute payable by Egypt to the Ottoman Empire was charged by the Porte with the payment of sums for the service of certain loans.

5. In 1855 there was a free balance of £72,000 per annum out of the tribute. This sum was applied to the service of the guaranteed loan of 1855, but no formal decree or instrument was issued by the Khedive pledging himself to the payment of this sum to the bondholders. References are, however, made in certain loan contracts between the Porte and financial houses responsible for the issue of new Turkish loans to the arrangements in force as to the payment by Egypt of the £72,000 towards the service of the 1855 loan (see, for instance, paragraph 4 of the loan contract of 1877, pp. 12 and 13 of Paper (A)). Of these loan contracts Egypt had official notice, and she acted in accordance with their contents.

6. In 1894 the Khedive of Egypt issued a decree reciting the contract of the 4th-16th May, 1894, for the conversion of the Ottoman loans of 1854 and 1871, and pledging the Egyptian Government to pay annually until 1955 a stipulated sum for the service of the new loan. For the service of the 1854 loan the sum of £210,000 out of the Egyptian tribute had been pledged by the Porte. For the service of the 1871 loan the sum of £399,000 out of the Egyptian tribute had been pledged by the Porte (see p. 5 of Paper (A)). It will be noticed that the title of this decree is "Décret affectant au Service de l'Emprunt ottoman . . . une Somme . . . prélevée sur le Tribut d'Égypte," and this stipulation is repeated in the body of the decree: "Cette somme sera prélevée sur le tribut d'Égypte que nous et nos successeurs devons et devrons au Gouvernement impérial ottoman" (see pp. 28 and 29 of Paper (A)).

7. In 1891 an analogous decree had been issued by the Khedive relating to the loan of 1891 (see p. 35 of Paper (A)).

8. The service of the loans of 1855, 1894 and 1891 required the whole of the Egyptian tribute.

9. Despite the termination in 1914 of the political connection between Turkey and Egypt, the Egyptian Government continued to make periodical payments to London of the sums required for the service of the tribute loans; nor was any change made after the declaration issued by His Majesty's Government in February 1922 as to the independence of Egypt. It should be explained, however, that, for some little time after the declaration of 1922, Governments were in office in Egypt which were largely dependent on the support of the Residency. Furthermore, a British Financial Adviser remained in the service of the Egyptian Government and enjoyed a position of considerable influence. These two circumstances were sufficient to ensure that the payment of the sums required for the service of the tribute loans was made by the Egyptian Government. While the Zaghlul Cabinet were in office neither of these circumstances existed. The Government did not depend on the support of the Residency, and the position of the Financial Adviser had changed, though in the document issued by Lord Allenby to the British advisers in Egypt with the tacit concurrence of the Egyptian Government at the time of the declaration as to Egypt's independence (see Paper (D)) the functions of the Financial Adviser as regards external loans are preserved.

10. It should be remembered that the members of the party to which Saad Pasha Zaghlul and his Cabinet belonged all maintain that Egypt has acquired complete political independence, and that her independence does not date from and is not conditioned by the British declaration of 1922 (Paper (B)).

11. In the notification made to foreign Powers at the time of the British declaration as to the independence of Egypt (Paper (C)) His Majesty's Government said that they could not allow the special relations as defined in the declaration to be questioned or discussed by any other Power, and there are, therefore, manifest objections to any steps being taken in connection with the tribute loans which would entail consideration by an outside authority of the basis and the measure of the independence now enjoyed by Egypt.

12. In the Treaty of Sévres—the treaty of peace with Turkey which was signed on the 10th August, 1920, but was never ratified—article 112 provided as follows:—

"Turkey renounces all claim to the tribute formerly paid by Egypt.

"Great Britain undertakes to relieve Turkey of all liability in respect of the Turkish loans secured on the Egyptian tribute.

EGYPT.

9

"These loans are:—

"The guaranteed loan of 1855;

"The loan of 1894, representing the converted loans of 1854 and 1871;

"The loan of 1891, representing the converted loan of 1877.

"The sums which the Khedives of Egypt have from time to time undertaken to pay over to the houses by which these loans were issued will be applied as heretofore to the interest and the sinking funds of the loans of 1894 and 1891 until the final extinction of those loans. The Government of Egypt will also continue to apply the sum hitherto paid towards the interest on the guaranteed loan of 1855.

"Upon the extinction of these loans of 1894, 1891 and 1855, all liability on the part of the Egyptian Government arising out of the tribute formerly paid by Egypt to Turkey will cease."

In the Treaty of Peace with Turkey signed at Lausanne on the 24th July, 1923, and in force since the 6th August, 1924, article 18 provided as follows:—

"Turkey is released from all undertakings and obligations in regard to the Ottoman loans guaranteed on the Egyptian tribute—that is to say, the loans of 1855, 1891 and 1894. The annual payments made by Egypt for the service of these loans now forming part of the service of the Egyptian Public Debt, Egypt is freed from all other obligations relating to the Ottoman Public Debt."

At the time of the conclusion of the Treaty of Sévres the British protectorate over Egypt was still in force, and His Majesty's Government were therefore in a position to bind Egypt. At the time of the Conference of Lausanne the British protectorate over Egypt had terminated, and it had been intended that Egypt should become a party to the treaty, but the arrangements for this purpose broke down, and Egypt is not a party to it.

13. The question of the liability of Egypt to continue the service of the tribute loans has been constantly under consideration. Lord Edward Cecil, Financial Adviser in Egypt, raised the question in 1916 (see Paper (A 1)). It has also been considered from time to time by the Departments of His Majesty's Government in London. When it became necessary to complete the peace treaty with Turkey without the participation of Egypt it was hoped that it would be possible to regularise the situation of the tribute loans by negotiation with Egypt (see Treasury letter of the 13th May, 1923—Mr. Waley to Mr. Murray—Paper (H)). On the other hand, Sir M. Amos, the Judicial Adviser in the service of the Egyptian Government who acts as legal adviser to the Residency in Cairo, has consistently advised that Egypt is bound to continue the service of the tribute loans. I am to draw your attention to Lord Allenby's despatch of the 13th July, 1924 (Paper (J)), a letter from the Treasury of the 12th September, 1924 (Paper (K)), a despatch from Mr. Clark Kerr of the 8th September, 1924 (Paper (M)), Lord Allenby's despatch of the 15th November, 1924 (Paper (N)), and Lord Allenby's despatch of the 29th November, 1924 (Paper (O)). These papers contain memoranda by Sir M. Amos. They also contain memoranda by Mr. Hornsby, the Governor of the National Bank of Egypt. The latter are interesting as showing the way in which the question strikes a well-informed man of business who looks at the matter apart from legal subtleties.

14. At the time when the Egyptian Government served notice of their intention to discontinue after the 12th July the service of the loans (Paper (I)), an intimation was made of their willingness to submit the question of their liability to the Permanent Court of International Justice at The Hague.

15. One of the objections to agreeing to this course has been that the question is within the jurisdiction of the Mixed Tribunals in Egypt and that the bondholders are, if they so wish, in a position to initiate litigation against the Egyptian Government so soon as a default has occurred in the payment of the interest due. The Foreign Office has been in constant correspondence with Messrs. Freshfields, who act on behalf of the Bank of England, and with Messrs. Rothschild, who now represent the issuing houses of the loans of 1891 and 1894, as to the initiation of proceedings in the Mixed Tribunals. The letter from Messrs. Freshfields of the 17th September, 1924 (Paper (L)), contains an elaborate legal opinion by a Mr. Alexander, who is a lawyer carrying on business in Egypt, p. 26 of which deals with the jurisdiction of the Mixed Courts in this matter. The bondholders are, however, reluctant to initiate proceedings



for the recovery of the interest due. They are disposed to consider that it is a case in which His Majesty's Government ought to secure for them the resumption of the service of the loans by Egypt. I am also to draw your attention to a minute by the legal adviser to this Department of the 9th December, 1924 (Paper (P)), in which he draws attention to the risks involved in any proceedings before the Permanent Court of International Justice or before the Mixed Tribunals in Egypt, because such proceedings would almost certainly entail some consideration of the basis of Egypt's present measure of independence. It should be borne in mind that, as the loan of 1855 is guaranteed by the British and French Governments, the bondholders feel no concern in any default by the Egyptian Government in regard to the interest upon that loan. It is only with regard to the default on the loans of 1891 and 1894 that they are interested.

16. The Secretary of State is impressed with the view that some measures are incumbent upon him to endeavour to secure the resumption of the service of the loans by the Egyptian Government, because assurances were on one occasion given to the bondholders that measures would be taken to protect their interests (see Paper (Q)). As it is possible that such resumption cannot be obtained by means other than British insistence on the payment, he is desirous of receiving your advice as to the strength of the case for the bondholders, and I am, therefore, to ask that you will be so good as to favour him with your opinion—

- (1.) Whether Egypt remained liable to pay tribute to the Porte after the abrogation of the Turkish suzerainty in 1914.
- (2.) Whether Egypt is, in all the circumstances, under obligation to continue the payments heretofore made for service of the tribute loans, and, if so, upon what grounds.
- (3.) Whether the case in favour of Egypt's liability is sufficiently strong to justify the question being made the subject of proceedings in the Mixed Tribunals.
- (4.) If not, whether it is a case which might be referred to the Judicial Committee of the Privy Council for their consideration and advice in pursuance of section 4 of "The Judicial Committee Act, 1833."

17. Mr. Chamberlain would also be grateful for any observations of a general nature which you may be good enough to offer.

18. I am to add that, should you desire any further papers or information, Mr. Chamberlain has directed the officials of this Department to hold themselves at your disposal.

I have, &c.

JOHN MURRAY.

List of Papers.

- (A.)—Treasury Paper, October 12, 1916, "The Egyptian Tribute Loans." [Confidential 10859* (2).]
- (A 1.)—Lord E. Cecil to the Foreign Office, February 21, 1916. [35465/1916.]
- (B.)—British declaration as to the independence of Egypt, p. 29 of "Egypt No. 1 (1922)." [Cd. 1592.] [Parliamentary 5113.]
- (C.)—British notification to foreign Powers as to status of Egypt, March 1922, "Egypt No. 2 (1922)." [Cd. 1617.] [Parliamentary 5118.]
- (D.)—"Notice to Advisers," March 4, 1922 (see No. 114 in printed volume "Further Correspondence respecting Egypt and the Soudan, Part LXXXIX)." [E 2766/1/16/1922.]
- (E.)—Foreign Office minute, memorandum of the legal adviser, November 7, 1922. [E 12331/10102/44/1922.]
- (F.)—Extract from the Treaty of Sévres, articles 101–112 (Egypt). [Treaty 1589.]
- (G.)—Extract from the Treaty of Lausanne, articles 16–19 (Egypt). [Treaty 1681.]
- (H.)—Treasury letter. Mr. Waley to Mr. Murray, May 13, 1923. [E 5013/957/16/1923.]
- (I.)—*Note verbale* from the Egyptian Legation, July 22, 1924. [E 6345/1573/16/1924.]
- (J.)—Lord Allenby's despatch No. 457, July 13, 1924. [E 6248/1573/1924.]
- (K.)—Treasury letter to Foreign Office, September 12, 1924. [E 7853/1573/16/1924.]
- (L.)—Sir W. H. Leese, of Messrs. Freshfields, to Foreign Office, September 17, 1924. [E 8042/1573/16/1924.]
- (M.)—Mr. Clark Kerr's despatch No. 568, September 8, 1924. [E 8127/1573/16/1924.]
- (N.)—Lord Allenby's despatch No. 675, November 15, 1924. [E 10234/1573/16/1924.]
- (O.)—Lord Allenby's despatch No. 693, November 29, 1924. [E 10984/1573/16/1924.]
- (P.)—Memorandum by the legal adviser to the Foreign Office, December 9, 1924. [E 11098/1573/16/1924.]
- (Q.)—Mr. H. Bailey to the Foreign Office, March 17, 1922, and Foreign Office to Mr. Bailey, March 22, 1922. [E 2998/2998/16/1922.]

Report.

The questions involved in this report raise matters of considerable difficulty, and we are not surprised to find divergent views, such as those expressed by Lord Edward Cecil and Mr. Hornsby on the one hand, and Sir Maurice Amos on the other. The difficulty arises largely from the fact that international law in the sphere of contract is built up by the application to the relations between States of the provisions of municipal law governing the relations between individuals in analogous circumstances; and that there is no precise analogy in municipal law to the obligation created by the imposition of a tribute by a suzerain upon a vassal State.

The argument in favour of the continued liability of Egypt is based upon two alternative contentions: first of all it is said that the tribute was a debt owing from Egypt to Turkey, and that the raising of the loans of 1855, 1891 and 1894 upon the security of this tribute amounted to an assignment of this debt to the bondholders; that Egypt had notice of this assignment, and therefore that a liability from Egypt to the bondholders was thereby created which could not be determined by any transactions between Egypt and Turkey. Alternatively it is said that in the case of the loans of 1891 and 1894 there was an express promise by Egypt to Messrs. Rothschild and Sons as agents for the bondholders, which amounted to an undertaking to pay the stipulated interest and sinking fund during the currency of these respective loans.

We have come to the conclusion that the first contention is unsound, but that the second is sound. In our opinion it is fallacious to regard the obligation of Egypt to pay tribute to Turkey as analogous to a debt. The obligation is in our opinion one arbitrarily imposed by Turkey upon Egypt as an incident of its position as a vassal State: when once that position was ended, then the incidents attaching thereto clearly came to an end. No doubt Egypt had notice that Turkey had charged the tribute in favour of the bondholders, but in our opinion that imposed no obligation upon Egypt to go on paying the tribute to the bondholders when her liability to pay the amount to Turkey had ceased. On the other hand, we have come to the conclusion that the language used in the Khedivial decrees of the 20th March, 1891, and the 30th May, 1894, amounts to an unconditional promise by the Egyptian sovereign to pay the named sums for the named period to Messrs. Rothschild or to the Bank of England on their account. We do not think that the fact that the tribute is named as the source from which the money is to be derived entitles the Egyptian Government, by putting an end to its liability for tribute, to extinguish its expressed obligation to pay to the bondholders the sums which they have undertaken to discharge.

The result is that our answer to the first question submitted to us is in the negative, and that our answer to the second question is in the affirmative so far as the loans for 1891 and 1894 are concerned, and in the negative so far as the loan for 1855.

The third and fourth questions submitted to us seem to turn upon questions of political expediency rather than of law, and we express our opinion with hesitation. But since they have been submitted, and since you have been good enough to invite us to make any further observations which occur to us, we would say that we agree with Sir Cecil Hurst in regarding the suggestion of doing nothing as impossible, since it would be tantamount to an acceptance of the repudiation of Egypt of her liability. Furthermore, we should strongly deprecate a reference to the International Court at The Hague. Such a reference to such a body would give Egypt the very opportunity which the extremist section of her people desires of raising before the court the whole question of her status.

There remain the proposals as to the Mixed Tribunals and as to the Judicial Committee of the Privy Council. We should not advise this country to be a party to any submission to the Mixed Tribunals so as to be bound by their decision; but it seems to us that it is open to any bondholder to institute proceedings before these tribunals against the Egyptian Government; and if the matter is to be judicially considered, probably this is the best way of raising it. If our opinion as expressed in the preceding paragraphs is correct, the decision should be in favour of the bondholder and it would bind the Egyptian Government. We do not think the case is suitable for submission to the Judicial Committee. No doubt it is open to His Majesty to refer any question to that body for their opinion; but the opinion so given is consultative only, although this country would, in effect, be bound by any decision so given. On the other hand, the decision would not bind either the bondholders or the Egyptian Government. The result would be that, if the decision were in favour of the continued liability of Egypt, Egypt would still be able to say that the decision was



EGYPT.

erroneous and that her case had never been presented to the Judicial Committee, before whom she is under no obligation to appear; whereas, if the decision were against the liability of Egypt, it would be impossible for this country further to press the claims of the bondholders. Proceedings in the Mixed Courts should preferably be instituted by some bondholder not a British national, so as to avoid any complication created by the release of Turkey by Great Britain contained in the Treaty of Lausanne.

We should have thought that the preferable course would be to have this question decided by diplomatic agreement on broad grounds, rather than by judicial decision on the exact language of the bonds. If a judicial decision is obtained it will, if our opinion is correct, result in the liability for the 1855 loan being left with the British and French Governments; and, as between these two Governments, the French may not improbably say that, by the Treaty of Lausanne, Great Britain has undertaken the obligation, and is therefore now the principal debtor, and, further, that it is owing to the action of Great Britain that Egypt is relieved of the liability, and that it is not fair that France should be asked to pay for this mistake.

On the other hand, if the matter is dealt with diplomatically, it is obviously reasonable that Egypt should bear a part of the Public Debt of the former Turkish Empire, and the proportion she will assume, if she accepts liability for the three loans, is less than would probably be allotted to her on an equitable basis of partition; the loans have, in fact, long been treated as almost forming part of the Egyptian Public Debt; Egypt has, until last year, always recognised her responsibility for them, and it cannot be right that, as between Great Britain and Egypt, Great Britain should be saddled with the liability for paying any or all of these loans, or that, as between Egypt and the bondholders, Egypt should be released from liability to honour her bond by the fact of her having become independent.

We would venture to suggest, therefore, that it would be eminently desirable to spare no effort to arrange the matter amicably with Egypt on this basis, rather than have recourse to any judicial tribunal, but that, if judicial proceedings are forced upon us, the best form that they could take would be an action by the bondholders under the 1891 or 1894 loan brought before the Mixed Tribunals against Egypt, in which the British Government would not in any way play a part.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
January 20, 1925.

[J 1046/32/16/1925]

No. 4.

[April 7, 1925.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, February 27, 1925.

Arrests by
British
military
authorities
in Egypt.

I HAVE the honour, by direction of Mr. Secretary Chamberlain, to refer to the opinion you were good enough to forward him on the 5th January last* in reply to certain questions which had been submitted to you in a letter from this Department, dated the 24th December last, regarding arrests made by the British military authorities in Egypt.

2. In this particular case, having regard to the importance of the issues involved, Mr. Chamberlain thought it right to communicate your opinion very confidentially to His Majesty's High Commissioner for Egypt for his information and guidance.

3. A despatch has now been received from Lord Allenby, forwarding a memorandum by Sir Maurice Amos, who acts as Legal Adviser to his Lordship, making certain observations on the points dealt with in your opinion.

4. In view of the special circumstances of the case and of the extreme importance which this question is again likely to assume should Zaghlul Pasha be returned to power at the forthcoming elections in Egypt, Mr. Chamberlain ventures to send you a

* No. 2.

EGYPT.

copy of this despatch, and to enquire whether you wish to make any observations on the contents of the memorandum enclosed therein.

I have, &c.

MERVYN HERBERT.

Paper.

Lord Allenby's despatch No. 87, February 6, 1925. [J 478/32/16/1925.]

Report.

We have read and considered the observations of Sir Maurice Amos in his minute of the 26th January, 1925, on which we are asked for our comments.

Sir Maurice Amos approaches the question by postulating that martial law as employed by the commander of a British force outside His Majesty's dominions is a well recognised situation by the law of nations, and consists in the claim and exercise by the commander of a civilised army, of a necessary though limited sovereignty; but that sovereignty extends at least to such limits as may be reasonably necessary to protect the army; and that, therefore, the question to be investigated is whether the British Government have waived their *prima facie* rights to exercise over Egyptians such jurisdiction as may be necessary for the protection of the army.

There is no doubt that where an army is in occupation of invaded territory it possesses the right claimed for it by Sir Maurice Amos; and if the British army could be regarded as filling that rôle in Egypt we should not dispute his conclusion.

In our view it is neither possible nor politic to base the position of the British army in Egypt on these grounds. We claim to be in friendly relations with Egypt; and we have recognised her independence and sovereignty, subject to four specified qualifications.

In our view the army of occupation in Egypt must be regarded as being placed there for the protection of our interests in the Suez Canal with the assent of Egypt as the sovereign power in that country. Such assent necessarily implies that the Commander of the army of occupation shall have full jurisdiction over the army itself; but in our opinion it cannot legitimately be extended to a grant of jurisdiction over Egyptians in their own country when they are accused of offences against a British officer or soldier.

As pointed out in our previous opinion, circumstances may arise which render it necessary to assume such jurisdiction; but the assumption is a violation of Egypt's sovereign rights over her own people, and it can only be regarded, and justified, as an act of martial law.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
April 7, 1925.

[J 2121/1849/16/1925]

No. 5.

[July 22, 1925.]

Foreign Office to the Lord Chancellor.

Foreign Office, July 11, 1925.

My dear Lord Chancellor,

YOU will have seen from Henderson's telegram No. 241 of the 1st July, of which I enclose a copy for convenience of reference, that the Egyptian Government have raised the question of applying for membership to the League of Nations. I have had the accompanying memorandum prepared with a view to summarising the history of this question in the past. I find that in this Office we are considered to be committed to support or at least not to oppose this application by the opinion which you gave on the 17th November last,* in regard to the communication to Egypt of the Geneva Protocol and by Curzon's despatch No. 1283 of the 19th October,

* Confidential 12786, p. 17.

Egypt and
the League
of Nations.



1925

14

EGYPT.

1922, to Lord Allenby. But is this so? I do not so read your opinion and I am alarmed at the possible consequences of the attitude adopted by Curzon.

If Egypt is admitted to membership of the League (as distinguished from adherence to particular conventions or treaties) can we in law, and, still more urgently, can we in practice maintain our reservations and the rights they were intended to protect? If dispute arises about any of them, shall we not inevitably be dragged before the League and will it not in practice be the League and not we who decide whether we may or shall remain in Egypt, protect the canal, &c.

These are grave questions indeed. Please give me your help.

Your sincerely,

AUSTEN CHAMBERLAIN.

Memorandum concerning the Eligibility of Egypt for Membership of the League of Nations.

ARTICLE 11 of the so-called Milner memorandum (p. 26 of the Report of the Special Mission to Egypt) read as follows:

"After the coming into force of the treaty (the proposed Anglo-Egyptian Agreement) referred to in article 3, Great Britain will communicate its terms to foreign Powers and will support an application by Egypt for admission as a member of the League of Nations."

2. After the breakdown of the official negotiations which followed with the Egyptian Government under Adly Pasha in the summer and autumn of 1921, Lord Allenby, under instructions from His Majesty's Government, on the 4th December addressed to the then Sultan of Egypt a letter in which the following passage occurred:—

"Their hope (His Majesty's Government's) was that Egypt, with a reconstituted Ministry for Foreign Affairs would at once have despatched her own representatives to foreign courts; and they (His Majesty's Government) would readily have supported an application on her part for admission to the League of Nations."

3. Owing to the impossibility of securing the collaboration of any Egyptian Ministry after the resignation of Adly Pasha, His Majesty's Government decided to withdraw the Protectorate and by unilateral action to make the concessions which they had been prepared to offer in return for the conclusion of an Anglo-Egyptian Treaty. This decision was embodied in the Declaration to Egypt of the 28th February, 1922.

4. On the 29th September, 1922, Lord Allenby reported that there had been some discussion in Egyptian political circles as to the propriety of Egypt applying for admittance to the League of Nations, and enquired what attitude His Majesty's Government would be likely to adopt in that eventuality. In his reply on the 19th November, 1922, Lord Curzon, after discussing the various considerations involved, expressed the view that "on the whole His Majesty's Government should support an Egyptian application for admittance to the League."

5. On the 17th November last the Lord Chancellor observed, in the course of a written opinion on the question of the accession of Egypt to the Geneva Protocol, that "many instances might be quoted where States, which have entered into engagements, seriously detracting from their independence, have, nevertheless, been held to remain sovereign States, and it appears to me that it would be extremely difficult for this country, in face of the solemn declaration (of the 28th February, 1922) . . . to maintain the position that Egypt is not a State to which, under the resolution of the Assembly dated the 2nd October, 1924, the protocol is open for signature." It is not clear whether this opinion should be construed as implying that Egypt is entitled to join the League of Nations and that His Majesty's Government should not oppose her admission, but should content themselves with ensuring that the limitations on Egyptian independence, imposed by the Declaration of the 28th February, 1922, to which the attention of the League of Nations has already been drawn by the Foreign Office letter of the 19th November, 1924, are recognised and respected by the League. In this connection the view expressed by the Legal Department of the Egyptian Ministry of Foreign Affairs is of interest. This view is

EGYPT.

15

embodied in a memorandum which came into the possession of the Residency and of which a copy was annexed to Mr. Henderson's despatch No. 336 of the 9th May, 1925.

Foreign Office, July 13, 1925.

List of Papers.

- (A.) Mr. Henderson's telegram No. 241, July 1, 1925. [J 1849/1849/16/1925.]
- (B.) Report of the Special Mission to Egypt—Egypt No. 1 (1921). [Parliamentary 5052.]
- (C.) Lord Allenby's letter to the Sultan of Egypt, December 4, 1921. [E 12919/260/16/1921.]
- (D.) Lord Allenby's despatch No. 780, September 29, 1922. [E 10805/1/16/1922.]
- (E.) Foreign Office despatch to Lord Allenby, No. 1283, October 19, 1922. [E 10805/1/16/1922.]
- (F.) Correspondence respecting Affairs in Egypt—Egypt No. 1 (1922). [Parliamentary 5113.]
- (G.) Lord Chancellor's Opinion, November 17, 1924. [Confidential 12786, p. 17.]
- (H.) Foreign Office to Secretary-General of League of Nations, November 19, 1924. [E 9996/9316/16/1924.]
- (I.) Lord Allenby's despatch No. 336, May 9, 1925. [J 1401/29/16/1925.]

Opinion of the Lord Chancellor.

My dear Foreign Secretary,

House of Lords, S.W., July 22, 1925.

With reference to your letter of the 11th instant on the subject of the admission of Egypt to the League of Nations, I enclose a note of my opinion, and hope that it may be of service to you.

I retain your memorandum on the subject, but return the other papers which you sent me.

Yours sincerely,

CAVE.

Note.

It does not appear to me that there is anything in the Declaration of February 1922 which binds Great Britain to support or not to oppose an application by Egypt to be admitted to membership of the League of Nations. The recognition of Egypt as an "independent sovereign State," to which I referred in my opinion on the Geneva Protocol, would no doubt make it difficult for us to contend that Egypt is not a "fully self-governing State" within the meaning of article 1 of the Covenant of the League, and so entitled to apply for admission to membership. But a State applying for membership does not obtain admission as a matter of right. Admission cannot be granted unless agreed to by two-thirds of the Assembly; and any member of the League is entitled to oppose admission on any grounds, including grounds of policy and expediency.

In the present instance, reasons against the admission of Egypt are not wanting. The Declaration of February 1922 reserves to us a special voice in the preservation of our communications through Egyptian territory, the defence of Egypt against foreign aggression or interference, the protection of foreign interests in Egypt and the relation of Egypt to the Sudan; and there would be considerable difficulty in reconciling the relation so created between Egypt and this country with the position which Egypt would occupy as a member of the League. It may perhaps be suggested that these reservations constitute "obligations incompatible with the terms of the Covenant" within the meaning of article 20 of the Covenant and of condition (F) referred to in the memorandum of the Legal Department of the Egyptian Ministry of Foreign Affairs, enclosed in Mr. Henderson's despatch of the 9th May, 1925; and however that may be, the existence of the reservations side by side with articles 10, 12 and 13 of the Covenant would be likely to give rise to many difficulties.

I am assuming that we are not bound by Lord Curzon's despatch of the 19th October, 1922, to support the admission of Egypt to the League. It may be that the purport of that despatch was not communicated to the Egyptian Government; but in any case it appears from Mr. Henderson's telegram of the 1st July, 1925, that he has advised the present Egyptian Government in the opposite sense.

July 22, 1925.

C.



1925

16

GENERAL.

[L 1229/152/402/1925]

No. 6.

[March 13, 1925.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, December 10, 1924.

Law
Officers'
opinions
down to
1878;
question of
allowing
public to
have access.

I HAVE the honour, by direction of Mr. Secretary Chamberlain, to inform you that on the 1st January, 1925, he will throw open to students at the Public Record Office the volumes of Foreign Office correspondence down to the end of the year 1878: they have hitherto been open only to the end of the year 1860.

2. On the occasion of the last extension of period, it was decided to remove from the volumes so made accessible to the public all the opinions of the Law Officers of the Crown, together with the submissions on which those opinions were based. On consideration, Mr. Chamberlain is inclined to reverse this policy, and to replace in the Public Record Office the opinions down to the end of the year 1860 which were then removed, and to refrain from extracting the opinions from the volumes which will now become accessible, so that they will be available to the public in the same measure as the rest of the Foreign Office records in which they are contained.

3. I have the honour to enquire whether you concur in the procedure suggested now and for the future, and are willing that the opinions of your predecessors should thus be open to public inspection with the rest of the records to which they belong.

I have, &c.

S. GASELEE.

Report.

The Law Officers are of opinion that, if records are to be thrown open to public inspection, it is probably desirable that such records should be as complete as possible, and they, therefore, concur in the suggestion that their opinions should be included in the documents disclosed.

JAS. ABBS, *Chief Clerk.*

*Law Officers' Department,
March 13, 1925.*

[L 2514/52/405/1925]

No. 7.

[May 23, 1925.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, May 19, 1925.

Communi-
cation of
Law
Officers'
opinions to
other
Govern-
ment
Depart-
ments and
to His
Majesty's
representa-
tives
abroad.

I HAVE the honour, by direction of Mr. Secretary Chamberlain, to request your decision on a further point (see your chief clerk's letter of the 13th March*) respecting the communication of the opinions given by you, at his request, to others than himself.

2. It has hitherto been the general practice of this Department to regard the text of your opinions as strictly confidential, and not to be communicated either to other Departments of His Majesty's Government or to His Majesty's diplomatic representatives abroad. If at any time it has been necessary to convey an opinion to any person or body of either of these classes, they have only been informed of its substance, and it has never been quoted to them verbatim.

3. Mr. Chamberlain does not, on consideration, feel that this practice has been well founded: if due precautions are taken to ensure that your opinions are treated as confidential documents, there is less chance of misrepresentation if their *ipsissima*

* No. 6.

GENERAL.

16A

[W 4238/259/50/1928]

No. 6^d.

[Colonial Office.]

[April 8, 1925.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, March 19, 1925.

WITH reference to the letter from this Department of the 22nd February, 1907, and to your predecessors' report dated the 25th April, 1907, I am directed by Mr. Secretary Amery to inform you that the question of the right of Great Britain to exercise jurisdiction in the Straits of Johore has again been raised in connexion with the proposed establishment of a naval base and aerodrome at Singapore.

Prerogative
of the
Crown as
regards
cessions of
territory.

2. It will be seen from the report of the 25th April, 1907, that your predecessors were of the opinion that article 5 of the treaty of 1885 with Johore does not operate as a retrocession of any part of the sovereignty or property ceded by article 2 of the earlier treaty of 1824, and that article 5 of the later treaty only applies therefore to waters outside the 10-mile limit mentioned in the earlier treaty. It is not clear whether, in expressing this opinion, your predecessors were aware of the fact that, with the exception of the Johore Straits, there were no waters less than 6 miles in width to which article 5 of the treaty of 1885 could apply.

3. The Governor of the Straits Settlements has now reported that, while the opinion of your predecessors is doubtless conclusive as to the British claim to sovereignty over the Straits of Johore, it would not, in his opinion, be politic to insist on the strict legal interpretation of the above-mentioned articles. He has recommended, therefore, in a despatch of which a copy is enclosed, that the boundary between the territorial waters of the Straits Settlements and Johore should be an imaginary line equidistant from the shore of the mainland, on the one side, and the Islands of Singapore, Pulau Ubin, Pulau Tekong Kechil and Pulau Tekong Besar, on the other side. It will be seen that the Governor has selected the last three islands as well as Singapore because it has never been disputed that they belong to the Straits Settlements.

4. The Secretary of State is anxious to adopt Sir L. Guillemard's proposal, and he has secured the assent to this course of the Admiralty, the War Office and the Air Ministry, subject to the conclusion of a subsidiary agreement with the Sultan of Johore providing for the grant of certain facilities required for defence purposes. Assuming, however, that you concur in the report of your predecessors in 1907, the present proposal would involve a cession of British territory, and in view of the fact that the question whether the Crown has power to alienate British territory by treaty or agreement not following the close of a war has been much debated, the Secretary of State desires to have your opinion as to the procedure which should be adopted in such a case as the present one. It appears that the view held generally in modern times is that, even if the Prerogative of the Crown extends to cessions of this nature, it is desirable that, if the cession is of any substantial importance, it should be confirmed by Act of Parliament. This procedure was followed in the case of the Anglo-German Convention, 1890 (Heligoland), the Anglo-French Convention, 1904 (Gambia Boundaries and Iles de Los) and the recent Anglo-Italian Agreement involving the cession of British territory in Jubaland.

5. On the other hand, the main reason for requiring confirmation by Parliament appears to be that such a cession transfers the inhabitants of the ceded territory to the jurisdiction of a foreign Power. This argument is not, however, applicable in the present case, since the adoption of Sir L. Guillemard's proposal would involve merely the cession of territorial waters and of a few insignificant islands which are either uninhabited or without permanent inhabitants. As at present advised, therefore, the Secretary of State is inclined to the view that a cession of this character can properly be effected by the Prerogative of the Crown without the intervention of Parliament.

6. Mr. Amery trusts that the foregoing remarks will have made clear his position in the matter, and I am to request that he may be favoured with your replies to the following questions:—

- (1.) Do you concur in the opinion expressed by your predecessors in their report dated the 25th April, 1907, as to the interpretation of article 2 of the treaty of 1824 with Johore read with article 5 of the treaty of 1885?

3481A [17751]

C*



1925

16B

GENERAL.

- (2.) If so, what procedure should be adopted to give effect to the cession of British territory involved by the adoption of the proposals contained in Sir L. Guillemard's confidential despatch dated the 14th May, 1924?

I am, &c.

G. GRINDLE.

Report.

- (1.) We concur in the opinion expressed by our predecessors in their report dated the 25th April, 1907.
- (2.) In our opinion it is constitutionally within the Prerogative of the Crown to cede British territory not forming part of a self-governing Dominion. But we regard it as undesirable that such a prerogative right should be exercised without the concurrence of Parliament, and we should advise that any treaty or agreement containing such a provision should be submitted to Parliament for ratification.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
April 8, 1925.

THIS DOCUMENT IS THE PROPERTY OF HIS BRITANNIC MAJESTY'S GOVERNMENT

GENERAL.

[W 9425/72/50/1932]

No. 7A

[Air Ministry.]

[December 17, 1925.]

Case for the Opinion of the Law Officers of the Crown.

HEREWITH are sent—

1. Departmental Minutes and Correspondence.
2. Convention for the Regulation of Aircraft flying over Great Britain and Northern Ireland, 1919 [Cmd. 1609 (Treaty 1639)].
3. Air Navigation (Consolidation) Order, 1923 [Confidential 12193*].
4. Minutes of Conference of the 4th February, 1925.
5. Air Staff Note on Prohibited Areas.

The advice of the Law Officers is desired in this case with regard to the powers of the Crown by Order in Council made under the Air Navigation Act, 1920, to prohibit or restrict photography from aircraft flying over Great Britain and Northern Ireland. The Air Navigation (Consolidation) Order, 1923, a copy of which is herewith, provides by article 11 that a person shall not take or cause or permit to be taken from an aircraft flying within Great Britain and Northern Ireland any photograph of a prohibited area, or of any part thereof, or of any object therein, except with the special permission in writing of the Secretary of State, and subject to any conditions that may be attached to such permission. A prohibited area is defined by article 31 as meaning any of the areas referred to in schedule VII of the order.

In October 1924 a question arose as to the amendment of article 11. The proposal was to prohibit generally the carrying of photographic apparatus by aircraft when flying within Great Britain and Northern Ireland, except that such apparatus might be carried as goods for delivery in a sealed case or in virtue of a licence issued by the Secretary of State. It was further proposed that the amended article should provide that all negatives, films, reproductions and records should be subject to inspection by the Secretary of State, and that the Secretary of State should have power to order the destruction of any negatives or films or to prohibit their distribution or reproduction. The matter was referred to parliamentary counsel for his observations and in order that he might draft the proposed amending article. Parliamentary counsel, however, pointed out that, while, if a person were convicted of using apparatus in contravention of the article or in contravention of the terms of his licence, it might be reasonable to give to the court before whom he was convicted power to order the forfeiture of both the negative and the apparatus, it would be an entirely different matter to provide that photographs taken by the licensee should be liable to forfeiture if it appeared to the Secretary of State that this was desirable, and he suggested that it should be possible for the licence to indicate generally classes of places, objects and occurrences which were not to be photographed, and that the power might be given to impound any photographs taken apparently in contravention of these terms pending proceedings against the offender.

The question of the proposed amendment was very fully considered by the various departments of the Air Ministry concerned, and the conclusion was reached that there did not appear to be any practical method by which the prohibition of aerial photography could be enforced in Great Britain.

In the meantime, as the Law Officers will observe from the copy Departmental Minutes and Correspondence herewith, the Air Ministry had been approached by the War Office with regard to information which the War Office had received as to photographs of Gibraltar having been taken from the air.

On the 31st October, 1924, the Air Ministry addressed a letter to the War Office with regard to the possibility of preventing air photography of defended ports, in which it was stated (paragraph 7) that the Air Ministry were proposing to amend the Air Navigation (Consolidation) Order, 1923, so as to prohibit the

6526 [7506]

B

Power to
Prohibit
or Restrict
Photo-
graphy
from Air-
craft by
Order in
Council
made under
the Pro-
visions of
Air Navi-
gation Act,
1920.



1925

16D
2

GENERAL.

taking of photographs from the air except under licence. It was pointed out that the Air Navigation Order does not apply to British territories overseas, but it was suggested that steps could be taken for the inclusion of a similar prohibition in an order relating to British colonies, &c.

In November 1924 the Admiralty communicated with both the War Office and the Air Ministry raising the question of aerial espionage, and suggesting a meeting to discuss the matter.

On the 2nd February, 1925, the Air Ministry addressed letters to the Admiralty, the War Office and the Colonial Office, with reference to the proposed meeting, in which it was stated that, since the last meeting between the departments with reference to prohibited areas, the question of prevention or control of photography from the air had been considered by the Air Ministry. The conclusion arrived at was, however, that there was no satisfactory solution to the problem, each solution considered being open to certain objections, which were pointed out in the letter.

A meeting was held at the Air Ministry on the 4th February, 1925, at which representatives of the Admiralty, the War Office and the Colonial Office were present.

The Law Officers may be referred to the minutes of the meeting and the conclusions arrived at, a copy of which is herewith. As the Law Officers will observe, the position was that the Admiralty and the War Office were of opinion that the existing situation was unsatisfactory and dangerous, and desired to curtail the right to take air photographs, while the Air Ministry did not wish to impose further restrictions. If any restrictions were required, it was, however, considered that it would be better that they should be on lines which had been proposed by the War Office, namely: (1) That photography from foreign aircraft should be prohibited; and (2) that air photographs should only be taken by persons holding a licence to be granted by the Air Ministry after reference to the War Office.

On the 22nd April, 1925, the Air Ministry addressed a further letter to the Admiralty, the War Office and the Colonial Office, stating the conclusions arrived at by the Air Council after consideration of the proposals outlined in the minutes of the conference held on the 4th February. These were to the following effect: (1) If, in the opinion of the Admiralty and the Army Council, it was desirable so to do, the Air Council would be prepared to amend the Air Navigation (Consolidation) Order, 1923, so as to prohibit the taking of photographs from foreign aircraft over Great Britain and Northern Ireland. The letter went on to point out certain reasons for which, in the view of the Air Council, it would be difficult to enforce such an order. The letter further stated that, with regard to photography from British aircraft, the council were of opinion that the scope of Official Secrets Act was wider than any powers which could be exercised by the Air Council under the Air Navigation Act, or which it was reasonable to suppose could be obtained in times of peace by means of further legislation. They would be prepared to take steps to draw the attention of persons concerned to the provisions of the Official Secrets Act, but they considered that the further restriction or prohibition of air photography would be both impolitic and of little value.

The Law Officers will observe from the copy Departmental Minutes and Correspondence herewith that the question of the power to prohibit or restrict aerial photography by Order in Council made under the Air Navigation Act, 1920, was referred by the Air Ministry in April 1925 to the Treasury Solicitor, who expressed the opinion that, if it was intended to impose a regulation embodying the extensive prohibitions indicated, it would be desirable, in view of the doubts which he entertained as to the extent of the powers of the Crown in this respect under the Air Navigation Act, 1920, that the matter should be referred to the Law Officers for the opinion (see minute of the 9th May, 1925, copy Departmental Minutes and Correspondence, p. 36).

On the 3rd July the War Office again communicated with the Air Ministry, stating that, although the council realised that espionage from the air was difficult to prevent, this should not preclude the taking of such steps as were possible to mitigate any evil consequences, and the council were of opinion that the proposals recorded in the seventh paragraph of the Air Ministry letter of the 31st October, 1924, should be adopted. They concurred that the best means for a reasonably effective control in the United Kingdom would be to prevent the

GENERAL.

16E
3

taking of photographs from the air except under personal licence, the Air Navigation (Consolidation) Order being amended accordingly. They suggested that the attention of licensees should be drawn to the relevant provisions of the Official Secrets Acts, and that this might be done by the insertion of a warning to be inserted in the licence, and they further suggested that there should be an opportunity for a voluntary censorship before the publication of the photograph.

On the 10th July the Admiralty communicated with the Air Ministry to the effect that, in the view of the Admiralty, foreign aircraft should be prohibited from taking photographs over Great Britain or Ireland, and they concurred in the proposal contained in paragraph 3 of the Air Ministry letter of the 22nd April (namely, that the Air Navigation (Consolidation) Order, 1923, should be amended so as to prohibit the taking of photographs from foreign aircraft over Great Britain and Northern Ireland). They further stated that, in connexion with the limitations to be imposed on photography from British aircraft, they strongly recommended that the prohibition of the carriage of cameras, except by special permission, should be adopted, and they suggested that British firms to whom such permission was granted would probably be willing to submit to reasonable safeguards as regards censorship of photographs taken in certain areas. They further recommended that private photography from aircraft should be prohibited.

In a subsequent letter of the 11th August, 1925, the Admiralty stated that they concurred generally with the views expressed by the Army Council in the letter of the 3rd July.

The Law Officers will thus see that the view of Air Council is that it might be desirable to prohibit the taking of photographs from foreign aircraft flying over Great Britain and Northern Ireland, but that the Air Council do not consider it advisable to extend the existing provisions of the Air Navigation (Consolidation) Order, 1923, as respects photography from British aircraft. The Admiralty and the War Office, on the other hand, however, are desirous that, in addition to prohibition of photography from foreign aircraft, all photography from British aircraft should be prohibited except under licence, and both Departments appear to have in mind the imposition of some further provisions with regard to the censorship of photographs taken by licensees either generally or as to photographs taken in particular areas. Before dealing further with the question the Air Ministry are desirous of ascertaining how far there is power to impose the restrictions upon aerial photography which are now suggested by the Admiralty and the War Office by Order in Council made under the Air Navigation Act, 1920.

The proposals under consideration appear to be:—

1. To prohibit altogether the taking of photographs from foreign aircraft.
2. To prohibit the taking of photographs from British aircraft except in pursuance of a licence granted by the Secretary of State, this proposal being alternatively coupled with a further prohibition of the carriage of cameras and photographic apparatus in aircraft.

It is not, the Treasury Solicitor gathers, proposed to insert any provision with regard to censoring any photographs taken in pursuance of the Secretary of State's licence, inasmuch as it seems, from the War Office letter of the 3rd July and the Admiralty letter of the 10th July that the intention is to license only photographers or photographic firms of good standing, who would be disposed to fall in with reasonable arrangements for some sort of informal censorship being exercised by the Department over photographs taken by them from the air.

Article 27 of the Air Navigation Convention provides that each State may prohibit or regulate the carriage or use of photographic apparatus.

Article 28 empowers a contracting State to subject the carriage of other objects to restrictions, and article 29 provides that all restrictions mentioned in article 28 shall be applied equally to national and foreign aircraft, from which it would appear that the provision as to equal treatment is not applicable to article 27, and that so far as the convention is concerned, it is open to a contracting State to differentiate between its own nationals and foreign aircraft with regard to regulating the carriage or use of photographic apparatus.

The Air Navigation Act, 1920, recites that it is expedient to make further provision for controlling and regulating the navigation of aircraft, whether British or foreign, within the limits of His Majesty's jurisdiction, and provides

16 F
A

GENERAL.

(section 1) that His Majesty may make such Orders in Council as appear to him necessary for carrying out the convention and for giving effect thereto, or to any of the provisions thereof, and (section 2) that His Majesty may by Order in Council direct that the provisions of the convention . . . shall apply to, or in relation to, any aircraft in or over the British islands or the territorial waters adjacent thereto, and may make such consequential and supplementary provisions as appear necessary or expedient for the purpose of such application, and (section 3) without prejudice to the generality of the powers before conferred an Order in Council may make provision for the specific matters set out in the section. These specific matters are set out under thirteen heads, lettered from (A) to (M). None of these, however, appear to give any assistance with regard to the prohibition or control of photography from aircraft. The attention of the Law Officers should, perhaps, be directed to (E) "as to the conditions under which aircraft may be used for carrying goods, mails and passengers," and (J) "supplementing the convention in such manner as appears necessary or expedient by general safety regulations."

While it is submitted that a condition as to the carrying of photographic apparatus and the taking of photographs might possibly be imposed under (E), inasmuch as (E) relates only to aircraft used for carrying goods, mails and passengers, a condition limited to such aircraft would not apparently meet the requirements of the Department.

With regard to (J), it is submitted that the expression "general safety regulations" must be read as being intended to have reference to safety in connexion with the operations of flying and not to the safety of the Realm, and if this is so a regulation, the object of which is to prevent espionage, could not, it is submitted, be made under (J). If the Law Officers should be of opinion that no assistance can be obtained from section 3 of the Air Navigation Act, 1920, it is then necessary to consider the provisions of section 1 and section 2.

Article 27 of the convention appears to be the only article dealing with photography, and it is to be observed that article 27 does not directly prohibit or restrict photography in aerial navigation, but merely provides that each State may (within its own jurisdiction) prohibit or regulate it.

It is submitted that in so far as the convention specifically requires that certain things are to be done or omitted by or in relation to aircraft and air navigation these requirements can be imposed by Order in Council upon aircraft in or over the British islands or territorial waters adjacent thereto, because the specific provisions of the convention can be so applied under section 2 or (alternatively) the Order in Council imposing the requirement may be regarded as being necessary for carrying out the convention or for giving effect thereto under section 1. It is not, however, so clear that where that which has to be dealt with is not a specific requirement of the convention, but merely something which the convention says may be done if the contracting State wishes to do it, the case is covered by the provisions of section 1 and section 2, and this seems to be the first question which may require the consideration of the Law Officers.

It is, however, submitted for the consideration of the Law Officers that the construction above indicated is an unfairly narrow one, and that it can reasonably be said that an Order in Council prohibiting or regulating the carriage or use of photographic apparatus (which is a matter clearly contemplated by the convention, although not, it is true, required by it) comes within the ambit of section 1 as being necessary for carrying out the convention or for giving effect to its provisions, and that it may further be said (although the powers of applying by Order in Council the provisions of the convention to or in relation to aircraft given by section 2 may not alone be sufficient in the case of a provision of the nature of that which is embodied in article 27 of the convention) that the further powers contained in section 2 of making consequential and supplementary provisions for the purpose of such application are sufficiently wide to enable specific regulations to be made by Order in Council prohibiting or regulating the carriage or use of photographic apparatus.

Assuming that there is power to make regulations by Order in Council prohibiting the carriage or use of photographic apparatus in aircraft, it is further submitted (in view of the somewhat wide provisions generally of the Act, which the Law Officers will observe is entitled "An Act to enable effect to be given to a convention for regulation of air navigation and to make further provision for the control and regulation of aviation," and which recites that it is expedient

GENERAL.

16 G
B

to make further provision for control and regulation in reference to aircraft . . . within the limits of His Majesty's jurisdiction), and having regard to the wide provisions contained in section 2 enabling such consequential and supplementary provisions as appear necessary or expedient to be made, that there is power to regulate as well as prohibit the taking of photographs and the use of photographic apparatus, and to regulate by providing that photographs may be taken under licence issued by the Secretary of State.

It is further submitted that assuming that there is power to make regulations prohibiting or regulating the carriage or use of photographic apparatus in aircraft, that power extends equally to foreign aircraft and persons therein or to British aircraft and persons therein, and consequently that photography and the carrying of photographic apparatus can be prohibited absolutely, or prohibited subject to licence as may be thought expedient, and that this distinction can be made as respects different classes of aircraft, namely, foreign or British.

The attention of the Law Officers should be drawn to the point raised in paragraph 6 of Mr. Evan's minute of the 28th August (copy Departmental Minutes and Correspondence, p. 48), which is referred to in Mr. Webster's minute of the 2nd September (copy Departmental Minutes and Correspondence, p. 52), that inasmuch as the object of the proposed amending regulation is not the control of aviation but is the prevention of espionage, it is not an object which can fairly be regarded as being within the proper scope of the Air Navigation Act, 1920, and regulations made by Order in Council under that Act, and, further, having regard to these circumstances and having regard to the existing provisions of the Official Secrets Acts, 1911 and 1920, which are designed to prevent espionage and evils of that nature, there might be objections on that ground also to dealing with the matter in the way proposed, even assuming that technically there is power to make by Order in Council such a regulation as is proposed. The Law Officers will, no doubt, consider this aspect of the matter.

The Law Officers are requested to advise the Air Ministry:—

- (1) Whether or not there is power by Order in Council made by His Majesty under the provisions of the Air Navigation Act, 1920, to make a regulation prohibiting the taking of photographs from foreign aircraft.
- (2) Whether or not there is power by Order in Council made by His Majesty under the provisions of the Air Navigation Act, 1920, to make a regulation prohibiting the taking of photographs from British aircraft (a) absolutely, or (b) except in pursuance of a licence granted by the Secretary of State to an individual or firm authorising the taking of a particular photograph or photographs generally.
- (3) Whether or not there is power by Order in Council made by His Majesty under the provisions of the Air Navigation Act, 1920, to make a regulation prohibiting the carriage of cameras or other photographic apparatus in (a) foreign aircraft, (b) British aircraft.
- (4) Assuming that the Law Officers are of opinion that there is power to make by Order in Council under the Air Navigation Act, 1920, a regulation prohibiting any of the acts referred to in questions (1), (2) or (3) above, there would be, in the view of the Law Officers, any objection, either legal or other, to such regulations being made having regard to the scope and intentions of the Air Navigation Act, 1920, and having regard to the existence of the provisions which are contained and the powers which are given in the Official Secrets Acts, 1911 and 1920, and
- (5) Generally upon the case.

Opinion of the Law Officers of the Crown.

(1) and (2) We think an Order in Council may be made under the provisions of section 3 (e) of the Air Navigation Act prohibiting the taking of photographs from aircraft, whether British or foreign, which carry goods, mails or passengers. Apart from this limited power, we think there is nothing in the Air Navigation Act, 1920, to enable an Order in Council to be made prohibiting aerial photography from either British or foreign aircraft. In our opinion, an Order in



1925

16 H
B

GENERAL.

Council containing a prohibition which is not found in the convention cannot to that extent be said to carry out or give effect to or apply the provisions of the conventions.

(3) Yes, under section 3 (e), but not otherwise.

(4) We see no objection. The convention clearly contemplates prohibition by any of the signatories. The wide scope of the Official Secrets Acts which may render resort to the Air Navigation Act unnecessary cannot, in our opinion, make it improper to use whatever powers Parliament has given for expressly dealing with aerial photography.

(5) We have nothing to add.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

*Law Officers' Department,
December 7, 1925.*

L
O
O
d
i
q
a
p
hC
L
O
O
G
U
D
n
t
M
r
t
i
a

GERMANY.

17

verba are handed on to the parties concerned. He cannot see that any harm could result from the communication of an opinion, unless there are special circumstances which impose secrecy in a specific case, to another Department of His Majesty's Government, if the matter is of interest to that Department, and similarly to any of His Majesty's diplomatic representatives abroad who may be concerned in the matter on which the opinion is sought.

4. Mr. Chamberlain proposes to be guided in this matter entirely by your advice; and I have therefore the honour to enquire whether you concur in the communication of the text of your opinions, under due precautions, and if the matter of the opinion is of interest to the recipient—

- (a.) To other Departments of His Majesty's Government;
- (b.) To His Majesty's diplomatic representatives abroad.

I have, &c.

S. GASELEE.

Report.

We see no objection to the proposal that the actual opinions given by us to the Foreign Office should be communicated to other Departments and to the diplomatic representatives of His Majesty, provided, of course, that proper precautions are taken to ensure that the opinions are treated as confidential.

We would, however, point out that in many cases the opinion by itself is apt to be almost unintelligible and often misleading unless it is accompanied by the case upon which it is based; and in these instances we should have thought that it would have been sufficient to give the gist of the opinion instead of sending the whole of the case and the text of the opinion itself.

This, however, is rather a matter of convenience than of policy, and no doubt there would be no difficulty in deciding in any particular instance which was the more convenient method.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

*Law Officers' Department,
May 23, 1925.*

GERMANY.

[C 741/741/18/1925]

No. 8.

[January 16, 1925.]

Foreign Office to the Law Officers of the Crown.

Gentlemen, *Foreign Office, January 9, 1925.*

I HAVE the honour, by direction of Mr. Secretary Chamberlain, to bring to your notice a question of some legal complexity, upon which it is felt that His Majesty's Government should have the advantage of the considered opinion of their highest legal advisers. The question is, briefly, the extent of the right of investigation into Germany's military situation which is conferred by article 213 of the Treaty of Versailles upon the Council of the League of Nations.

2. The articles of the treaty upon which the question turns are the following: In the first place, the demilitarisation of the Rhineland is provided for by articles 42-44, which read:—

"Article 42: Germany is forbidden to maintain or construct any fortifications, either on the left bank of the Rhine or on the right bank to the west of a line drawn 50 kilom. to the east of the Rhine.

"Article 43: In the area defined above, the maintenance and the assembly of armed forces, either permanently or temporarily, and military manoeuvres of any kind, as well as the upkeep of all permanent works for mobilisation, are in the same way forbidden.

[14641]

D

Investiga-
tion of
Germany's
military
situation by
Council of
League of
Nations.



"Article 44: In case Germany violates, in any manner whatever, the provisions of articles 42 and 43, she shall be regarded as committing a hostile act against the Powers signatory of the present treaty and as calculated to disturb the peace of the world."

3. Secondly, Germany's permanent military strength is governed by Part V of the treaty, which lays down detailed provisions for the permanent limitation of her military, naval and aeronautical forces. Article 203 provides that:—

"All the military, naval and air clauses contained in the present treaty, for the execution of which a time-limit is prescribed, shall be executed by Germany under the control of Inter-Allied Commissions specially appointed for this purpose by the Principal Allied and Associated Powers."

4. The functions of these commissions accordingly terminate when the time-limit clauses in question have been completely executed. Subsequent supervision is provided for by article 213 (the last article in the military, naval and air clauses), which reads:—

"So long as the present treaty remains in force, Germany undertakes to give every facility for any investigation which the Council of the League of Nations, acting, if need be, by a majority vote, may consider necessary."

5. The point upon which your counsel is now requested is whether the rights conferred upon the Council of the League by this article 213 are limited, so far as the demilitarisation of the Rhineland zone is concerned, to *ad hoc* investigations carried out, as and when required by the council, for certain specific purposes, or whether they can extend to the establishment of permanent commissions actually resident in the zone.

6. The view of the legal advisers to the Foreign Office has hitherto been that the right of investigation which the League of Nations possesses under article 213 does not warrant the institution of a permanent resident control organ, with the rider that this defect could, of course, be remedied with German consent. But the matter is of such vital political importance that the Secretary of State hesitates to accept the above advice without confirmation by the Law Officers of the Crown.

7. It may be well to indicate the trend of French thought in dealing with this question hitherto. In all their plans for safeguarding French "security," the French Government have for some time argued that the demilitarisation of the Rhineland zone stipulated for in articles 42-44 of the Treaty of Versailles can only be regarded as effectively assured if an organ of supervision appointed by the League of Nations is permanently established in the zone itself. Their view was that care must be taken to see that the right of investigation conferred upon the Council of the League was applied in a really effective manner; which they consider involves a permanent organ of control, with power to superintend the due observance not only of the disarmament clauses of the treaty (Part V), but also of the demilitarisation clauses (articles 42-44).

8. The practical issue underlying the question was brought into prominence last summer, when the scheme for making operative the similar powers vested in the League in regard to Austria, Hungary and Bulgaria was under discussion. When, in June 1924, the Council of the League instructed their Permanent Advisory Commission (constituted in accordance with article 9 of the covenant) to advise upon this matter, the French representative insisted that any scheme to be adopted should be made applicable to Germany as well as to the other ex-enemy States, and to this the council agreed.

9. When the actual terms of the scheme came to be discussed, the demands of the French representative on the Permanent Advisory Commission were found to be unexpectedly moderate. They did not, as had been expected, demand the establishment of permanent commissions on the territories of the several ex-enemy States. A copy of the scheme, finally approved by the council on the 27th September last, is transmitted to you herewith. Those of its provisions which bear, directly or indirectly, on the point now under discussion, are the following:—

"Chapter I: The investigations . . . shall, when the council so decides, cover such demilitarisation of territory as may be laid down in the same treaties."

"Chapter IV (d): Every local investigation shall be carried out by at least three experts of different nationalities."

"(1.) Commissions of investigation may during a period fixed by the council either carry out the operations without interruption or intermittently."

"Chapter V: Within the period fixed by the council and with its approval, the president of a commission of investigation may detach groups to remain at points in the demilitarised zones where continuity of investigation is required."

10. In so far as concerns the question of permanent resident commissions, it will be observed that the wording of these provisions is by no means clear. The French Government accordingly, at the December meeting of the council in Rome, submitted a resolution, subsequently adopted, to the effect that the Permanent Advisory Commission should be instructed to study the application to the Rhine zone, demilitarised by articles 42-44 of the Treaty of Versailles, of Chapters I and V of the League scheme already adopted on the 27th September, 1924. The desire of the French Government, as previously explained in a note handed to the Secretary of State by M. Herriot on the 5th December (see enclosed copy), was to see some system organised whereby the periods of investigation in the demilitarised zone might be so renewed as to constitute a body permanently established in the Rhineland. "Le contrôle rhénan," the note reads, "devrait comporter un organisme fonctionnant sur place."

11. It will be borne in mind that the scheme approved by the council on the 27th September last was drawn up independently of the German Government, to whom it has not been communicated so far. Nor would the question of German consent arise unless the scheme were to impose on Germany conditions going beyond the provisions of the Treaty of Versailles.

12. It is unnecessary to emphasise that in all matters touching French security the desire of His Majesty's Government is to meet French susceptibilities and fears so far as is compatible with the Treaty of Versailles. On the other hand, Mr. Chamberlain cannot take a course which is inconsistent with our treaty rights and obligations. Nor can he neglect the contingency that the German Government might ultimately demand that the matter should be submitted to the Permanent Court of International Justice at The Hague. In this connection attention is invited to the significant German note of the 9th August last, of which a copy is also enclosed. It seems clear, in any case, that the question of the legality of a system of permanent resident commissions, even if disguised under the French formula of a "renewal of the periods," must turn, not upon the wording of the scheme of the 27th September, but entirely upon the proper interpretation of article 213 of the Treaty of Versailles, which is the binding authority.

13. In these circumstances, your advice is requested on the following points:—

- (1.) Is it possible under the Treaty of Versailles to comply with the desire of the French Government for the establishment by the Council of the League of "un organisme fonctionnant sur place" in the zone permanently demilitarised by articles 42-44 of the Treaty of Versailles; or
- (2.) Are the rights of the council confined to *ad hoc* investigations carried out from time to time by commissions of enquiry of a non-resident character?

I have, &c.

C. HOWARD SMITH.

List of Papers.

1. Scheme of Investigation, approved by the Council of the League of Nations, September 27, 1924.
2. Memorandum by M. Herriot, December 5, 1924 [C 18874/2048/18/1924].
3. German Ambassador's note, August 9, 1924 [C 12985/2616/18/1924].

Report.

In answer to the point submitted to us, we are of opinion that it is not possible under the Treaty of Versailles for the Council of the League of Nations to establish the permanent resident organisation which the French Government desire, but that the rights of the council are confined to the institution of specific investigations carried out from time to time by commissions of enquiry appointed for the purpose.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
January 16, 1925.



ITALY.

[C 9405/15/22/1925]

No. 8^d.

[Board of Trade.]

[July 10, 1925.]

Case for the Opinion of the Law Officers of the Crown.

Italian
restrictions
on carriage
of emi-
grants by
British
vessels;
position as
regards
Anglo-
Italian
Commercial
Treaty of
1883.

COMPLAINTS have been received regarding discrimination on the part of the Italian Government against British shipping engaged in carrying Italian emigrants to Australia. It is understood that prior to the war no Italian passenger ships were employed in this service. Since 1918, however, two Italian lines have embarked in this traffic and the Italian Government, through their Emigration Department, have, it is alleged, sought by restrictive regulations to make it difficult for the Orient Line to carry these passengers. Further the Italian Commissioner of Emigration has informed the Orient Line that he would be unable in the future to license more than two or three Orient steamers for the carriage of third class passengers from an Italian port. The letter of the 30th December, 1924, of the Orient Line to the Colonial Office (a copy of which accompanies this case) indicates the nature of the Italian regulations. The Ambassador at Rome reports that the Italian Government inform him "that on account of restriction of American immigration their ships must find employment on other services and accordingly they intend to limit affixes [*sic*] to Orient Line vessels in proportion to the amount of Australian emigrant traffic and with due regard to Italian flag."

It has been suggested that the Australian Government might reply to this discrimination by providing that no Italian emigrants into Australia may travel in Italian ships or, at any rate, might intimate to the Italian Government that they must expect some counter-action calculated to neutralise the discrimination against British shipping.

The question has arisen whether the matter is affected by the above-mentioned treaty which provides, *inter alia*, as follows:—

"ARTICLE 1.

"There shall be between the Dominions and Possessions of the two High Contracting Parties reciprocal freedom of commerce and navigation. Subjects of each of the two Parties shall have liberty freely to come, with their ships and cargoes, to all places, ports and rivers in the Dominions and Possessions of the other to which native subjects generally are or may be permitted to come, and shall enjoy, respectively, the same rights, privileges, liberties, favours, immunities, and exemptions in matters of commerce and navigation which are or may be enjoyed by native subjects, without having to pay any tax or impost greater than those paid by the same, and they shall be subject to the laws and regulations in force."

Article 13 provides for the privileges of subjects and gives freedom of residence and travel, for the hiring by them of houses and warehouses and for the carrying on of their commerce. The treaty applies to the greater part of Australia. By a protocol, disputes respecting the interpretation of the treaty or the consequences of the violation thereof are to be submitted to arbitration. It is significant that article 5 of the treaty provides for imports and exports being made of articles into and from the possessions of either contracting party in the vessels of either party, but there is no mention of the carriage of passengers, whereas in the corresponding article 16 in our treaty with Japan of the 3rd April, 1911, specific reference is made not merely to the import or export of merchandise, but also to the carriage of passengers.

The Foreign Office have raised the question whether article 1 of the treaty may not be invoked by this country on the ground that the embarkation and carriage of Italian passengers in and from Italian ports is one of the rights, privileges, &c., in a matter of navigation which are to be enjoyed by native subjects and British subjects alike under the provisions of that article. The view hitherto taken by the Board of Trade has been that the business of carrying passengers is not commerce

in the ordinary sense, and that navigation ought to be interpreted in its strictest sense as referring to the actual movements of a ship and not to the business in which a shipowner may be engaged.

It should perhaps be added that, if the question raised by the Foreign Office is answered in the affirmative, Australia would equally be precluded from discriminating against Italian ships in the carriage of passengers from Italy to Australia.

The matter is one of considerable importance and urgency and the Law Officers are requested to give their opinion on the following questions:—

1. Does the reference in article 1 of the treaty to matters of commerce and navigation include the embarkation and carriage of passengers by ship?
2. Is the embarkation and carriage of passengers by ship affected by any of the other articles in the treaty?
3. Generally on any other point which may occur to the Law Officers.

Opinion of the Law Officers of the Crown.

1. The word "commerce" must in our opinion be read as limited to transactions in commodities or finance and the word "navigation" as limited to the movements of ships. We therefore think that the embarkation and carriage of passengers by ship are not included in the matters covered by article 1.

2. An attempt to differentiate between British and Italian vessels catering for emigrant traffic by preventing the former from resorting to Italian ports except under some more onerous terms than Italian vessels as to duties or as to berths would in our opinion offend against the provisions of either article 6 or article 7, but, apart from such methods as the above, we do not see any objection so far as the treaty is concerned to restrictions placed by the Italian Government on the embarkation and carriage of passengers by ship.

3. Retaliation in the form of an embargo by the Australian Government upon the entrance of Italian subjects reaching Australia in Italian ships might be regarded by the Italian Government as infringing article 13, and though we think a good argument might be made against this contention it may be advisable to adopt measures which are not open to this criticism.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
July 10, 1925.

MEXICO.

[A 3976/57/26/1925]

No. 9.

[August 4, 1925.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 20, 1925.

I AM directed by Mr. Secretary Chamberlain to request the favour of your advice as to the validity of certain Mexican bond issues made by the Government of President Huerta in 1913 and 1914.

2. In order that the circumstances in which these issues were made may be fully understood, it is desirable in the first instance to give a brief historical survey of the principal events during General Huerta's régime.

3. At the beginning of 1913 the Presidency was held by General Madero, the first President of the so-called "revolutionary party," to which the present Mexican Government belong. President Madero had not been able to redeem the promises made by his party during the long years of the revolution, and, taking advantage of the discontent thus created, Madero's opponents started a revolution on the 9th February, 1913. Fighting in the capital continued for ten days, with great loss of life, and

Validity of
certain
Mexican
bond issues
of 1913 and
1914.



finally, through the mediation of the United States Ambassador, General Huerta, who had been leader of the Presidential forces, assumed the Presidency by agreement with the leaders of the insurrection. The steps by which this was achieved were as follows: President Madero and Vice-President Pino Suárez were arrested and forced to resign. Señor Lascurain, Minister for Foreign Affairs, succeeded as constitutional President, and, as soon as he had signed a decree appointing General Huerta Minister of the Interior, he resigned. General Huerta thus succeeded constitutionally to the Presidency on the 18th February, 1913. On the 22nd February Madero and Suárez were assassinated as they were being conveyed to prison from the National Palace. It seems probable that General Huerta was not directly responsible for this crime.

4. Shortly afterwards a complete change occurred in United States policy towards Mexico. Up to the 4th March the United States Government appear to have actively supported General Huerta, and in some degree he owed his elevation to the Presidency to the mediation of the United States Ambassador. President Taft, however, who was on the point of retiring, was reluctant to bind the hands of his successor by recognising the new régime in Mexico. On the 4th March Mr. Wilson succeeded to the Presidency and Mr. Bryan became Secretary of State. From the beginning both were strongly opposed to General Huerta, whom they considered to be a reactionary barring the progress of the revolutionary party towards the regeneration of Mexico. They accordingly refused to recognise the new President.

5. In April 1913, notwithstanding the attitude of the new American Government, His Majesty's Government recognised General Huerta as Provisional President on the ground that he was the *de facto* ruler, and that his succession to the Presidency had been in accordance with the Mexican Constitution. In due course General Huerta was also recognised as Provisional President by all Powers other than the United States, Argentine, Brazil and Chile.

6. Largely as a result of the attitude of the United States Government, General Huerta, hard pressed by the insurrections which occurred in various parts of Mexico, slowly lost ground, and by October 1913 his position in the capital had become so difficult that he decided to dissolve Congress. He arrested some 120 of its members, ruling thenceforward to all practical purposes as a dictator. It is true that new elections were held on the 26th October, but these are alleged to have been more than ordinarily corrupt, and have never been recognised as valid by the Mexican revolutionary party.

7. The *coup d'état* did not, however, save the President. The revolutionary forces under General Carranza continued to gain ground, and in November 1913 his position was further weakened by a hostile declaration issued by the President of the United States. This was to the effect that the United States would refuse to recognise as legal or binding any act of General Huerta since he had assumed dictatorial powers in the preceding October. Huerta continued a losing fight until July 1914, when he fled the country.

8. The struggle against this prolonged revolutionary movement had involved General Huerta's Government in heavy expenditure. On the 30th May, 1913, Congress had authorised the flotation of a foreign loan for £20,000,000. A translation of the decree is given in Appendix (A). In June of the same year the Mexican Government had entered into an agreement (Appendix (B)) with an international group of bankers, under which the former "issued a loan" of £16,000,000 under the following title: "Treasury Bonds of the Mexican Federal Government, 6 per cent., 10 years, 1913." The loan was to be secured by the hypothecation of 38 per cent. of the customs receipts of Mexico. The banks undertook to take firm £6,000,000 of this issue, known as the Series "A" of Huerta Bonds, and they were granted the option for six months from July 1913 to take up a further £5,000,000 and the option for one year to take up the remaining £5,000,000. These options were never exercised.

9. Under article 13 of the Loan Agreement the Mexican Government agreed that, for a period of two years from the date of this issue, they would neither issue a further foreign loan, nor negotiate any further bonds, nor give their guarantee to any further foreign bond issue without previous agreement with the group undertaking the issue of the Series "A" Bonds.

10. At the end of 1913 and early in 1914 the Mexican Government, again hard pressed for money, had concluded, under the authority of the law of the 30th May, 1913, the following further loan agreements:—

- (1.) £7,404,853 with the National Bank of Mexico and other local banks. This issue is stated to have been taken up under threats from the Government.

- (2.) £1,361,050 with the Guarantee Trust Company of New York. Against the Mexican Government's bonds the Guarantee Trust Company issued certificates in respect of the current interest due on bonds of the National Railways of Mexico. The latter have since been included in the agreement of 1922 with the International Committee of Bankers, to which further reference is made below (§ 15).

11. These issues, amounting in the aggregate to £8,765,903, are known as the Series "B" Bonds. Their validity is repudiated by the present Mexican Government, who, however, are understood to be ready to pay an *ex gratia* compensation to the banks concerned. So far as His Majesty's Government are aware, no British interest is affected by this issue except in so far as there may have been British shareholders in the Mexican banks on whom the loan was forced.

12. In January and March 1914 another issue of bonds of the 6 per cent. External Debt, 1913, was made to purchase 51 per cent. of the common stock of the Mexican National Packing Company from a man named Mr. John de Kay (recently extradited from this country). Further bonds of the nominal value of £2,000,000 were deposited with Mr. de Kay's bankers to serve as collateral security for a credit of 35,000,000 fr., with which de Kay was to purchase arms and munitions for the Mexican Government. As part of this arrangement the Mexican Government undertook to guarantee the principal and interest of the two series of Mortgage Bonds issued by the Packing Company, and believed for the most part to be held by British subjects. The texts of the agreements with Mr. de Kay are annexed (Appendices (C), (D), (E)). The bonds were delivered to de Kay upon the express condition that none of them should be sold before the 1st July, 1915, *i.e.*, the date of expiry of the two-year period during which no fresh external loan might be floated without the assent of the bankers responsible for the issue of the "A" Series Bonds (see § 8 above).

13. On the 18th May, 1914, the London papers announced the offer of trust certificates to the value of £700,000, secured upon an issue of the 1913 bonds. The loan was offered by Reuter's Bank (Limited), and the prospectus (Appendix (F)) contained a copy of a letter from Señor del Paso, the Mexican Financial Agent in London. The trustees for the issue were Messrs. W. B. Peat and Co. It is understood that the bonds deposited as security were a portion of those given to de Kay in payment for his shares in the Mexican National Packing Company. On seeing the announcement of the loan, Messrs. Morgan, Grenfell and Co., issuing bankers and contractors for the London portion of the "A" Series Loan, addressed a letter to the "Times" (Appendix (G)) declaring that their consent had not been given to this new negotiation of bonds, although such consent was required under the terms of their agreement. The Banque de Paris et des Pays-Bas, representing the French group concerned with the issue of the "A" Series Bonds, addressed an identical protest to the Mexican Government through their financial agent in London. It is understood that this issue by Reuter's Bank was a failure. At a later date bonds of this series were offered in fortnightly auction sales by a London firm of estate and furniture agents.

14. As regards the provision of arms to the Mexican Government, which formed an integral part of the agreement under which that Government had purchased de Kay's controlling share of the Mexican National Packing Company, there is evidence that de Kay did in fact place contracts with various armament firms (including Messrs. Vickers) for the supply of arms and ammunition, but the delivery of this material was prevented by the outbreak of the Great War.

15. It has been shown that between June 1913 and May 1914 there had been three issues of 6 per cent. External Bonds by the Huerta Government, Series "A," "B" and "C." According to the information available in this Department, these issues amounted respectively to £6,000,000, £8,766,000 and £3,025,000, making a total of £17,791,000. The attitude of the present Mexican Government towards these issues is as follows: The bonds of the "A" Series are included in an agreement for the adjustment of Mexico's external debt, which was signed at New York in June 1922 between the Mexican Minister of Finance and the International Committee of Bankers on Mexico, and their validity has to this extent been admitted by the Government of President Obregón. As regards the "B" and "C" Series, the Mexican Government deny all responsibility for their issue and refuse even to submit to arbitration the claims of their holders. It was this refusal which, more than any other cause, led to the breakdown of the negotiations conducted between His Majesty's Government and the Mexican Government in 1922 with a view to the renewal of diplomatic relations.



16. His Majesty's Ambassador at Washington recently received instructions to open negotiations with the Mexican Ambassador in Washington in the hope that the present situation may prove more favourable than in 1922 to the conclusion of an agreement which would give adequate protection to British interests. The negotiations begun at Washington are being continued at Mexico City. An indefinite prolongation of the present phase of our relationship with Mexico is obviously undesirable and there are grounds for fearing that if arrangements cannot soon be made for the resumption of diplomatic intercourse, the Mexican Government may embark on a campaign of injustice and even of violence against the property and interests of British subjects in Mexico. A tendency to discriminate unfairly against these interests is, indeed, already noticeable. In these circumstances, it would be most unfortunate if the negotiations now opening should again break down primarily on the question of Mexico's repudiation of the Series "B" and "C" Bonds of the Huerta Loan. It is to enable the Secretary of State to be advised as to the legal validity of these issues that the present case is being submitted for your consideration.

17. The question is somewhat complicated by the absence of any detailed statement of the grounds on which the Mexican Government repudiate responsibility for the "B" and "C" Series of the Huerta Bond issues, while apparently accepting responsibility for the "A" issue. Their only official utterance on the subject has been a bald denial of the right of General Huerta to make these issues. Having regard to the insignificance of the British interests involved in the "B" Series Bonds, it is unnecessary in the present reference to go further into the circumstances of their issue. As regards the "C" Series Bonds, it would appear from the information derived from a variety of sources that the case against their recognition may be summarised as follows:—

- (a.) General Huerta executed a *coup d'état* on the 10th October, 1913. Unlike the "A" Series of bonds, which were issued in June and July 1913, the "B" and "C" Series were issued after the *coup d'état*. The present Mexican Government have repudiated all the acts of General Huerta's Government since that date and refused all responsibility for the results of those acts.
- (b.) A similar attitude was adopted by President Wilson, who, as stated above, announced publicly that his Government would not recognise as legal or binding anything done by General Huerta since he became dictator (October 1913) or by the Congress elected after Huerta's *coup d'état*.
- (c.) The issue of the Series "C" Bonds, arranged with de Kay in March 1914, to the public in May of that year, of which a part served as security for the issue of £700,000 of trust certificates by Reuter's Bank, was held to be a violation of article 13 of the agreement of June 1913, under which no further foreign bond issue was to be made before July 1915 without the assent of the syndicate of bankers which issued the Series "A" Bonds. The actual bonds of the "B" and "C" issues were, it is true, delivered to de Kay subject to a proviso that they should not be sold to the public before the 1st July, 1915, but the delivery of these bonds to de Kay to serve as collateral security for the public issue of trust securities in London and for the purchase of arms in foreign countries was a breach of the spirit if not of the actual letter of article 13. The purpose of this article was evidently to prevent the premature depreciation of the "A" Series Bonds and to retain for a period of two years the whole security afforded by the hypothecation of 38 per cent. of the Mexican customs receipts. This purpose was defeated by the procedure adopted in issuing and circulating the "C" Bonds to banking and armament firms in Europe.
- (d.) The attention of the public was drawn to this breach of the agreement by the letter in the "Times" of the 18th May, 1914, from Messrs. Morgan, Grenfell and Co.
- (e.) It is understood that the Mexican Government claim that the agreement, under which de Kay received the £3,025,000 of Bonds constituting the "C" Series, was to all intents and purposes a fraudulent one, since the shares of the National Packing Company, which de Kay sold to the Mexican Government for £1,025,000, were at the time valueless. The concern is understood to have been in difficulties since 1911. Moreover, none of the arms and ammunition ordered by de Kay in virtue of the

credits created by the delivery to him of the further £2,000,000 of bonds ever reached the Mexican Government, although a sum of £400,000 is stated to have been paid to a French firm in settlement of an old debt. General Huerta's position at the time is affirmed to have been so desperate that he felt compelled to make this altogether excessive payment to de Kay in order to obtain through his agency the munitions which he had been unable to secure by direct contract with foreign munition firms.

- (f.) The purchasers of these bonds (it is understood that most of them are held by the Bank of Montreal and a Captain J. G. Bennett) are declared to be undeserving of sympathy or of support for their claim against the Mexican Government since the purchase of these bonds, designed as they were to finance the supply of arms to a Government which was in the last stages of its unsuccessful struggle against revolutionary forces, was a transaction of an unduly speculative nature, and was, moreover, undertaken in face of the warning published by Morgan, Grenfell and Co. that the issue was a violation of an earlier agreement entered into by the Huerta Government.
- (g.) It is stated by Señor Barrios, attorney for the Mexican Government in Europe, that Señor del Paso had no authority from his Government to agree to the public issue of the Trust Securities by Reuter's Bank in May 1914. The only instruction to him on the subject from his Government was a decree issued by the Mexican Government on the 27th February, 1914 (Appendix (H)), authorising the payments to de Kay to be made in bonds of the External Debt instead of in bonds of the Internal Debt as originally provided in the agreement with de Kay of the 8th January (Appendix (C)). It was on this decree that the agreement of the 2nd March (Appendix (E)) was based, but the decree contained no authority for any public issue of trust certificates. Señor del Paso subsequently admitted in conversation that de Kay had "bullied him into the whole business."

18. As against the arguments enumerated above, the case of the holders of the "C" Series Bonds may be summarised as follows:—

- (a.) The agreements concluded with de Kay in January and March 1914 were perfectly valid. While the National Packing Company was at the time temporarily in difficulties owing to the distracted state of the country, which interfered with the supply of cattle for slaughter, nevertheless it had been before and has since again become a paying concern. Having regard to this and to the services which de Kay had for many months rendered to the Mexican Government as adviser in matters concerning the supply of meat to the capital and the troops, the sum of £1,025,000 was not an excessive price to pay for de Kay's controlling interests in the company.
- (b.) The fact that the "C" Series of bonds was issued after Huerta's *coup d'état* was immaterial, seeing that this Series (like the "A" Series which had been recognised by the present Mexican Government) was issued under the authority of a law passed in May 1913 by a Congress the validity of whose acts had not been called in question.
- (c.) The rights of the signatories of the 1913 agreement respecting the "A" Bond issue were safeguarded by the insertion of a stipulation in the de Kay agreement respecting the "C" Bond issue, to the effect that these bonds should not be sold before July 1915, the date by which the control exercised by the "A" bondholders would cease.
- (d.) Lord Balfour's view, when in office, was that no real reason had been shown to justify the repudiation of the "C" Bonds by the Mexican Government, and he expressed his willingness in a letter to Captain Bennett to give such assistance as he could to the bondholders. When Lord Curzon was Secretary of State for Foreign Affairs, Colonel Vaughan Morgan was informed in reply to a parliamentary question that His Majesty's Government could not accept repudiation of the Huerta and National Packing Company Bonds, but considered that the liability or otherwise of the Mexican Government should be submitted to a mixed commission on claims. A letter was also sent to Captain Guest in September 1924 stating that nothing has since occurred to cause His Majesty's Government to change their attitude.
- (e.) General Huerta's Government having been recognised by His Majesty's Government, the Series "C" bondholders maintain that they were justified



1925

26

MEXICO.

in considering that this was a reputable Government deserving of financial support. They maintain further that Lord (then Sir E.) Grey as Secretary of State for Foreign Affairs had encouraged the investment of British capital in support of the cause of President Huerta. (No trace can, however, be found in the Foreign Office records of this Department having encouraged the public to purchase the Huerta bonds.)

- (f) The fact that the mortgage bonds of the National Packing Company were endorsed by the Mexican Financial Agent in London with the guarantee of the Mexican Government is held to prove that the latter were satisfied that Mr. de Kay had fulfilled the obligations assumed by him in regard to the supply of munitions.
- (g.) Before the London trustees of the Packing Company accepted the £1,025,000 of bonds of the Mexican External Department, all the documents were submitted to a number of legal and financial authorities and approved. A list of these authorities is given in Appendix (I) (paragraph 3 (d)).

A legal opinion by M. Chenue, Advocate of the Court of Appeal in Paris, holding that the issue of Trust Certificates by Reuter's Bank was valid, is annexed as Appendix (J).

I am to request that you will be so good as to take this question into your consideration and to favour the Secretary of State with your opinion:—

- (a.) Whether the Mexican Government are justified, whether on any and, if so, which of the grounds summarised in paragraph 16, or on other grounds, in repudiating responsibility for the issue of the bonds of the Mexican Federal Government 1913 Loan, Series "C"?
- (b.) If the reply to (a) is in the negative, whether the claim on the Mexican Government of the British holders of "C" Bonds is a sufficiently strong one to justify His Majesty's Government in carrying the matter to arbitration with a reasonable expectation of securing a decision in their favour?

Mr. Chamberlain would also be grateful for any observations of a general character which you may be good enough to offer.

I have, &c.

ROBERT VANSITTART.

List of Papers.

APPENDIX (A).—Decree of Mexican Congress of the 30th May, 1913, authorising flotation of a foreign loan of £20,000,000.

APPENDIX (B).—Agreement concluded at Paris on the 8th June, 1913, between the Financial Agent of the Mexican Government and an International Syndicate of Bankers respecting the Mexican Federal Government 6 per Cent. Ten-Year Loan.

APPENDIX (C).—Agreement concluded at Mexico City on the 8th January, 1914, between Mr. P. L. y Parra, Sub Secretary of Finance and Public Credit, and Mr. John W. de Kay respecting the transfer to the Mexican Government of the control of the Mexican National Packing Company.

APPENDIX (D).—Agreement concluded at Mexico City on the 10th January, 1914, between the Mexican Minister of War and Mr. John W. de Kay respecting the purchase of munitions of war for the Mexican Government.

APPENDIX (E).—Agreement concluded in London on the 2nd March, 1914, between Señor del Paso, Financial Agent of the Mexican Government in London, and Mr. John W. de Kay modifying the terms of the agreement of the 8th January.

APPENDIX (F).—Announcement in London papers on the 18th May, 1914, of offer of trust certificates to value of £700,000 secured upon an issue of the 1913 bonds.

APPENDIX (G).—Letter of the 18th May, 1914, from Messrs. Morgan, Grenfell, to the "Times."

APPENDIX (H).—Mexican decree of the 25th February, 1914, granting authority for the modification of the agreement of the 8th January mentioned above.

APPENDIX (I).—Memorandum by Captain J. G. Bennett giving list of authorities consulted before the London trustees of the National Packing Company accepted the agreements transferring control of the company to the Mexican Government.

APPENDIX (J).—Opinion by M. C. Chenue, Advocate of the Court of Appeal in Paris, in regard to the legality of the issue of the so-called "Peat" trust certificates.

[The above-mentioned documents will be found in "South and Central America," July 20, 1925, Section 1.]

MOROCCO.

27

Report.

Some of the contentions which are set out in paragraphs 17 and 18 of the letter of instructions depend upon questions of fact with regard to which we have not the necessary information to form an opinion. For instance, the statement that de Kay obtained the bonds fraudulently, the statement that del Paso had no authority from his Government to agree to the issue of trust securities and the suggestion that in that event he was at any rate held out by the Mexican Government as having such authority, are all matters of fact which would have to be investigated if the issue were unobjectionable on other grounds. Even the question as to the position of Huerta after October 1913 depends upon a close study of events of October 1913 and on the Mexican law and Constitution, with which we are not familiar.

For the purposes of this opinion we assume that the acts of Huerta in that month were not in accordance with the Mexican Constitution, and that after that date he was not legally President, but was in fact in the position of an usurper. On that assumption, in our opinion, the Mexican Government of to-day is justified in repudiating responsibility for the Series "C" Bonds. It is true that the issue of these bonds by the Mexican Executive was authorised by Congress in May 1913; but this authority was an authority given to the Government of Mexico, which must mean to the lawful Government of that country. Huerta was not lawfully governing at the time when the bonds were issued, and therefore when he is ejected and a lawful Government reinstated, that Government is not bound to recognise the validity of the acts done by him during his usurpation of power.

We think that the issue of the bonds was a violation of article 13 of the agreement of June 1913; but in our opinion this would not in itself invalidate the bonds in the hands of the holders as against the Mexican Government, but would only give a right to the issuing banks with whom the agreement was made to claim damages against that Government.

It follows that in our opinion the answer to the first question is in the affirmative and to the second in the negative.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
August 4, 1925.

MOROCCO.

[W 2274/94/28/1925]

No. 10.

[March 16, 1925.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 10, 1925.

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to inform you that the Spanish Ambassador in London has been apprised of the alleged intention of certain British subjects to purchase an aeroplane in this country for the use of the Riff tribes in rebellion against the Government of the Spanish zone of Morocco. In communicating this intelligence to His Majesty's Government, his Excellency requested that steps should be taken to stop the export from this country of the aeroplane in question.

2. Aeroplanes are not at present specified in "The Arms Export Prohibition Order, 1921," and are therefore not subject to licence on exportation from this country. The Secretary of State has considered whether "The Foreign Enlistment Act, 1870," can properly be invoked in order to give effect to the Spanish Ambassador's request. The Riff tribes are situated within the boundaries of the Spanish zone of Morocco, as defined in the Franco-Spanish Treaty of 1912 (vol. cvi, "State Papers," at p. 1025), and their military operations against the Spanish forces constitute, in the opinion of the Secretary of State, rebellion against the Government of a friendly Power. In the circumstances it would seem that the Riff tribes cannot be regarded as a foreign State within the meaning of the Foreign Enlistment Act, and that to invoke the Act generally in the present case might be held to involve recognition of the Riff tribes as a belligerent.

[14641]

Export from Great Britain of aeroplane for use of Riff tribes in revolt against Spanish Government.

F



PALESTINE.

3. From the information communicated by the Spanish Ambassador, it appears that it is the intention of the British agents of the Riff tribes that any aeroplane purchased in this country should be flown direct to Morocco rather than transported as cargo by land or sea. If it can be shown that this is so, action might perhaps be taken under section 11 of the Foreign Enlistment Act without any implicit recognition of the Riff tribes' belligerent status, provided that the wording of section 11 does not exclude the application of the section to aircraft. In the contrary event, apparently no powers exist under which the export of aeroplanes to the Riff can be prohibited.

4. The Secretary of State will be glad to learn whether you concur in the conclusion set forth above, and in particular whether you consider that section 11 of the Foreign Enlistment Act can be held to apply to an expedition by aircraft against the dominions of a friendly power.

I have, &c.
G. H. VILLIERS.

Report.

In our opinion the conclusion reached by the Secretary of State that the provisions of the Foreign Enlistment Act, other than section 11, are inapplicable to the present situation is correct.

The proposed application of section 11 presents more difficulty. We think it possible that an expedition of aircraft fitted with armament, such as guns, bombs, &c., might constitute a military expedition within the meaning of the section.

On the other hand, we do not think that an unarmed aeroplane can constitute a military expedition, even if it be intended to convert it into an engine of war when it reaches its destination. The expedition that leaves this shore must be a military one, and a commercial aeroplane does not answer this description.

If the aeroplane be designed by a Government contractor, upon information acquired by him in that capacity, its exportation might be stopped under the Official Secrets Acts. Unless it can be shown either—

- (a.) That the aeroplane in itself is so fitted up as to constitute a military expedition; or
- (b.) That it comes within the provisions of the Official Secrets Acts,

we do not consider that its exportation can be legally stopped under the existing law. There might, of course, be an Order in Council extending the prohibition of the existing "Arms Export Prohibition Order, 1921," to aeroplanes, if the Board of Trade consider this course advisable; but, unless power is obtained in that way, we do not think that the exportation can legally be prevented.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
March 16, 1925.

PALESTINE.

[E 2379/338/65/1925]

No. 10^a.

[Colonial Office.]

[April 7, 1925.]

Colonial Office to the Law Officers of the Crown.

Gentlemen.

Downing Street, March 31, 1925.

Constitutional position of Government of Palestine.

I AM directed to state that certain questions have arisen in Palestine and will doubtless continue to arise which depend for their solution on a definition of the constitutional position of the Government of Palestine.

2. For example, questions have arisen in connection with the following points:—

- (a.) The extension to Palestine of imperial preference, which was dealt with by your predecessors in reports dated the 18th February, 1921,* and the 3rd January, 1923.†

* Confidential 11933, p. 35.

† Confidential 12470, p. 17.

PALESTINE.

- (b.) The status of civil servants in Palestine, with particular reference to the question whether or no they are to be regarded as "in the service of the Crown."

- (c.) The proper way for the Governor of Palestine to sue and be sued, either in this country or in Palestine—the proper method of entering into contracts, and matters of a similar nature.

3. As you are doubtless aware, His Majesty the King was selected by the Principal Allied Powers as mandatory for Palestine. The terms of the mandate were approved by the Council of the League of Nations in July 1922 and brought into operation by resolution of the council on the 29th September, 1923. A copy of the instrument is transmitted herewith.

4. The article of the covenant of the League of Nations concerning mandates is No. 22, and the mandates contemplated in that article have generally been regarded as of three distinct classes, viz.:—

- (1.) Territories defined in paragraph 4 of the article: A Mandates.
- (2.) Territories defined in paragraph 5 of the article: B Mandates.
- (3.) Territories defined in paragraph 6 of the article: C Mandates.

5. Except in the case of Nauru, His Majesty's Government are not directly concerned with the territories referred to in (3) above as being under C Mandates. The territories under B Mandates are administered pursuant to orders in council under the Foreign Jurisdiction Act. At the time article 22 of the covenant of the League of Nations was drafted it appears to have been contemplated that both Iraq and Palestine would come under paragraph 4, and that in both cases States could be created whose existence as independent nations could be provisionally recognised. In Iraq this step has actually been taken; His Majesty has recognised King Feisal as a sovereign ruler, and has concluded with him a treaty of alliance with protocol and subsidiary agreements thereto. His Majesty, therefore, exercises no direct jurisdiction in Iraq and only such control as is conferred by the treaty of alliance and connected instruments.

6. It was not possible to take the same course in Palestine as that taken in Iraq, both for political reasons and more especially inasmuch as the Principal Allied Powers had decided that the mandatory should be responsible for putting into effect the declaration made on the 2nd November, 1917, by His Majesty's Government and adopted by those Powers, in favour of the establishment of a national home for the Jewish people. The terms of the Palestine Mandate were, therefore, so drafted as to give His Majesty full powers of legislation and of administration, and the largest possible discretion as to the form of government which should be set up.

7. A form of government has in fact been established by the Palestine Order in Council (1922) made under the Foreign Jurisdiction Act. A copy of this order in council is attached for your information. The general scheme of the order in council is similar to that adopted in the case of B Mandates, and also in the case of countries under His Majesty's protection in which His Majesty possesses and exercises jurisdiction, and which are generally known as British protectorates.

8. It should be mentioned in this connection that it is proposed in Palestine to create a Palestinian citizenship, and a draft of the order in council which is in preparation for this purpose is enclosed.

It must be pointed out, however, that the effect of this arrangement will be to create only local citizenship—the persons holding certificates thereof being, when out of Palestine, simply in the position of British-protected persons.

9. I am further to state that, with the concurrence of the Foreign Office and the Board of Trade, "The Copyright Act, 1911," has under section 25 of that act been extended to Palestine as a territory under His Majesty's protection. A copy of the order in council is transmitted herewith.

10. It is submitted that the order in council mentioned in paragraph 7 above is the document which must be looked at to determine the constitutional position of the Government of Palestine. It will be observed that by the order in council His Majesty creates the legislature upon which he confers the power of legislation, subject to his ultimate power of disallowance under article 27: that he gives to the High Commissioner under article 25 a limited power to assent to ordinances, and delegates to him his prerogative of mercy under article 16: that he sets up courts of law from which there is an appeal to the Privy Council under article 44: and that he lays down generally the form of government. A copy of the order in council (Appeal to the Privy Council) is attached hereto.



11. The High Commissioner is appointed by the King under a commission. A copy of this document is enclosed together with a copy of the Royal Instructions which are issued to the officer holding that appointment.

12. I am to request therefore that the Secretary of State may be favoured with your advice on the following point:—

Whether the constitutional position of the Government of Palestine in relation to His Majesty is the same as that of other Governments established by order in council under the Foreign Jurisdiction Act, and if not, in what material respect the relationship is different.

I am, &c.
H. YOUNG.

List of Papers.

- (1a.) Law Officers to Foreign Office, February 18, 1921. [Confidential 11933, p. 35.]
- (1b.) Law Officers to Colonial Office, January 3, 1923. [Confidential 12470, p. 17.]
- (2.) League of Nations Mandate for Palestine, July 24, 1922. [Cmd. 1785.] [Parliamentary 5152.]
- (3.) Covenant of League of Nations. [Cmd. 2300.] [Treaty 1741.]
- (4.) Foreign Office telegram No. 1032 to Sir R. Wingate, November 2, 1917.
- (5.) Palestine Order in Council, 1922. [Confidential 11940*.]
- (6.) Draft Order in Council for Palestine. [T 23/23/378/1925.]
- (7.) Copyright Act, 1911 (Extension to Palestine) Order in Council, 1924. [Confidential 12109*.]
- (8.) Palestine (Appeal to Privy Council) Order in Council, 1924. [Confidential 12159*.]

Report.

IN our opinion, in any British court the Palestine Order in Council, 1922, is the document determining the constitutional position of the Government of Palestine; and that position in relation to His Majesty is the same as that of other Governments established by order in council under the Foreign Jurisdiction Act. Internationally, foreign States are bound to recognise the position of His Majesty in Palestine as defined in the mandate; and by article 1 His Majesty has the right to exercise all the powers inherent in the Government of a sovereign State, save as therein limited. But since those rights are conferred by the mandate, we think that a foreign Government would have the right to appeal to the League against a breach by His Majesty of the limitations contained in the mandate, and to that extent the position in Palestine differs from that in other British possessions.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
April 7, 1925.

E 3176/1178/65/1926

No. 10^B.

[Colonial Office.]

[June 19, 1925.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, May 27, 1925.

Preferential
treatment
in United
Kingdom of
goods im-
ported from
Palestine.

I AM directed by M. Secretary Amery to refer to the report of your predecessors in office of the 18th February, 1921,* addressed to the Secretary of State for Foreign Affairs, and to your report of the 3rd January, 1923,† addressed to the Secretary of State for the Colonies on the question of the extension of Imperial preference to Palestine, and to request you, in the light of the circumstances hereinafter appearing, to be so good as to consider the question anew.

At the time when the reports above referred to were made, the exact status of Palestine was not entirely clear despite the wide terms of the mandate and the provisions of the Palestine Order in Council, since it was undoubtedly one of the communities referred to in the fourth paragraph of article 22 of the Covenant of the League of Nations.

* Confidential, 11933, p. 35.

† Confidential, 12470, p. 17.

In a letter which Mr. Amery caused to be addressed to you on the 31st March, 1925, it was, however, pointed out that His Majesty's Government had not in fact accorded to Palestine any recognition as an independent nation, but, on the contrary, had, as they were entitled to do under the terms of the mandate, arranged for Palestine to be administered under the Foreign Jurisdiction Act.

In your report of the 7th April, 1925,* you state that the position of Palestine in relation to His Majesty is the same as that of other Governments established by Order in Council under the Foreign Jurisdiction Act—in other words, that the Government of Palestine is His Majesty.

In considering whether, in the event of an Order in Council being made applying the provisions of section 8 of "The Finance Act, 1919," to Palestine as a mandated territory, any breach of the most-favoured-nation clause contained in various commercial treaties would be involved, it is necessary, it is submitted, to determine the proper construction of the clause in question. These clauses differ considerably in language, but they resemble one another in conferring upon the foreign State with which the treaty is made as favourable treatment as is, or may be, granted to any "other" foreign State, or any "other" foreign nation, or any "other" foreign country, or any "third Power," or any "third nation."

These expressions appear to be used as synonymous and interchangeable phrases.

The question therefore seems to be whether Palestine, in existing circumstances, should be regarded as enjoying a status which is analogous to that of the foreign State with which the particular treaty is made, so that the principle of equally favoured treatment must apply to the one as much as to the other.

It is submitted that if due weight is given to the wording of these clauses, it is clear that the favoured nation must be a foreign country in the full sense of the term, enjoying independent sovereignty and free from British jurisdiction.

Palestine, it is true, is a foreign country in the sense that it is not part of His Majesty's dominions, but in that narrow sense so also are protectorates and "B" mandated territories.

It has never been suggested that the most-favoured-nation clause is applicable to protectorates, and, as regards "B" mandated territory, your predecessors advised the Secretary of State for the Colonies, in a report dated the 21st September, 1921,† that there was no objection to the extension of Imperial preference to such territories.

I am to request you therefore to be good enough to advise Mr. Amery whether, in view of the information which, since the date of your previous report on this matter has been supplied to you, as to the action which His Majesty's Government have in fact taken with reference to Palestine, and in view of your report of the 7th April, 1925, you are still of opinion that the extension to Palestine of Imperial preference would infringe the obligations arising from the "most-favoured-nation clauses" of commercial treaties.

Copies of the reports referred to, the Palestine Order in Council and the mandate, are enclosed for convenience of reference.

I am, &c.
H. YOUNG.

List of Papers.

- Law Officers to Colonial Office, February 18, 1921. [Confidential, 11933, p. 35.]
- Do. Do. , September 21, 1921. [Confidential, 11933, p. 30.]
- Do. Do. , January 3, 1923. [Confidential, 12470, p. 17.]
- Do. Do. , April 7, 1925. [Confidential, , p. .]
- Palestine Order in Council, 1922. [Confidential, 11940*.]
- League of Nations Mandate for Palestine. [Parliamentary, 5152.]

Report.

We have reconsidered this question in the light of the observations contained in the Colonial Office letter above referred to, but we still consider that the extension of Imperial preference to Palestine would be a breach of the most-favoured-nation clauses of British commercial treaties. The question depends upon whether Palestine must be regarded as a "foreign" or a "third" State or nation within the meaning of these treaties. We have already expressed the view, which we gather is

* No. 10A.

† Confidential, 11933, p. 30.



not disputed, that Palestine falls within the category of States included in the fourth paragraph of article 22 of the Covenant of the League of Nations; and it seems to us necessarily to follow that internationally it is an independent nation, although the administration of its affairs is mandated to His Britannic Majesty.

The point upon which we advised in April last depended upon the municipal law of this country; the point which we are now considering depends entirely upon the international status conferred upon Palestine by the Covenant and other international documents. In our opinion those documents do constitute Palestine a foreign or third nation within the meaning of the treaties. We would add that Palestine cannot on its side grant Imperial preference to this country by reason of the provisions of article 13 of the mandate.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
June 19, 1925.

[E 3918/2989/34/1925]

No. 11.

[June 30, 1925.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, June 18, 1925.

I HAVE the honour, by direction of the Secretary of State, to transmit to you the papers noted in the accompanying list on the subject of the fiduciary issue of the Imperial Bank of Persia.

2. This matter was originally referred to your predecessors in a letter signed by Sir Louis Mallet on the 21st August, 1912, as well as in a further communication dated the 5th February, 1913. Copies of these letters and of your predecessors' opinions of the 23rd December, 1912,* and the 13th March, 1913,† are enclosed in print for convenience of reference. The bank is now desirous of receiving a confirmation of an opinion given by their solicitors in 1913 to the effect that the bank is entitled, in accordance with the terms of its charter, concession and deed of settlement, to expand its note circulation to an unlimited extent, provided that any excess over a circulation of £1,100,000 is secured by a metallic reserve of the full amount of such excess.

3. In view of the importance to His Majesty's Government that the terms of the charter and concessions of the Imperial Bank of Persia should be meticulously adhered to, Mr. Chamberlain will be glad to have the benefit of your opinion once more, and I am to request you to take the enclosed papers into your consideration and to inform him whether, in your opinion, the bank is entitled to expand its circulation from time to time over the limit of £1,100,000, provided that the excess be secured by a metallic reserve of the full amount of such excess.

4. As the Royal Charter, &c., of the Imperial Bank of Persia is the only copy in the possession of this Department, I have the honour to request that it may be returned with your reply.

I have, &c.

LANCELOT OLIPHANT.

List of Papers.

- (1.) Imperial Bank of Persia to Foreign Office, May 22, 1925. [E 2989/2989/34/1925.]
- (2.) The Charter, the Deed of Settlement and the Concession of the Imperial Bank of Persia. (8vo 9982.)
- (3.) Law Officers' Opinions of December 23, 1912, and March 13, 1913. [Confidential 10192, pp. 22 and 23; and Confidential 10391, pp. 40 and 41.]

* Confidential 10192, p. 22.

† Confidential 10391, p. 40.

Report.

By clause 3 (b) of the charter it is provided that the—

"difference between the metallic reserve and the amount of notes so issued and in circulation shall not at any one time exceed the amount of the capital of the company for the time being actually paid up, after deduction of the amount which, in pursuance of the deed of settlement hereinafter mentioned, is to be paid for the acquisition of the said concession."

The amount of the capital paid up after deduction of the amount paid for acquisition of the concession amounts, we are told, to £450,000. It follows, in our opinion, that, so far as the charter is concerned, the only limit upon the right of the bank to issue notes beyond £1,100,000 is that the notes in circulation shall not exceed the metallic reserve as defined in the charter by more than £450,000.

The deed of settlement (article 14) is less stringent in its requirements. The concession (article 3) requires a cash reserve of at least one-third of the value of notes in circulation and a guarantee of the difference between the cash reserve and the notes issued consisting of securities belonging to the bank and deposited in its coffers in Persia.

So long as these conditions are fulfilled, in our opinion there is no limit to the amount of notes which may be issued; but previous notice of any issue beyond £800,000 must be given to the Persian Government under article 3 of the concession.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
June 30, 1925.

[C 14118/2265/37/1925]

No. 12.

[November 4, 1925.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 20, 1925.

I HAVE the honour by direction of Mr. Secretary Chamberlain to request the favour of your observations on the following matter:—

In November 1916 the victorious German armies invaded Roumania and it became evident that within a very short time they would occupy the whole country. It was essential at that stage of the war to prevent Germany replenishing her stocks of oil products, and the Roumanian Government were therefore urged by the three Allies, Britain, France and Russia, immediately to destroy the oil plant and wells so as to prevent, or at least delay, the exploitation of these resources by the enemy. In order to secure the assent of the Roumanian Government the three Allies found it necessary to furnish them with a joint guarantee to the effect that they would be compensated for the loss which might result from this destruction. The terms of this guarantee will be found in Paper (A).

2. Further, and in order to make certain that the destruction for which the consent of the Roumanian Government had then been obtained should be carried out with the greatest expedition and efficiency, His Majesty's Government despatched a mission under Sir John Norton-Griffiths, who, acting under the authority and with the co-operation of the Roumanian Government, succeeded in the short time at his disposal in effecting what amounted to a wholesale and complete destruction of the existing oil plant and properties. The military advantage secured for the Allies by this destruction was considerable, and in this advantage all the Allied Powers benefited.

3. On the conclusion of the armistice a joint Anglo-French commission proceeded to Roumania to assess the damage done. A counter-assessment was also prepared by the Roumanian Government. These two assessments were then examined by a joint committee which, in October 1922, agreed on a figure of, roughly, £10 million sterling as the total compensation due to the oil companies.

4. The French and British representatives on this joint committee only accepted this figure on the two conditions (1) that the Roumanian Government themselves made proper provision for compensating the companies, and (2) that they accepted as

Standard Oil Company's claim against His Majesty's Government in respect of the destruction of Roumanian oil wells in 1916.



discharge of the guarantee given in 1916 by the Ministers of the three Allied Powers the cancellation of an equivalent amount of Roumanian external debt.

5. The Roumanian Government have not yet formally acquiesced in these conditions, and they have, in fact, given it to be understood that they do not consider themselves bound by the assurances furnished on their behalf by the Roumanian Finance Minister when in London in 1920. The text of these latter assurances, which have become known as the "Blackett-Titulesco Agreement," will be found in Paper (B). At the same time, the Roumanian Government have always contended, and still contend, that it is for them, and not for the Allied Governments, to pay compensation to individual companies. In this connection attention is invited to Paper (C).

6. Among the properties destroyed were those of the "Romano-Americana"—a company incorporated under Roumanian law and having its seat and sphere of operations entirely within Roumania. The shares of this company are, it appears, held almost wholly by the Standard Oil Company of New Jersey. The amount of compensation which, under the assessment agreed to by the joint committee, would fall to the Romano-Americana is, roughly, £2 million.

7. In the year 1919 and again in the year 1920 the United States Embassy in London made verbal enquiries of the Foreign Office in regard to the claim of this company. A reply was in each case given that His Majesty's Government did not admit any liability to individual companies, but only to the Roumanian Government, to whom the companies should apply.

8. In 1924 the Standard Oil Company of New Jersey, evidently despairing of obtaining any early compensation from the Roumanian Government, decided to press their claim in London. They contended, at this stage, that His Majesty's Government were morally responsible for the damage done, that the guarantee given to the Roumanian Government was in substance a joint and several guarantee to the individual companies, and that His Majesty's Government were not justified in setting this liability against the Roumanian war debt, which arose from quite distinct and separate circumstances.

9. In September 1924 the American Ambassador in London, in a conversation with Mr. Ramsay MacDonald, drew his attention to the claim which had been raised by the Standard Oil Company, and begged the then Prime Minister to give the matter his personal attention. After examining the papers which then existed on this matter, Mr. MacDonald addressed Mr. Kellogg a private letter, of which a copy is annexed as Paper (D).

10. This letter provoked an official note from the American Ambassador, enclosing a detailed memorandum, in which the basis of the claim was stated in somewhat fuller detail, although in different terms. The United States Government suggested arbitration on the ground that this issue had proved incapable of settlement by diplomacy and appeared therefore to fall within the Arbitration Treaty concluded between His Majesty's Government and the Government of the United States on the 4th April, 1908, and extended by the Agreement of the 23rd June, 1923. The full text of this note, which is the document on which your observations are primarily invited, will be found as Paper (E) annexed to the present letter.

11. The issue raised by the American demand for arbitration has been carefully considered by the Departments of His Majesty's Government directly concerned. Strong reasons exist both in favour of and against the acceptance of the proposal to submit this claim to arbitration. The financial risks involved in any such submission of the case to arbitration are very great. If His Majesty's Government were defeated, compensation would have to be paid directly by His Majesty's Government not only to the Standard Oil Company, but also to the other companies whose property was similarly destroyed. On the other hand, if His Majesty's Government are in the right, there should be every reason to expect a successful issue to the arbitration. Experience has shown that it is not easy for His Majesty's Government permanently to resist demands by the United States Government for arbitration, and in this case the power of the oil interests in the United States is so great that continued insistence by the American Government on the arbitration of the claim may be anticipated.

12. These conflicting considerations may ultimately have to come before the Cabinet for a decision as to the terms of the answer which should be returned to the United States note, but before steps can be taken to submit the matter to the Cabinet, Mr. Chamberlain is anxious to obtain your advice as to the extent to which the Anglo-American Arbitration Treaty of 1908 (Paper (F)) entitles the United States Government to claim arbitration as of right in this case, and as to the right of the United States to intervene on behalf of the Romano-Americana Company.

13. You will observe that the treaty relates to differences of a legal nature or relative to the interpretation of a treaty.

14. What is a difference of a legal nature? No exact definition of the term which can be said to be binding on His Majesty's Government is in existence so far as Mr. Chamberlain is aware. Disputes are frequently characterised as justiciable or non justiciable, and disputes are regarded as justiciable if they are capable of solution by the application of a rule of law. Frequent attempts have been made to define the type of dispute to which compulsory arbitration should apply, and by article 13 of the Covenant of the League of Nations parties to that instrument are pledged to regard certain categories of disputes as generally suitable for submission to arbitration, but this provision is not one of which the United States can claim the advantage, unless it may be taken as affording a key to the meaning of the phrase "differences of a legal nature" in the treaty of 1908.

15. The Arbitration Treaty of 1908 pledges the contracting parties to submit to arbitration differences relating to the interpretation of a treaty. If the United States allege that the claim for compensation for the destruction of the "Romano-Americana" oil properties falls within the Arbitration Treaty as being "of a legal nature," and His Majesty's Government maintain that it does not, it is possible that the United States Government may contend that this question as to the meaning of the treaty should itself be referred to arbitration as being a difference relating to the interpretation of a treaty.

16. An exception is made in article 1 of the Arbitration Treaty by the terms of which differences affecting the vital interests, independence and honour of the contracting States and those concerning the interests of third parties are excluded.

17. This dispute can scarcely be said to affect the vital interests, or the independence or the honour of Great Britain, but it is clear that it affects the interests of third parties. It certainly affects Roumania as the territorial sovereign of the locality where the oil properties were destroyed, and it affects France and (in theory) Russia as parties with Great Britain to the guarantee given to the Roumanian Government (Paper (A)). It is not clear, however, whether the exception as to differences concerning the interests of third parties constitutes an objection which should be raised before the tribunal by way of defence, or whether it constitutes an objection excluding the operation of the article altogether.

18. The questions dealt with above relate to the interpretation of the Arbitration Treaty of 1908. Another question which arises is whether the United States Government are entitled to put this claim forward at all in view of the fact that the Romano-Americana had been incorporated as a company in Roumania, and therefore enjoyed Roumanian nationality. On this point I am to transmit a memorandum by one of the assistant legal advisers to this Department (Paper (G)).

19. A further reference will, if necessary, be made to you on the question whether the claim is one which can be resisted on the ground that it falls within the principle that a party who suffers injury as the result of "war losses" is not entitled to compensation as of right.

20. In communicating to you the accompanying papers, I am to request that you will favour Mr. Chamberlain with your opinion on the questions:—

- (1.) Whether, having regard to the fact that the Romano-Americana Company is incorporated in Roumania, the Government of the United States of America is entitled, pursuant to existing principles of public international law, to take up the claim of the company against His Majesty's Government on the ground that the ultimate financial interests are those of United States citizens or on any other ground?
- (2.) Whether the claim of the United States Government to represent the interests of the Romano-Americana Company is in itself a matter on which the United States Government are entitled to claim arbitration under the Treaty of 1908?
- (3.) Whether the difference between the United States Government and His Majesty's Government on the subject of the right of the Romano-Americana Company to compensation from His Majesty's Government constitutes a difference of a legal nature?
- (4.) Whether a disagreement between the two Governments as to whether or not this claim is covered by the Arbitration Treaty of 1908 would constitute a difference relating to the interpretation of a treaty?
- (5.) If the answer to (3) is in the affirmative, whether it would be advisable for



ROUMANIA.

His Majesty's Government to raise (a) by way of objection to arbitration, or (b) as a defence in arbitration proceedings on the claim of the Romano-Americana Company, the allegation that the United States Government is not entitled to arbitration under the Treaty of 1908 because the claim concerns also the interests of parties other than His Majesty's Government?

21. I am further to request you to furnish Mr. Chamberlain with any observations of a general character which you consider may be useful in this connection.

I have, &c.
MILES W. LAMPSON.

List of Papers.

- (A.) Joint Guarantee of three Allied Ministers to Roumanian Government. [31119 F 23234/1917].
(B.) Blackett-Titulesco arrangement, August 11, 1920. [C 4366/4366/19/1920].
(C.) M. Léon Wenger to Mr. Wills (Board of Trade), February 9, 1925. [C 2144/329/37/1925].
(D.) Mr. MacDonald to Mr. Kellogg, October 6, 1924. [C 15033 8593/37/1924].
(E.) United States Ambassador, February 16, 1925. [C 2330/2265/37/1925].
(F.) Anglo-American Arbitration Treaty, April 4, 1908. [Treaty 1322].
(G.) Memorandum by an Assistant Legal Adviser to the Foreign Office. [C 3321/2265/37/1925].

Report.

1. We answer the first question submitted to us in the negative. It is a recognised maxim of international law that citizenship is an essential condition of diplomatic protection. In the matter of the presentation and enforcement of international claims no rule is more strictly observed. The nationality of corporations is a matter which has been much discussed; but both in England and in America it has been repeatedly decided that the citizenship of a corporation is determined by the place of its incorporation. Further, it is well settled that a corporation is a different entity from its corporators, and that the corporation is not the agent of the individual shareholders. In the present case the allegation is made that the British Government has destroyed certain property in Roumania belonging to a Roumanian corporation. Apart from precedent, it would seem clear that any claim for compensation must be made by the Roumanian company; and that, as that company is not an American citizen, the United States Government has no right to take up its claim.

We have read and considered a number of cases in order to ascertain whether there is any precedent conflicting with this view; and we have also considered the memorandum prepared in the Foreign Office, in which many of these cases are discussed. We do not analyse them in detail in this report, but we may say that we have found nothing conflicting with the view which we are putting forward in any decision. There are several cases in which States (including the United States) have refused to take up claims of foreign corporations in which their citizens held a substantial interest, and conversely there are cases in which the claims of corporations incorporated in a State have been treated as claims by a citizen of that State, although the shareholders were mainly foreign. The cases in which the claims of a foreign corporation have been taken up by a State on the ground that the shareholding interest belongs to its citizens are all cases in which the facts shew a right in the shareholders as distinct from the corporation. The most usual instance is where the corporation has ceased to be a going concern and has gone into liquidation, so that its assets really belong to its creditors and shareholders.

The United States in its memorandum refers to the Delagoa Bay case. In that case a claim against Portugal was made in respect of the infringement of a concession granted to an American citizen and assigned by him to a Portuguese company in which an English company held substantially all the shares. It is true that both the United States and the British Government took up the claim; but the grounds upon which they did so do not in any way support the contention of the United States Government in the present case. In that case the Portuguese Company was, to use the language of Lord Salisbury, "practically defunct," and it is expressly on this ground that Lord Salisbury bases his right to intervene. It is, therefore, only an example of the principle explained above.

ROUMANIA.

The American memorandum seems to us consistently to ignore the distinction between the company and its corporators. It speaks of an American mutual corporation "engaged in business in Roumania through a Roumanian subsidiary." This seems to be an echo of the old fallacy that a company is the agent of its shareholders. It goes on to refer to the destruction of American-owned property, whereas this property was Roumanian owned. It might be conceded that either the United States or Great Britain might fairly be called upon to go to arbitration in regard to damage done with the approval of the Roumanian Government to a Roumanian corporation owned exclusively by nationals of a third State, if that State could establish that that damage was the immediate consequence of acts on account of which the law of nations imposed upon the actor an obligation to make reparation, if it were made clear that the obligation was to make reparation to the shareholders and not to the Roumanian corporation. In the present case the obligation (if any) is clearly an obligation to make reparation to the Roumanian corporation for the destruction of its property.

2. We do not think that the question can be stated quite in the form in which it is put in our instructions. The claim of the United States Government must be a claim, not to represent the interests of the Roumanian company, but to assert a right in the shareholders of the Roumanian company to recover compensation. That right, if it is pressed, might be a proper subject of arbitration, and one which the United States Government could properly put forward.

3. We think the difference stated in the third question is a difference of a legal nature, but, for the reasons already given, we do not think it is one which the United States Government is entitled to assert.

4. We think this question must be answered in the affirmative.

5. We think the British Government would be well advised to raise the objection mentioned in the fifth question by way of objection to arbitration, among other grounds, if it were decided to refuse to arbitrate.

6. Whether or not the British Government should persist in refusing arbitration obviously raises questions of a political character, on which we express no opinion. If for any reason it were ultimately decided to go to arbitration, we desire to call attention to the fact that it is most important that the matters submitted should be defined with accuracy. In more than one case the question whether the State asserting a right was entitled to maintain the claim has been ruled by the tribunal not to be open for discussion, on the ground that, by submitting the merits to arbitration, the point had been conceded. It would therefore be very important so to frame the submission as to make it clear that the matter was not submitted in a form to admit the right of the United States Government to put forward a claim on behalf of the Roumanian company.

We would also point out that it is not usual to allow diplomatic intervention until the party aggrieved has exhausted his remedies in the municipal courts. In the present case the United States Government seek to meet this objection by stating that the claim is not founded in contract, and that it is only for contractual claims that the British courts entertain a petition of right. We think that care should be taken, if any arbitration takes place, to hold the United States Government to this position, and to limit the claim put forward to the claim of a legal right not founded in contract.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
November 4, 1925.



1925

THIS DOCUMENT IS THE PROPERTY OF HIS BRITANNIC MAJESTY'S GOVERNMENT

TURKEY

[E 6006/408/44/1923]

No. 12^A

[Clearing Office.]

[July 13, 1925.]

Case for the Opinion of the Law Officers of the Crown and Mr. J. H. Stamp.

UNDER article I (xvi) (b) of the Treaty of Peace Order, 1919, all German property, rights and interests within His Majesty's Dominions are charged—

"Secondly, with payment of the amounts due in respect of claims by British nationals, other than British nationals ordinarily resident in the self-governing Dominions and Egypt, with regard to their property, rights and interests in the territories of Austria-Hungary, Bulgaria and Turkey, in so far as those claims are not otherwise satisfied."

These provisions are based upon the concluding words of clause 4 of the annex to section IV, Part X, of the Treaty of Versailles.

The Board of Trade will have shortly to decide whether there is to be an extension of release of property in this country to certain of the more meritorious classes of ex-enemy nationals, and, before doing so, it is necessary for them to have precise knowledge as to what classes of claims of British nationals are entitled to participate in the charge already conferred by the Order in Council.

The question upon which it is desired to take the opinion of the Law Officers and Mr. Stamp is whether, having regard to the terms of the Treaty of Lausanne, it can be properly said that there are or may be amounts due in respect of claims by British nationals with regard to their property, rights and interests in the territory of Turkey, the payment of which is secured by the charge on German property contained in the paragraph of the Treaty of Peace Order, 1919, set out above.

An examination of the Treaty of Lausanne suggests that the only articles under which it would appear possible that there may be amounts due in respect of such claims are the following: Articles 65, 66 and 71, and articles 2, 3, 6 and 7 of the protocol, being the instrument numbered xii of those signed on the 30th January, 1923, forming part of the Turkish peace settlement, and set out on pp. 205 to 209 of the official publication containing the Treaty of Lausanne.

In view of the fact that, in the earlier part of clause 4 of the annex to section IV, the expression "amounts due in respect of claims" is used as distinct from "debts" owing to Allied nationals by German nationals, and that the charge secondly conferred does not refer to "debts," this being doubtless due to the fact that, as appears in the reply of the Allied Powers to the observations of the German delegation on the conditions of peace, the Allied Powers stated themselves as prepared to omit from the charge on the property of German nationals the liability to satisfy the unpaid debts of nationals of Powers allied with Germany, it has been recognised that such claims cannot be deemed to include these unpaid debts. It is not therefore considered relevant to call the attention of the Law Officers to the articles in the Treaty of Lausanne which provide for the payment of these debts and for the determination of their amount, if need be, by the Mixed Arbitral Tribunal.

Dealing with the various articles above referred to, it is suggested that, both having regard to the obligation of Turkey to restore property, rights and interests in specie or to pay the proceeds of the liquidation to the owner, and to the power of the Mixed Arbitral Tribunal to order the addition to the proceeds of a liquidation of such amount as it shall consider equitable, there may well be amounts due in respect of claims by British nationals of the above nature.

As to article 71, having regard to the fact that this refers to claims or suits by Allied nationals with regard to their property, rights and interests against the Ottoman Government begun before the 29th October, 1914, and that the article merely states that the provisions of section I are not to prejudice such claims or suits which are to be continued against the Turkish Government and

7137 [9398]

33

E. 39

TURKEY

other Governments under previously existing conditions, it may be difficult to contend that the amount of such claims comes within the charge. As to this, it may be mentioned that the Law Officers, on the 14th June, 1922, advised, with reference to a somewhat similar article, viz., article 179 of the Treaty of Neuilly-sur-Seine, that the diplomatic and consular claims therein mentioned would not be entitled to participate in the benefit of the charge over Bulgarian property. Having regard, however, to the difference in the form of the two treaties, and to the special circumstances applicable to these diplomatic and consular claims against Bulgaria, it is not considered that this decision has much bearing on the present case.

With reference to the articles contained in protocol No. 12 relating to certain concessions granted in the Ottoman Empire, it would certainly appear *prima facie* as if amounts might become due to British nationals in respect of claims with regard to their property, rights and interests in the territory of Turkey, both in the case of the two British companies expressly referred to in article 2 and of the general body of beneficiaries (in so far as they are British), under concessionary contracts referred to in article 1, to whom indemnities and compensation may become payable under articles 6 and 7.

Article 297 (c) of the Treaty of Versailles, and the corresponding provisions of the treaties of peace with the other ex-enemy Powers other than Turkey, provided that the nationals of Allied and Associated Powers should be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, in the territory of the enemy Power concerned, by the application of exceptional measures of war or measures of transfer, and these treaties contained provisions for investigation of claims and determination of the amount of compensation by the Mixed Arbitral Tribunal or by an arbitrator. This paragraph of article 297 also provides that the compensation might be charged upon the property of the nationals of the ex-enemy State concerned, and that such property might be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the annex—i.e., the paragraph upon which the charge contained in the Treaty of Peace Order is based.

No such provisions are contained in the Treaty of Lausanne, and, except in the case of the articles specially referred to above, no machinery is provided by that treaty for ascertaining the amounts due in respect of claims by the nationals of the Allied and Associated Powers.

A large number of claims were made to the Royal Commission on Compensation for Suffering and Damage by Enemy Action, presided over by Lord Sumner, by British subjects in respect of loss or damage to their property in Turkey which do not come within the provisions of articles 66 or 71 of the Treaty of Lausanne or articles 2, 3, 6 or 7 of the protocol.

The Law Officers and Mr. Stamp are therefore requested to advise—

- (1) Whether, having regard to the terms of the Treaty of Lausanne and other instruments forming part of the Turkish peace settlement, it can reasonably be contended that, under any of the articles, and, if so, which, amounts are or may become due in respect of claims by British nationals, with regard to their property, rights and interests in the territory of Turkey so as to entitle them to participate in the benefit of the charge over German property secondly conferred in the Treaty of Peace Order, 1919, made in pursuance of the Treaty of Versailles.
- (2) Whether British nationals are entitled to participate in the benefit of the charge over German property referred to above in respect of claims with regard to their property, rights and interests in Turkish territory for which no specific provision for compensation or for the assessment of the amount of compensation is made in the Treaty of Lausanne.
- (3) Generally.



TURKEY

Opinion of the Law Officers of the Crown and Mr. J. H. Stamp.

In our opinion, having regard to the terms of the Treaty of Lausanne and other instruments forming part of the Turkish peace settlement, it can reasonably be contended that under certain of the articles thereof amounts are or may become due in respect of claims by British nationals with regard to their "property, rights and interests" in the territory of Turkey so as to entitle them to participate in the benefit of the charge over German property secondly conferred in the Treaty of Peace Order, 1919, made in pursuance of the Treaty of Versailles. The articles under which, in our opinion, it would be reasonably contended that amounts are or may become so due are articles Nos. 65, 66, 69 and 81, and the last provision of article 89 of the treaty, and articles Nos. 3 and 7 of the protocol numbered XII signed concurrently with the treaty.

2. In our opinion British nationals are not entitled to participate in the benefit of the charge referred to above in respect of claims with regard to their property, rights and interests in Turkish territory in cases where no provision for compensation is made in the Treaty of Lausanne.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.
J. H. STAMP.

*Law Officers' Department,
July 13, 1925.*



1926

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office.

CONFIDENTIAL.

(13206)

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1926.



1926

(ii)

LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 2^a, &c

ABYSSINIA.				
No.		Date.	SUBJECT.	Page.
1	Law Officers ..	Apr. 22, 1926	Jurisdiction over British subjects in Abyssinia ..	1
GENERAL.				
2	Law Officers ..	July 22, 1926	Administration of estates by consuls; article in British commercial treaties ..	3
PALESTINE.				
2 ^a	Law Officers .. [Colonial Office]	Jan. 13, 1926	Dead Sea salts: validity of Turkish pre-war concession ..	7
SWITZERLAND.				
2 ^b	Law Officers .. [Colonial Office]	Mar. 16, 1926	Assets of the Basle Mission Trading Society ..	10

(iii)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1926.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

ABY—EST.	GOO—WES.
A.	G.
Abyssinia: jurisdiction over British subjects in, 1-3. " removal under Colonial Prisoners Removal Act, 1884, of British subjects sentenced by Mixed Court, 1-3.	<i>Goods of Aikyo</i> , 5.
B.	H.
<i>Barnett's Trust</i> , 5. Basle Mission, 10-12. Basle Mission Trading Society: disposal of assets, 10-12. Bennett, Captain J. G., 7-10.	Henry, Major J. D., 7, 8.
C.	J.
Claims: right of British dominion to bring claims against mother country before The Hague Court, 10. Colonial Prisoners: removal under Colonial Prisoners Removal Act, 1884, of British subjects sentenced by Mixed Court of Abyssinia, 1-3. Commonwealth Trust (Limited), 11, 12. Compensation: to national of friendly State for seizure of property, 11, 12. Concession: Turkish pre-war concession relating to Dead Sea salts; validity, 7-10. Consuls: administration of estates by; article in British commercial treaties, 3-7. Court: Mixed, in Abyssinia; removal under Colonial Prisoners Removal Act, 1884, of British subjects sentenced by, 1-3.	Jurisdiction: over British subjects in Abyssinia, 1-3.
D.	M.
Dead Sea: validity of Turkish pre-war concession for exploitation of mineral salts, 7-10. Domicile Act, 1861: suggested amendment of, 6, 7.	<i>Macromatis</i> , 10. Mizzi, Dr., 7, 8.
E.	P.
Edwards, Mr. W. M., 7, 8. Estates: administration of, by consuls; article in British commercial treaties, 3-7.	Prisoners. <i>See</i> Colonial Prisoners. Property: of nationals of friendly State; compensation for seizure, 11, 12.
	S.
	Sentences. <i>See</i> Colonial Prisoners.
	T.
	Treaties: British commercial treaties; article relating to administration of estates by consuls, 3-7. Treaty of Lausanne. <i>See</i> Treaty of Peace (Turkey). Treaty of Peace (Turkey): validity under article 77 of transfer of Turkish pre-war concession respecting Dead Sea salts, 7-10. Turkey: validity of concession granted in 1911 for exploitation of Dead Sea salts, 7-10.
	W.
	Westbury, Preston and Stavridi, Messrs., 7, 8.



Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1926.

ABYSSINIA.

[J 950/2/1/1926]

No. 1.

[April 22, 1926.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 9, 1926.

I HAVE the honour, by direction of Secretary Sir Austen Chamberlain, to request the favour of your advice on a point which has arisen in connection with the exercise of His Majesty's rights of jurisdiction over British subjects in Abyssinia. Jurisdiction over British subjects in Abyssinia.

2. The extent of that jurisdiction is less well-defined in Abyssinia than it is in other countries, and rests largely upon usage. His Majesty's Government have, however, always claimed and obtained the benefits of article 7 of the Franco-Abyssinian Treaty of Commerce of the 10th January, 1908, the text of which will be found in the memorandum enclosed as Paper A. It will be seen that the system of jurisdiction provided by that treaty for criminal cases between French citizens and Abyssinian subjects provides for such cases being heard by an Abyssinian magistrate assisted by a French consul. This system differs, as regards cases where a European is defendant or accused, from that which exists in other countries where the system of extra-territoriality prevails, since in those countries the rule is that the competent Court is that of the accused's nationality. The Tribunal established under the Franco-Abyssinian Treaty is known as the "Mixed Court"; its constitution and procedure are somewhat indeterminate, but it may be assumed for present purposes that it is not an ordinary Abyssinian Tribunal but a Court possessing an international character set up by treaty, and the principle is well established, as will be seen from the memorandum enclosed as Paper A, that criminal cases between British and Abyssinian subjects are tried by that Court and not by the ordinary Abyssinian Tribunals.

3. His Majesty's jurisdiction over British subjects in Abyssinia is exercised in accordance with the Abyssinia Order in Council, 1913 (Paper B). Article 35 of that Order makes provision for the detention in custody of a British subject, either pending his trial or while he is serving his sentence, in cases dealt with by the Mixed Court (the "Abyssinian Tribunal" referred to in the article). This is effected either by a separate warrant by the Consular Court or by the Court's endorsement on the warrant of the Mixed Court. Under that article, however, such detention can only take place in Abyssinia.

4. Recent cases have shown the necessity of making provision under which British subjects sentenced by the Mixed Court can be sent to serve their sentence in British territory, since there is no British prison in Abyssinia which is suitable for the reception of long-term prisoners, while the conditions of imprisonment in Abyssinian gaols are such that it is not possible to consent to British subjects convicted before the Mixed Court serving their sentences therein. In the case of British subjects convicted before the Consular Court, provision is made by article 56 of the Order



1926

2

ABYSSINIA.

under section 7 of the Foreign Jurisdiction Act, 1890) for imprisonment at Aden, Bombay or Malta. In view of the fact, however, that section 7 of the Act is confined to the case of offenders "convicted before a British Court in a foreign country," it is not possible to make provision under that section for persons convicted before the Mixed Court, and the question arises whether, without an amendment to the Act, it is possible to amend the Abyssinia Order in Council in such a way as to provide the required facilities.

5. There seems to be no difficulty as regards legalising the detention of the persons in question in prison after their arrival at the British possession to which they are to be sent; this can be effected by local legislation, of which the India Office and Colonial Office respectively are prepared to obtain the enactment. The difficulty arises as regards the detention of the persons concerned in custody in Abyssinia before their removal from that country and on their way from Abyssinia to the place of imprisonment. It has been proposed to effect this by making use of the provisions of section 8 of the Act, and an article, of which a copy is enclosed (Paper C), amending article 35 of the Abyssinia Order in Council, has been prepared for this purpose. Section 8 of the Act is the one on which are based the provisions in Foreign Jurisdiction Orders in Council providing for deportation (see, e.g., article 73 of the Abyssinia Order), and, in view of the fact that the word "removal" is used as well as "deportation" in the section in question, it is suggested that the section provides sufficient authority for the proposed amendment of article 35. It cannot, however, be denied that the effect of the proposed amendment would be to use section 8 to give power to do that which cannot be done under section 7, and doubts have accordingly been expressed as to whether, in the event of the lawfulness of the detention in custody of a convicted prisoner on his way from Abyssinia to Aden or Berbera being questioned before a competent Court, the provision in question would be upheld.

6. It has been suggested that an alternative method would be to deal with the cases in question under the Colonial Prisoners Removal Act, 1884, which was applied by article 79 of the Abyssinia Order in Council, 1913, to Abyssinia as if Abyssinia were a British possession, with the substitution of the Consul-General for the Governor of a British possession. No such express limitation as that contained in section 7 of the Foreign Jurisdiction Act (the words "convicted before a British Court in a foreign country") is involved, and it is suggested that it could be argued that, even if the Mixed Court is technically an Abyssinian Tribunal, it is nevertheless exercising His Majesty's jurisdiction in the case contemplated; that it would, therefore, not be improper that persons convicted by it should be removed under the Act, and that there is nothing in the Act or in its application by article 79 to Abyssinia to prevent this being done.

7. If neither of these two courses can be adopted, it would appear that no power exists to make the necessary provision except by obtaining an amendment of section 7 of the Foreign Jurisdiction Act so as to make it applicable to British subjects convicted before tribunals of the nature of the Mixed Court, a proceeding to which it is presumed there would be no legal objection.

8. I am also to transmit for your consideration the draft of an article (Paper D) to replace article 56 of the Abyssinia Order in Council, 1913, under which offenders convicted before the Consular Court can be sent for imprisonment to Aden, Bombay or Malta. The object of the new article is merely to add Berbera to the places in question, but, inasmuch as Berbera is in a protectorate and is not therefore "a place within His Majesty's dominions," it has been necessary to reword the existing article 56.

9. In these circumstances, I am to request you to take the enclosed papers into your consideration and to favour Sir Austen Chamberlain with your opinion on the following points:—

- (1.) Whether the terms of the proposed article to replace article 56 of the Abyssinia Order in Council (Paper D) are fit and proper to be submitted for His Majesty's approval?
- (2.) Whether the proposed amendment of article 35 of the Abyssinia Order in Council (Paper C) affords a satisfactory method of dealing with the situation described in paragraphs 2-4 above, and can properly be submitted for His Majesty's approval?
- (3.) In the event of your answer to question (2) being in the negative, whether the alternative method suggested in paragraph 6 above can properly be adopted?

GENERAL.

3

In the event of your being unable to advise the acceptance of either of the two suggested courses, Sir Austen Chamberlain would be grateful for any alternative suggestions which you may be able to offer as to the means to be adopted for dealing with the question.

I have, &c.
JOHN MURRAY.

List of Papers.

- (A.) Library Memorandum, July 30, 1924 (9962).
- (B.) Abyssinia Order in Council, 1913 (Confidential 10352*).
- (C.) Draft article to replace article 35 of Abyssinia Order in Council, 1913 (J 3121/681/1/1925).
- (D.) Draft article to replace article 56 of Abyssinia Order in Council, 1913 (J 3588/681/1/1925).

Report.

- (1.) Our answer to the first question proposed is in the affirmative.
- (2) and (3). We do not think that the proposed amendment to article 35 affords a satisfactory method of dealing with the situation described in the letter under reply. In our opinion, sections 7 and 8 of the Foreign Jurisdiction Act, 1890, deal with two contrasted situations. Section 7 is designed to deal with the case of convicted offenders; section 8 is directed to the case of persons who have not been convicted and sentenced, but whose removal or deportation has been ordered under powers such as those afforded by paragraph 73 of the Abyssinia Order in Council. We do not, therefore, consider that section 8 is apt to deal with the difficulty arising in the case of convicted offenders.

We think, however, that a provision might be made by the alternative methods suggested in the Foreign Office letter, namely, by dealing with cases under section 2 of the Prisoners Removal Act, 1884. That Act has been applied to Abyssinia by paragraph 79 of the Abyssinia Order in Council; and the case seems to us to fall within section 2 (d) of the Act.

We have nothing to add.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
April 22, 1926.

GENERAL.

[K 9111/4417/250/1926]

No. 2.

[July 22, 1926.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, June 25, 1926.

I HAVE the honour, by direction of Secretary Sir Austen Chamberlain, to request that you will be so good as to favour him with your opinion on the question of a suitable form of words for adoption in commercial treaties to which this country is a party, relating to the rights of consuls to administer the estates, situate in the country to which they are appointed, of deceased nationals of the country in whose service they are.

2. In the Treaty of Commerce and Navigation between Great Britain and Japan of the 3rd April, 1911, article 5, the following provisions are found:—

"In the case of the death of a subject of one of the high contracting parties in the territories of the other, without leaving at the place of his decease any person entitled by the laws of his country to take charge of and administer the estate, the competent consular officer of the state to which the deceased belonged shall, upon fulfilment of the necessary formalities, be

[16111]

B 2

Adminis-
tration of
estates by
consuls;
article in
British
commercial
treaties.



GENERAL.

empowered to take custody of and administer the estate in the manner and under the limitations prescribed by the law of the country in which the property of the deceased is situated.

"The foregoing provision shall also apply in case of a subject of one of the high contracting parties dying outside the territory of the other, but possessing property therein, without leaving any person there entitled to take charge of and administer the estate.

It is understood that in all that concerns the administration of the estates of deceased persons any right, privilege, favour or immunity which either of the high contracting parties has actually granted, or may hereafter grant, to the consular officers of any foreign State shall be extended immediately and unconditionally to the consular officers of the other high contracting party."

On account of certain doubts being felt as to whether it was possible under English law as it is at present for His Majesty's Government to fulfil the obligations contained in the above-quoted article, in the Anglo-Siamese Commercial Treaty of the 14th July, 1925, the following provisions were substituted for those of article 5 of the Anglo-Japanese Treaty:—

"ARTICLE 28.

"In the case of the death of a subject of one of the two contracting parties in the territories of the other, *leaving kin*, but without leaving at the place of his decease any person entitled by the laws of his country to take charge of and administer the estate, the competent consular officer of the State to which the deceased belonged shall, upon fulfilment of the necessary formalities, be empowered to take custody of and administer the estate in the manner and under the limitations prescribed by the law of the country in which the property of the deceased is situated.

It is understood that in all that concerns the administration of the estates of deceased persons, any right, privilege, favour or immunity which either high contracting party has actually granted, or may hereafter grant, to the consular officers of any other foreign country shall be extended immediately and unconditionally to the consular officers of the other contracting party."

It will be observed that in the first paragraph the words "leaving kin" have been inserted, and that paragraph 2 of article 5 of the Anglo-Japanese Treaty has been altogether omitted in the treaty with Siam.

3. It is thought that under English law it is always within the discretionary power of the court to grant or refuse administration to a consular officer of the country to which the deceased belonged and to limit any grant made as the court may think fit. In particular, it is thought that, though leaving the discretion of the court unfettered, section 73 of the Court of Probate Act, 1857 (20 and 21 Vic., cap. 77), and as regards the estates of persons dying on or after the 1st January, 1926, section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, gives the court power to grant administration to consular officers. It would appear to be clear beyond question that in English law no person can obtain administration of the estate of a deceased person otherwise than by grant of the court, since upon the death of the deceased person his estate becomes vested in the President of the Probate Division of the High Court. The first question upon which your opinion is desired is, therefore, whether the first paragraphs of the two articles quoted above purport to give a right to consuls to administer the estates of deceased aliens without the necessity of a grant by the court. In this connection it will be observed that the article provides that the "consular officer . . . shall, upon fulfilment of the necessary formalities, be empowered to take the custody of and administer the estate in the manner and under the limitations prescribed by the law of the country . . .". If the answer to the above question should be in the affirmative, then it is clear that His Majesty's Government would only be able to fulfil the obligations of the above treaties in so far as, if at all, the case were covered by some special statute.

4. Assuming that the answer to the above question is in the negative, the second question is whether the first paragraphs of the two articles above quoted purport to give the consular officers a stronger right to a grant of administration of the estates of deceased aliens than that which they possess of applying to the courts under section 73 of "The Court of Probate Act, 1857," or section 162 of "The Supreme Court of Judicature (Consolidation) Act, 1925." In other words, do the

GENERAL.

articles in question purport to limit the discretion of the court in cases coming within the terms of these articles where foreign consuls apply for administration? In this connection attention is drawn to the words "shall, upon fulfilment of the necessary formalities, be empowered to take the custody of and administer . . .".

5. Assuming that the answer to the second question is in the affirmative, it appears that it is only within the power of His Majesty's Government to fulfil the obligations contained in the first paragraph of these articles in so far as the case is provided for by statute. In this connection attention is drawn to section 4 of the Domicile Act of 1861 (24 and 25 Vic., cap. 121). It will be seen that the section gives power to consular officers to take possession and have the custody of the personal property of the deceased, but provides that such officers must immediately apply for and *shall be entitled to obtain from the court administration of the effects of the deceased "limited in such manner and for such time as to such court shall seem fit."* Therefore if the answer to the first question is in the affirmative it does not appear that this statute can be relied upon for rendering effective the right purported to be given by the treaties. On the other hand, assuming the answer to the first question to be in the negative and to the second question to be in the affirmative, it appears that section 4 of the Domicile Act covers the same cases as those provided for in the first paragraphs of the treaty articles above quoted and that, upon that section being put into operation by Order in Council as prescribed, it might have the effect of limiting the discretion of the court upon the application of a consular officer for administration.

6. The third question upon which you are desired to express an opinion is whether or not the words in section 4, "limited in such manner and for such time as to such court shall seem fit," give a wider discretion to the court in limiting the administration granted to a consular officer than that provided for in the words of the treaties, "in the manner and under the limitations prescribed by the law of the country in which the property of the deceased is situated." In this connection your attention is especially drawn to the case of an alien dying leaving personal property in this country without having disposed of it effectively by will and without leaving any kin entitled to succeed to it. In such cases by English law the Crown becomes entitled to the property as *bona vacantia* (*in re Barnett's Trust*, 1902, 1 Ch. 847), and care must, of course, be taken to ensure that this right of the Crown is safeguarded. If a foreign consul were granted administration of an estate and there should happen to be no person entitled to succeed to the estate, it is possible that such consul might, unless restrained by the conditions on which the grant is made, transfer the assets to the Government of his own country; in this connection it may be noted that the court, upon an application in 1912 in respect of the estate of a domiciled Chilean subject by a consul, as such, of Chile (a country with whom no convention existed within the meaning of section 4 of the Domicile Act), decreed administration to him, though not in his capacity as consul, under section 73 of the Court of Probate Act, but only authorised him to collect the assets and pay the debts and then required him to bring the residue of the estate into the registry. The administration decreed was further limited to extend only until the proper persons from Chile applied for a grant or, in the case of their continued absence or non-application, until the Treasury Solicitor should apply. It is thought that had the case been covered by section 4 of the Domicile Act, a similar limitation could and would have been imposed by the court, and the answer to the third question will incidentally determine whether this limitation would be justified under the words of the treaties. In 1925, in the case of the Goods of Aikyo (130 L.T. 32) pursuant to the Anglo-Japanese Treaty of 1911 above referred to, a general grant of administration was made to the Japanese consul at Liverpool in the matter of the estate of a Japanese subject dying intestate at that place. No notice of this case appears to have been given either to the Treasury Solicitor or to the Solicitor to the Duchy of Lancaster, and it would seem that the court, after reading the terms of the treaty in question, acted without considering the matter further, and the rights of the Crown may have been prejudiced thereby.

7. The fourth question upon which your opinion is desired is whether the words of article 5 of the Anglo-Japanese Treaty "without leaving at the place of his decease any person entitled" must be interpreted as necessarily implying "*leaving some person entitled, but not at the place of his decease.*" In other words, whether paragraph 1 of article 5 of the Anglo-Japanese Treaty bears the same meaning as paragraph 1 of article 28 of the Anglo-Siamese Treaty, in which the words "leaving kin" have been inserted, and thus gives no right to a consular officer unless the



deceased leaves kin who would be entitled to succeed to the estate and excludes the cases where the assets might become *bona vacantia*.

8. It was apparently under the impression that the answer to the immediately preceding question was in the negative, and to guard against the event of the limitation referred to in paragraph 6 not being justified under the terms of the first paragraph of article 5 of the Anglo-Japanese Treaty, that the additional words "leaving kin" were inserted in paragraph 1 of article 28 of the Anglo-Siamese Treaty. The fifth question upon which you are requested to advise is, therefore, whether these or similar (and if similar what) additional words are (a) necessary, or (b) desirable. There would appear to be no necessity for such words if the answer to the fourth question is in the affirmative, or if, whatever the answer to the fourth question may be, the answer to the third question is in the affirmative, and therefore such limitations as those imposed by the court in the case of the estate of the Chilean subject above referred to are thought to be justifiable under paragraph 1 of article 5 of the Anglo-Japanese Treaty.

9. The second paragraph of article 5 of the Anglo-Japanese Treaty applies the provisions of the first paragraph in the case of an alien dying outside British territory. It will be observed that section 4 of the Domicile Act only covers the case where the deceased foreign subject dies within His Majesty's dominions. In other words, it only covers the case dealt with in the first paragraphs of articles 5 and 28 of the treaties quoted. It does not cover the cases dealt with in paragraph 2 of article 5 of the Anglo-Japanese Treaty, namely, where a foreign subject dies outside His Majesty's dominions, but leaves property therein. If, therefore, the answer to the second question is in the affirmative, it would appear that His Majesty's Government are not in a position to fulfil the obligations contained in the second paragraph of article 5 of the Anglo-Japanese Treaty. It was this doubt which caused this paragraph to be omitted in article 28 of the Anglo-Siamese Treaty. In addition to the five preceding questions to which this paragraph gives rise in the same manner as the first paragraph, there is also a sixth question applicable only to this paragraph upon which your opinion is desired, namely, whether, without any change in the law, a paragraph in such terms can be safely included in future commercial treaties.

10. Your opinion is lastly desired on the question whether, in the event of the answer to the sixth question being in the negative, it would be desirable to amend section 4 of the Domicile Act so as to cover the cases provided for in this paragraph.

11. Sir Austen Chamberlain would further be glad to be favoured with any observations of a general nature which may occur to you on the framing of an article dealing with this matter for insertion in the commercial treaties of this country.

I have, &c.

E. F. CROWE.

Report.

1. Our answer to the first question is in the negative. We think it clear that the words "shall, upon fulfilment of the necessary formalities, be empowered to take the custody of and administer the estate in the manner and under the limitations prescribed by the law of the country" include the application to the court for grant of probate.

2. Our answer to the second question is in the affirmative. The court has power under "The Probate Act, 1857," and "The Supreme Court of Judicature Act, 1885," to grant administration to Consular officers, but it has the right to exercise its own discretion in so doing.

3. Our answer to the third question is in the negative.

4. Our answer to the fourth question is in the negative. We do not think that the Anglo-Japanese Treaty can be interpreted in the manner suggested.

5. Our answer to both parts of the fifth question is in the affirmative. We think that the Anglo-Japanese Treaty imposes upon His Majesty's Government obligations which under existing legislation it is unable to discharge. We think that the Anglo-Siamese Treaty contains satisfactory provisions.

6. Our answer to the sixth question is in the negative. This necessarily follows upon the view we have already expressed in answer to the second question.

7. The seventh question seems to us to raise matters of policy rather than of law. Presumably foreign countries will not give us rights in these treaties wider than those we are prepared to concede to them. If, therefore, there is any large

number of cases in which it is desired to obtain the protection afforded by the language of the Anglo-Japanese Treaty for the property of British subjects dying outside a foreign country, and leaving property within that country, it will be necessary to alter section 4 of the Domicile Act. But before doing this we think it would be advisable to consult Somerset House as to the effect on the rights of the Crown in the case of *bona vacantia* if the Act is so extended.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
July 22, 1926.

[E 742/742/65/1926]

No. 2^A.

[Colonial Office.]

[January 13, 1926.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, December 16, 1925.

I AM directed by Mr. Secretary Amery to inform you that he has had under consideration a claim advanced by a Mr. W. M. Edwards and a Major J. D. Henry in respect of rights to a concession granted by the Ottoman Government in 1911 to certain Turkish subjects for the exploitation of certain mineral resources of the Dead Sea, and to transmit to you in this connection copies of the documents and correspondence noted in the attached schedule. A copy of the translation of the original firman granting the concession will be found as an enclosure to the letter from Captain J. G. Bennett of the 7th June, 1923, as also of an opinion on the validity of the claim by a Dr. Mizzi, who, however, is understood himself to be or to have been financially interested. The accuracy of the translation is by no means guaranteed, but Mr. Amery has not thought it necessary to incur the trouble and expense involved in having the translation checked in detail.

2. As you will observe, Mr. Amery has been advised that the present claim is one which cannot be substantiated, and he has accordingly caused the claimants to be informed that he is unable favourably to consider their application. A full discussion of the case as it presents itself to Mr. Amery will be found in the letters from this Department to the Foreign Office and the Board of Trade No. 20425/25 of the 28th May.* With respect to the question of the validity of the transfer of the concession from the original Turkish holders to Captain Bennett, attention is directed to the closing words of article 77 of the Treaty of Lausanne. In reply to the letters referred to above, both the Secretary of State for Foreign Affairs and the Board of Trade expressed their general concurrence with the arguments advanced therein. It will be observed that, in the letter from this Department No. 27969/25 of the 10th July to the claimants' solicitors, Messrs. Westbury, Preston and Stavridi, the latter were merely informed that His Majesty's Government did not recognise the concession or admit that their clients possessed any rights in respect thereof. It should be explained, however, that the matter was subsequently discussed at the Colonial Office with Sir John Stavridi, a partner in the firm of solicitors employed by the claimants, and full oral explanations were given to him of the grounds on which Mr. Amery had been advised to reject the claim.

3. It may be held that the question whether or not Messrs. Westbury, Preston and Stavridi's clients have had the concession actually assigned to them or merely hold an option to acquire it has a material bearing on the whole case. Mr. Amery, however, has no definite evidence on this point, and Sir J. Stavridi was inclined to be evasive when questioned thereon. Such information as is available tends, as will be seen from the attached correspondence, to the former view.

4. I am to add that, as the Crown Agents for the Colonies, acting on behalf of the Palestine Government and on instructions from the Secretary of State, had publicly

* Printed below.

Dead Sea
salts:
validity of
Turkish
pre-war
concession.



invited the submission on or before the 31st October of tenders for a concession to develop the mineral resources of the Dead Sea, it was suggested to Messrs. Westbury, Preston and Stavridi that their clients would be well advised to submit a tender themselves, and as will be observed from the later correspondence, viz., the letters from this Department of the 16th September and the 27th October, and the solicitors' reply, a tender has been deposited on behalf of Mr. Edwards and Major Henry on the understanding that their claim to rights in respect of the Turkish concession will not be in any way prejudiced thereby.

5. For the above reasons, Mr. Amery is anxious that, should the claimants' tender be found less acceptable than that of some other applicant for a concession, he may be furnished with your advice as to the correctness, or otherwise, of the position adopted by His Majesty's Government in the matter before a concession conflicting with the rights purported to be bestowed by the alleged concession is actually granted to the successful tenderer; and he would ask that, as the date by which tenders were to be received has already passed, you will be good enough to give the matter your early consideration.

6. Mr. Amery is further advised that it is of importance in the present case, and in any similar cases which may arise in the future, to know whether any tribunal, international or otherwise, exists before which it is at the moment open to the claimants themselves to bring their claim. I am accordingly to request you to furnish him with your views on this additional point.

I am, &c.

J. E. SHUCKBURGH.

*List of Papers.**

Captain Bennett to Colonial Office, April 19, 1923.
Colonial Office to Captain Bennett, May 9, 1923.
Captain Bennett to Colonial Office, June 7, 1923 (with enclosures).
Colonial Office to Captain Bennett, July 27, 1923.
Captain Bennett to Colonial Office, November 10, 1923.
Colonial Office to Foreign Office, December 4, 1923.
Foreign Office to Colonial Office, December 8, 1923.
Colonial Office to Captain Bennett, December 14, 1923.
Mr. Tillett to Mr. J. H. Thomas, July 22, 1924 (with enclosures).
Major Stewart to Colonial Office, October 18, 1924.
Colonial Office to Major Stewart, November 11, 1924.
Westbury, Preston and Stavridi to Colonial Office, May 5, 1925.
Colonial Office to Foreign Office and Board of Trade, May 28, 1925.†
Westbury, Preston and Stavridi to Colonial Office, May 29, 1925.
Board of Trade to Colonial Office, June 18, 1925.
Foreign Office to Colonial Office, June 19, 1925.
Colonial Office to Westbury, Preston and Stavridi, July 10, 1925.
Colonial Office to Westbury, Preston and Stavridi, September 16, 1925.
Westbury, Preston and Stavridi to Colonial Office, September 29, 1925.
Westbury, Preston and Stavridi to Colonial Office, October 8, 1925 (with enclosures).
Westbury, Preston and Stavridi to Colonial Office, October 24, 1925 (with enclosure).
Colonial Office to Westbury, Preston and Stavridi, October 27, 1925.
Westbury, Preston and Stavridi to Colonial Office, October 29, 1925.

Sir,

Downing Street, May 28, 1925.

WITH reference to—

- (1.) Your letter No. E. 11572/11572/65 of the 8th December, 1923.
- (2.) The letter from this Department No. 28744/23 of the 5th December, 1923.

(To both.) I am directed by Mr. Secretary Amery to transmit to you, to be laid before Mr. Secretary Chamberlain/the Board of Trade, the enclosed copies of further correspondence in regard to a claim advanced by certain British subjects to a concession in respect of the salts of the Dead Sea, alleged to have been granted by the Turkish Government in 1911 to certain Turkish nationals. I am also to enclose copies of the concession and of an opinion delivered by a Dr. Mizzi, who however is understood to be financially interested himself.

* Copies of these papers will be found in [E 7131/3118/65/1925].

† Printed below.

2. Mr. Amery is not disposed to recognise the claim as having any validity, and he is advised that the legal position may be stated shortly as follows:—

- (a.) That in the case of territory detached from a Power by reason of conquest, the succeeding Government, in the absence of express stipulations, has it in its discretion whether to recognise, or not to recognise, concessionary contracts entered into by the preceding Government.
- (b.) Further, or in the alternative, that where a treaty is made which contains provisions with respect to concessions, it is exclusive, and concession holders, whose concessions are not maintained by the terms of the treaty, cannot claim that nevertheless they are maintained by principles of international law.

3. As Mr. Chamberlain/the Board of Trade is of course aware, the question of concessions in Palestine and other parts of the pre-war Ottoman Empire is dealt with by the special Concessions Protocol attached to the Treaty of Lausanne. Under the terms of this protocol, concessionary contracts and subsequent agreements relating thereto duly entered into before the 29th October, 1914, between the Ottoman Government or any local authority, on the one hand, and nationals (including companies) of the contracting Powers, other than Turkey, on the other hand, are maintained. The present concession regarding the Dead Sea was granted in 1912 to Turkish nationals, and Mr. Amery is of the opinion that, if the advice given him as stated in the preceding paragraph in regard to the general position is correct, unless and until His Majesty's Government recognise the present concession, no property right or interest exists which could be claimed to be restored to its original owners under article 65 of the treaty. Further, he considers that the assignment of this concession without permission during the war to Captain Bennett, a British subject, does not render it any the less an Ottoman concession for the purpose of the treaty and of the rights of His Majesty's Government in the matter.

4. In addition, article 9 of the protocol provides that any State acquiring territory detached from Turkey under the treaty is fully subrogated as regards the rights and obligations of Turkey towards the nationals of the other contracting Powers, and companies in which the capital of the said Powers is predominant, who are beneficiaries under concessionary contracts entered into before the 29th October, 1914, with the Ottoman Government or any local Ottoman authority. In this connection also Mr. Amery is advised that the assignment of a concession originally granted to Turkish nationals without permission to British nationals after the beginning of hostilities with Turkey, precludes any claim of the sort under consideration, on the ground that "beneficiaries," correctly interpreted, can only refer to the original grantees.

5. I am also to observe in this connection that, in the case of German concessions in Tanganyika territory and elsewhere, His Majesty's Government have claimed to have the right to recognise or not, as they themselves decide, and in fact have only recognised concessions upon which substantial work has already been done. Only those, therefore, which His Majesty's Government have recognised have been treated as a property right and interest falling to be dealt with in accordance with the appropriate clauses of the Treaty of Versailles.

6. Mr. Amery would be glad to learn whether Mr. Chamberlain/the Board of Trade concurs in the foregoing statement of the position, and I am to request that an early answer may be furnished.

I am, &c.

H. YOUNG.

- (1) The Under-Secretary of State,
Foreign Office.
- (2) The Secretary,
Board of Trade.

Report.

In answer to the first question, we agree with the position taken up by the Government. In our opinion the claimants have no legal right against either His Majesty's Government or the Government of Palestine under the concession referred to for the reasons which are set out in the departmental correspondence submitted to us.

[16111]



2. We are not able to advise whether a claim would be entertained by the Courts of Palestine. We do not think that the claimants could successfully bring a claim before the English Courts. We do not think the claim falls within the jurisdiction of the Arbitral Tribunal set up by the Treaty of Lausanne. The only other International Tribunal would appear to be The Hague Court. That Court has already held in the Mavromatis case that it has jurisdiction under article 11 of the Mandate to consider claims that the mandatory is acting in breach of international obligations accepted by it. The Court has also held that these claims can only be brought before it by the Government of the party complaining. It would appear that in the present case the Government is the Commonwealth of Australia.

Whether or not on the true construction of the Covenant a Dominion could bring a claim against the mother country before The Hague Court is a matter of extreme difficulty; but we should not think it probable that the present Government of Australia would endeavour to assert such a right in the present case.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
January 13, 1926.

SWITZERLAND.

[W 2914/2914/43/1926]

No. 2^a.

[Colonial Office.]

[March 16, 1926.]

Colonial Office to the Law Officers of the Crown.

Assets of
the Basle
Mission
Trading
Society.

Gentlemen,

Downing Street, February 26, 1926.

I AM directed by Mr. Secretary Amery to invite your attention to the following matter:—

2. Prior to the war there was in the Gold Coast a missionary body called "The Basle Mission," which owned churches and schools and carried on missionary enterprise generally. The Head Office of the Mission was at Basle, Switzerland, but the Directorate was very pro-German, as was a large number of the missionaries in the Gold Coast. Associated with the Mission was a body called "The Basle Mission Trading Society," which appears to have been in the nature of a company registered at Basle.

3. One-fifth of its capital was held by the Mission, who could also nominate a certain number of Directors. By its constitution it had to pay 5 per cent. on its capital to the shareholders and to pay the balance of its profits to the Basle Mission for missionary work. The shares were held by persons of various nationality, about 6 per cent. being held in Germany and 11 per cent. by Germans living in Switzerland. The Society engaged in general trading operations in the Gold Coast, India, China and anywhere where the Mission operated, and its operations were very successful. Certain of the Directors and staff of the Society were Germans. On the outbreak of war most of the missionaries in the Gold Coast were interned and subsequently deported. The Trading Society, being staffed to some extent by Swiss nationals, carried on, the German employees being weeded out and interned.

4. So matters continued from 1914 to 1917, although representations were constantly being received to the effect that the Basle Mission was a thoroughly German body, but it is noteworthy that at this time a clear distinction was seldom drawn between the Mission and the Society. During 1917 the Society got rid of its German capital and prepared a new constitution, which was finally approved in November 1917. Under this the Society was not bound to the Basle Mission, but their surplus profits were to be devoted to "the furtherance of the Kingdom of God." A copy of the constitution is enclosed.

5. About this time the Governor of the Gold Coast recommended that the business of the Society there should be wound up on the ground of enemy association, and more particularly because some of the staff were alleged to have shown active pro-German sympathy. After some hesitation the Governor's proposal was accepted,

and the business was wound up under Chapters 190 and 193 of the Laws of the Gold Coast Colony, copies of which are enclosed.

6. Mr. Amery does not anticipate that any question will arise with regard to the winding up of the Society's business, since the concern was certainly of enemy association, but he is concerned about the validity in international law of the action which was taken subsequently with reference to the assets of the Society.

7. In the ordinary course of events under a liquidation, the shops, trading stations and other property of the Society would have been sold and the proceeds lodged with the Controller of Enemy Property; and at the end of the war, if the Society had turned out to be legally German, credited through the Clearing Office, or, if it had turned out to be legally Swiss, returned to it. Strong representations were, however, made to the Secretary of State that if the properties were sold they would fall into the hands of commercial firms who would, among other things, sell liquor in the Trading Society's shops, and further that the work of the Mission would be at an end and the goodwill irretrievably lost. It was suggested that the Society could be regarded as operating a Trust for the benefit of the Basle Mission and that its assets could be regarded as impressed with that Trust, and that a proper course would be to pay to the shareholders of the Society the amount of their holdings and to convey the rest of the assets to Trustees to perpetuate the Trust. The argument as to the propriety of this course is conveniently stated in the note of the 11th February, 1919, from the Foreign Office to the Swiss Minister, of which a copy is enclosed.

8. This policy was eventually carried out. A company called "The Commonwealth Trust" was formed for the purpose of carrying on the business of the Trading Society in the Gold Coast, and the necessary steps were taken to complete the arrangements by the passing of Ordinance No. 40 of 1918 (Chapter 69), and the execution of a Deed of Trust. Copies of the Memorandum and Articles of the Commonwealth Trust (Limited), of the Trust Deed and of Chapter 69 of the Laws of the Gold Coast are enclosed.

9. The Society has never accepted the position, and the case which it makes upon the matter will be found in the volume of printed correspondence which is enclosed.

10. There is some reason to suppose that the whole question may be raised by the Swiss Government, who would, doubtless, ask for arbitration. Mr. Amery is not at all anxious to disturb the existing position if the action which has been taken can be defended under the provisions of international law. Otherwise it is proposed to try to effect some sort of settlement, but no settlement would be possible which did not involve the dispossession of the Commonwealth Trust. I am to ask, therefore, that you will be so good as to advise whether the action taken under Chapter 69 of the Laws of the Gold Coast and the Trust Deeds with respect to the assets of the Basle Mission Trading Society is justifiable under international law, and could be defended with a reasonable prospect of success before an international tribunal.

I am, &c.

C. STRACHEY.

List of Papers.

- (A.) Constitution, of 1917, of Basle Mission Trading Society.
- (B.) Laws of Gold Coast Colony, Chapters 190 and 193.
- (C.) Foreign Office to Swiss Minister in London, February 11, 1919.
- (D.) Memorandum and Articles of Association of the Commonwealth Trust (Limited).
- (E.) Deed of Trust of the Commonwealth Trust (Limited).
- (F.) Laws of Gold Coast Colony, Chapter 69.
- (G.) Printed correspondence with Basle Mission Trading Society.

Report.

In our opinion international law in the sense in which the expression is used in the present instructions is really no more than the customary usage which prevails between sovereign States, and has no legal sanction. It would be necessary in any arbitration to define with precision the question submitted to any tribunal and the rules by which it was to be guided.

In the case under consideration the Governor of the Gold Coast has in effect confiscated the property of a Swiss Company and handed it over to another person. It is not in accordance with international usage to seize property of a national of a



1926

12

SWITZERLAND.

friendly State without making full compensation to the owner; and the fact that the owner had bound himself to apply some part of his property to charitable purposes does not, in our opinion, justify a State in seizing that property and giving it to someone else to use for one of the charitable purposes in question.

Our answer to the question propounded is, therefore, in the negative.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

*Law Officers' Department,
March 16, 1926.*



1927

[This Document is the Property of His Britannic Majesty's Government.]

Printed for the use of the Foreign Office.

CONFIDENTIAL

(13403)

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1927.



(ii)

LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 4^a, &c.

GENERAL.

No.		Date.	SUBJECT.	Page.
1	Law Officers ..	Mar. 10, 1927	Foreign Jurisdiction (Military Forces) Order in Council, 1927	1

GERMANY.

2	Law Officers ..	Aug. 11, 1927	Participation of British shipping lines in German emigrant traffic to Canada	2
---	-----------------	---------------	--	---

LEAGUE OF NATIONS.

3	Attorney-General ..	Dec. 22, 1927	Meaning of "arbitration" and scope of arbitration treaties	4
---	---------------------	---------------	--	---

ROUMANIA.

4	Law Officers ..	Dec. 1, 1927	Standard Oil Company's claim against His Majesty's Government in respect of the destruction of Roumanian oil wells in 1916	7
---	-----------------	--------------	--	---

TURKEY.

4 ^a	Law Officers .. [Treasury Solicitor]	Oct. 17, 1927	Claim of the Imperial Ottoman Bagdad Railway Company against His Majesty's Government in respect of the concession granted by Turkey in 1903	12
----------------	---	---------------	--	----

(iii)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1927.

The figures refer to the numbers of the pages.

Cases cited are indicated by italics.

ANG—DEU.

A.

Anglo-Turkish Trust Company (Limited), 14, 15.
Arbitration: meaning of, 4-6.
" treaties; scope of, 4-6.
" right of United States to claim, in connection with the Standard Oil Company's claim against Great Britain, 7-12.
" of question of rights of shareholders of foreign company to compensation by a third State, 7-12.
Army. *See* Military forces.

B.

Bagdad Railway Company: claim against His Majesty's Government, 12-17.
Banca commerciale italiana, 14.

C.

Canada: German emigrant traffic to; participation of British shipping lines, 2-4.
Canadian Pacific Railway Company, 2.
Certificates. *See* Passenger certificates.
Claim: of Standard Oil Company of New Jersey for destruction of Roumanian oil wells, 7-12, 15.
" of Imperial Ottoman Bagdad Railway Company against His Majesty's Government, 12-17.
" right of a State to support claim of foreign company against a third State, 7-12, 15.
Companies: foreign; right of a State to support claims of, against a third State, 7-12, 15.
" foreign; ownership of property of, by shareholders possessing a controlling interest, 7-12.
Compensation: for property destroyed to prevent its falling into enemy's hands, 7-12.
Concession: granted to Imperial Ottoman Bagdad Railway Company in 1913; claim against His Majesty's Government, 12-17.
" Turkish pre-war, relating to Dead Sea salts, 16.
Courts: consular; jurisdiction over military forces Order in Council, 1, 2.
Cunard Steamship Company (Limited), 2.

D.

Dead Sea: validity of Turkish pre-war concession for exploitation of mineral salts, 16.
Deutsche amerikanische Petroleum Gesellschaft, 9, 10.
Deutsche Bank, 13, 16.

EDW—PRO.

E.

Edwards, Mr. W. M., 16.
Emigration: participation of British shipping lines in German emigrant traffic to Canada and United States, 2-4.

G.

Germany: emigrant traffic to Canada and United States; participation of British shipping lines, 2-4.
Griffiths, Colonel N., 8, 11.

H.

Henry, Major J. D., 16.

I.

Imperial Ottoman Bagdad Railway Company: claim against His Majesty's Government, 12-17.
Iraq: claim of Imperial Ottoman Bagdad Railway Company against His Majesty's Government, 12-17.

J.

Jurisdiction: of consular courts over military forces: Order in Council, 1, 2.
" British consular courts in China, over Shanghai Defence Force, 1, 2.

M.

Military forces: jurisdiction of consular courts, 1, 2.

O.

Oil wells: destruction of. *See* Roumania.
Order in Council: Foreign jurisdiction (Military forces), 1, 2.
Ottoman Anatolian Railway Company, 12, 13.
Ottoman Bank, 14-17.

P.

Passenger certificates: German; proposed British threat to discontinue recognition of, 2-4.
Property: destroyed to prevent its falling into enemy's hands; liability of destroyer to pay compensation, 7-12.
" of foreign companies: rights of ownership by shareholders possessing controlling interest, 7-12.



1927

(iv)

RAI—TRE.

R.

Railway: Bagdad; claim of Bagdad Railway Company against His Majesty's Government, 12-17.
 Romana Americana: right of United States to support claim of, against Great Britain, 7-12, 15.
 Roumania: destruction of oil wells in 1916; Standard Oil Company's claim against Great Britain, 7-12, 15.
 " Blackett-Titulesco Agreement, 1920, respecting oil wells, 7.
 Roumanian Consolidated Oil-fields, 8, 9.
 Royal Mail Steam Packet Company, 2.

S.

Shanghai Defence Force: jurisdiction of British consular courts, 1, 2.
 Shipping: participation of British lines in German emigrant traffic to Canada and United States, 2-4.
 Standard Oil Company of New Jersey: claim against Great Britain for destruction of Roumanian oil wells in 1916, 7-12, 15.
 Survey. *See* Vessels.
 Swiss Bank Corporation, 14.

T.

Treaties: arbitration; scope of, 4-6.
 Treaty: Anglo-German Commercial, 1924; right of British shipping lines to participate in German emigrant traffic to Canada and United States, 2-4.

TRE—WHI.

T.--(cont.)

Treaty: Anglo-German Commercial, 1924; right of His Majesty's Government to discontinue recognition of German passenger certificates and exemption of German vessels from survey, 2-4.
 Treaty of Peace (Germany): article 327 and participation of British shipping lines in German emigrant traffic to Canada and United States, 2-4.
 " (Turkey): position of Bagdad Railway Company's concession as regards Irak, 12-17.
 Treaty of Lausanne. *See* Treaty of Peace (Turkey).
 Treaty of Versailles. *See* Treaty of Peace (Germany).

U.

United States: German emigrant traffic to; participation of British shipping lines, 2-4.

V.

Vessels: German; proposed British threat to discontinue exemption of, from Board of Trade survey, 2-4.

W.

White Star Line (Limited), 2.

Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1927.

GENERAL.

[F 2591/864/10/1927]

No. 1.

[March 22, 1927.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 10, 1927.

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to request that you will take into your consideration the attached papers and furnish him with your opinion on the question of the jurisdiction over the members of the Shanghai Defence Force to be exercised by the courts established in China under the China Order in Council, 1925 (Paper A).

2. Sir Austen Chamberlain has been in communication with the other Departments concerned, and a telegram, of which a copy is enclosed (Paper B), has been despatched to the Crown Advocate at Shanghai. The opinion of Lord Finlay,* to which reference is made in that telegram, was given in reply to a reference by the War Office on the 30th June, 1902, and a copy of this opinion, together with the opinion of Lord Carson,* then Solicitor-General, is enclosed for convenience of reference (Paper C).

3. In their letter concurring in the despatch of this telegram (Paper D), the Army Council asked that the question of amending the China Order in Council, 1925, to exempt explicitly the members of His Majesty's forces from the jurisdiction of the courts set up by that Order should be considered, and this has now been done in consultation with the Departments concerned. The Army Council only desire that the jurisdiction of the consular courts should be excluded in cases which can be dealt with by court-martial, but their view is understood to be that, while the instructions already sent should prevent proceedings being instituted against members of the force by the Crown in cases where this would be undesirable, the possibility of proceedings being instituted by private prosecutors cannot be ignored, and that, while it is to be hoped that the court would take the view of its jurisdiction indicated in Lord Finlay's opinion, it is undesirable that in existing circumstances in China such proceedings should be instituted before the consular courts at all, and that it is therefore very desirable that the legal position should be placed beyond doubt. Sir Austen Chamberlain is prepared to accept this view, provided that the necessary Order in Council is not confined in its operation to China alone, and subject to its terms being approved by you.

4. The draft Order in Council, of which a copy is enclosed (Paper E), has been prepared with this object. You will observe (1) that it applies to all countries where courts are established by Orders in Council for the administration of which the Foreign Office is responsible; (2) that it leaves the jurisdiction of the courts in civil matters unaffected; (3) that it applies only to persons who are on active service

Foreign
Jurisdiction
(Military
Forces)
Order in
Council,
1927.

* Confidential 8022, p. 42.



1927

2

GERMANY.

within the meaning of the Army Act. One result of the last limitation is that the Order would not at present have any effect in Egypt, which is the only other country concerned where British forces are permanently stationed, since the troops in Egypt are held not to be on active service.

5. Sir Austen Chamberlain would therefore be obliged if you would favour him with your opinion as to whether the terms of the draft Order in Council are fit and proper to be submitted to His Majesty in Council. Inasmuch as it is obviously desirable that any legislation which it may be decided to enact should be passed as soon as possible, Sir Austen Chamberlain would be grateful for an early reply to this letter.

I have, &c.
GEORGE MOUNSEY.

List of Papers.

- (A.) China Order in Council, 1925. [Confidential 12770.*]
(B.) Telegram No. 23 to Shanghai, February 12, 1927. [F 1974/864/10]
(C.) Law Officers' opinions, June 30, 1902. [Confidential 8022, p. 42.]
(D.) War Office letter, February 11, 1927. [F 864/864/10.]
(E.) Draft Foreign Jurisdiction (Military Forces) Order in Council, 1927. [F 1974/864/10.]

Report.

In our opinion the terms of the draft Order in Council^a are fit and proper to be submitted to His Majesty in Council.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
March 22, 1927.

GERMANY.

[C 7293/3635/18/1927]

No. 2.

[August 31, 1927.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, August 11, 1927.

I HAVE the honour, by direction of Secretary Sir Austen Chamberlain, to transmit to you the papers noted in the attached list and to request the favour of your advice in the following matter.

2. Under a German law of the 9th June, 1927, all ships using German harbours for the purpose of carrying emigrants must be provided with a licence. A controversy with the German Government over the grant to British shipping companies of such licences has continued more or less continuously ever since the conclusion of peace.

3. As a result of official representations, the White Star, Cunard and Royal Mail Steam Packet Companies have been granted licences to engage in the emigration traffic from Germany to the United States, and the Canadian Pacific Railway Company have received a licence to engage in the traffic from Germany to Canada. But the first three lines have been refused licences to engage in the Canadian traffic, and the Canadian Pacific Railway Company has similarly been refused a licence for the American traffic, while licences for other British lines have been refused. The reason given for such refusal is that there is no need of further services, and the German Government state that, for the same reason, other applications, including those of German lines, have been refused. A translation of the last German note on the subject is enclosed (Paper A).

* The text of the Order in Council is contained in the "London Gazette" of April 26, 1927 (Confidential No. 13158*).

Participation of British shipping lines in German emigrant traffic to Canada.

GERMANY.

3

4. The question whether it could be successfully contended that the German action in refusing these licences involves a violation either of article 1 of the Anglo-German Commercial Treaty of the 2nd December, 1924, of article 6 of the Protocol of the same date (Paper B), or of article 327 of the Treaty of Versailles, has formed the subject of correspondence between the Board of Trade and the Foreign Office (Papers C and D). It will be seen that, apart from the difficulty arising from the unwillingness of the Board of Trade to submit to arbitration any question as to the interpretation of the Protocol of the 2nd December, 1924, Sir Austen Chamberlain was of opinion that under none of the treaty provisions in question was it possible to claim anything more than national treatment, and that it did not seem possible in the circumstances of the case to establish that Germany was not, in fact, granting such treatment to British vessels.

5. In these circumstances it has been suggested that pressure might be brought to bear on the German Government by means of a threat to discontinue the present arrangement under which German passenger certificates are recognised by the Board of Trade and German passenger vessels are exempted from the Board of Trade survey, in accordance with the provisions of section 363 of "The Merchant Shipping Act, 1894." The question, however, at once arises whether such action is possible in view of the provisions of articles 3, 18 and 25 of the Anglo-German Commercial Treaty. This question is fully discussed in the enclosed memorandum prepared by the Board of Trade (Paper E). A copy of your opinion of the 10th July, 1925,* which is referred to in that memorandum, is enclosed for convenience of reference (Paper F).

6. Sir Austen Chamberlain is advised that the proposed action would be inconsistent with the provisions of article 25 of the Commercial Treaty. The reasons for this view are set out in the enclosed extract from a letter from the Second Legal Adviser to this Department to Sir Sydney Chapman (Paper G). Inasmuch as the German Government would be entitled to require the point to be submitted to arbitration under article 30 of the treaty, it is clear that the proposed action could not be taken unless it were considered that there was at least a reasonable prospect of success before the Permanent Court of International Justice.

7. In view, however, of the importance of the matter to the British shipping interests concerned, it is desired to submit the question to you, and Sir Austen Chamberlain would therefore be obliged if you would take the enclosed papers into your consideration and would favour him with your advice on the following points:—

- (i.) Whether it can be successfully maintained that the action of the German Government in refusing licences to certain British lines to engage in the emigration traffic to the United States and Canada constitutes a violation either of any provisions of the Anglo-German Commercial Treaty and Protocol of the 2nd December, 1924, or of article 327 of the Treaty of Versailles.
- (ii.) Whether, in view of the provisions of articles 3, 18 and 25 of the Commercial Treaty, it is open to His Majesty's Government to discontinue the present arrangement under which the German passenger certificate is recognised by the Board of Trade and German passenger vessels are exempted from the Board of Trade survey.

8. Sir Austen Chamberlain would also be grateful for any observations of a general nature which you may be good enough to offer.

I have, &c.
C. HOWARD SMITH.

List of Papers.

- (A.) German Government to British Ambassador, Berlin, April 6, 1926. [C 4641/818/18/1926.]
(B.) Anglo-German Treaty of Commerce and Navigation, 1924. [Treaty 1793.]
(C.) Board of Trade to Foreign Office, July 8, 1926. [C 7714/818/18/1926.]
(D.) Foreign Office to Board of Trade, July 27, 1926. [C 7714/818/18/1926.]
(E.) Board of Trade Memorandum. [C 6076/3635/18/1927.]
(F.) Law Officers to Board of Trade, July 10, 1925. [Confidential, 13004, p. 20.]
(G.) Mr. Malkin to Sir Sydney Chapman, June 27, 1927 (extract). [C 5056/3635/18/1927.]

* Confidential 13004, p. 20.

[17808]

B 2

*Report.*

1. We answer the first question in the negative. As regards the Treaty of Versailles, we agree with the view set out in the Foreign Office letter of the 27th July, 1926. As regards the Commercial Treaty and Protocol, we are of opinion that if it could be established that, under guise of a licensing system, Germany was, in fact, differentiating between British and German vessels, and was using the power of license to exclude British vessels from the emigration trade between Germany and North America, there would be a breach both of article 1 of the treaty and of clause 6 of the protocol. But the facts do not establish any such allegation; and it cannot be said that either the treaty or the protocol entitle British ships to licences whenever they desire them.

2. We answer the second question in the negative. In our opinion the proposed action would be inconsistent with article 25 of the treaty.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

*Law Officers' Department,
August 31, 1927.*

LEAGUE OF NATIONS.

[W 549/28/98/1928]

No. 3.

[December 22, 1927]

Minute by Sir C. Hurst.

Meaning of
"arbitra-
tion" and
scope of
arbitration
treaties.

A MEMORANDUM has now to be prepared for submission to the League of Nations, giving the views of His Majesty's Government as to the measures which the League might take to promote treaties of arbitration, and to co-ordinate and generalise them.

For this purpose a study of existing arbitration treaties is recommended by the Security Commission of the League, showing the elements which are universal to them all—as upon these elements a model convention might be based—and also a study of the scheme which Dr. Nansen put forward at Geneva in 1927 for a draft optional convention for the obligatory arbitration of all disputes.

2. Before these studies can be undertaken, there is one point on which the policy of His Majesty's Government must be indicated. It is one on which, so far as I know, that policy has not yet been declared, and it is useless to prepare the necessary memorandum until it has been so declared.

3. What is the meaning which His Majesty's Government intend to attribute to the word "arbitration" in this connexion? Is it intended to be synonymous with "compulsory method of peaceful settlement" irrespective of the nature of the dispute? Or is it intended to apply only to disputes which lend themselves to decision by the application of a rule of law, disputes which are termed "justiciable," or, in the more accurate language of the Treaty of Locarno, disputes where the parties "se contestent réciproquement un droit"?

4. The above is much more than a question of words; it is one of first-class importance. The reason why it is so necessary to know exactly the sense to be given to the word "arbitration" is that the Covenant* uses the word with the later

* Article 13.—"The members of the League agree that, whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement."

"Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement."

"For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them."

"The members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto."

meaning given above, and the protocol uses it with the earlier meaning. The protocol makes elaborate provision for the settlement by arbitration of disputes about which the Council, when handling a dispute under article 15 of the Covenant, fails to arrive at a unanimous report. The Council only deals with disputes under article 15 when they are not referred to arbitration (using the word in the Covenant sense). This may be for either of two reasons: (a) that the dispute does not lend itself to decision by the application of a rule of law, *i.e.*, is not justiciable; (b) that the parties refuse to submit the case to arbitration even though the dispute is justiciable, but prefer to have it dealt with as a political issue by the Council. Consequently, a dispute can go to arbitration in the protocol sense of the word which does not, and cannot, go to arbitration in the Covenant sense of the word.

5. In the industrial and commercial life of every nation the term "arbitration" is habitually applied to the settlement of disputes which are not justiciable in their nature. A dispute as to the amount of the wages of the guards on the London and North-Eastern Railway, or as to the correct price of a piece of land, are not matters which can be settled by the application of a rule of law, but they readily lend themselves to the decision of an arbitrator.

Equally, in the international world there is no theoretical reason why a State should not agree to allow an arbitration tribunal to settle a question rather than go to war, even if the question is purely non-justiciable in character and arises out of the clash of political interests.

6. The importance of the question both from the point of view of security and of disarmament is this: If a dispute occurs between two States, it must be settled somehow. It is only very rarely that a dispute is of such a nature that it can drag on unsettled indefinitely. In general, some solution must be found for a dispute; if a solution by peaceful means is not found, it will be solved by war.

7. When a State refuses to pledge itself in advance to agree to submit a dispute to solution by pacific means, other States are entitled to assume that it reserves to itself the right to seek a solution of that dispute by war, and consequently, feeling that they may each be the State with whom solution may be sought by war, are entitled, in determining the extent to which their security would be imperilled by recourse to war in such an eventuality, to determine also the extent to which they can disarm.

8. Under the Covenant, resort to war is legitimate whenever the Council, acting under article 15, fails to arrive at a unanimous decision. In measuring the extent to which disarmament is possible for a member of the League, that member is bound to form its estimate of the extent to which its security would be imperilled if war ensued as the result of the Council failing to achieve unanimity in handling a dispute in which it was itself a party.

9. In the eyes of France, the possibility of the Council not being unanimous in a dispute in which France was a party is very great. The Council is a political body composed in the main of the representatives of continental States, and the representatives of continental States do not approach their duties in the Council in the spirit in which an Englishman approaches it. France has ever before her eyes the picture of 1914, and considers how the Council machine would have functioned in the crisis preceding the war. She sees that Germany would have backed Austria unhesitatingly in the latter's dispute with Serbia, and therefore the Council would necessarily have been divided; war would then have ensued without any violation of the provisions of the Covenant. If France wants confirmation of her views, she has only to think of Mussolini's instructions to the Italian member of the Council to support Hungary in any event in the Optants dispute at Geneva last September.

10. No French statesman in these circumstances dare regard the Covenant as it stands as a sufficient protection against war. Such interest as there may be in the Protocol of 1924 in France is wholly due to the feeling that to some extent it limited the cases in which war was legitimate under the Covenant; it did so by providing machinery for ensuring a peaceful settlement of a dispute about which the Council could not achieve a unanimous report, and the method was by sending the dispute in such a case to a committee of arbitrators.

11. The attitude of His Majesty's Government has been made clear as to the compulsory arbitration of justiciable disputes, cases which must come before a court and be settled by the application of a rule of law, but has never been defined on the question of compulsorily referring to some peaceful mode of settlement disputes about which the Council cannot achieve unanimity.

12. Wars do not arise out of justiciable disputes, and consequently a refusal



to accept the system of compulsory arbitration for such disputes has no very profound effect on disarmament or security; but with disputes arising out of the clash of political interests it is a different matter. It is out of that class of disputes that wars arise, and if His Majesty's Government are determined to refuse to accept any compulsory system of solution by peaceful means for political disputes where the Council cannot agree, it will be very difficult for Geneva to make any progress in the direction of security or of disarmament.

13. British opposition to the protocol has been connected almost entirely with the "sanctions" provisions of that instrument, and has been occasioned by the fear that we should become involved in war with the United States of America through having to enforce the cessation of American trading with the recalcitrant State. It should be quite possible to separate this part of the protocol system from the part dealing with the machinery for ensuring a settlement by peaceful means of a dispute about which the Council cannot agree.

14. The suggestion that the continental nations should agree on some such system among themselves and that Great Britain should stand aloof is not attractive to the continental nations. Without doubt, the inhabitants of this country rightly regard themselves as the most pacific of peoples. Foreign nations take a somewhat different view. They regard Great Britain as a country which geographically, commercially, and even at times politically, lies across their path everywhere, and they regard disputes with Great Britain arising from the clash of political interests as by no means unlikely. The possibility of those disputes being solved by war if the Council cannot agree, and if Great Britain refuses to agree in advance to some method of peaceful solution, is not one which they can safely ignore.

15. Are His Majesty's Government prepared to accept some system under which, where the Council cannot agree, a political dispute would necessarily be submitted to some organ for peaceful settlement and war cease to be legitimate under the Covenant?

C. J. B. H.

December 19, 1927.

Opinion of the Attorney-General.

I think the memorandum to be prepared should deal with treaties of arbitration properly so called, not with all compulsory methods of peaceful settlement. In fact, so far as this country is concerned, arbitration treaties are usually confined to justiciable disputes.

In my opinion, the compulsory settlement of political disputes to an outside body for decision is the very thing which the Empire could not accept, for the reasons embodied in the recent decision of the Cabinet upon the recommendation of the Cabinet Committee, and it is no use recommending to other nations what we are not willing to do ourselves.

I think no harm would be done by the committee of the League of Nations exploring the peaceful settlement of political disputes; but I do not think that we can take a lead in advocating any form of compulsory settlement.

D. M. H.

Law Officers' Department,
December 22, 1927.

ROUMANIA.

[C 9737/4025/37/1927]

No. 4.

[December 1, 1927.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, October 13, 1927.

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to request the favour of a further opinion in the matter of the claim which is being preferred against His Majesty's Government by the United States Government on behalf of the Standard Oil Company of New Jersey in respect of the destruction in 1916 of the oil properties of the Romano-Americana Company—a Roumanian corporation, the totality of the shares of which are owned by the Standard Oil Company.

Standard Oil Company's claim against His Majesty's Government in respect of the destruction of Roumanian oil wells in 1916.

2. In a note of the 16th February, 1925, the United States Government demanded arbitration of the claim, and your observations on this demand were sought in a letter from this Department of the 20th July, 1925. In your reply of the 4th November, 1925,* you stated that, in your opinion, His Majesty's Government would be justified (a) in refusing arbitration of the claim itself, and (b) in resisting, without recourse to arbitration, any effort of the United States Government to assert a right to interpose on behalf of a Roumanian corporation. You added, however, that, should it be the intention of the United States Government to assert a right to compensation in the American shareholders in the Roumanian corporation, as distinct from that corporation itself, that right might be a proper subject for arbitration. Copy of this correspondence is enclosed herewith for convenience of reference (Papers A and B).

3. The questions on which Sir Austen Chamberlain is now anxious to obtain your advice arise out of a further note (Paper F) from the United States Government of the 2nd May of the present year, in which they renew their demand for arbitration of the claim failing some indication of willingness on the part of His Majesty's Government to effect a cash settlement direct with the Standard Oil Company of New Jersey. It is clear from this note that the United States Government now base their support of the Standard Oil Company mainly on a right to compensation which is alleged to be possessed by shareholders of a foreign corporation in cases where the property of the corporation has been destroyed by a third party to prevent its falling into the hands of an enemy. It will be necessary to revert to this allegation later in the present letter, but before doing so some mention must be made of the main developments that have occurred in this case during the past two years.

4. When this matter was referred to you in 1925, the Roumanian Government had taken no effective steps to implement the general assurances given in the Blackett-Titulesco Agreement of 1920, whereby they undertook to compensate the individual companies. At that time, the companies whose property had been destroyed in 1916 had received no compensation whatever. In October 1925, however, an agreement was reached between His Majesty's Government and the Roumanian Government for the funding of the Roumanian war debt to Great Britain, an essential feature of which was a subsidiary undertaking by Roumania to compensate the individual companies concerned and to negotiate direct with them the actual terms of payment. The terms of this agreement will be found in Paper C enclosed herewith. His Majesty's Government, for their part, undertook to cancel from the Roumanian war debt to Great Britain a sum equivalent to half the total assessed damage done to the Roumanian oil industry in 1916, thus carrying out their share of the pledges given to the Roumanian Government by the British and French (and Russian) Governments in December 1916 at the time when those Governments were pressing the Roumanian Government to destroy the oil properties. It will be noted that the convention of November 1926 provides for the payment of only half the total sums due to the companies, who will receive the remaining half when the Roumanian Government have made an arrangement with the French Government similar to that made with His Majesty's Government in October 1925 (see Paper C).



5. After protracted negotiations between the representatives of the large majority of interested companies on the one hand, and the Roumanian Government on the other, a convention was signed in November 1926 whereby a scale of annuities to be paid to the companies by the Roumanian Government was laid down. The terms of this convention will be found in Paper D. The first payments to the companies acceding to this convention were made in December 1926, and it should be noted in passing that all the companies affected—with the exception of the Standard Oil Company—have either definitely acceded to this convention or are in process of doing so. The Standard Oil Company have so far refused on the ground that the United States Government are claiming compensation on their behalf against His Majesty's Government and not the Roumanian Government.

6. After careful consideration had been given by the Departments of His Majesty's Government concerned to your report of the 4th November, 1925, a note was addressed to the United States Government on the 15th April, 1926, the text of which will be found in Paper E. In this note, the United States Government were again informed that His Majesty's Government could accept no responsibility whatever for the acts of destruction which were carried out with the approval and authority of the Roumanian Government and had received the ratification of that Government finally in the arrangement which had been reached for the compensation of the companies. His Majesty's Government also contested the right of the United States Government to interpose on behalf of a Roumanian corporation.

7. This note provoked a reply from the United States Government dated the 2nd May, 1927, the text of which will be found in Paper F, and it is in regard to the points raised in this note that Sir Austen Chamberlain requests the favour of your opinion. The note argues that from the evidence produced in the British courts in the Roumanian Consolidated Oil-fields case of 1920, His Majesty's Government were the actual destroyers of the property of the Romano-Americana, irrespective of the wishes of the Roumanian Government and in opposition to them, and that the ratification of the acts of destruction by the Roumanian Government in no way relieves His Majesty's Government, in their capacity of actual destroyers, from the obligation to compensate. It also sets out to prove by extensive quotations from authoritative sources that when, as in the present case, property is destroyed to prevent its falling into enemy hands, the destroyer (in this case His Majesty's Government) is burdened with an obligation to compensate the owners of the property. Further, the note asserts the claim that the United States Government have the right to intervene on behalf of the United States shareholders of the Romano-Americana Company, even though the latter is a Roumanian company. Lastly, the United States Government "insists" that if His Majesty's Government are not prepared to discuss the amount of indemnity to be paid, the question of the liability of His Majesty's Government in the premises and, if liable, the question of the amount of indemnity to be paid should be submitted to arbitration in accordance with the Arbitration Treaty of 1908 between His Majesty's Government and the United States Government.

8. The contentions raised in this note fall naturally into two categories: (a) questions regarding the facts of destruction, and (b) legal questions. Sir Austen Chamberlain considers that whatever may have been the facts regarding the destruction of the Roumanian Consolidated Oil-fields Company's property, they have no relation whatever to the facts of the destruction of the Romano-Americana's property. In the latter case, the destruction took place at a later date and in a different locality, and there is evidence to show that by the time Colonel Norton Griffiths took effective steps to destroy the Romano-Americana's property, he was fully authorised by the Roumanian executive authorities to do so. The text of a Roumanian army order of the 29th November, 1916 (new style), authorising the destruction of the wells, will be found attached to the record of the facts of destruction in Paper G, and it is to be noted that this army order was in the hands of the destroying commission—of which Colonel Norton Griffiths was no more than a member—some hours before the destruction of the property of the Romano-Americana Company was commenced. Sir Austen Chamberlain considers that whether or not it is eventually decided to refuse arbitration it is essential that His Majesty's Government, in order to maintain their fundamental argument that any claim for compensation lies against the Roumanian Government and not against His Majesty's Government, should (1) furnish the United States Government with a full statement of the facts of destruction, supported by all the material documents; (2) show that there is no analogy between the destruction of the Roumanian

Consolidated Oil-fields property and that of the Romano-Americana Company, and (3) refute the United States Government's contention that, notwithstanding the authorisation and ratification of the acts of destruction by the Roumanian Government, those acts remain primarily the acts of His Majesty's Government. A Departmental memorandum on the facts of destruction and the differences between the cases of the Consolidated Oil-fields and of the Romano-Americana Company (together with the comments of the Treasury solicitor thereon) will be found in Paper G, and Sir Austen Chamberlain would be glad to learn to what extent, in your view, it would be advisable to quote therefrom in replying to the United States note of the 2nd May, 1927. As regards the contention mentioned under (3) above, Sir Austen Chamberlain would invite your opinion on the following questions: Do the authorisation and ratification of the acts of destruction by the Roumanian Government make them legally the acts of the Roumanian Government? If so, what reliable authorities could be quoted to support this contention, and failing such authorities, how best can the contention of the United States Government in this connexion be refuted?

9. The next question concerns the arguments used in the United States Government's note as proof of the duty of a belligerent to compensate owners of property destroyed in order to prevent its falling into the hands of the enemy. At the present stage this discussion appears somewhat irrelevant, and, subject to your views, I am to suggest that it is hardly necessary to follow the United States Government in their arguments on this point.

10. There still remains the assertion, now definitely made for the first time by the United States Government, that they possess the right to intervene on behalf of the United States shareholders of a Roumanian company. In this connection, your attention is invited to the terms of a judgment recently given by an arbitral court appointed by the Reparation Commission. The text of this judgment will be found in Paper H. The case is briefly as follows: In 1917, when a declaration of war by the United States Government against Germany grew imminent, the Standard Oil Company became anxious to avoid the confiscation by the German Government of nine of their oil tankers. They therefore arranged that their German subsidiary company—the Deutsche Amerikanische Petroleum-Gesellschaft (known as the D.A.P.G.)—should take them over. The vessels from that time on carried the German flag. Under the reparation clauses of the Treaty of Versailles they were handed over to the Reparation Commission by the German Government when the treaty came into force. The Standard Oil Company protested against this step on the ground that they owned practically all the shares of the Deutsche Amerikanische Petroleum-Gesellschaft, and that they enjoyed "beneficial ownership" of the tankers themselves. In other words, they claimed that the vessels were the property of the United States citizens, in the same way as they now claim that the property of the Romano-Americana Company is the property of United States citizens. A special arbitral court was set up to judge the case, and in August 1926 the court decided that, even though the Standard Oil Company did own the majority of the shares in the Deutsche Amerikanische Petroleum-Gesellschaft, this gave them neither beneficial nor other ownership of the property of the Deutsche Amerikanische Petroleum-Gesellschaft. The vessels were therefore handed over to the Reparation Commission.

11. I am to enquire whether, in view of this judgment, you still adhere to the view stated in your opinion of the 4th November, 1925 (Paper B), to the effect that a claim by the United States Government to assert a right in the shareholders of the Roumanian company to recover compensation might be a proper subject of arbitration and one which the United States Government could properly put forward, or whether you now consider that the judgment above mentioned has furnished His Majesty's Government with adequate legal grounds for enabling them, notwithstanding the Arbitration Treaty of 1908 between His Majesty's Government and the United States Government, finally and definitely to refuse the United States Government's demand for arbitration on the ground that the preliminary question whether the United States Government are entitled to intervene on behalf of the United States shareholders of a foreign company has already been decided in the negative. If you should still adhere to your view of the 4th November, 1925, Sir Austen Chamberlain would be glad to know whether it would nevertheless still be open to His Majesty's Government to refuse arbitration on other grounds, e.g., that the claimants have not exhausted their legal remedies in this country, or that the United States Government



are not entitled to arbitration under the treaty of 1908 because the claim concerns also the interests of parties other than His Majesty's Government.

12. To sum up, the questions on which Sir Austen Chamberlain would desire to be furnished with your views are the following:—

- (1.) In replying to the United States note of the 2nd May, 1927, to what extent would it be advisable, in setting forth the facts of destruction of the property of the Romano-Americana Company, to quote from the memorandum in Paper G?
- (2.) Do the authorisation and ratification of the acts of destruction by the Roumanian Government make them legally the acts of the Roumanian Government. If so, what legal authorities could be quoted in support of this contention, and, failing such authorities, how best could the contention of the United States Government in this matter be refuted?
- (3.) Is it necessary in the present circumstances to reply to the arguments used in the United States note as proof of the duty of the belligerent to compensate the owners of property destroyed in order to prevent its falling into the hands of an enemy?
- (4.) In view of the recent judgment in the case of the claim of the Standard Oil Company to prevent the handing over to the Reparation Commission of certain "tankers" owned by the Deutsche Amerikanische Petroleum-Gesellschaft, do you still adhere to the view set forth in your opinion of the 4th November, 1925, to the effect that a claim by the United States Government to assert a right in the shareholders of a Roumanian company to recover compensation might be a proper subject of arbitration and one which the United States Government could properly put forward, or do you now consider that the judgment above mentioned has furnished His Majesty's Government with adequate legal grounds for enabling them, notwithstanding the Arbitration Treaty of 1908 between His Majesty's Government and the United States Government, finally and definitely to refuse the United States Government's demand for arbitration on the ground that the preliminary question whether the United States Government are entitled to intervene on behalf of the United States shareholders of a foreign company has already been decided in the negative?
- (5.) If the answer to No. (4) above is to the effect that the United States Government can properly demand arbitration, are there nevertheless still further reasons which His Majesty's Government could advance in order to refuse arbitration, such as the argument that the claimants have not exhausted their legal remedies in this country or that the United States Government are not entitled to arbitration under the treaty of 1908 because the claim concerns the interests of parties other than His Majesty's Government?

I have, &c.

ORME SARGENT.

List of Papers.

- (A.) Foreign Office to the Law Officers, July 20, 1925 (Confidential 13004, p. 33).
- (B.) Law Officers to the Foreign Office, November 4, 1925 (Confidential 13004, p. 36).
- (C.) Agreement for the funding of the Roumanian War Debt to the British Government (C 13397/4/62/1925).
- (D.) Convention between the interested Oil Companies and the Roumanian Government, November 1, 1926 (C 11659/49/37/1926).
- (E.) Sir Austen Chamberlain to United States Ambassador, April 15, 1926 (C 4421/1310/37/1926).
- (F.) United States Ambassador to Sir Austen Chamberlain, May 2, 1927 (C 4025/4025/37/1927).
- (G.) Foreign Office Memorandum, May 17, 1927 (C 5683/4025/37/1927), and Memorandum by the Treasury Solicitor, August 18, 1927 (C 7105/4025/37/1927).
- (H.) Reparation Commission, annex 2933 A, B and C (C 9293/257/18/1926).

Report.

1. In reply to the first question, we are of opinion that it is certainly desirable to state the facts as to the destruction of the Romano-Americana Company, and for that purpose to use such of the material set out in Paper G as appears to be of

assistance. But the memorandum should be used with discretion. We do not think it desirable to stress any suggestion that Colonel Norton Griffiths was acting unconstitutionally or exceeding his powers even at the earlier period; but rather to emphasise that at the later period his action had been expressly confirmed and endorsed by the Roumanian Government and his colleagues on the commission. The statement should show that Colonel Norton Griffiths was throughout acting as a member of the Roumanian Commission, and therefore as the agent of the Roumanian Government, and the Roumanian Government orders of the 10th September, the 23rd November, the 24th November and the 26th November can be relied upon; and it should go on to show that, whatever doubt may have existed in the mind of some of his colleagues at the time of the first destruction at Targoviste, the orders of the 29th November and the 4th December confirmed his view as to the duties imposed by Roumania upon the commission, and that his action in the later destruction was with the complete concurrence of his Roumanian colleagues.

2. We answer the second question in the affirmative. There is no distinction in the doctrine of ratification between international and private municipal law; so far as we are aware no such distinction has ever been suggested. The authorities in support of the proposition that the act of a person purporting to act as agent for a principal can be ratified by that principal can be found in any text book, and are elementary both in American and in English law.

3. We answer the third question in the negative; but we think it would be as well to point out that the authorities relied on by the United States only purport to assert the right of owners of property destroyed to claim against the Government which actually destroyed the property, *i.e.*, in the present case they would be authorities in favour of the view that the Romano-Americana Company had a right to compensation against Roumania, but not for the proposition that the shareholders in that company had a right to compensation against the United Kingdom.

4. The decision cited does not in any way conflict with our previous opinion of the 4th November, 1925. In the earlier part of that opinion we expressed our view that the right to claim compensation, if it existed, belonged to the Romano-Americana Company and not to its shareholders; the decision cited is an authority which confirms this view. In the second part of our opinion we were dealing with the right of the American Government under the Treaty of 1908 to claim arbitration; and we pointed out that under the terms of the treaty the United States Government would have a *prima facie* right to arbitrate upon the question as to whether or not their citizens as shareholders were entitled to have compensation for the destruction of property owned by the company. This is a question which is not affected by the decision of the Reparation Commission.

5. In our opinion, His Majesty's Government is entitled to refuse arbitration. This refusal can be based, first of all, on the ground that the interests of parties other than His Majesty's Government are concerned. France is concerned, since one of her nationals was a member of the commission equally with Colonel Norton Griffiths, and was equally responsible with him in the course which was taken. Roumania is also concerned, both because Roumania authorised and ratified the acts complained of and also because the property destroyed was that of a Roumanian company, which is the right claimant. Further, we notice that Roumania expressly objects to any interference in the matter as being an infringement of her sovereign rights, and this would seem an additional argument against the commencement of an arbitration between the United States and His Majesty's Government upon the question. Further, in our opinion, arbitration can be objected to on the ground that the legal remedies have not yet been exhausted. Apparently the claim purports to be a claim by the shareholders of a Roumanian company to recover the loss they have sustained by action taken against the property of that company. If that be the claim, even if (contrary to our view) it were well founded, its amount would obviously depend upon the extent to which the Roumanian company had been able to recover compensation for the injury done; and until that right had been asserted and pressed it cannot be said that the legal remedies of the parties concerned have been exhausted in the municipal courts. From the documents before us it appears quite clear that the Roumanian Government has actually offered compensation to the Romano-Americana Company for the injury sustained; and until and unless that company has obtained what it can by way of compensation no question can arise as to any further right by the shareholders for damages sustained by them. The principle that all legal remedies must be exhausted is a well recognised one; a discussion of it will be found in the British memorandum and counter-



memorandum filed in the Danube case recently before the Permanent Court of International Justice at The Hague.

6. We would like to reiterate the caution contained in paragraph 6 of our previous opinion against any submission which would concede that the United States Government has any right to intervene, or that American shareholders of a Roumanian company have any right of claim for damage done to the property of the company.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

*Law Officers' Department,
December 1, 1927.*

TURKEY.

[E 4430/72/44/1927]

No. 4^A.

[Treasury Solicitor.]

[October 17, 1927.]

Case for the Opinion of the Law Officers of the Crown.

Claim of the Imperial Ottoman Bagdad Railway Company against His Majesty's Government in respect of the concession granted by Turkey in 1903. HEREWITH are sent:—

1. The Treaty of Peace with Turkey and other instruments. [Cmd. 1929. (Treaty 1681.)]
2. Convention made between the Imperial Ottoman Government and the Ottoman Anatolian Railway Company in 1903 and accompanying documents. (Parliamentary 4604.) [Cd. 5635.]
3. Case and opinion of the Law Officers in the matter of the claim by Messrs. Edwards and Henry. (Confidential 13206, pp. 7-10.)

Questions have arisen with regard to the position of the concession granted by the Turkish Government to the Bagdad Railway Company in territory part of which now belongs to Iraq, and it is possible that the company may allege that it is entitled to continue in enjoyment of the concession granted by the Turkish Government, or, alternatively, that it is entitled to compensation under the Treaty of Lausanne or otherwise. His Majesty's Government accordingly desire to be advised by the Law Officers in the matter.

By the convention known as the Bagdad Railway Convention of the 20th February, 1903 (Document 2), the Imperial Ottoman Government (herein referred to as the Turkish Government) granted a concession for the construction and working of an extension of the line from Konia to Bagdad and Basra. The concession was for ninety-nine years. The concession was actually granted to the Ottoman Anatolian Railway Company, but provision was made in the convention for the creation of a new company, which was to be an Ottoman Joint Stock Company and to be known as the Imperial Ottoman Bagdad Railway Company (herein referred to as the Bagdad Railway Company). The convention provided that when this company had been duly formed the rights granted by the concession were to be handed over to it, and as soon as this was done the Ottoman Anatolian Railway Company thereupon ceased to have any interest in the concession, except in so far as they might be the owners of shares in the Bagdad Railway Company.

The Bagdad Railway Company was duly formed in accordance with the convention as an Ottoman company. It has a share capital of £600,000, divided into 30,000 shares of £20 each, which are bearer shares.

The Law Officers are referred for details of the convention to the copy of that document which accompanies this case (Document 2, translation on p. 37), but its general effect may be summarised as follows:—

The company was to undertake to build a new line of railway from Konia to Basra and to maintain it during the period of the concession (article 16). Article 4 gives a time limit for the construction, viz., eight years, but this could be extended if loans were not forthcoming, or there was a war between European Powers. They were given the right to levy tolls and had to deposit a certain sum as guarantee for

the performance of the provisions of the concession, which in certain events they might recover. The Turkish Government undertook to pay an annuity of 11,000 fr. per kilom. constructed, and a contract sum of 4,500 fr. per annum to the company during the period of the concession.

The Government reserved the right to withdraw the concession at any time on the payment of compensation (article 19).

The line was to be considered as divided into sections of 200 kilom. in length and by article 29, if the concessionnaires failed to carry out their obligations for each section within the appointed time, their concessionary rights became forfeit after due notice from the Turkish Government.

In 1908 the Turkish Government decided to extend the line for a further 840 kilom., which were to be completed within eight years, and a supplementary convention was framed for that purpose. Its text will be found at the end of the earlier convention (Document 2, p. 70), but, though for completeness reference is made to it, it does not seem to affect the questions now under consideration.

It will be observed that under article 35 of the convention, the Turkish Government undertook to issue certain bonds for the purpose of providing funds to meet the annuity above mentioned and that the Bagdad Company pledges the line to the bondholders as part of their security.

The bonds in question are outstanding and the interest upon them is in arrears, but it is understood that no steps have been taken by the bondholders to enforce their rights (if any) in respect of the pledge to them.

In the circumstances it is thought that for the purpose of the present case it is not necessary to consider especially the position of the bondholders, inasmuch as they cannot presumably have any greater rights than the company itself.

The Bagdad Railway Company duly commenced operations and before the outbreak of war the company had built in Iraq a railway line from Bagdad to Samarra, which is approximately 70 miles north of Bagdad. The Bagdad Railway Company, being a Turkish company, continued, it is understood, to carry on the construction of the railway up to the time when the territory of Iraq was occupied by the British military forces. During such military occupation a line from Basra to Bagdad was constructed by the British authorities, and the British authorities also extended the line (already constructed from Bagdad to Samarra) to Sharquat, which is approximately 100 miles north of Samarra, and it is understood that the route followed was almost identical with that contemplated in the Bagdad Railway Concession. Since the cessation of hostilities no steps have been taken by the Bagdad Railway Company under the concession in regard to the construction of any part of the railway in Iraq, though it is understood that certain steps have been taken with regard to that part of the railway which is situated in the territory which remains part of Turkey.

Under article 260 of the Treaty of Versailles, the Reparation Commission were entitled to demand that the German Government should become possessed of any rights or interests of German nationals in any concession operating in (among other countries) Turkey, and might require the German Government to transfer such rights to the commission. In fact, 13,510 shares were so acquired and transferred. The shares were apparently at that time under the control of the Deutsche Bank, who had given an option on them to the Ottoman Anatolian Railway Company. This option was to expire on the 31st December, 1926, but the Deutsche Bank has apparently attempted to extend the option, notwithstanding the fact that in the meanwhile the shares had been handed over to the Reparation Commission. The Reparation Commission have declined to recognise the extension of the option.

A protocol annexed to the Treaty of Lausanne (p. 203 of Document 1 herewith) makes special provision with regard to concessions granted by the Turkish Government.

Article 1 provides that concessionary contracts entered into before the 29th October, 1914, between the Turkish Government and nationals, including companies, of the contracting Powers other than Turkey were maintained. It is to be observed here that both the Anatolian and the Bagdad Railway Companies were Turkish companies, and article 1 does not, therefore, apply, unless it applies by virtue of article 10, which possibility is discussed later.

Article 9 of the same protocol (Document 1, p. 209) further provides that "in territories detached from Turkey under the Treaty of Peace signed this day the State which acquires the territory is fully subrogated as regards the rights and obligations of Turkey towards the nationals of the other contracting Powers, and companies in



which the capital of the nationals of the said Powers is preponderant, who are beneficiaries under concessionary contracts entered into before the 29th October, 1914." The subrogation was to take effect as from the 30th October, 1918.

Several difficulties arise on the interpretation and construction of this article.

In the first place, it is not clear what is the material date for ascertaining whether the capital of the contracting Powers in the company owning the concession is preponderant. The alternatives appear to be (a) the 30th October, 1918, (b) the 23rd July, 1923, or (c) the 6th August, 1924.

The 30th October, 1918, is the date as on which subrogation takes place, and inasmuch as the subrogation is to be in respect of rights and obligations towards a certain class of persons on a certain date, it would appear reasonable to assume that the class must itself be ascertained on that date.

The 23rd July, 1923, is the date when the protocol was signed. As no date for ascertainment is mentioned in the article and there are no provisions in the protocol for ratification, such as are to be found in the treaty itself, it is arguable that the proper date is the date of signature. The 6th August, 1924, as the date of the ratification of the treaty, appears to be the only possible alternative if the other two dates are rejected.

Secondly, the question arises whether, on whatever may be the relevant date, the capital of nationals of contracting Powers other than Turkey was preponderant.

The distribution of share capital in July 1923 was approximately as follows:—

	Shares.
Reparation Commission	13,510
The Ottoman Bank (a company registered in Turkey but which held shares in the Bagdad Railway Company on behalf of a French group) ...	8,500
Anatolian Railway Company (a company registered in Turkey but whose chief shareholders were the Swiss Bank Corporation. The remaining shareholders are not known, but the Reparation Commission had a small holding)	3,000
Turkish Government	2,000
Banca Commerciale Italiana	480
Residue held by the Swiss and others	1,510

In October 1918 the distribution of shares was substantially the same, except that the shares mentioned in the above table as belonging to the Reparation Commission were held by German nationals.

In August 1924 the distribution was the same as in 1923, except that the Anglo-Turkish Trust Company (a British company with British shareholders) are understood to have obtained an option to purchase the Swiss Bank's interest in the Anatolian Railway.

If the 30th October, 1918, be the correct date, it is clear that the preponderant share of the capital of the company was not held by nationals of the contracting Powers other than Turkey, since on that date German nationals and the Turkish Government together held 16,510 shares.

If, however, one of the later dates be correct, it becomes material to consider whether the shares held by the Reparation Commission are to be regarded as held by an Allied national for the purposes of article 9. It is suggested that the distinction which is drawn in the article and in the treaty generally between "nationals" on the one hand and "contracting Powers" on the other hand is a clear indication that a holding of an inter-Allied commission such as a Reparation Commission cannot properly be regarded as a holding by a national for this purpose. So far as is known, no definition of "national" occurs in the treaty, but article 64, which is the first article in Part III, defines "Allied nationals" as including physical persons, companies and associations of the contracting Powers other than Turkish. It is submitted that associations ("associations et établissements") does not include such a body as the Reparation Commission.

If the Law Officers should be of opinion that the correct date for the purpose of article 9 is either 1923 or 1924, and also that the holding by the Reparation Commission is to be taken into account in determining whether on the relevant date the capital of nationals of the Allied Powers was preponderant, further questions will arise as to the exact position of the shares held by the Ottoman Bank; but as precise information on this point is difficult to obtain, it has been decided not to delay the present case. The only available information about the holding of this

bank is that the shares are held by the bank on behalf of a French group, but the precise relationship between the bank and the French nationals concerned is not known. It may be that the bank are no more than custodians of the shares (which are bearer shares), and that the property is that of the French nationals concerned; and if this be so, there can be no doubt that these shares must be included amongst those held by Allied nationals. On the other hand, it may be that the legal ownership is that of the bank, and in this case a further question as to the nationality of the bank itself might conceivably arise, inasmuch as a large number of its shareholders are possibly Allied nationals.

Having regard, however, to the opinion expressed by the Law Officers* in connection with the claim of the Standard Oil Company in relation to damage suffered by the Romana Americana Oil Company, it is submitted that the nationality of the Ottoman Bank falls to be decided by the place of registration, and on this view it is clearly a Turkish company.

It may also be that the option obtained by the Anglo-Turkish Trust Company in 1924 affects the nationality of the holding of the Anatolian Railway Company, but for the purposes of the questions now submitted to the Law Officers this point is immaterial.

If it is decided that article 9 does apply, the consequence will be that article 1 will likewise apply, because by article 10 of the protocol it is specially provided that, with certain immaterial exceptions, the earlier articles of the protocol shall apply to such contracts and concessions as come under article 9.

The concession is therefore definitely maintained and the State which acquires the territory is fully subrogated as regards the rights and obligations of Turkey under the concession.

If article 9 applies, the further question arises whether there is any obligation on the part of His Majesty's Government or the Iraq Government to readapt the concession as provided by article 4. With regard to readaptation of concessions, there is a time limit fixed by article 5, the effect of which appears to be that in default of prior agreement the adaptation to be made shall be fixed by two experts to be mutually agreed within two months after the expiration of one year from the date of the ratification of the treaty. No steps have been taken by the Bagdad Company to claim the appointment of these experts, and it may therefore be that their rights have lapsed.

Two further references must be made to the protocol and the documents accompanying it before turning to the treaty itself.

There is attached to the protocol the following declaration (p. 211 of Document 1) by the Turkish delegates:—

"The undersigned, duly authorised, declare that the Turkish Government undertakes to apply the provisions of section 1 of the protocol of to-day's date with respect to certain concessions granted in the Ottoman Empire to Ottoman companies in which on the 1st August, 1914, the capital of nationals of the other Powers party to that protocol was preponderant.

"Done at Lausanne, the 24th July, 1923.

"M. ISMET.
"DR. RIZA NOUR.
"HASSAN."

And at p. 239 of the Treaty of Peace and other instruments (Document 1) will be found the following letter from Ismet Pasha to the president of the Third Committee:—

"Your Excellency,

"Lausanne, July 24, 1923.

"I have the honour to inform you that the concession contracts, as well as the subsequent agreements referring thereto, duly concluded before the 29th October, 1914, with the Ottoman Government in regard to the following undertakings are maintained: Anatolian Railway, Bagdad Railway, Mersina-Adana Railway, Oriental railways and Haidar-Pasha harbour. The clauses of the said contracts and agreements will, within a period of one year to be reckoned from the coming into force of the Treaty of Peace of to-day's date, be brought into conformity with the new economic conditions.

"I avail myself, &c.
"M. ISMET.

"To the president of the Third Committee of the Peace Conference."

* Confidential 13004, p. 36.



It is submitted that the declaration does not apply to the present concession, because in August 1914 the capital of the nationals of the other Powers party to the protocol was not preponderant, the Deutsche Bank being holders of 13,510 shares and the Turkish Government of 3,000.

With regard to Ismet Pasha's letter, it is submitted that the specific undertaking to maintain the Bagdad Railway concession can only relate to that part of the concession which related to the territories which remained part of Turkey after the treaty.

Moreover, if this were not so, it is submitted that the declaration and letter, being by their express terms merely unilateral, cannot be regarded as imposing any obligation upon the contracting Powers other than Turkey.

If article 9 of the protocol does not apply, certain further considerations arise. It may be that, although the concession does not come within the class of concessions which His Majesty's Government has expressly undertaken in the Concessions Protocol to maintain, yet by reason of general rules of international law, His Majesty's Government, or alternatively the Iraq Government, may, in fact, be under an obligation to maintain the concession. It is, however, suggested that the explicit recognition of certain concessions by the protocol involves the corollary that there was no obligation to maintain concessions not coming within those classes.

It is understood that no steps have been taken by His Majesty's Government or by the Iraq Government which could be relied on by the company as amounting to a recognition of the continued validity of the concession.

The questions which arise in connection with the possible application of general rules of international law have already been submitted to the Law Officers for their Opinion in relation to a claim advanced by Mr. W. M. Edwards and Major Henry in respect of rights to a concession granted by the Ottoman Government in 1911 for the exploitation of certain mineral resources of the Dead Sea. A copy of the Case* submitted to the Law Officers and of their Opinion* is sent herewith (Document 3).

The final question which appears to arise is whether the Bagdad Railway Company have any rights under article 65 of the Treaty of Lausanne (p. 53 of Document 1). This article defines three categories into which the concession might conceivably fall:—

- (a.) Immovable property situate in territory detached from the Ottoman Empire under the treaty (i) which, after having been subjected by the Ottoman Government to an exceptional war measure, was, at the date of the treaty, in the hands of the contracting Power exercising authority over the said territory, (ii) which can be identified, and (iii) which may have been liquidated by the contracting Power exercising authority over the said territory, is to be restored to its owner in its existing state.
- (b.) Property, rights, and interests, which still exist, and can be identified and which belong to Turkish nationals in territories detached from the Ottoman Empire under the treaty and which may have been subjected to liquidation or any other exceptional measure whatever on the part of the Allied Powers, are to be immediately restored to the owners in their existing state.
- (c.) Property rights, and interests, situate in territory detached from the Ottoman Empire under the Treaty which, after having been subjected by the Ottoman Government to an exceptional war measure, were, at the date of the treaty in the hands of the contracting Power exercising authority over the said territory and which can be identified, are to be restored to the owners in their existing state.

With regard to any claim under category (a), it is understood that certain land situate near Bagdad has, in fact, been restored to the company, but not the property and land relating to the 70 odd miles of track between Bagdad and Samarra laid by the company before the war in Iraq, and this still remains the property of His Majesty's Government, but the management of it has been handed over to the Iraq Government.

With regard to any other claims to restoration of its rights by the company, it is submitted that the article can only relate to rights *in rem*, such as mortgages and proprietary rights generally, and cannot include rights of a merely contractual nature. Even if this is not so, it is difficult to see how the concession, as such, can be said to be properly situate in territory detached from Turkey or to be in the hands of a contracting Power. It is submitted that the fact that special provision has

* Confidential 13206, pp. 7-10.

been made in the protocol for concessionary contracts, and in articles 73, 74 and 75 of the treaty (pp. 59-61 of Document 1) for contracts other than concessionary contracts, strongly supports this view. It has been suggested that, inasmuch as the company has not put in a claim before the Mixed Arbitral Tribunal under article 65, its rights (if any) have lapsed. This view, however, appears to be open to considerable doubt, as the jurisdiction of the Mixed Arbitral Tribunal under the article is limited to the settlement of disputes as to identity of property and the consideration of the adequacy of amounts received in cases where the property in question has been liquidated. There does not appear to be much prospect of any dispute on either of these two points, and the obligation to restore the property if identifiable and in the hands of the contracting Power seems to be independent of any question of the jurisdiction of the tribunal.

The Law Officers are accordingly requested to advise:—

- (1.) In interpreting article 9 of the Concessions Protocol, which date is to be taken as the correct date for ascertaining the preponderant interest in the capital of a company holding a concessionary contract.
- (2.) Whether the 13,510 shares held by the Reparation Commission are to be regarded as the capital of nationals of the Allied Powers.
- (3.) If the answer to (2) be in the affirmative, and as the result of further enquiry into the position of the shares held by the Ottoman Bank it is found that the capital of nationals of Allied Powers was preponderant and, therefore, that the concession falls within article 9 of the protocol, whether the company are entitled to demand readaptation of the concession under articles 4 and 5 of that protocol; and, if not, whether the company are entitled to insist on the concession being maintained in its present form.
- (4.) Whether, under article 65 of the Treaty of Lausanne, the company are entitled to demand the restoration to them (a) of any immovable property physically situate in Iraq which formerly belonged to them, and/or (b) any rights which, but for the war, they would have been entitled to exercise in Iraq by virtue of their concession.

Opinion of the Law Officers of the Crown.

1. We are of opinion that, for the purposes of article 9 of the Concessions Protocol, the correct date for ascertaining the preponderant interest in the capital of a company holding a concessionary contract is the 30th October, 1918. The subrogation is to have effect as from that date, and it seems to us necessarily to follow that the companies affected by the subrogation should be ascertained on the same date.

2. In view of our answer to the first question this question is not relevant to the present case, but we are of opinion—

- (a.) That the shares in question cannot be regarded as the capital of nationals of the Allied Powers.
- (b.) That the national character of the Ottoman Bank is conclusively determined by the fact that it is a Turkish company.

3. This question does not arise, having regard to the foregoing answers.

4. We are of opinion that under article 65 of the Treaty of Lausanne the company are entitled to the restoration of any immovable property physically situate in Iraq which formerly belonged to the company, but that the provisions of article 65 do not apply to rights which were conferred on the company by the concession but have not been exercised.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

*Law Officers' Department,
October 17, 1927.*



1928

This Document is the Property of His Britannic Majesty's Government

Printed for the use of the Foreign Office.

CONFIDENTIAL

(13565)

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1928.



(ii)

LIST OF REPORTS.

CHINA.

No.		Date.	SUBJECT.	Page.
1	Law Officers .. [Colonial Office]	Nov. 19, 1928	Legality of seizure at Singapore of arms and explosives <i>ex</i> German steamship "Deike Rickmers" intended for China. Effect of China Arms Embargo Agreement	1
GENERAL.				
2	Law Officers .. [Treasury Solicitor]	Jan. 31, 1928	Claim of Ottoman Tobacco Régie to rights in Iraq, Palestine and Transjordan	6
3	Law Officers .. [Colonial Office]	May 24, 1928	Conditions of contract for harbour works at Haifa ..	14
4	Law Officers .. [Treasury Solicitor]	May 24, 1928	Possible conflict between British nationality and Palestine citizenship	16
5	Law Officers .. [Colonial Office]	Nov. 12, 1928	Conditions of contract for harbour works at Haifa ..	19
IRAQ.				
6	Law Officers .. [Colonial Office]	Aug. 3, 1928	Interpretation of certain articles in Anglo-Iraq Military Agreement of March 25, 1924	21
TURKEY.				
7	Law Officers .. [Treasury Solicitor]	Dec. 10, 1928	Claim of Imperial Ottoman Bagdad Railway Company against His Majesty's Government in respect of concession granted to the company by the Turkish Government in 1903	23

(iii)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1928.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

AGR—CLA.

A.

Agreement: China Arms Embargo. *See also* Arms. ditto; not a general international convention, 5.
" Anglo-Iraq Military. *See* Treaty.
" Anglo-Iraq Financial. *See* Treaty.
Allegiance: oath of, to Government of Palestine; nature of, 16, 19.
Arbitration. *See also* Court of International Justice. of claims covered by Treaty of Lausanne, 13.
" at request of French Government of claim against His Majesty's Government of Turkish company with preponderant French capital, 7, 12, 13.
" of Ottoman Tobacco Régie's claim against His Majesty's Government, 6-13.
Arms: seizure at Singapore in transit for China from Germany, 1-5.
" ditto; as to application of China Arms Embargo Agreement, 1, 5.
" Embargo Agreement (China); not a general international convention, 5.
" export from Germany prohibited by Treaty of Versailles, 5.
" Saint-Germain Convention. *See* Treaty.
" Geneva Convention. *See* Treaty.
Army: British, in Iraq; period of retention, 21-23.

B.

Bagdad Railway Company: claim against His Majesty's Government, 23, 24.
Barcelona Convention: seizure of goods in transit contrary to, 5.

C.

Cargo: in transit on foreign vessels; general principle against interference with, by territorial authorities, 3-5.
" ditto; ditto; whether interference is justified in case of arms and munitions, 4, 5.
China: Arms Embargo Agreement, 1, 5.
" arms for, seized at Singapore in transit, 1-5.
Claim: of Ottoman Tobacco Régie against His Majesty's Government, 6-13.
" right of foreign State to take up claim of company which is not a national of that State, 7, 12, 13.
" under Concessions Protocol of Treaty of Lausanne, 1923, of company in which allied nationals preponderate, 7, 11-13.

4994 [19745]

CLA—CRO.

C.—(cont.).

Claim: period covered by Treaty of Lausanne, 13.
" of Bagdad Railway Company against His Majesty's Government, 23, 24.
" of Standard Oil Company against His Majesty's Government, 7, 12.
Company: right of French Government under Concessions Protocol of Treaty of Lausanne to support claim against His Majesty's Government of Turkish company with preponderant French holding, 7, 12, 13.
" right of foreign State to support claim of company not a national of that State, 7, 12, 13.
Compensation: suppression of Ottoman Tobacco Régie's monopoly in Palestine, Iraq and Transjordan, 6-13.
" ditto; basis for calculating damages, 13.
Concession: of Ottoman Tobacco Régie in Iraq, Palestine and Transjordan, 7-10.
" Concessions Protocol of Treaty of Lausanne. *See* Treaty of Peace (Turkey).
" of Bagdad Railway Company; rights under article 65 of Treaty of Lausanne, 23, 24.
Contract: of Ottoman Tobacco Régie—a concessionary contract within meaning of article 9 of Concessions Protocol of Treaty of Lausanne, 10, 11, 13.
" for harbour works at Haifa, 14, 15, 19, 20.
Convention. *See* Treaty.
Court of International Justice: right to bring claim of Ottoman Tobacco Régie before, without consent of His Majesty's Government, 12, 13.
" ditto; right of French Government to bring claim of Turkish company against His Majesty's Government before, 12, 13.
" ditto; ditto; position of Turkish Government, Turkey not being member of League of Nations, 12.
Crown: service under; service under Palestine Government equivalent to, for purpose of British Nationality and Status of Aliens Act, 1914, 18, 19.

a



(iv)

DEL-MAN.

D.

"Deike Rickmers," steamship, 1.
 Diplomatic representations: concerning interference by territorial authorities with foreign merchant vessels in transit, 3.
 " " right of French Government under protocol of Treaty of Lausanne to intervene in claim of Turkish company against His Majesty's Government, 13.
 Discrimination: in inviting tenders for works in Palestine, 14, 15, 19, 20.
 Dynamit Actien-Gesellschaft, 1.

E.

Embargo. *See* Agreement.
 Explosives: seizure in Straits Settlements in transit to China, 1-5.
 " not covered by Saint-Germain Arms Convention of 1919, 4.
 " position under Geneva Arms Convention of 1925, 4.
 Export: definition of, in Straits Settlements ordinance, 2, 5.
 " whether goods in transit are covered, 2, 5.

G.

Garrison. *See* Army.

H.

Haifa: contract for harbour works, 14, 15, 19, 20.

I.

Imperial Ottoman Bagdad Railway Company: claim against His Majesty's Government, 23, 24.
 Iraq: British garrison in; period of retention, 21-23.
 " Military Agreement with Great Britain. *See* Treaty.
 " Financial Agreement with Great Britain. *See* Treaty.
 " rights of Bagdad Railway Company in, under their railway concession, 23, 24.

J.

Jurisdiction: over foreign merchant vessel in port, 2-5.
 " over cargo of foreign vessel in transit, 2-5.
 " ditto: effect of general international conventions respecting freedom of communications and transit, 3-5.
 Justice: Court of International. *See* Court.

L.

Law: Municipal; vessel in foreign port subject to, 2-5.

M.

Mandate: for Palestine; meaning of "discrimination" under article 18 as applied to tenders, 14, 15, 19, 20.
 Palestine, nature of citizenship contemplated by article 7 of, 17.

MAV-STR.

M.—(cont.)

Mavrommatis, 12.
 Military. *See* Army; Treaty.
 Monopoly: in Iraq, Palestine and Transjordan of Ottoman Tobacco Régie; suppression of, 6-13.
Muller v. Baldwin, 2.

N.

Nationality: effect on British, of acquisition by British subject of Palestinian citizenship under Palestine Citizenship Order in Council, 16-19.
 Naturalisation: acquisition by British subject of Palestine citizenship by; effect on British status, 16-19.
 " under section 2 of British Nationality and Status of Aliens Act, 1914; alien in Palestine Government service may qualify for, 18, 19.
 " service in Palestine Government as equivalent to "service of the Crown" for purpose of section 2 of British Nationality and Status of Aliens Act, 1914, 18, 19.
 Nobel's Explosives Company (Limited), 1.

O.

Oath: of allegiance. *See* Allegiance.
 Order in Council: Palestine citizenship. *See* Nationality.
 Ottoman Tobacco Régie: claim respecting monopoly in Iraq, Palestine and Transjordan, 6-13.

P.

Palestine: tenders for works; limitation to British firms, 14, 15, 19, 20.
 " not a "foreign State" within meaning of section 13 of British Nationality and Status of Aliens Act, 1914, 17-19.
 " Citizenship Order in Council, 1925. *See* Nationality.
 " oath of allegiance to Government of, nature of, 16, 19.
 " service in Government of, equivalent to "service of the Crown," 18, 19.
 Property: rights of Bagdad Railway Company in Iraq; application of article 65 of Treaty of Lausanne, 23, 24.
 Protection: British diplomatic and consular, of Palestine citizens, 17.

R.

Railway: rights of Bagdad Railway Company in Iraq, 23, 24.
Reg. v. Keyn, 5.

S.

Société de la Régie cointéressée des Tabacs de l'Empire ottoman. *See* Ottoman Tobacco Régie.
 Standard Oil Company: claim against His Majesty's Government respecting destruction of property belonging to Roumanian company, 7, 12.
 Straits Settlements: seizure of arms in transit to China, 1-5.
 " Arms and Explosives Ordinance; definition of "export" in, 2, 5.

(v)

TEN-TRE.

T.

Tenders: for works in Palestine; limitation to British firms, 14, 15, 19, 20.
 Tobacco. *See* Ottoman Tobacco Régie.
 Transit: freedom of, under Barcelona Convention and Statute, 3-5.
 " whether term "export" includes, 2, 5.
 " cargoes on foreign vessel in; jurisdiction of territorial authorities, 2-5.
 Treaty. *See also* Barcelona Convention.
 " Anglo-Iraq Financial Agreement, 1924; bearing of article 3 on retention of garrison in Iraq, 22.
 " Anglo-Iraq Military Agreement, 1924; period of operation, 23.
 " China Arms Embargo Agreement not a general international convention as contemplated by article 5 of Barcelona Statute on Freedom of Transit, 5.
 " Convention and Statute on International Regulation of Maritime Ports, 3, 4.
 " Geneva Arms Convention, 1925; position of explosives under, 4.
 " ditto: control of arms and explosives in transit not covered by, 4.
 " Saint-Germain Arms Convention of 1919; explosives not covered by, 4.
 " ditto: control of arms in transit not covered by, 4.
 " of Lausanne. *See* Treaty of Peace (Turkey).

TRE-WIL.

T.—(cont.)

Treaty of Peace (Germany): article 170 and Germany's obligation to prevent export of arms, 5.
 " (Turkey): period covered by, in respect of claims, 13.
 " article 9 of Concessions Protocol; application to claim against His Majesty's Government of Turkish society with preponderant French capital, 10-13.
 " article 65; application to Bagdad Railway Company's concessionary rights in Iraq, 23, 24.

V.

Vessel: jurisdiction over foreign, in port, 2-5.

W.

Wilson v. Robertson, 2.



1928

Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.:
1928.

CHINA.

[F 6606/20/10/1928]

No. 1.

[Colonial Office.]

[November 19, 1928.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, October 29, 1928.

I AM directed by Mr. Secretary Amery to inform you that he has had under consideration the question of the legality of the seizure at Singapore in February 1927 of certain arms and explosives on board the German steamship "Deike Rickmers," belonging to the German company the Dynamit Actien-Gesellschaft. These seizures were effected under the authority of a proclamation of the 16th April, 1925, issued under Straits Settlements Ordinance No. 136 (Arms and Explosives). This proclamation was issued in order to carry out the obligations assumed by His Majesty's Government under the China Arms Embargo Agreement of 1919. Copies of the proclamation and the ordinance and of the agreement are enclosed. It will be observed that the categories of arms and munitions, to which they respectively apply, are defined in the proclamation in terms which are somewhat different from those of the agreement, and in particular that the proclamation mentions "explosives" without any qualification with regard to their intended use, whereas the agreement is confined to arms and munitions of war and material destined exclusively for their manufacture. It is not therefore certain whether the consignment of explosives (as distinct from the arms) seized at Singapore is covered by the terms of the Arms Embargo Agreement. The German Government is not a party to the Embargo Agreement, being already debarred from exporting arms and munitions under the provisions of the Treaty of Versailles.

Legality of seizure at Singapore of arms and explosives on board German steamship "Deike Rickmers" intended for China. Effect of China Arms Embargo Agreement.

2. Nobel's Explosives Company (Limited), acting on behalf of the Dynamit Actien-Gesellschaft, have now contested the legality of the seizures of these explosives in a letter dated the 16th May, of which a copy is enclosed. It will be seen that the grounds on which their claim is based are, first, that the explosives in question were industrial in character, and therefore there was no justification for their seizure from the point of view of the military situation in China, and, secondly, that the seizure was effected under the authority of "a very old police law in Singapore," which, however, cannot be regarded as applicable, since, under the legal advice given to the German firm, goods in transit through Singapore cannot be classed as exports. The company further contend that it is against established international practice to regard goods in transit as being exported from the intermediary territory concerned, and refer to the Barcelona Convention of 1921.

3. The first of these contentions is irrelevant to the question whether the seizure was or was not legal, and in any case it could hardly be maintained in view of the fact that Mr. Amery has information that the explosives in question were intended for Chang Tsung-chang, at that time the Military Governor of Shantung. Apart from that, the definition of explosives adopted in the proclamation of the 16th April, 1925,



is so wide as to include explosives of all kinds, whether *prima facie* industrial in character or not.

4. The second contention is, however, a matter for serious consideration. The reference to the "very old police law in Singapore" is inaccurate, since, as previously stated, the proclamation under which the seizure was effected was dated the 16th April, 1925, but the question whether goods in transit through Singapore can be classified as exports is more difficult and appears to depend upon the interpretation of Straits Settlements Ordinance No. 136 (Arms and Explosives).

5. Section 4 of Ordinance No. 136 empowers the Governor to prohibit by proclamation the exportation of explosives from the colony. "Export" is defined in the ordinance as meaning "to take or cause to be taken out of the colony either by land or sea." Under section 30 of the same ordinance if any vessel about to leave any port in the colony is suspected of having on board any article, the exportation of which is prohibited, it may be searched, and if any article which is prohibited to be exported is found on board, it shall be presumed that that article was attempted to be exported, and the article may be removed from the ship.

6. Mr. Amery has consulted the Governor of the Straits Settlements in the matter and has received the following telegraphic reply:—

"The line of defence would be that the word 'export' had in the proclamation the same meaning as that assigned to it in Ordinance No. 136. It, therefore, covers goods in transit. Even if that meaning is inconsistent with established international practice, the proclamation must, nevertheless, be so construed. The proclamation in effect prohibits the passage through the colony of goods to which it applies. There is nothing in that prohibition which conflicts with the principle of international law."

7. Mr. Amery is advised, however, that there is some doubt whether this argument could be sustained in a Court of Law. The question appears to turn on what is the proper meaning of the expression "export from the colony." The ordinary meaning clearly is to take out of the colony something which was previously in the colony. Can it be said to include something which comes into the territorial waters of the colony in a ship which merely touches at a port? In other words, can it be said that a consignor in Germany who consigns explosives to China exports those explosives from the Straits Settlements merely because the ship in which they were loaded touches at a port in the Straits Settlements?

8. That the answer to these questions might well be in the negative is suggested by a reported case which appears to be in point (*Wilson v. Robertson*, 24 L.J.Q.B. 185). Under the statute of George III a duty was imposed on all goods imported or exported from Berwick Harbour. The harbour extended from Berwick Bridge down the Tweed to the sea, but not above the bridge. Goods were brought up the river in a sea-going vessel which, having first used the rings and posts in the harbour in order to moor the vessel temporarily, passed through Berwick Bridge and unloaded the cargo about 200 yards beyond the limits of the harbour. It was held that these goods were not imported into the harbour. It has, however, been suggested that in arriving at this decision the Court had in mind the purpose of the tolls. Mr. Amery further understands that the definition of "export" in Ordinance No. 136 is very similar to that given in the English case of *Muller v. Baldwin* (1874), 9 L.R.Q.B. 457.

9. There remains the contention that the seizure of these explosives was contrary to international law or practice. While the validity of the municipal law of the Straits Settlements is not affected by the international law, and it would, therefore, not be possible to plead that the ordinance was *ultra vires* by reason of the Barcelona Convention of 1921 or any other treaty, it is possible that the German Government might make the matter the subject of diplomatic representations.

10. I am to enclose a letter dated the 24th August from the Custom House, London, in which this matter is discussed.

11. For the purpose of considering the validity of the seizure from the point of view of international law and custom, the legality of the seizure under the municipal law of Singapore must be assumed. In principle, therefore, it would seem to be strictly irrelevant upon this aspect of the case whether or not the municipal ordinances or proclamations, under which the seizure was made, apply to these consignments in transit as exports from the Colony, though it may be somewhat unfortunate, in view of the provisions of certain international conventions, to which further reference will be made hereafter, that the jurisdiction thus exercised over goods passing in transit through a port should be based upon a treatment of such goods as exports. The question, therefore, seems to be whether it is contrary to any international convention

or to any rule of international law and custom that the authorities of a British port should interfere with foreign-owned cargo consigned from one foreign port to another in the holds of a foreign vessel calling at such British port in the ordinary course of a voyage between two foreign ports, there being no reason whatever to suspect that such cargo would be removed from the vessel while she was in the British port or constituted any danger to the port while so lying in the holds.

12. The general rule of international law is no doubt that a merchant vessel entering a foreign port becomes subject to the plenary jurisdiction of the territorial sovereign of such port and to the municipal law in force therein, whatever it may be. This principle is of general application, save in so far as in the interests of freedom of international commerce exceptions thereto have been accepted in international conventions or in international law or custom. The answer to the question would seem, therefore, to depend on whether there is any provision of any international convention or any rule of international law or custom limiting the exercise of the jurisdiction of the local authorities over foreign-owned cargoes in transit on a foreign merchant vessel which applies to the facts of this case.

13. The rights of jurisdiction of the territorial authorities over foreign vessels calling at a port are fully treated in the following works: Moore, "Digest of International Law," vol. 2, pp. 269-363; Hall, "International Law" (eighth edition), pp. 253-256; Hyde, "International Law," p. 393. Reference may also be made to the "British Year Book of International Law, 1920-1921," at p. 45 (and article on merchantmen in territorial waters by A. H. Charteris). Such authority as there is, however, relates principally to the exercise of criminal jurisdiction over offences committed in foreign ships, and there seems to be no clear authority for the existence of any precise rule of international law or custom limiting the jurisdiction of the territorial authorities over the cargoes of foreign vessels in transit. It might be argued from this fact that, since the existence of such an exception to the general rule must be proved affirmatively, the absence of authority on the matter shows that no such exceptional limitation exists.

14. On the other hand, it may be contended that there is a principle of a somewhat undefined nature by which interference with foreign merchant vessels in transit should be limited to matters which affect the interests of the territorial authorities, and that this principle is generally followed in practice and has been recognised in certain international conventions referred to hereafter, concluded in pursuance of article 23 (e) of the Covenant of the League of Nations relating to the freedom of communications and transit. It is further worth notice that any new departure on the part of any State involving or alleged to involve any interference with foreign merchant vessels, which appears to infringe this general principle, has generally been the subject of diplomatic representations. Examples of such representations in somewhat analogous cases may be found quoted in Moore, *loc. cit.*, at p. 282 *et seq.*, with reference to the Merchant Shipping Act of 1876 (Plimsoll Act), United States against Great Britain; and at pp. 305-310 with reference to the United States Shipping Act of 1884 (relating to the engagement of seamen in United States ports), France against United States; and on pp. 326-333 with reference to a Colombian statute relating to the custody of ship's papers, United States against Colombia; and p. 339 relating to certain regulations in force in Singapore relating to the participation of the territorial authorities in all engagements and discharges of seamen, United States against Great Britain.

While it seems doubtful whether any such principle can be said at present to be sufficiently definite to constitute a rule of international law, it may be contended that departures from it would be contrary to international custom and undesirable, and that the seizure of these consignments of arms and explosives in the circumstances of this case constituted an interference with the foreign merchant vessels in transit which could not be justified by the proper interests of the territorial authorities.

15. This principle, limiting the interference with foreign merchant vessels and their cargoes in transit to cases where such interference is justified in the proper interests of the territorial authorities, appears to some extent to be recognised in two general international conventions, namely, the Convention and Statute on Freedom of Transit signed at Barcelona on the 20th April, 1921, and the Convention and Statute of the International Regulation of Maritime Ports signed at Geneva on the 9th December, 1923. Both these conventions, of which copies are attached, have been ratified by Germany and by His Majesty and apply to the port of Singapore. It seems to be clear that under article 1 of the Statute on Freedom of Transit these consignments of arms and explosives must be regarded as traffic in transit, and under article 2 it is provided that the measures to be taken by the contracting parties for



CHINA.

regulating traffic across their territory shall facilitate free transit, and that transit will be allowed in accordance with the customary conditions and reserves across their territorial waters. Apart from this, the provisions of the convention appear to be irrelevant to the present issue, since they are directed to prohibiting discrimination on the grounds of nationality. The Convention and Statute on the International Regulation of Maritime Ports is also made, as the preamble records, to ensure the freedom of communications by guaranteeing in maritime ports and for the purposes of international trade equality of treatment. It does not appear, however, to contain any specific provision which is strictly relevant to the case under consideration.

16. Assuming, however, the existence in international custom or by virtue of convention of a general principle against the interference with cargoes in transit on foreign vessels, it might be contended in defence of the action taken in this case that the international traffic in arms and munitions is in an exceptional position, and that interference with such cargoes is justifiable in cases when it would not be right in the case of cargoes of an ordinary character. Such a contention might be based on the ground that the desirability of the strict control of traffic in arms and munitions has been recognised in article 23 (d) of the Covenant of the League of Nations, and in two international conventions on traffic in arms which have been signed. These conventions are the Saint-Germain Convention of 1919 and the Geneva Convention of 1925, of which copies are attached. Neither convention has, however, at present secured the number of ratifications necessary to bring it into force. The Saint-Germain Convention was signed by Great Britain and was made binding on Germany by virtue of article 126 of the Treaty of Versailles. The Geneva Convention has been signed by both Germany and Great Britain. Both these conventions provide for the control of exports of arms and munitions, but neither can (with the exception of certain provisions applicable only in certain regions known as "special zones" and which are irrelevant because China is not included in the special zones) contain any provisions for the control of arms in transit. The Saint-Germain Convention does not, however, apply to explosives. The Geneva Convention places explosives in category 5 and provides, in article 10, that materials covered by categories 4 and 5 may be exported without formalities or retention, except in the case of exports to the special zones. Neither of these conventions could be regarded, therefore, as containing any specific justification for the action taken in this case. On the other hand, it may be argued that these conventions and the Covenant of the League are evidence of a general international recognition of the fact that international traffic in arms and munitions is on a footing distinct from international commerce in other kinds of goods in general and requires special control and supervision in the general interests of peace. It might be contended, therefore, that there is at least as strong international authority for treating cargoes of arms and munitions as an exception as there is for the existence of any general rule forbidding the interference with goods in transit on foreign vessels. In this connexion attention may be called to the fact that the following provision is to be found both in the Statutes for the Freedom of Transit and for the International Régime of Maritime Ports (see articles 5 and 17 of these statutes respectively): "Nothing in this Statute shall affect the measures which one of the contracting parties may feel called upon to take in pursuance of general international conventions to which it is a party or which may be concluded hereafter, particularly conventions concluded under the auspices of the League of Nations relating to transit, export or import of particular kinds of articles such as opium or other dangerous drugs, arms or the product of fisheries . . ." and it may be argued that these provisions contain an express recognition of the exceptional nature of traffic in arms in transit. On the other hand, however, this argument is weakened by the fact that it only provides for measures taken in pursuance of general international conventions and that neither of the international conventions relating to arms traffic has come into force, and, further, that neither of these conventions contains any provisions (except in the special zones) providing for the existence of any control upon goods in transit. It is doubtful whether the China Arms Embargo Agreement can be described as a general international convention.

17. The questions upon which Mr. Amery desires your opinion are as follows:—

- (1.) Whether the seizure of the arms and explosives in question was legal under the municipal law of the Straits Settlements.
- (2.) If so, whether, assuming that the seizure was legal under that law, the German Government could claim that it constituted a violation of any international convention or any rule of international law or custom.

I am, &c.

WALTER D. ELLIS.

CHINA.

List of Enclosures.

Straits Settlements Proclamation, April 16, 1925.
Straits Settlements Ordinance No. 136 (Arms and Explosives).
China Arms Embargo Agreement, 1919.
Nobel's Explosives Company (Limited) to Colonial Office, May 16, 1928.
Customs to Colonial Office, August 24, 1928.
Convention and Statute on Freedom of Transit, Barcelona, April 20, 1921.
Convention and Statute on International Régime of Maritime Ports, Geneva, December 9, 1923.
Saint-Germain Convention for Control of Trade in Arms and Ammunition, September 10, 1919.
Geneva Convention for Supervision of Trade in Arms and Ammunition, June 17, 1925.

Report.

(1.) We are of opinion that the seizure of the arms and explosives in question was legal under the municipal law of the Straits Settlements. The definition of the word "export" contained in Ordinance No. 136 is sufficiently wide to cover the case of a vessel having arms and explosives on board and leaving the port, which must for this purpose be regarded as being part of the Colony. Section 6 (2) and section 30 support this view of the meaning of the word "export," and section 30 (3) renders lawful the seizure of articles whose exportation is prohibited by the proclamation.

(2.) Upon the assumption that the seizure was legal under the municipal law of the Colony, no objection can in our opinion be taken to the seizure on the ground of international law unless (a) the ship in question ought not according to international law to be regarded as subject, while within the port, to the municipal law; or (b) the municipal law is, in so far as it authorised the seizure of these goods, a violation of international law either as contained in express conventions or as generally recognised. With regard to (a), we cannot say that any rules of law which by agreement amongst nations in their dealings with each other have been generally accepted exempt a vessel in a foreign port from the municipal law. It has been stated in the English Courts that "a foreign merchant vessel going into the port of a foreign State subjects herself to the ordinary law of the place during the period of her commorancy there" (see *per* Sir Robert Phillimore: *Reg. v. Keyn*, 2 Ex. D. at p. 82). A more restricted view is that States may exercise, besides such jurisdiction as is necessary for their safety and for the fulfilment of their international duties, such ordinary jurisdiction as is necessary to maintain customs and other public regulations within their territorial waters (Hall: "International Law," eighth edition, p. 258). In the light of these statements the vessel in question could not, in our opinion, on the basis of any rule of international law, claim immunity from the municipal law of the colony.

With regard to (b), we are of opinion that the seizure of the goods in question on the ground of destination to China was contrary to the international agreement contained in the Barcelona Convention and Statute. These goods were "traffic in transit" (statute, articles 1 and 2). The statute forbids any distinction which is based on destination, so as to prevent free transit (article 2). If it had been possible to rely on any general international convention of the character mentioned in article 5, the provisions of article 2 would not be effective in the present case. We are, however, informed that there is no such general international convention. We do not think the China Arms Embargo Agreement can be so regarded.

If, therefore, the Barcelona Convention stood alone, it would follow that diplomatic objection might properly be taken by the German Government to the seizure of these goods in transit. It is, however, in our opinion, not open to Germany to put forward the Barcelona Convention in this connexion. By article 170 of the Treaty of Versailles the export to foreign countries of arms, munitions and war material of every kind is prohibited, and Germany thereby came under an obligation to make illegal and to prevent the export by German nationals of arms and explosives. Any diplomatic protest against the seizure would therefore, in our opinion, be wholly lacking in substance and, in the circumstances of this case, without justification on any ground of international law or custom.

T. W. H. INSKIP.
F. B. MERRIMAN.

Law Officers' Department,
November 19, 1928.



GENERAL.

[E 552/121/65/1928]

No. 2.

[Treasury Solicitor.]

[January 31, 1928.]

Instructions to the Law Officers to Advise.

Herewith are sent—

- (1.) Correspondence passing between the Foreign Office and the French Embassy, including the claim.
- (2.) Volume 5 of Young's "Corps de Droit."
- (3.) Copy of the convention granted by the Ottoman Government to the Société on the 4th August, 1913.
- (4.) Copy of the protocol attached to the convention of the 4th August, 1913.
- (5.) Agreement made between the Turkish Government and the Société, dated the 23rd June, 1923.
- (6.) Copy of the *procès-verbal* (meeting of the Ottoman Public Debt Council), 27th August 1924.
- (7.) *Procès-verbaux* of the Ottoman Public Debt contained in Memorandum No. 53 of the 23rd March, 1925.
- (8.) Opinion of Count Ostrorog.
- (9.) Notes exchanged between French and British delegates at Lausanne Conference.
- (10.) Extract from a note made by B. H. Bourdillon, C.M.G., Counsellor to his Excellency the High Commissioner for Iraq.
- (11.) Treaty of Lausanne, 1923. Translations of documents 1 (claim only), 3, 4 and 5 are included and marked 1A, 3A, 4A and 5A respectively.
- (12.) Mandat for Palestine.
- (13.) Decision of the Council of, and undertaking given by His Majesty's Government to, the League of Nations on the 24th September, 1924.
- (14.) Treaty with King Feisal (October 1922).

Claim of
Ottoman
Tobacco Régie
to rights in
Iraq, Pales-
tine and
Transjordan.

LA Société de la Régie cointéressée des Tabacs de l'Empire ottoman, an Ottoman company (herein referred to as the Society), whose shareholders are now principally of French nationality, has presented, through the French Government, a claim against His Majesty's Government in respect of certain action taken by the Governments of Iraq, Palestine and Transjordan in regard to the tobacco monopoly for which the Society had, prior to the late war, obtained a concession from the Ottoman Government.

His Majesty's Government is concerned in the matter owing to its mandatory responsibility for the territories in question.

The claim is placed at £ T. 342,244 (gold), but it has not yet been examined in detail, as certain preliminary questions of law arise which may render such examination unnecessary.

The legal ground on which the claim is based is obscure.

The Law Officers will remember, from the case* recently submitted to them in connexion with the Bagdad Railway Company's claim, that article 9 of the Concessions Protocol of the Treaty of Lausanne, 1923 (p. 209 of document 11), provides that in territories detached from Turkey under that treaty the State acquiring the territory is fully subrogated as regards the rights and obligations of Turkey towards companies in which the capital of nationals of the Allied Powers is preponderant who are beneficiaries under concessionary contracts entered into before the 29th October, 1914, with the Ottoman Government. The subrogation is to take effect as from the 30th October, 1918.

By an interchange of notes between His Majesty's Government and the French Government, the texts of which are sent herewith (document 9), those two Governments

* Confidential 13403, p. 12.

agreed not to avail themselves as regards each other of section 11 of the protocol (which includes article 9), and they mutually recognised that each might have the power during one year from the coming into force of the treaty in territory in which it exercised authority as mandatory to acquire by repurchase concessions for the public services of which Turkish companies in which the interests of their nationals were preponderant were the beneficiaries.

The effect of the interchange of notes is not altogether clear. It certainly recognised the right of the Government concerned, within one year from the coming into force of the treaty, to repurchase concessions existing in the territory concerned, but nothing is said as to the position if that option is not used. The notes, as will be seen, begin with the agreement not to take advantage of the provisions of the protocol, and it may therefore be that, failing repurchase, the concessionnaires are left without remedy. This, however, seems to be a harsh result, and the true effect of these notes may therefore be merely that, if the Government concerned does not avail itself of the option to repurchase, the concessionnaires' rights are those indicated in the protocol, and this is the view taken of the notes by certain Government representatives who took part in the negotiations.

It is necessary also to take into consideration the correspondence which passed between His Majesty's Government and the French Government in 1922, and subsequently, copies of which accompany this case (document 1). Particular attention is drawn to the letter of the 15th January, 1926, from the Foreign Office to the French Ambassador, in which the latter is requested to ask the Society to formulate their claim, and reference is made to the possibility of arbitration.

There is one other preliminary point which should, it is thought, be mentioned before proceeding to consider the merits of the claim.

In the recent case of the Standard Oil Company's claim in connexion with the destruction of the property belonging to a Roumanian company, the Law Officers will remember that objection was raised to the Government of the United States pressing the claim on the ground that the nationality of the true claimant, a Roumanian company, was in no way affected by the fact that the shareholders were almost entirely American, and that it was not in accordance with the usages of international law for a foreign Government to take up a claim on behalf of any company which was not a national of that country.

The Society is a Turkish company, and, although the shareholders may be entirely of French nationality, it may create an unfortunate precedent to permit the French Government to take the matter to arbitration.

It is true that article 9 of the protocol departs in some degree from the strict rule concerning the nationality of companies by referring to companies in which the capital of allied nationals is preponderant. The question whether a company is entitled to benefit under the protocol does therefore depend on the nationality of its shareholders; but the further question of the Government who is, under international usage, entitled to press the claim of the company must, it is suggested, be separately considered.

The circumstances relating to the Society's concession are as follows:—

By article 8, 1°, (a) of the Decree of Mouharrem, 1881 (a Turkish decree), (p. 69 and following of document 2) the revenue of the tobacco monopoly in the Ottoman Empire was ceded with other revenues to the Council of the Administration of the Ottoman Public Debt (hereinafter called the "Debt Council") for the service of the Debt. By article 9 of the same decree the Ottoman Government declared itself not opposed in principle to arrangements being made for exploiting the monopoly by means of a Régie, subject to agreement between the Government and the Debt Council and subject to a division of profits between the Government, the bondholders and the exploiting Society.

In 1883 the Society obtained a concession from the Government for the administration of the monopoly in the Turkish Empire for thirty years (p. 192 *et seq.* of document 2), in return for which the Society undertook to pay a royalty of £ T. 750,000 annually to the Debt Council, and to be subject to the general control of the Debt Council (see articles 7 and 8 of the Cahier des Charges, pp. 194 and 195 of document 2). The net profits earned by the Society were to be divided on a sliding scale between the Government, the Debt Council and the Society.

In 1913, as the 1883 concession was nearing expiration, negotiations were opened between the Ottoman Government, the Debt Council and the Society for a renewal of the concession. It is understood that the monopoly was not popular in the empire, but that the Government, having become embarrassed financially, desired to obtain a



loan from the Society in return for an extension of the monopoly. A convention was eventually drawn up between these three parties renewing the concession for fifteen years from the 15th April, 1914 (see document 3 herewith).

The convention states in terms that it contains the conditions under which the tobacco monopoly is to be exercised from the 2nd (15th) April, 1914. The terms of the earlier concession have therefore to a great extent been superseded except in so far as the national character of the Society was determined by them.

While the whole of this convention is of importance as constituting the concession on which the claim is based, reference may in particular be made to the following articles:—

Article 1.—The exploitation of the tobacco monopoly in the Turkish Empire is conceded to the company for the duration of fifteen years, dating from the 2nd (15th) April, 1914. The company pledges itself to continue the exploitation, without any break, in accordance with the stipulations of the present convention, when made definite by the promulgation of the Imperial Decree.

Article 6, which provides for payment to the Debt Council of an annual royalty of £ T. 800,000, "payable even if there are no profits," and for division of net profits between the Government, the Debt and the Society.

Following these there is a curious provision, which may prove of particular importance, as follows:—

In view of the fact that the fixed royalty and the amounts of surpluses indicated above apply to the territory of the Turkish Empire existing at the end of the Turkish year 1326 (1909).

That since that date the Treaty of Lausanne of the 18th October, 1912,* has made modifications to the above-mentioned territory and that current negotiations may result in others.

That the exploitation of the monopoly may become impossible in other parts of the territory.

These different eventualities may give rise to the following modifications in conformity with the examples on the attached list.

(Then follow provisions for the reduction of the royalty in proportion to loss of detached territories.)

It may be a question whether these provisions will apply to any events which result in the exploitation of the monopoly becoming impossible in other parts of the Ottoman Empire (e.g., the Treaty of Lausanne, 1923), or whether they refer only to the then current negotiations, but in considering this point it is material to note that a similar provision occurred in the 1883 convention (see p. 195 of document 2):—

Article 7.—As long as the debt indicated in the Decree of the 28th Mouharrem, 1299, and in the Supplementary Decree, 1321, is not entirely repaid, the Debt (Council) shall have the same rights of control as the Government.

Article 8.—The concession may be renewed by agreement to be drawn up between the interested parties two years or less before the date of expiry. . . . If, for any reason whatever, the tobacco monopoly should cease to be exploited by any company or individual, the monopoly shall revert to the Debt (Council).

Article 10.—The monopoly, the exploitation of which is conceded to the company by virtue of article 1, consists essentially in the right to manufacture and to sell, to the exclusion of all others, in the form of snuff, tobacco for smoking, for chewing, cigars and cigarettes within the extents of the Ottoman Empire, the tobacco produced in the Empire. As an exception, the vilayets of Bagdad, Basra and Mosul, &c., shall continue to enjoy provisionally the special régime now in force in each of these regions. The exploitation of the monopoly comprises, besides the collection of sundry receipts, viz. (*inter alia*):—

1°. The taxes in force at the present time in the regions enjoying the special régime indicated in the preceding paragraph.

(In the territory now known as Iraq, therefore, the only rights granted to the Society are those of collecting certain taxes.)

* This was a treaty between Italy and Turkey following on the war in Tripoli.

Article 14.—No alteration shall be made in any article in the present convention, except by agreement between the Government, the Debt (Council) and the company.

To the 1913 concession was attached a protocol which in Part 1 prescribed the conditions under which the new convention might be annulled by the company in the event of the Turkish Parliament affecting any modification or failing to confirm the concession before a certain date (see document 3), and in Part 2 set forth the conditions under which the Society made a loan of £ T. 1,500,000 to the Ottoman Government.

It was expressly provided in article 2 of the (1913) convention that the statutory modifications should be presented for their sanction to the Sublime Porte, but this sanction was never obtained, and although a provisional law was drawn up which was submitted to Parliament, no decision was taken upon it. Nevertheless, the Society did not demand its annulment under the protocol, but continued to operate, and Parliament is stated to have annually voted the money required to pay off the loan.

It had been suggested that in consequence of the failure to obtain the approval of the Ottoman Parliament the concession never became operative in law. As this question depended on Turkish law, an opinion on the matter was obtained from Count Ostrogrog, a copy of which is sent herewith (document 8). It will be seen that he takes the view that as the Society was allowed to operate on the basis of the 1913 convention, it cannot now be contended that the absence of confirmation by the Ottoman Parliament can be advanced as a reason for declining to admit the Society's claim to compensation.

The facts relating to the suppression of the monopoly can be shortly stated:—

In March 1915 British forces having entered Mesopotamia, the operations of the Society were suspended in the Basra Vilayet. In 1917 suspension occurred in the Bagdad Vilayet, and in 1918 in the remainder of Iraq. Suspension of the monopoly occurred in Palestine in April 1921, and in Transjordan on the 19th June, 1921, although in these territories the Society was permitted to carry on the commercial business of manufacturing and selling tobacco.

In 1922 the French Government were pressing on behalf of the Society for compensation in respect of the damage caused by the suppression of the monopoly, and the then Secretary of State for Foreign Affairs informed the French Ambassador that "His Majesty's Government continue to hold the view that, failing an amicable settlement, the claim of the Ottoman Tobacco Régie should be submitted to arbitration" (p. 3 of document 1).

It may be noted that the Society at about this time also lost its monopoly in Turkey. Some time prior to January 1923 the Turkish Government deprived the Society of its revenues and set up a director of their own at Angora to administer the monopoly, though the Society was apparently permitted to carry on ordinary business in tobacco in Turkey itself.

On the 13th June, 1923, an agreement (document 5 herewith) was entered into between the Society and the Turkish Government (to which the Debt Council was not a party), by article 8 of which the Society agreed, "de son propre gré," to concede to the Government the right to suppress the administration of the monopoly before its natural expiration in April 1929, on the Government giving three months' notice (such notice to expire at the end of a financial year), neither party was to have any claim to indemnity or compensation, but the conditions of termination were (with certain exceptions) to be those provided for in the 1913 protocol. The Government were relieved from paying additional 25 per cent. prices on inventory stock taken over. It was provided that the Government might repay to the Society the amount of its capital, namely, 40 million francs, and itself take over all the rights, obligations and, upon payment of the inventory price, the stock of the Society in the Régie, with the exception of the reserves, which belonged to the shareholders.

During the six months before the signing of this agreement negotiations for the Treaty of Lausanne had been in progress. An extract from a note made by Mr. B. H. Bourdillon (Counsellor to His Excellency the High Commissioner for Iraq) as to the effect of these negotiations on the June 1923 agreement is sent herewith for the Law Officers' information (document 10).

The Society's version of the circumstances in which the 1923 agreement was signed is given in Part III of Annex III to their claim (pp. 18-23 of document 1).

The Debt Council were apparently not consulted at all in the 1923 agreement and subsequently entered a protest against it.

[19745]



On the 24th July, 1923, the Treaty of Lausanne and the concession protocol attached to it were signed.

On the 6th August, 1924, the treaty came into force and in the same month notice was given by the Ottoman Government to the Society in accordance with the 1923 agreement, and the cancellation date was fixed as the 1st March, 1925. In pursuance of the terms of cancellation the Ottoman Government has paid to the Society their full capital of 40 million francs, and from the 1st March, 1925, the control and sale of tobacco has been administered by the Ottoman Government direct.

In the same month the Debt Council sent a formal protest to the Society telling them that they, the Debt Council, did not recognise the 1923 agreement (document 6).

In August 1925 the French Embassy again took the matter up with the Foreign Office. In January 1926 the Foreign Office invited the Society to submit a specific claim which would be considered (p. 7 of document 1).

In February 1926 the Society accordingly furnished a detailed claim to the Foreign Office through the French Ambassador (pp. 9-23 of document 1).

The Society has now gone into liquidation and the liquidator is represented by an English firm of solicitors, Messrs. Johnson, Jecks and Colclough, who have written to the Colonial Office pressing for a settlement of their clients' claim (pp. 27-29 of document 1).

These being the facts relating to the matter, it remains to examine the basis of the company's claim and any possible objections which can be adduced to repel it.

The Society have formulated their claim in the following terms:—

- (1.) It considers that the rights accruing to it under the concession granted to it by the convention of 1913 are juridically incontestable.
- (2.) By the action of the British authorities it has been deprived of the monopoly of exploitation granted to it by this convention.

This dispossession gives it the right to an indemnity equal to the profits which it may legitimately have expected from its exploitation during the whole period during which it has been and will remain dispossessed.

In order to succeed in their claim the Society must, therefore, first establish that the rights accruing to it under the convention of 1913 remain incontestable. This contention involves questions of the construction of the Treaty of Lausanne and attendant documents including the Concessions Protocol and also general considerations of international law.

If article 9 of the protocol governs the position the State acquiring the territory is subrogated as from the 30th October, 1918, to the rights and obligations of Turkey towards the Society.

In order that it may apply, two conditions must be fulfilled:—

- (1.) There must be "a concessionary contract entered into before the 29th October, 1914, with the Ottoman Government or any local Ottoman authority."

It is to be observed that the tobacco monopoly in Turkey was originally granted to the Debt Council by the Decree of Mouharrem. That decree expressly recognised that the monopoly might be exploited by a company provided that the terms of any arrangement to that end were approved by the Ottoman Government and included a provision for a share of the profits being paid to them.

When the agreement of 1883 was originally made and when it was renewed in 1913 the Debt Council had already acquired indefeasible rights to the tobacco monopoly, and the Ottoman Government were not therefore in a position to create the monopoly or to grant away to anyone else the rights already conferred on the Debt Council. They were necessary parties to the agreements because they had to approve its terms and also because the exemptions from taxation, &c., to which the Debt Council itself was entitled could not be passed on to the Society except by the action of the Ottoman Government.

There is therefore, it is submitted, room for doubt whether the convention of 1913 is a concessionary contract made with the Ottoman Government within the meaning of article 9, since the monopoly conferred on the concessionnaires is derived from the Debt Council and not directly from the Government itself.

The Law Officers will remember that the treaty makes special provision for the partition of the Ottoman Public Debt. Territories detached from Turkey are made liable to contribute annuities of amounts to be ascertained, but these amounts being paid, they are free to dispose of their revenues in such manner as they think fit, and

are no longer bound by those provisions of the Decree of Mouharrem which allocated certain revenues (including the tobacco monopoly) to the service of the Debt Council.

The paramount rights of the Debt Council under the Decree of Mouharrem having thus disappeared, can it be said the Concessions Protocol has the effect of keeping alive the derivative rights conferred on the Society by the agreement of 1913?

The fact that in the territory now known as Iraq the only rights acquired by the Society were to collect certain taxes makes it, it is submitted, all the more difficult to regard this convention as a concessionary contract within the meaning of article 9.

(2.) The next question is whether at the material date under the protocol, which the Law Officers will remember they have advised* in connexion with the case of the Bagdad Railway Company is the 30th October, 1918, the capital of nationals of the Allied Powers was preponderant in the Society. This is a question of fact, concerning which enquiries have been made, but it has not been possible to obtain positive information. It seems probable, however, that the only way to obtain definite information is to approach the Society direct, but it is not proposed to adopt this course at this stage unless the Law Officers so desire. If it was not, there is presumably no claim under article 9.

The question will then arise whether it is now open to His Majesty's Government to rely on this contention, having regard to the course the negotiations in the matter have taken, as set out in the correspondence between the Foreign Office and the French Government, to which reference has already been made.

If neither of the two suggestions already made is sufficient in the opinion of the Law Officers to dispose of the claim, there are certain further matters which require consideration.

It will be remembered that article 6 of the convention of 1913 refers to the possibility that the exploitation of the monopoly may become impossible in other parts of the territory and provides for the modifications to be made in this event in the financial provisions of the convention.

It has been suggested that, as the instrument under which the Society are claiming expressly recognises the possibility of further territory being detached, the rights of the Society are those conferred by the conventions, to have the financial provisions adjusted, and the sole obligation of Turkey (to which the succession States are subrogated) was to acquiesce in that financial adjustment.

The difficulty of accepting this view, apart from any question whether that article refers to anything beyond the negotiations then pending (but in this connexion the Law Officers will recollect that there was a similar provision in the 1883 convention), is that before the clause operates at all the exploitation of the monopoly must have become impossible in parts of the territory.

If article 9 of the Concessions Protocol does apply to the concession, then, so far from becoming impossible, the exploitation of the monopoly should apparently be permitted to continue, although it has been suggested that if the word "impossible" referred solely to the detachment of territory, the position might be different.

It has been suggested that the agreement of June 1923 between the Society and the Turkish Government relating to the termination of the monopoly and the subsequent termination thereof by notice on repayment of the whole of the capital of the Society affords a ground for contending that there is no valid concession within the meaning of article 9 of the protocol.

There appear, however, to be considerable difficulties in the way of sustaining this contention and the subsidiary suggestion that, even if the notice given by the Turkish Government did not in itself have the effect of putting an end to the rights of the Society in the detached territories, it is now open to the Governments of the territories concerned themselves to give notice under that agreement. While it is true that the States in question have been subrogated to Turkey's rights and liabilities and are thus *prima facie* entitled to take advantage of any agreement relating to the concession which Turkey may have made with the Society, that subrogation takes place as from the 30th October, 1918, a date long before the agreement of 1923, and it may therefore be difficult to contend that the succession States can be affected by or take advantage of anything Turkey may have done in relation to a concession after that date.

The Society will no doubt contend that the agreement of 1923 related only to that part of the monopoly which was being operated in territory remaining Turkish, on the ground that it must have been obvious to everyone by that time that Iraq, Palestine and Transjordan would be detached.

The fact that the Society succeeded in obtaining repayment of the whole of their capital may possess significance, but it is capable of explanation on the ground that it

* Confidential 13403, p. 17.



afforded a convenient method of liquidating the damages due to the Society for breach of the concession by Turkey in respect of the territory remaining Turkish.

If it becomes necessary to admit the application of article 9 of the protocol, and that the State acquiring the particular territory is subrogated as from the 30th October, 1918, to the rights and liabilities of the Ottoman Government, the next point to consider is whether the basis suggested by the Society for assessing the compensation is correct.

The claim is based on the assumption that the claimants are entitled to compensation equal to the increased profits which it might have expected to gain had the exploitation continued during the whole period during which it has been and will remain dispossessed (see pages 11 to 17A of document 1).

Article 9 of the protocol does not in terms give any right to compensation, but only to have the concession maintained with such adaptations under article 4 as may be necessary to put it into conformity with new economic conditions.

"Where no request for readaptation has been made by a concessionnaire under article 4, it is by no means clear what his remedy is should the Government of the territory concerned decline to permit him to enjoy his rights under his original concession. By article 9 of the protocol that Government is subrogated to the liabilities of the Turkish Government under the existing concession, but the protocol is not a part of the municipal law of the territories in question and therefore he would appear to have no remedy in their municipal courts.

It remains to be considered whether, without the consent of His Majesty's Government, the Society could bring a claim before the Permanent Court of International Justice at the Hague. Assuming that article 9 of the protocol applies, the present claim of the Society bears some analogy to that of Mavrommatis (with which the Attorney-General will be familiar) inasmuch as the monopoly of the Society has been totally suppressed by the Governments concerned. It may therefore be that action could similarly be taken under article 11 of the mandate in the case of Palestine (document 12 herewith). In the case of Iraq, the position is somewhat different. By paragraph V of the Decision of the Council of the League of Nations of September 1924 (see document 13 sent herewith) any dispute between His Majesty's Government and another member of the League as to whether the provisions of the Iraq Treaty or of that decision are being fulfilled in Iraq, or as to their interpretation or application, if not settled by negotiation, is to be submitted to the Permanent Court of International Justice. By article 10 of the Iraq Treaty (document 14 herewith) the parties agreed to conclude separate agreements to secure the execution of any treaties, agreements, &c., which His Britannic Majesty is under obligation to see carried out in respect of Iraq. These engagements by a note of the 26th March, 1924, were interpreted as including the Treaty of Lausanne.

In view of the fact that the Society is a Turkish company, it would seem that the proper Government to take up the case diplomatically is the Turkish Government. But the Turkish Government, since Turkey is not a member of the League, could claim no right under article 11 of the Palestine Mandate or under paragraph V of the League Council's decision of September 1924 to bring a claim by the Society before the Permanent Court of International Justice. On the other hand, to concede the right of the French Government to take up the Society's claim might create a precedent which would be embarrassing in connexion with the Standard Oil Company's claim already mentioned. It is, however, possible that, having regard to the wording of the protocol and to the reference therein to questions of the nationality of the preponderant capital in societies, a distinction can be drawn between the present case and the claim such as that which the United States Government are attempting to press in the Roumanian case.

The Law Officers are accordingly requested to advise:—

1. Whether, in view of the correspondence which has passed between their respective representatives, His Majesty's Government is committed to the claim of the Society being referred to arbitration at the request of the French Government.
2. If so, whether any special reservation should be made in consenting so to refer the matter, having regard to the fact that the Society is a Turkish company.
3. Whether the French Government are entitled (under articles 11 and 26 of the Palestine Mandate and under the decision of the League of Nations of

the 24th September, 1924, as regards Iraq) to take the claim to the International Court of Justice (without the consent of His Majesty's Government).

4. Whether His Majesty's Government has in law a good defence to the claim of the Society to compensation for the suppression of their monopoly, and, if so, on what grounds.
5. Whether, having regard to all the circumstances, an attempt should be made to settle the claim, and, if so, whether the basis of claims put forward by the Society is correct, or, if not, what is the true basis on which the compensation (if any) should be calculated.
6. Generally on the case.

Opinion of the Law Officers of the Crown.

1. We observe in the claim enclosed in the French Embassy letter of the 22nd February, 1926, that the dates of the grievances set out, so far as relates to Mesopotamia, begin as far back as March 1915 (Appendix 2, p. 11), but when the claim is quantified (Appendix 2, p. 15) it appears that the claim really begins in November 1918. The distinction is material, since, in our view, claims in respect of acts done before October 1918 would not fall within the provisions of the Treaty of Lausanne, and therefore the special provisions of the 9th article of the protocol with regard to companies in which Allied nationals preponderate would not apply. We do not think that the correspondence with the French Government would necessarily pledge His Majesty's Government to submit to arbitration any claim whatever its nature; but, in our opinion, it would be very difficult for His Majesty's Government, in view of that correspondence, to refuse arbitration altogether; and we think that it may fairly be said that claims limited to the period covered by the Treaty of Lausanne must be submitted to arbitration.

2. We think it should be made clear that the reason why we recognise the right of the French Government to intervene lies in the express provisions of the protocol; and that we can only agree to arbitration on the basis that it is shown that French capital preponderated in the Society on the 30th October, 1918.

3. In view of the decision of the Permanent Court of International Justice in the Mavrommatis case, we think it would probably be held that the French Government was entitled to take the claim of the Society before that court without the consent of His Majesty's Government.

4. The contract is a Turkish contract; its validity and meaning and remedies for any breach are matters of Turkish law; we can only deal with this and the following question on the basis that English and Turkish law would interpret the contract alike and would give the same remedies if its provisions were not observed. Count Ostrorog has already advised that by Turkish law the contract was a valid one. In our opinion it is a concessionary contract within the meaning of article 9 of the protocol of the Treaty of Lausanne. It is true that the administration of the Ottoman Debt had a charge on the tobacco monopoly and that the concession could not, therefore, be granted without their consent; but in our opinion this does not render it any the less a concessionary contract when it was granted with that consent. We do not think that the provisions with regard to territories detached from the Turkish Empire have any effect as regards territories detached under the express provisions of the Treaty of Lausanne. Admittedly the Governments of those territories in Iraq, Palestine and Transjordan, have not observed the terms of the concession; and, therefore, there seems *prima facie* to be a good claim for compensation against these Governments.

5. In these circumstances, it would seem wisest to attempt a settlement of the claim. The claim being for damages would rightly be estimated upon the basis of the profits actually lost to the Society by reason of their being deprived of the rights granted to them under the concession. We do not think that the agreement with the Turkish Government of June 1923 covers territory which *de facto* ceased to be within Turkish territory at the conclusion of the war; this again, however, is a question of construction under Turkish law. Whether the figures put forward by the Society can be justified is a matter for expert criticism; but assuming that they are justified, the basis does not seem to us an unreasonable one.

DOUGLAS MCGAREL HOGG.
T. W. H. INSKIP.

Law Officers' Department,
January 31, 1928.



1928

14

GENERAL.

[E 2988/322/65/1928]

No. 3.

[Colonial Office]

[May 24, 1928.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, May 9, 1928.

Conditions
of contract
for harbour
works at
Haifa.

I AM directed by Mr. Secretary Amery to state that, in connexion with the construction of certain harbour works at Haifa out of funds provided by the recent Palestine Loan which was issued under a guarantee by His Majesty's Government, a question has arisen with reference to article 18 of the Palestine Mandate.

2. In March 1926, Mr. Amery sought your opinion on the question whether it would be consistent with the terms of the mandates for Palestine and Tanganyika territory to attach to the British guarantee of the loan to be raised by the Government of those territories formal conditions, (a) that any contracts for the works of development to be paid for out of the loans should be given to British and not to foreign firms, and (b) that all non-local expenditure should be in the United Kingdom. You reported, on the 16th March, 1926, that in your opinion the attachment of such conditions to the guarantee by His Majesty's Government of the Palestine Loan would not be inconsistent with article 18 of the mandate.

3. No formal conditions of the nature in question were in fact attached to the guarantee of the Palestine Loan, but in the course of the debate on the Bill at the committee stage, recorded in pp. 2369 to 2378 of vol. 200 of the "Official Record of Parliamentary Debates," Mr. Amery stated that he was quite ready to give the most explicit assurance that, broadly speaking, with the exception of some particular small item or some unforeseeable circumstances of urgency, the whole orders for the executing of the public works to be paid for out of the loan, apart from the work to be done locally, would be placed in this country. Mr. Amery went on to say that this ensued quite naturally and automatically from the provisions already in force. The orders for the works would be issued through the Crown Agents for the Colonies, and the Crown Agents have standing instructions not to give any order outside this country, or outside the British Empire, without special reference to the Secretary of State.

4. The construction of the harbour at Haifa was one of the principal objects to be charged against the funds raised by the loan; and, though at the time when Mr. Amery made the above statement in the House of Commons no decision had been taken as to the manner in which this work should be carried out, it was evidently assumed that these works would be constructed by a staff employed for the purpose by the Palestine Government, and, as he stated on that occasion, that their orders would be issued through the Crown Agents for the Colonies. The Government of Palestine now desires, however, to arrange for the works to be constructed by contract, and will probably wish that tenders for the construction of these works should be invited from selected British firms only, the tenders to provide that the contractor shall use British or Palestinian materials as far as possible. The question therefore arises whether such a course would be contrary to article 18 of the Palestine Mandate. I am to enclose a copy of correspondence with the Foreign Office in which the position has been discussed. I am also to enclose a copy of the Palestine Mandate. Article 18, it will be seen, provides that the Mandatory shall see that there is no discrimination in Palestine against the nationals of any State Member of the League of Nations as compared with those of the Mandatory or of any foreign State in matters of commerce, or the exercising of industries or against goods originating in any of those States. It may be thought that this is a provision against a general discrimination by legislation or other Government action, and is not designed to prevent the Government of Palestine spending its money as it considers best. Otherwise, unless in placing all contracts the Government of Palestine issued world-wide invitations to tender and accepted the lowest suitable tender irrespective of the nationality of the tenderer, it would apparently be guilty of some discrimination within the terms of the article whenever it accepted a tender of a national of the Mandatory or of a State not a member of the League which was not the lowest suitable tender.

5. I am, therefore, to request that Mr. Amery may be favoured with your advice on the following points:—

Whether, having regard to article 18 of the Palestine Mandate, His Majesty's Government is under an obligation to prevent the Government of Palestine from

GENERAL.

15

proceeding in connexion with the contract for the harbour works at Haifa in any of the following ways:—

- 1.—(a.) Placing the contract with a British firm without inviting any tenders.
- (b.) Inviting tenders from British firms alone.
- (c.) Issuing a world-wide invitation to tender and then accepting a British offer if it appears suitable, although not the lowest suitable tender.
- 2.—Making it a term of any contract that the contractor shall use British or Palestinian materials as far as possible.

I am, &c.

J. E. SHUCKBURGH.

List of Papers.

- (A.) Palestine Mandate. [Cmd. 1785.] [E 322/322/65/1928.]
 (B.) Colonial Office to Foreign Office, January 19, 1928. [E 322/322/65/1928.]
 (C.) Foreign Office to Colonial Office, January 30, 1928. [E 322/322/65/1928.]
 (D.) Foreign Office to Colonial Office, February 8, 1928. [E 322/322/65/1928.]
 (E.) Colonial Office to Foreign Office, March 14, 1928. [E 1373/322/65/1928.]
 (F.) Foreign Office to Colonial Office, March 29, 1928. [E 1373/322/65/1928.]
 (G.) Law Officers to Colonial Office, March 5, 1926. [E 1373/322/65/1928.]

Report.

Discrimination within the meaning of article 18 of the Mandate of Palestine must be a question of fact depending on the precise circumstances, and we have difficulty in answering the questions submitted to us without some qualification. If it is decided to be in the interests of the mandated territory that an offer by a British firm to enter into a contract on any particular terms should be accepted, we see no reason for requiring that tenders should be invited from firms of other nationality. Similarly, if after the issue of a world-wide invitation to tender, it is thought desirable in the interests of the mandated territory to accept a suitable British tender, though not necessarily the lowest suitable tender, we are of opinion that there is nothing in article 18 of the Palestine Mandate to compel the acceptance of any other tender. We are also of opinion that the mere circumstance that tenders were only invited from firms which were, in fact, British would not offend against article 18, but a general invitation to tender subject to a restriction that only tenders from British firms would be considered would, in our opinion, be on the other side of the line.

We think it would be discrimination within the meaning of article 18 to make it a term of the contract, without regard to the efficient execution of the proposed work, that the contractor should use British or Palestinian materials as far as possible.

T. W. H. INSKIP.
 F. B. MERRIMAN.

Law Officers' Department,
 May 24, 1928.



1928

16

GENERAL.

[T 7281/3/378/1928]

No. 4.

[Treasury Solicitor.]

[May 24, 1928.]

*Case for the Opinion of the Law Officers of the Crown.*Possible
conflict
between
British
nationality
and
Palestine
citizenship.

THE Treasury Solicitor has received from the Home Office a letter dated the 24th February, 1928, of which the following is a copy:—

"496099/10.

"Home Office, Whitehall,

"Sir,

"February 24, 1928.

"I am directed by the Secretary of State to refer to the opinion of the Law Officers of the Crown dated the 7th April, 1925,* on the constitutional position of the Government of Palestine in relation to His Majesty, and to transmit to you, to be laid before the Law Officers, the accompanying case for their opinion on two points connected therewith which have arisen out of the British Nationality and Status of Aliens Act, 1914. The Secretary of State directs me to request that you will move the Attorney and the Solicitor-General to favour him with their opinion on the two questions raised.

"I am, Sir,

"Your obedient Servant,

"JOHN PEDDER

"The Treasury Solicitor,

"Storey's Gate, S.W. 1."

The Case for the Opinion of the Law Officers transmitted with the Home Office letter is annexed hereto.

The Law Officers are requested to advise upon the Questions raised in the Case.

Case for the Opinion of the Law Officers.

I.

The Secretary of State desires to have the opinion of the Law Officers on the question whether a British subject who acquires Palestinian citizenship by the grant of a certificate of naturalization under Article 7 of the Palestinian Citizenship Order in Council, 1925, thereby ceases to be a British subject.

1. The Mandate for Palestine, Article 7, contains the following provision:—

"The Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine."

2. In fulfilment of the obligations in Article 7 of the Mandate, the Palestinian Citizenship Order, 1925, was made under the Foreign Jurisdiction Act, 1890. By Article 7 (1) of this Order it is provided that the High Commissioner may grant a certificate of naturalization as a Palestinian citizen to any person who makes application therefor and satisfies the High Commissioner that he has fulfilled the residence and other qualifications specified in the Article. By Article 7 (2) of this order it is provided that the certificate of naturalization shall not take effect until the applicant has taken the oath of allegiance in the form stated in the Schedule to the Order, viz.:—

"I, A.B., swear by Almighty God that I will be Faithful and Loyal to the Government of Palestine."

3. The Oath of Allegiance in His Majesty's Dominions commonly connotes allegiance to the King, e.g., the British Nationality and Status of Aliens Act, 1914, prescribes that on naturalization the following oath shall be taken:—

"I, A.B., swear by Almighty God that I will be Faithful and bear true allegiance to His Majesty King George the Fifth, His Heirs and Successors according to law."

* Confidential 13004, p. 30.

GENERAL.

17

4. Section 13 of the British Nationality and Status of Aliens Act 1914, is as follows:—

"A British subject who when in any foreign State and not under a disability by obtaining a certificate of naturalization or by any other voluntary and formal act becomes naturalized therein shall thenceforth be deemed to have ceased to be a British subject."

5. The question for determination appears to be affected by the consideration whether Palestine is a "foreign State" within the meaning of the above section.

6. The attention of the Law Officers is directed to the considerations set out in the enquiry addressed to them in 1925 by the Colonial Office with reference to the constitutional position of the Government of Palestine in relation to His Majesty, and to their Opinion thereon, dated the 7th April, 1925, viz., that the constitutional position of the Government of Palestine would in any British Court be determined by reference to the Palestine Order in Council, 1922, and that its position in relation to His Majesty is the same as that of other Governments established by Order in Council under the Foreign Jurisdiction Act, 1890. The Opinion further expressed the view that internationally foreign States are bound to recognise the position of His Majesty in Palestine as defined in the Mandate; and by Article 1 His Majesty has the right to exercise all the powers inherent in the Government of a Sovereign State, save as therein limited.

7. It might be argued that the citizenship contemplated by Article 7 of the Mandate and established by the Palestinian Citizenship Order, 1925, is a national status which has all the incidents of the nationality of an independent Sovereign State. It may be mentioned that the Government of Poland, whose law provides for the loss of nationality upon naturalization in another State, have held that Polish subjects who have acquired Palestinian citizenship by naturalization have thereby lost their Polish status. From this it might be argued that, from the international standpoint, the acquisition of Palestinian citizenship does not differ from, and produces exactly the same consequences as, the acquisition of the nationality of an independent Sovereign State.

8. It might further be argued that, notwithstanding the special relationship between the Government of Palestine and His Majesty as Mandatory, Palestine is a "foreign State" within the meaning of Section 13 of the British Nationality and Status of Aliens Act, 1914, so that a British subject who becomes a Palestinian citizen by naturalization thereby loses his British nationality, in accordance with the general principle of British law that a person loses his British nationality on acquiring another nationality. In support of this argument it might be contended that any other conclusion would be inconsistent with the Mandate, as it would involve the position that Palestinian citizenship is a merely local status and that Palestine is not, for the purposes of British nationality law, in the same position as any other country which has a nationality of its own.

9. On the other hand, it can be argued that the question whether Palestine is a "foreign State" ought to be determined by reference to the right conferred on His Majesty by Article 1 of the Mandate to exercise all the powers inherent in the Government of a Sovereign State, subject to the limitations imposed by the Mandate and by reference to the constitutional position as determined by the Palestine Order in Council, 1922, and that the conclusion to be drawn is that Palestine is not a "foreign State" within the meaning of Section 13 of the Act of 1914 if that expression there is to be construed as meaning "independent foreign Sovereign State."

10. It may be urged further that if a British subject who becomes naturalized in Palestine is to be deemed to have become naturalized in a foreign State, he would apparently lose his British nationality by reason of a certificate of naturalization granted under authority conferred by the Sovereign to whom, as a British subject, he owed allegiance—which would seem anomalous.

11. It is to be borne in mind that, pursuant to Article 12 of the Mandate, diplomatic and consular protection is afforded by His Majesty to Palestinian citizens outside Palestine, and that for this purpose Palestinian citizens are in the same position as British protected persons. Thus a British subject who became a Palestinian citizen would continue to receive British Consular protection abroad even if he ceased to be a British subject and became an alien in contemplation of British nationality law.

12. One of the questions to be considered is whether the Palestine Order in Council, 1922, is the sole document which falls to be considered in determining

[19745]

D



whether Palestine is a "foreign State" for the purposes of Section 13 of the British Nationality and Status of Aliens Act, 1914, or whether it is also necessary to have regard to the position of Palestine as a territory administered under Mandate of the League of Nations in accordance with the principles laid down in Article 22 of the Covenant.

13. The anomalies which would result from holding that Palestinian citizenship is a nationality in the full sense are due to the fact that the constitution of Palestine is inconsistent with its being an independent foreign State. In fact, it has never been recognised as such. It will be observed that paragraph 4 of Article 22 of the Covenant does not lay it down that the communities therein referred to "are hereby" or "must be" recognised as independent nations, but that they can be so recognised. The position is that Palestine can be recognised as an independent nation when the situation allows, but that it has not so far been possible to accord that country such recognition.

The Law Officers are requested to advise—

Whether a British subject who acquires Palestinian citizenship by the grant of a certificate of naturalization under Article 7 of the Palestinian Citizenship Order in Council, 1925, thereby ceases to be a British subject.

II.

The Secretary of State desires, also, to have the Opinion of the Law Officers on the further question, whether members of the Palestine Civil Service can properly be regarded as being in the service of the Crown within the meaning of Section 2 of the British Nationality and Status of Aliens Act, 1914, which provides that the Secretary of State may grant a certificate of naturalization to an alien who makes an application for the purpose, and satisfies the Secretary of State, *inter alia*, that he has "either resided in His Majesty's dominions for a period of not less than five years . . . or been in the service of the Crown for not less than five years within the last eight years before the application."

1. On the one hand, it may be contended that the Mandate for Palestine being vested in His Majesty the King, the Government of Palestine is merely the instrument by which His Majesty exercises his authority, and that the servants of that Government are in fact the servants of His Majesty, and may therefore qualify by such service for naturalization as British subjects, pursuant to Section 2 of the Act of 1914. On this view, members of the Palestine Civil Service are to be regarded as falling in the same category as persons employed in the service of the Government of a British Protectorate.

2. On the other hand, it may be contended that the Government of Palestine is not the Crown within the meaning of Section 2 of the British Nationality and Status of Aliens Act, 1914. In this connection the attention of the Law Officers is directed to their Opinion dated the 7th April, 1925, with reference to the constitutional position of the Government of Palestine in relation to His Majesty.

3. It would appear to be open to question, moreover, whether a certificate of naturalization as a British subject could properly be granted to a person upon the basis of employment in the service of the Government of a territory which possesses a nationality of its own, assuming that Palestinian citizenship is a nationality in the full sense of the term, and which exercises the power of conferring that nationality by the grant of certificates of naturalization to persons within its jurisdiction.

The Law Officers are requested to advise—

Whether an alien who is employed in the service of the Government of Palestine may qualify by reason of such service for the grant of a certificate of naturalization under Section 2 of the British Nationality and Status of Aliens Act, 1914.

Opinion of the Law Officers of the Crown.

1. So long as the constitutional position of Palestine continues as it is by virtue of the Palestine Order in Council, a British subject who acquires Palestinian citizenship under Article 7 of the Palestinian Citizenship Order in Council, 1925, does not in our opinion cease to be a British subject. The oath of allegiance to the Government of Palestine as established by the Order in Council made by virtue of the Foreign Jurisdiction Act is a recognition of the exercise by His Majesty of His powers as Mandatory for Palestine, and in our opinion Palestine is not a "foreign State" within the meaning of Section 13 of the British Nationality and Status of Aliens Act, 1914.

2. We are of opinion that an alien who is employed in the service of the Government of Palestine may qualify by reason of such service for the grant of a certificate of naturalization under Section 2 of the British Nationality and Status of Aliens Act, 1914.

T. W. H. INSKIP.
F. B. MERRIMAN

Law Officers' Department,
May 24, 1928.

[E 5645/322/65/1928]

No. 5.

[Colonial Office]

[November 12, 1928.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, October 27, 1928.

I AM directed by Mr. Secretary Amery to refer to your report* dated the 24th May in regard to the interpretation to be placed on article 18 of the Palestine Mandate in so far as it concerns the invitation of tenders to construct harbour works at Haifa. A copy of the report is enclosed (Enclosure (A)).

2. As you stated in that report that you were of the opinion that the mere circumstances that tenders were invited only from firms which were in fact British would not offend against article 18 of the Palestine Mandate, Mr. Amery decided that invitations to tender for the work should be issued to selected British firms only. Preliminary invitations to tender were issued on the 9th August, and the contractors were given to understand that definite invitations and tender forms would be sent to them at the beginning of October. Certain foreign firms, who were aware of the proposal to construct a harbour at Haifa, approached the Palestine Government, or in some cases His Majesty's Government in Great Britain, and asked to be furnished with particulars of the works in order that they might have an opportunity of submitting tenders. Mr. Amery proposed that the reply to all enquiries on the point, whether emanating from foreign firms or Governments, should be that it had been decided to invite tenders for the Haifa harbour works from selected British firms only. The Acting Secretary of State for Foreign Affairs took exception to this course and the matter has been the subject of prolonged departmental correspondence, of which copies are attached (Enclosures (B-F)). From paragraph 9 of the Foreign Office letter of the 16th October (Enclosure (F)) it will be seen that the Acting Secretary of State for Foreign Affairs does not agree with the interpretation which Mr. Amery had placed upon your report of the 24th May. It has accordingly been decided, with the concurrence of the Acting Secretary of State for Foreign Affairs, to solicit an expression of your opinion on the question whether, on the facts of the present case, the limitation of invitations to tender to selected British firms is consistent with article 18 of the Palestine Mandate.

3. The arguments in support of Mr. Amery's view that this course is correct are set out at length in the Colonial Office letter of the 4th October (Enclosure (E)). There is one point only on which he would wish to develop those arguments. The statement which he made in the House of Commons on the 9th December, 1926, as recorded in columns 2379 and 2380 of volume 200 of Hansard (copy attached, Enclosure (G)) was, of course, within the knowledge of the Palestine Government before the loan was issued in December 1927. That Government, therefore, accepted the benefit of

Conditions of
contract for
harbour
work at
Haifa.



1928

20

GENERAL.

the guaranteed loan with the knowledge that the orders for the executing of the public works contemplated would, apart from work done locally, be placed in Great Britain, and they are accordingly proposing to place the contract for the construction of Haifa harbour with a British firm. The only question which arises is whether article 18 of the Palestine Mandate imposes on His Majesty, in his capacity as mandatory for Palestine, an obligation to prevent the Palestine Government from limiting to British firms the medium through which it will spend certain monies obtained under the guaranteed loan. Having in mind the terms of your report of the 24th May, and, in particular, the terms of the penultimate sentence of that report, Mr. Amery is of the opinion that no such obligation rests upon His Majesty.

4. I am to request that Mr. Amery may be favoured with—

- (1) Your advice on the question whether, on the facts of the present case, the limitation of invitations to tender to selected British firms is consistent with article 18 of the Palestine Mandate; and
- (2) Any observations of a general character which you may be good enough to offer.

5. As the preliminary invitations to tender were issued more than ten weeks ago the matter is urgent, and Mr. Amery would be grateful if he could be favoured with your advice at a very early date.

I have, &c.

O. G. R. WILLIAMS.

List of Enclosures.

- (A.) Law Officers to Colonial Office, May 24, 1928 [Confidential, p.].
- (B.) Colonial Office to Foreign Office, September 15, 1928 [E 4566/322/65/1928].
- (C.) From Foreign Office to Colonial Office, September 15, 1928 [E 4439/322/65/1928].
- (D.) From Foreign Office to Colonial Office, September 24, 1928 [E 4566/322/65/1928].
- (E.) From Colonial Office to Foreign Office, October 4, 1928 [E 4819/322/65/1928].
- (F.) From Foreign Office to Colonial Office, October 16, 1928 [E 4819/322/65/1928].
- (G.) Parliamentary Debates, Vol. 200, cols. 2379 and 2380.

Report.

On the facts of the case now fully stated to us we are of opinion that the limitation of invitations to tender to selected British firms is not consistent with article 18 of the Palestine Mandate.

We desire to emphasise our former opinion that the interests of the mandated territory afford the test of the propriety of the course proposed. It was not our intention that this test should be regarded as applicable only to two of the courses suggested and not to the third.

It is not disputed that the limitation of tenders to British firms is intended to give effect to the assurance offered to the House of Commons on the 9th December, 1926. There is, therefore, something more than the mere circumstances of a limitation to firms which are, in fact, British. The object of the limitation appears clearly to be to discriminate in favour of British contractors and not to further the interests of the mandated territory.

The assurance given by you to the House of Commons on the 9th December, 1926, is not a circumstance which in our opinion affects the question submitted to us, as the British guarantee was not made subject to the condition that preference should be given to selected British firms.

T. W. H. INSKIP.
F. B. MERRIMAN.

Law Officers' Department,
November 12, 1928.

21

IRAQ.

[E 4047/133/65/1928]

No. 6.

[Colonial Office.]

[August 3, 1928.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, July 28, 1928.

I AM directed by Mr. Secretary Amery to state that a question has arisen with regard to the interpretation of certain articles in the Military Agreement concluded under article 7 of the Treaty of Alliance between Great Britain and Iraq of the 10th October, 1922. This agreement, which was signed on the 25th March, 1924, entered into force on the 19th December, 1924, upon the ratification of the principal treaty. A copy of a print containing the text of the Anglo-Iraq Treaty of 1922 and the agreements subsidiary thereto (including the aforesaid Military Agreement) is enclosed (Paper 1).

Interpreta-
tion of cer-
tain articles
in Anglo-
Iraq
Military
Agreement
of March
25, 1924.

2. By article 3 of the Anglo-Iraq Treaty of 1926 (copy enclosed, Paper 2) His Majesty's Government undertook *inter alia* to consider the possibility of amending the agreements referred to in article 18 of the Anglo-Iraq Treaty of 1922, namely, the Military Agreement of the 25th March, 1924, to which reference has already been made, and the Financial Agreement signed on the same day (Paper 1). In accordance with this undertaking, revised agreements were drawn up by His Majesty's Government and were submitted to the Iraq Government. Following upon preliminary negotiations, the Iraq Government have now formally expressed their inability to accept the revised draft agreements failing the acceptance by His Majesty's Government of certain important modifications. To these modifications His Majesty's Government are unable to agree.

A deadlock has accordingly been reached, and until this has been resolved and new agreements have been concluded, it would appear that, for the purpose of regulating the position of the Imperial garrison in Iraq and the financial relations between the two Governments, His Majesty's Government must continue to rely upon the provisions of the existing agreements.

3. The Iraq Government, however, have advanced the view that for the former purpose it will be impossible to rely upon the existing Military Agreement after the 19th December, 1928, since upon that date the greater part of that agreement will, in their opinion, cease to have effect. They apparently contend that, in view of the terms of articles 1 and 3 of the Military Agreement, the remaining articles, which depend for their effect upon article 3, will automatically become inoperative upon the expiry of the period of four years mentioned in article 1 (viz., upon the 19th December, 1928), and that there will then be no instrument safeguarding the position of the British forces in Iraq.

4. If this view is correct, it will be necessary for His Majesty's Government to consider what special measures will be necessary, failing the conclusion of a new agreement, in order to safeguard the position of the British forces in Iraq after December 1928, and to preserve the present powers and immunities secured to them under the existing agreement. But before doing so His Majesty's Government would wish to be satisfied that the interpretation placed by the Iraq Government upon articles 1 and 3 of the agreement is correct and cannot be resisted.

5. It will be observed that Article 1 of the Military Agreement only states that the two Governments "recognise the principle" that Iraq is to accept full responsibility before a given date for the maintenance of internal order and external defence and that article 3, which appears to be the more important article, continues the remaining provisions of the agreement in effect "so long as the presence of an Imperial garrison . . . is necessary in order to assist the Government of Iraq in attaining the full responsibility accepted in principle under article 1." Assuming, therefore, that no new agreements were concluded but that the Imperial garrison were to remain in Iraq beyond the maximum period contemplated in article 1 without objection being raised by the Iraq Government, it is submitted that it could be maintained that the two parties had tacitly agreed that the "principle" stated in article 1 could not yet be transformed into practice, that, therefore, the presence of the Imperial garrison was still "necessary" within the meaning of article 3 and that the following articles of the agreement accordingly remained in force.



6. In this connexion, however, the terms of article 3 of the Financial Agreement are of some relevance. This article also purports to impose a limit of time upon the continuance of British military support, since the financial assistance, to which reference is made in this article, is defined in the preceding article as meaning the maintenance in Iraq of an Imperial garrison. Owing to an oversight, the periods mentioned in article 1 of the Military Agreement and in article 3 of the Financial Agreement do not coincide, the one running from the date of the conclusion of the Military Agreement and the other from the date of the ratification of peace with Turkey. This discrepancy, however, is not, it is submitted, material to the question under consideration, and it is rather to the form of words employed in article 3 of the Financial Agreement than to this disparity of dates that the attention of the Law Officers is directed. It will be observed that in article 3 of the Financial Agreement the statement that the financial assistance (i.e., military support) provided by His Majesty's Government shall terminate within a given period is not conditioned by the use of any such qualifying phrases as "recognise the principle" or "accepted in principle" as in the Military Agreement, although the former expression is reproduced in article 1 of the Financial Agreement, in which no time limit is prescribed.

It might, perhaps, be argued that in case of doubt as to the meaning and intention of article 1 of the Military Agreement it would be reasonable to look to the wording of its counterpart in the Financial Agreement. It is suggested, however, that this view is by no means inevitable. The Military and Financial Agreements, although possessing certain points of similarity, are entirely separate and independent agreements. They were concluded under different articles in the principal treaty; they were designed to regulate entirely different matters and there is nothing in their terms to support the view that they depend upon each other either for effect or interpretation.

7. If it is held that the view of the Iraq Government set out in paragraph 3 above cannot be sustained and that articles 4 to 15 of the Military Agreement will not automatically cease to have effect upon the expiry of the period of four years mentioned in article 1 provided that an Imperial garrison be retained in Iraq after that date with the concurrence of the Iraq Government, it remains to consider whether the concurrence of the Iraq Government in, or at least the absence of objection on their part to, the retention of British forces in Iraq is essential in order to satisfy the requirements of article 3, i.e., whether the decision that the retention of those forces "is necessary" rests with His Majesty's Government or with the Iraq Government or, alternatively, requires the agreement of both Governments.

It is not anticipated that in practice the Iraq Government would, in any case for some time to come, feel able to dispense with British military support or desire the removal of the British forces from Iraq. The possibility that some extremist group might obtain temporary political control in Iraq and might then demand the withdrawal of the British garrison from the country cannot, however, be excluded from consideration, and it is therefore desirable that the question of what would be the position of His Majesty's Government under the Military Agreement in that event should be examined. In examining this question it is suggested that consideration should be given to the terms of article 7 of the Anglo-Iraq Treaty of 1922, in virtue of which the Military Agreement was concluded. Under that article His Britannic Majesty undertakes to provide such support and assistance to the armed forces of the King of Iraq "as may from time to time be agreed by the high contracting parties." It would thus appear that any decision affecting the extent of British military support and assistance, which is defined in article 2 of the Military Agreement as taking the form of the presence of a military garrison in Iraq, would require the prior agreement both of the Iraq Government and of His Majesty's Government. It would seem to follow that any proposal for the reduction (or increase) of the Imperial garrison and *a fortiori* any proposal for the total withdrawal of that garrison would also require the prior concurrence of both Governments, and, consequently, that it would not be open to the Iraq Government, by unilateral declaration and without the agreement of His Majesty's Government, to declare that the retention of the British garrison was no longer necessary within the meaning of article 3 and to demand its withdrawal from Iraq.

8. In the light of the foregoing considerations, I am to request that Mr. Amery may be favoured with your advice on the following points:—

Whether, in view of the terms of articles 1 and 3 of the Military Agreement, and having regard to terms of article 3 of the Financial Agreement, articles 4 to 15

inclusive of the former agreement will automatically cease to have effect upon the date of the expiry of the four years period mentioned in article 1 of that agreement if an Imperial garrison be retained in Iraq after that date (a) with the concurrence, expressed or implied, of the Iraq Government, (b) under protest from the Iraq Government to the effect that such retention is not necessary under article 3 of the Military Agreement.

I am, &c.

J. H. HALL.

List of Papers.

1. Anglo-Iraq Treaty of October 10, 1922; Protocol of April 30, 1923; and Agreements of March 25, 1924 (Cmd. 2370). [Treaty No. 1760.]
2. Anglo-Iraq Treaty of January 13, 1926 (Cmd. 2587). [Treaty No. 1810.]

Report.

In our opinion the period of the Military Agreement is fixed by the combined operation of articles 1 and 3 so as to end not later than the four years specified in article 1. Articles 4–15, therefore, in our opinion, will automatically cease to have effect upon the expiry of the four years. The maintenance of an Imperial garrison in Iraq after that date may be continued in accordance with any agreement made in pursuance of article 18 of the treaty, but in that event the conditions applicable to the maintenance of the force will be such as may be provided by the new agreement. If the Iraq Government, either by express or by implied agreement, concur in the maintenance of the garrison after the four years upon the same conditions as those contained in articles 4–15, those conditions will operate as a new agreement and not by virtue of the original agreement.

The retention of the Imperial garrison in Iraq in spite of the protest of the Iraq Government after the expiry of the four years would, in our opinion, be without any warrant derived from the Military Agreement and the provisions of the Military Agreement would be wholly inoperative.

T. W. H. INSKIP.

F. B. MERRIMAN.

Law Officers' Department,
August 3, 1928.

[E 28/28/44/1929]

No. 7.

[Treasury Solicitor.]

[December 10, 1928.]

Case for the Opinion of the Law Officers.

Herewith are sent the Case and accompanying Documents submitted to the Law Officers in July 1927.*

IF the Law Officers will be so good as to refer the last question submitted on the previous Case they will observe that they were asked to advise whether Article 65 of the Treaty of Lausanne entitled the Company to demand restoration to them (a) of any immovable property physically situate in Iraq which formerly belonged to them, and (b) any rights which but for the war they would have been entitled to exercise in Iraq by virtue of their concession. The reply was to the following effect:—

"We are of opinion that under Article 65 of the Treaty of Lausanne the Company are entitled to the restoration of any immovable property physically situate in Iraq which formally belonged to the Company, but that the provisions of Article 65 do not apply to rights which were conferred on the Company by the Concession but have not been exercised."

The High Commissioner for Iraq, who is dealing with the matter in that country on behalf of His Majesty's Government, has now raised the question whether the concluding words of the answer just quoted imply that the Company is entitled to the restoration of or compensation in respect of rights conferred on the Company by their Concession which have already been exercised.

* Confidential 13403, p. 12.

Claim of the Imperial Ottoman Baghdad Railway Company against His Majesty's Government in respect of Concession granted to the Company by the Turkish Government in 1903.



TURKEY.

The point which the High Commissioner has in mind is, it is understood, as follows:—

The Concession (details of which are given in the Case previously submitted) may be said for present purposes to have conferred two rights on the Company—(a) the right to build a railway and (b) the right to run it when built. The Company, in fact, constructed a railway for some 70 odd miles north of Baghdad, and, having regard to the opinion already expressed by the Law Officers, it is clear that they are entitled to have returned to them any physical property which came into being as a result of this construction. It appears, however, that the Company also exercised their right to run that portion of the railway, and the question raised by the High Commissioner is whether it is to be inferred from the last part of the sentence quoted from the Law Officers' Opinion that the Company are entitled to have returned to them this right as well. The matter is of importance, because, in fact, it is unlikely that any property will be returned in specie; the claim will be settled by the payment of compensation, and the question, therefore, is whether such compensation should be assessed on the basis that the railway is a going concern or on the scrap value of the physical property.

It is submitted that Article 65 is limited in its application to rights of property strictly so called, such as land, buildings, mortgages, &c., and that it has no application to rights arising under a contract, whether of a concessionary nature or otherwise. The phrase "property rights and interests situate in territory detached . . . which . . . are now in the hands of the contracting Power" seem quite inapt to describe a concessionary right to run a railway in future. Contracts other than concessionary contracts are dealt with in Articles 73 and 75 of the Treaty. Concessionary contracts are the subject of a special Protocol, which is referred to at some length in the case originally submitted. This Protocol provided that Concessions which fulfilled certain specified conditions should be maintained subject to readaptation to meet the new economic conditions. If rights arising under concessionary contracts are within Article 65, it would seem to follow that every concessionaire would be entitled to have his concession maintained, since that would in effect be the only way in which rights arising thereunder could be "returned" to him. This would in effect override the provisions of the Protocol, and can scarcely, therefore, have been the intention of the framers of the Treaty, nor, it is submitted, is it the natural interpretation of the language used. In so far as a concessionaire, acting under his Concession, has created physical property of any kind, he is no doubt entitled to the return of that property, but it is submitted that Article 65 has no application to future rights, which the concessionaire would but for the war have been entitled to exercise by virtue of his concession, such as, in the present case, the right to run traffic over a section of a railway already constructed, although that right had, in fact, been exercised by the concessionaires.

The Law Officers are accordingly requested to advise:—

1. Generally, whether in any case where rights conferred on a concessionaire have been exercised in whole or in part, the concessionaire has, under Article 65 of the Treaty, any greater right than the right to the return of the physical property involved.
2. In particular, whether in the present case that Article gives the Company any rights with regard to the future running of traffic over that part of the railway which has, in fact, been constructed.

Opinion of the Law Officers of the Crown

1. In our opinion, where rights conferred upon a concessionaire have been exercised in whole or in part, the concessionaire has, under Article 65, rights which are not limited to the return of the physical property involved divorced from the right of user.

2. In our opinion Article 65 does give to the Baghdad Railway Company rights with regard to the future running of traffic over that part of the railway which it has constructed and worked as a railway.

T. W. H. INSKIP.
F. B. MERRIMAN.

*Law Officers' Department,
December 10, 1928.*



1929

THIS DOCUMENT IS THE PROPERTY OF HIS BRITANNIC MAJESTY'S GOVERNMENT

Printed for the use of the Foreign Office.

CONFIDENTIAL.

(13761)

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1929.



(ii)

LIST OF REPORTS.

GENERAL.

No.		Date.	SUBJECT.	Page.
1 ^A	Law Officers .. [Privy Council Office]	Feb. 4, 1929	Interpretation of Part II of Medical Act, 1886, and of expression "registered medical practitioner of the United Kingdom"	1
GERMANY.				
1	Law Officers ..	Feb. 14, 1929	Evacuation of Rhineland and interpretation of article 431 of Treaty of Versailles	5
PALESTINE.				
1 ^B	Law Officers .. [Colonial Office]	Feb. 7, 1929	Extension of Imperial preference to Palestine ..	8
1 ^C	Law Officers .. [Colonial Office]	Feb. 16, 1929	Western or Wailing Wall in Jerusalem and rights of Jewish worshippers	12
PORTUGAL.				
2	Law Officers ..	June 21, 1929	Grievances of "Companhia do Nyassa" and right of His Majesty's Government to intervene ..	15
TURKEY.				
2 ^A	Law Officers .. [Treasury Solicitor]	Aug. 10, 1929	Claim of Bagdad Railway Company against His Majesty's Government	20

(iii)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1929.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

ACT—HOL.

A.

Act. *See* Medical Act, 1886.
Antiquities: Palestine Ordinance, 1920; inconsistency with article 13 of Palestine mandate, 14.
Armes automatiques Lewis, 18.
Army: occupying forces in Rhineland; treaty position as to withdrawal, 5-7.

B.

Bagdad Railway Company: claim against His Majesty's Government, 20-22.

C.

Claim: of Bagdad Railway Company against His Majesty's Government, 20-22.
Commission: Holy Places. *See* Holy Places.
"Companhia do Nyassa," 15-19.
Company: British shareholders in foreign, diplomatic intervention on behalf of, 17-19.
Concession: of Bagdad Railway Company in Iraq, 20-22.
" ditto: inadmissibility of claim for restoration of rights, 22.
" concessionary rights not covered by article 65 of Treaty of Lausanne, 21.
" of "Companhia do Nyassa," 15.

D.

Delagou Bay Railway Company, 17, 18, 19.
Diplomatic intervention: on behalf of British shareholders in a foreign company, 17-19.

G.

Germany: withdrawal of allied occupying forces, 5-8.
" reparation obligations. *See* Reparation.

H.

Heirs of Mrs. T. B. Rees and H. J. Whittall (Smyrna International Ferry) v. Turkish Government, 22.
Holy Places: status of Western Wall, Jerusalem, 14.
" Palestine, Commission, 12, 13.
" Order in Council, 13, 15.

5525 [21571]

IMP—MOS.

I.

Imperial Ottoman Bagdad Railway Company: claim against His Majesty's Government, 20-22.
Imperial Preference: extension to Palestine, 8-11.
" ditto; extension would infringe most-favoured-nation clauses of British commercial treaties, 11.
" extended to territories under British mandate in Central Africa, 8.
" cannot be extended to Trans-jordan, 10.
Intervention: diplomatic. *See* Diplomatic Intervention.
Iraq: Bagdad Railway Company's concession, 20-22.

J.

Jerusalem: Western or Wailing Wall, 12-15.
Jews: rights of worshippers at Western Wall, Jerusalem, 12-15.

L.

League of Nations: article 22 of Covenant; interpretation of, as regards status of mandated territories, 8-11.

M.

Mandates: difference between mandated territories of former Turkish Empire and those of Central Africa, 8, 9.
" Palestine, articles 13 and 14, 12-14.
" Palestine, position under, 9, 10.
" difference between Palestine and Syria and Iraq, 9, 10.
" consideration of mandated territory as foreign or third state within meaning of British commercial treaties, 9-11.
Mavrommatis, 21.
Medical Act, 1886: construction and import of Part II, 1-4.
Medical practitioners: registered, of the United Kingdom; meaning of phrase in Part II of Medical Act, 1886, 4.
" colonial and foreign; right to practise in United Kingdom under Part II of Medical Act, 1886, 4.
" rights of foreign and colonial, in New Zealand, 2-4.
Most-favoured-nation clauses. *See* Treaties.



(iv)

NEW—REP.

N.

New Zealand: opinion on reciprocity of medical practice under Part II of Medical Act, 1886, 2-4.
 " rights of foreign and colonial medical practitioners in, 2-4.
 Nyassa Consolidated Company, 16.

O.

Order in Council: Palestine; terms of, as affecting status of Palestine, 10.
 " Holy Places. *See* Holy Places.
 Ordinance: Palestine antiquities. *See* Antiquities.

P.

Palestine: status, 9-11.
 " Order in Council, 1922, as affecting status, 9, 10.
 " constitutional position different from Syria and Iraq, 9.
 " whether a foreign or third State *vis-à-vis* Great Britain, 10, 11.
 " extension of Imperial Preference to, 8-11.
 " ditto; infringement of most-favoured-nation clauses of British commercial treaties, 11.
 " rights of Jewish worshippers at Western Wall in Jerusalem, 12-15.
 " Holy Places. *See* Holy Places.
 " Antiquities Ordinance. *See* Antiquities.
 " mandate. *See* Mandates.

R.

Railway: Bagdad Railway Company's rights in Iraq, 20-22.
 Religion: rights of Jewish worshippers at Western Wall, Jerusalem, 12-15.
 Reparation: fulfilment of Germany's obligations and question of evacuation of Rhineland, 5-8.

RHI—WHI.

R.—(cont.)

Rhineland: occupying forces, treaty and legal position as to withdrawal, 5-8.
Romano-Americana Company, 18.

S.

Salvador Commercial Company, 19.

T.

Transjordan: cannot be granted Imperial Preference, 10.
 Treaties: British commercial; extension of Imperial Preference to Palestine would infringe most-favoured nation-clauses in, 11.
 " British commercial; consideration of mandated territory as a foreign or third State within meaning of, 9, 10.
 Treaty of Lausanne. *See* Treaty of Peace (Turkey).
 Treaty of Peace (Germany): interpretation of Part XIV, section 1, 5-8.
 " interpretation of article 431, 6-8.
 " (Turkey): whether article 65 covers concessionary or contractual rights, 21, 22.
 " Concessions Protocol (No. XII) annexed to Treaty, 20, 21.
 Treaty of Versailles. *See* Treaty of Peace (Germany).

U.

Union Castle Mail Steamship Company (Limited), 16.

W.

Wailing Wall. *See* Jerusalem.
 Western (Wailing) Wall. *See* Jerusalem.
R. F. Whittall v. Turkish Government and Others, 22.

Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN. &c.:
1929.

GENERAL.

[C 3583/598/22/1929]

No. 1^A.

[Privy Council Office.]

[February 4, 1929.]

Privy Council Office to the Law Officers of the Crown.

Sir,

December 14, 1928.

I AM directed by the Lord President of the Council to transmit to you the accompanying Statement by the Legal Advisers of the General Medical Council, and to request that it may be laid before the Attorney-General and the Solicitor-General, and that His Lordship may be favoured with their Opinion as to—

- (1) What is the true construction and import of Part II of the Medical Act, 1886;
- (2) What is the precise meaning of the expression "registered medical practitioner of the United Kingdom."

I am, &c.

M. P. A. HANKEY.

Interpretation of Part II of Medical Act, 1886, and of expression "registered medical practitioner of the United Kingdom."

Statement by the Legal Advisers of the General Medical Council.

From the passing of the Medical Act, 1858, which created the General Medical Council and the Medical Register, until the passing of the Medical Act, 1886, there were no means for the holders of colonial and foreign diplomas only to be admitted to the British Register except after obtaining one of the qualifications mentioned in Schedule A of the Medical Act of 1858. But the Medical Act of 1886 provided in Part II for the registration under certain conditions of colonial and foreign practitioners. It was enacted that His Majesty might, on being satisfied that a British possession or foreign country afforded to the registered medical practitioner of the United Kingdom such privileges of practising there as His Majesty might seem just, by Order in Council declare that the Act should apply to such possession or country, and thereupon any practitioner in such British possession or foreign country who complied with the provisions laid down in sections 11 and 12 respectively of the Act was entitled to registration in the British Register. A separate list of colonial practitioners and a separate list of foreign practitioners were to be kept in the Register, and the provisions of the Medical Act, 1858, relating to persons registered under that Act and relating to the Medical Register and to offences in respect thereof were to apply in the case of colonial and foreign practitioners registered under the Act of 1886 in the same way as such provisions applied in the case of persons registered under the Medical Act, 1858.

For many years after the passing of the Act of 1886 the operation of Part II was confined to British possessions, which, led by New Zealand, gradually came into



the scheme, until the whole of the Dominions, with the solitary exception of the Canadian province of British Columbia, had come in.

Later Orders in Council were made in respect of Italy (1901) and Japan (1906), and for a short time towards the end of and after the Great War, of Belgium also. From one cause or another, Belgium, New Brunswick, Ontario, Quebec, and Saskatchewan, have withdrawn their privileges from British practitioners, and the Orders in Council have accordingly been rescinded in their cases.

The mutual recognition made possible by the Act of 1886 has gone by the name of Reciprocity, but this word does not occur in the Act, and is only used as a convenient label to describe the relations of Great Britain and the other countries concerned.

As already stated, the application of the Act at first only affected the British Empire, but in 1899 the question of reciprocity with Italy became a practical one, and the opinion of the late Mr. Muir Mackenzie, then Legal Assessor of the Council, was taken on the question of whether, under section 17 of the Act of 1886, the privileges to foreign practitioners could be restricted to the recognition of practice by them among their fellow-countrymen only who might be resident in this country. Mr. Muir Mackenzie was unable to find any express provision in the Act empowering His Majesty by Order in Council so to limit the rights of foreign practitioners, and advised that in the absence of such expressed power no such restriction could be imposed by Order in Council, and consequently that foreign practitioners, if otherwise eligible under the Act, were not confined to practising in this country among their own compatriots. It will be seen presently that the opinion of Mr. Muir Mackenzie does not touch upon the question recently raised by New Zealand, but it is mentioned here as being the only legal opinion recorded at the time regarding Part II of the Act of 1886.

Going back for a few years the Minutes of the Council record that in 1893 a report by the Executive Committee on the reciprocity of medical practice in relation to foreign countries was received and entered on the Minutes. This report is printed in full in Appendix II, and the effect of Part II of the Medical Act is therein stated (page 7) as follows:—

5. The second part of the Medical Act of 1886 provides for the recognition by the General Medical Council of equivalent qualifications granted in countries which treat this country with reciprocity. Her Majesty's Privy Council have the power to bring such countries within the scope of the Act by an Order in Council, whereupon the General Medical Council can admit the foreign practitioner who has obtained equivalent qualifications abroad to the Foreign and Colonial Register. Persons on that Register have all the rights of persons on the English Medical Register.

In 1906, when reciprocity with Japan was being negotiated, the Japanese Government expressly intimated that its desire was to enable Japanese medical practitioners to practise medicine in the Straits Settlements, and in a communication from the Japanese Legation in London to our Foreign Office of the 23rd June, 1905, the Japanese Minister referred to this and expressed the earnest hope of his Government—

"That the British Government will see their way to cause some measures to be taken by which Japan shall be recognised as one of the countries to which the Medical Act applies, thus enabling the Japanese medical practitioners to practise medicine in general in the Straits Settlements as well as in other parts of the British Empire."

The term "reciprocity" has always been interpreted by the Council and in other quarters as meaning that a medical practitioner registered by virtue of Part II of the Act of 1886 is entitled to practise not only in Great Britain, but in every other part of the world which has reciprocity with this country, so that, for instance, a Japanese on the Foreign List is entitled to practise not only in the Straits Settlements but in any other part of the Empire which has come in and in Italy, and a New Zealander on the Colonial List is likewise entitled to practise in any other part of the Empire which has come in and in Japan and Italy.

This view has now been challenged by New Zealand.

In New Zealand the law as to medical practice was, from 1914 to 1924, regulated by the Medical Practitioners Act of 1914, the provisions of which were entirely consistent with reciprocity as understood by the General Medical Council.

In 1924, however, an amending Act was passed which modified the Act of 1914. The relevant portions of these Acts are section 8 of the Act of 1914 and section 4 of the Act of 1924, and they are as follows:—

ACT OF 1914: SECTION 8.

Registration.

8.—(1) Every person shall be entitled to be registered under this Act who satisfies the Board that he is—

- (a) A graduate in medicine and surgery of the University of New Zealand; or
- (b) registered on the Register kept in accordance with the provisions of the Acts regulating the registration of medical practitioners in the United Kingdom; or
- (c) eligible for registration on such last-mentioned Register; or
- (d) the holder of a diploma (hereinafter referred to as a foreign diploma) approved by the Board, and granted by any University or institution other than the University of New Zealand or than a University or institution situated in the United Kingdom, after a course of not less than five years' study of the subjects pertaining to a medical and surgical degree or licence:

Provided that the Board may refuse to approve any diploma for the purposes of this Act, unless it appears to the Board that the graduates in medicine and surgery of the University of New Zealand are by virtue of such graduation, and without further examination, entitled to be registered as medical practitioners and to practise medicine and surgery in the country in which is situated the University or other institution by which that diploma has been granted.

(2) Notwithstanding anything in the last preceding subsection, no persons shall be entitled as of right to be registered under this Act if he is not a fit person to be so registered by reason of the fact that—

- (a) He has been at any time convicted of any offence punishable by imprisonment with hard labour for a term of two years or upwards; or
- (b) He is otherwise not of good fame or character.

ACT OF 1924: SECTION 4.

4.—(1) Section 8 of the Principal Act is hereby amended by adding to paragraph (d) the following proviso:—

"Provided further that the Council may in any case, if it thinks fit, require that the holder of a foreign diploma, before being entitled to registration, shall pass to the satisfaction of the Council an examination in medicine and surgery to be prescribed and conducted by the Senate of the University of New Zealand."

(2) Notwithstanding anything in paragraph (b) or paragraph (c) of the said section 8, a person registered or eligible for registration in the United Kingdom by virtue of a diploma or other qualification granted otherwise than by a University or institution in the United Kingdom shall not be entitled as of right to registration in New Zealand, but the Council shall have the same power to refuse approval of any diploma or to require further examination as it has in the case of the holders of foreign diplomas applying for registration on the grounds mentioned in paragraph (d) of the said section.

The amended section 4 of the Act of 1924 effects such a change in the privileges of practising in New Zealand accorded to practitioners registered in the British Register as to raise the serious question whether reciprocity can any longer be continued. It is, moreover, clear from the opinion of the New Zealand Crown Office* that New Zealand takes a different and more limited view of the mutuality created by Part II of the Act of 1886 than the General Medical Council, and that much depends on the meaning of the expression "registered medical practitioner of the United Kingdom." This expression is not defined in the Act, but "registered

* A copy of this document is contained in [C 3583/598/22 1929].



GENERAL.

medical practitioner" is defined as meaning any person for the time being registered under the Medical Acts. As already indicated, the expression "registered medical practitioner of the United Kingdom" has been interpreted by the General Medical Council and by others as meaning the same as "registered medical practitioner" or as "medical practitioner registered in the United Kingdom." The Council has always regarded the Register of the United Kingdom, including the Foreign and Colonial Lists, as one and indivisible in respect of the privileges conferred by registration, and whoever is on the Register, whether in the Foreign or Colonial Lists, or otherwise, as actually or potentially a registered medical practitioner of the United Kingdom and entitled to the full to all the advantages of reciprocity.

New Zealand is, in fact, aiming at a different and more limited reciprocity than that which has hitherto obtained. She desires reciprocity with Great Britain only, certainly not with any foreign country, and apparently not with any other Dominion, and argues that what she claims is in accordance with Part II of the Act of 1886. The limited reciprocity claimed by New Zealand may or may not be a desirable thing (and it is to be allowed the effect is likely to be far-reaching), but it is materially different from that which has hitherto obtained, and would, it is submitted, involve a change in the law as hitherto understood. Accordingly, the first requirement is to determine what is the true construction and import of Part II of the Act of 1886, and particularly what is the precise meaning of the expression "registered medical practitioner of the United Kingdom."

Opinion.

1. The scheme of Part II of the Medical Act, 1886, is to enable persons holding certain colonial or foreign medical diplomas to have their names entered in the Medical Register (Sections 11 and 12). Those who hold such colonial diplomas and are so registered are called "colonial practitioners," and those who hold such foreign diplomas and are similarly registered are called "foreign practitioners" (see Section 14). The effect of these provisions coupled with Section 6 and the definition of "registered medical practitioners" in Section 27 is to entitle both colonial and foreign practitioners to practise in the United Kingdom and (subject to any local law) in any other part of His Majesty's Dominions. In order to ascertain the diplomas which entitle the holders thereof to be registered in the Medical Register it is necessary to refer to Sections 13 and 17. Section 13 merely deals with and defines the expression "recognised medical diploma." Section 17, when read with Sections 11 and 12, provides in effect that only diplomas granted in those British possessions or foreign countries which afford certain privileges of practising within their respective jurisdictions to "the registered medical practitioners of the United Kingdom" shall entitle the holders thereof to be registered in pursuance of Sections 11 and 12 in the Medical Register.

In our opinion the phrase "registered medical practitioners of the United Kingdom" is used to denote persons on the register who are neither "colonial practitioners" nor "foreign practitioners." So far as British possessions are concerned, the right to practise there which is conferred by Section 6 on all three classes of practitioners is "subject to any local law." So far as foreign countries are concerned the rights of all three classes depend entirely on the laws of the several foreign countries. The extent to which any local law in the case of British possessions or foreign law limits or forbids the right of registered medical practitioners of the United Kingdom to practise in the British possession or foreign country concerned is matter for consideration by His Majesty in deciding whether the privileges of practising afforded by such British possession or foreign country are or are not just.

2. We have already answered this question. It follows from our answer that we do not agree with the interpretation hitherto given by the General Medical Council to the expression in question.

T. W. H. INSKIP.
F. B. MERRIMAN.

*Law Officers' Department,
February 4, 1929.*

GERMANY.

[C 1211/45/18]

No. 1.

[February 14, 1929.]

*Foreign Office to the Law Officers of the Crown.**Foreign Office, December 7, 1928.*

Gentlemen,

I HAVE the honour, by instruction of the Secretary of State for Foreign Affairs, to submit to you the accompanying papers relating to the interpretation of article 431 of the Treaty of Versailles, and to request you to furnish him with your opinion as to whether Germany is now entitled to claim under that article the unconditional evacuation of districts occupied in virtue of article 428 by the Allies as a guarantee for the execution of that treaty by Germany.

2. The articles governing the occupation are to be found in Part XIV, section 1, of the treaty (Paper (A)). Article 428 provides, as a guarantee for the execution of the treaty, for the occupation of the German territory to the west of the Rhine for fifteen years from the coming into force of the treaty (the 10th January, 1920). Article 429 provides that, if the conditions of the treaty are faithfully carried out by Germany, the area under occupation is to be successively restricted as there specified at intervals of five years. Article 430 provides that, if the Reparation Commission during or after the fifteen years finds that Germany refuses to observe the whole or part of her reparation obligations under the treaty, the whole or part of the areas specified in article 429 will be reoccupied. Article 431 provides that if, "before the expiration of the fifteen years Germany complies with all the undertakings resulting from the present treaty, the occupying forces will be withdrawn immediately."

3. Since the conclusion of the agreement negotiated in 1924 for bringing into force the Dawes plan, and since the Locarno treaties of 1925, German statesmen have in public speeches and in conversation with Allied statesmen been disposed to maintain the view that Germany is now entitled to the evacuation of the Rhineland upon the ground that she has complied with all her reparation obligations, and that no other treaty obligations are outstanding. No formal specific demand has, however, been addressed to the Allied Governments by Germany to this effect.

4. In the course of the last few weeks, speeches by political leaders in this country to the effect that, as Germany had complied with all her obligations, the Allied Governments are not acting up to their treaty engagements in failing to withdraw the occupying forces, have attracted attention, and on the 3rd December, in answer to a parliamentary question, the Secretary of State was obliged to explain the policy which he has hitherto been advised to follow in this matter (Paper (B)).

5. For the purposes of the present discussion, Germany's obligations in connexion with reparation need alone be taken into account. These obligations are defined in general terms in articles 231 and 232 of the treaty. Under article 233 the amount of the damage for which compensation was to be made by Germany in accordance with the preceding articles was to be determined by the Reparation Commission and notified to the German Government on or before the 1st May, 1921, "as representing the extent of that Government's obligations," and "the entire obligation" was to be discharged under a Schedule of Payments to be drawn up by the commission within a period of thirty years from the 1st May, 1921, but the commission had power to postpone any part of the obligations not discharged within that period.

On the 5th May, 1921, the Reparation Commission established a Schedule of Payments (Paper (C)), prescribing the time and manner for securing (by means of a system of bonds) and discharging Germany's reparation obligations, which had been fixed at the amount of 132 milliard gold marks (£6,600 million), subject to certain minor adjustments.

6. Under the experts' plan of the 9th April, 1924 (Paper (D)), which was adopted by the Governments concerned in the London Agreement of the 30th August, 1924 (Paper (E)), the system and amounts of the annual payments to be made by Germany were, in fact, modified, though there was no formal revocation of the Schedule of Payments laid down in May 1921. Germany's financial obligations

Evacuation
of Rhine-
land.
Interpreta-
tion of
article 431
of Treaty of
Versailles.



resulting from the Treaty of Versailles were to be met by the payment of a series of annuities, of which the amounts were laid down, but no mention was made therein of the actual number of such annuities which Germany was to pay in order to discharge her obligations completely. That question was outside the competence of the experts, and was left untouched in the London Agreement. The duration of Germany's obligation to pay the annuities was therefore left unsettled, though there might be a question as to whether the amount of the annuities was to be reduced to the contributions from the budget of the Reich when the bonds provided for by the experts' plan, to the amount of 16 milliards of gold marks, secured partly on the German railways and partly on German industrial concerns, had been amortised.

7. It is to be observed that under both the London Agreement and the Schedule of Payments, established in pursuance of the Treaty of Versailles, it is contemplated that the payment of reparation by Germany is to extend beyond the period of fifteen years fixed by article 428 of the treaty, and it is not considered that the adoption of the experts' plan has any effect upon the legal question of the interpretation to be put upon article 431.

8. There are two possible interpretations of article 431. The first is that, in order to claim the withdrawal of the occupying forces at any time before the expiry of the fifteen-year period, Germany must show that she has completely and finally discharged her reparation obligations to the Allied Powers. This is the view on which His Majesty's Government have hitherto acted. The other interpretation, which is that suggested by the German Government, is that it is only necessary for this purpose for Germany to show that she has complied with such of her reparation obligations as have matured up to date. According to this interpretation, the words in article 431: "If . . . Germany complies with all the undertakings resulting from the present treaty," have precisely the same meaning as "If the conditions of the present treaty are faithfully carried out by Germany," in article 429.

9. The view upon which His Majesty's Government have hitherto acted is that articles 429 and 431, which contain different provisions as to the date of the evacuation of the Rhineland, are framed to meet two different, though possible, sets of circumstances. According to this view, the words in article 429: "If the conditions of the present treaty are faithfully carried out by Germany," contemplate, so far as reparation is concerned, the punctual performance by Germany of her reparation obligations as they mature (*i.e.*, the regular payment each year of the sums due from time to time by Germany under the prescriptions in force, that is to say, at present the Dawes annuities), and the article provides that, if this is done, the occupied territory is to be evacuated in three successive stages, the final evacuation taking place at the end of the fifteen years prescribed by article 429, although at that time Germany's reparation obligations would not have been completely discharged, since, even if the period of thirty years laid down in article 233 had remained unaltered, and no postponement had been granted, such payments as were to be made during the last fifteen of the thirty years would still remain to be paid. Article 431, on the other hand, which provides for the complete evacuation of the occupied territory before the expiration of the period of fifteen years, cannot be regarded as referring to the punctual performance of Germany's reparation obligations as they mature contemplated by article 429. If it did, it would constitute a second provision relating to the evacuation of the occupied territory, inconsistent with article 429, but applicable to the same set of circumstances. The phrase employed in article 431: "If . . . Germany complies with all the undertakings resulting from the present treaty," must, therefore, mean more than the performance by Germany of her current obligations under the treaty, and was intended to indicate the complete execution and discharge of those obligations before the termination of the fifteen-year period.

10. In this connexion it is material to observe that the possibility of the discharge of Germany's reparation obligations by the payment of a lump sum was mentioned in the reply of the Allies of the 16th June, 1919, to the observations of the German delegation on the conditions of peace (Paper (F), p. 202). According to this statement, Germany might, within four months of the signature of the treaty, offer (*inter alia*) "a lump sum in settlement of her whole liability as defined in article 233." If such an offer had been made and accepted, and payment had been made at any time during the period fixed for the occupation, article 431 would therefore have come into operation, provided that Germany's other obligations under the treaty had been then fulfilled. It is also relevant to refer to paragraph 12 (*d*) of Annex II to the Reparation Section, Part VIII of the Treaty of Versailles, which deals with the possibility of the commercialisation of the reparation debt. These annexes follow article 244 of the treaty. The effect of paragraph 12 (*d*) is that, if

the debt is commercialised, the nominal amount of Germany's liability on the bonds *pro tanto* takes the place of, and extinguishes, Germany's reparation debt towards the Governments. Consequently, if the whole reparation debt were commercialised, article 431 would certainly come into operation.

11. The legal advice which the Secretary of State for Foreign Affairs received on this point is to be found set out in a despatch which was sent to Paris in 1926 (Paper (G), p. 18) at a time when it was thought that Germany would, as soon as she had taken a seat in the Council of the League of Nations, formally demand the evacuation of the Rhineland under article 431.

12. On the 16th June, 1919, President Wilson, Mr. Lloyd George and M. Clemenceau signed a declaration relating to the costs of the Rhineland occupation, in which (*inter alia*) it was provided that, "if Germany at an earlier date has given proof of her goodwill and satisfactory guarantees to assure the fulfilment of her obligations, the Allied Powers concerned will be ready to come to an agreement between themselves for the earlier termination of the period of occupation." A copy of this declaration is enclosed (Paper (H)).

13. The legal effect of this document and the extent to which it can be regarded as throwing light on the interpretation of article 431 are discussed in paragraphs 12-14 of the 1926 despatch (Paper (G), p. 20). It has always been regarded by the Secretary of State for Foreign Affairs as confirming the interpretation which he had placed on article 431, or at any rate as showing that the interpretation in question must have been adopted by the signatories of the declaration. For, if the interpretation which the German Government now seek to place on article 431 were correct, Germany would, in the circumstances contemplated in paragraph 3 of the declaration, be entitled to the immediate evacuation of the whole of the occupied territory (since Germany could not have "given proofs of her goodwill and satisfactory guarantees to assure the fulfilment of her obligations" if she had not complied with such obligations as had matured up to date), and the provision that the Allied and Associated Powers concerned would "be ready to come to an agreement between themselves for the earlier termination of the period of occupation" would not merely be superfluous, but would amount to less than Germany would be entitled to under the treaty which she had signed.

14. In view of the answer which the Secretary of State for Foreign Affairs felt obliged to give to the parliamentary question referred to above (Paper (B)), I am to say that he is anxious to know whether you concur in the advice upon which he has previously acted, and whether, in your opinion, Germany is now entitled to claim under article 431 of the Treaty of Versailles that the occupying forces in the Rhineland should be withdrawn immediately.

15. Sir Austen Chamberlain would also be grateful for any observations of a general nature which you may be good enough to offer.

I am, &c.

R. C. LINDSAY.

List of Papers.

- (A.) The Treaty of Versailles. [Treaty 1557.]
- (B.) Extract from Hansard, December 3, 1928: Question by Mr. Rennie Smith and Answer given thereto by the Secretary of State for Foreign Affairs.
- (C.) Schedule of Payments of May 5, 1921. [Parliamentary 5231, pp. 4-9.]
- (D.) Reports of the Expert Committees appointed by the Reparation Commission, April 9, 1924. [Parliamentary 5214.]
- (E.) London Agreements of August 30, 1924. [Treaty 1740.]
- (F.) Correspondence with the German Peace Delegation respecting the Treaty of Peace (Confidential 11556).
- (G.) Foreign Office Memorandum of August 18, 1928. [C 6400/969/18.]
- (H.) Declaration by the Governments of the United States of America, Great Britain and France in regard to the occupation of the Rhine Provinces, June 16, 1919. [Parliamentary 4977.]



GERMANY—PALESTINE.

Report.

As a matter of the strict legal construction of article 431 of the Treaty of Versailles, read together with the other articles forming Part XIV, section 1, of the treaty, we are of opinion that during the period of fifteen years, so long as the reparation indebtedness of Germany is not wholly extinguished, Germany is not entitled to claim under article 431 the immediate withdrawal of the occupying forces.

The documents placed before us other than the treaty, so far as they may be regarded as throwing any light upon the interpretation of article 431, confirm us in our opinion.

T. W. H. INSKIP.
F. B. MERRIMAN.

Law Officers' Department,
February 14, 1929.

PALESTINE.

[E 1312/1312/65/1929]

No. 1ⁿ.

[Colonial Office.]

[February 7, 1929.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, January 25, 1929.

Extension
of Imperial
Preference
to Pales-
tine.

I AM directed by Mr. Secretary Amery to refer to the report of your predecessors in office of the 18th February, 1921,* addressed to the Secretary of State for Foreign Affairs, and to your reports of the 3rd January, 1923,† and the 19th June, 1925,‡ addressed to the Secretary of State for the Colonies, on the question of the extension of Imperial Preference to Palestine, and to request you, in the light of the considerations hereafter appearing, to be so good as to consider the question anew.

2. In their report of the 21st September, 1921,§ your predecessors in office advised that goods, the produce of or manufactured in territories administered under B and C Mandates, might benefit by the grant of Imperial Preference. In accordance with that advice, the benefits of Imperial Preference have been extended to Tanganyika Territory and the Cameroons and Togoland under British mandate. No foreign Power has, in consequence of that grant, asked that its commerce should receive similar benefits, nor has the grant been challenged by the League of Nations. From this position the deduction is drawn that the question whether or not a mandated territory must be regarded as a foreign or third State within the meaning of British commercial treaties depends upon the closeness of the link between the mandatory and the mandated territory—that is to say, upon the degree of authority, control or administration exercised by the mandatory Power. In the following paragraphs of this letter the question of the extension of Imperial Preference to Palestine will be examined anew in the light of this consideration.

3. In the fourth paragraph of article 22 of the Covenant of the League it is provided that "certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone." This paragraph defines the characteristics which distinguish the communities in Asia Minor from the territories dealt with in the two following paragraphs of article 22 of the Covenant; its effect is to recognise that the communities formerly belonging to the Turkish Empire are communities which may reasonably be expected so to progress and develop in future that they will in time be able to become independent nations capable of standing alone. There is nothing in the fifth paragraph of article 22 showing any recognition by the framers of the Treaty of Versailles that the peoples of the mandated territories in Central Africa will ever develop into communities capable of standing alone as independent nations. It would seem to

* Confidential 11933, p. 35.
† Confidential 13004, p. 30.

‡ Confidential 12470, p. 17.
§ Confidential 11933, p. 30.

PALESTINE.

follow that the difference between the two groups of communities is that the first consists of territories where progress in this direction can be expected, while the second does not; but, it is submitted, there is nothing in the fourth paragraph of article 22 of the Covenant which would support the view that, because a community may be expected some day to be capable of standing alone as an independent nation, it is, during the interval when it is being trained to that end, to be necessarily regarded as a foreign State.

4. It will be observed, moreover, that the fourth paragraph of article 22 of the Covenant does not lay it down that the communities therein referred to "are hereby" or "must be" recognised as independent nations, but that they "can be" so recognised. Owing to the obligations placed upon His Majesty's Government by the Balfour Declaration, and to the general political situation in Palestine, it was not, in fact, found possible to recognise Palestine, however provisionally, as an independent nation; and when, following the allocation of the mandates for the territories detached from Turkey, the time came for the Council of the League to define (as is provided for by the eighth paragraph of article 22 of the Covenant) the degree of authority, control or administration to be exercised in those territories by the mandatories to whom they were entrusted, the difference in the terms of the mandate issued shows that a distinction was already present in the mind of the Council between Palestine on the one hand and Syria and Iraq on the other.

5. His Majesty has recognised Iraq as an independent Sovereign State; therefore, no written mandate has been issued for that territory, but, in its stead, the Council of the League have accepted the undertakings of His Majesty's Government—as embodied in the Treaty of Alliance with Iraq and in a communication made to the Council by His Majesty's Government on the 27th September, 1924—as giving effect in respect of Iraq to the provisions of article 22 of the Covenant.

The mandate for Syria, issued on the 24th July, 1922, defined the degree of authority to be exercised by the mandatory Power in terms which make it clear that the duties of that Power are to render administrative advice and assistance to the population, and not, as in the case of Palestine, itself to administer the territory.

In regard to Palestine, on the other hand, the mandatory is entrusted, by article 1 of the Palestine mandate, with full powers of administration and legislation in the territory, save as they are limited by the terms of the mandate. The corresponding article of the mandate for Syria requires the mandatory to frame an organic law in agreement with the native authorities and to encourage measures to facilitate the progressive development of Syria and the Lebanon as independent States. No such obligation is placed on His Majesty by the terms of the mandate for Palestine. On the contrary, the effect of the Palestine Order in Council, 1922, which was made pursuant to the mandate, has been to set up a Government under the Foreign Jurisdiction Act, as is recognised in your report of the 7th April, 1925,* where you stated that the position of Palestine in relation to His Majesty is the same as that of other Governments established by Order in Council under the Foreign Jurisdiction Act. The provisions of the Palestine mandate and the Palestine Order in Council, it is submitted, make it clear that the constitutional position of that territory is totally different from that of either Syria or Iraq. They show that in Palestine, as in Tanganyika, the Cameroons and Togoland under British mandate, His Majesty as mandatory has himself assumed the government of the territory.

6. Looking at the question from the point of view of a foreign Power attempting to establish that Palestine is a foreign or third State within the meaning of British commercial treaties, there are, it seems, three passages in the Palestine mandate and the Palestine Order in Council, 1922, which might be quoted in support of such a contention. These are:—

- (1.) The provision in article 7 of the mandate requiring the Palestine Government to enact a nationality law.
- (2.) The last paragraph of the preamble to the Order in Council, by which it may be said to have been issued under the *Foreign Jurisdiction Act*, 1890.
- (3.) The provision in article 59 of the Order in Council which defines the expression "foreigner" in terms which include British subjects in Palestine.

7. As regards the first of these three points, it will be within your recollection that in your report of the 24th May, 1928,† to the Secretary of State for the Home

* Confidential 13004, p. 28.

† Confidential 13565, p. 16.



Department you advised that Palestine is not a "foreign State" within the meaning of Section 13 of the British Nationality and Status of Aliens Act of 1914, and that a British subject who acquires Palestinian citizenship by naturalisation does not thereby lose his British status. It follows, then, that the status of a British subject is not separate and distinct from that of a Palestinian citizen. Moreover, if the question is regarded from the point of view of international as opposed to municipal law, it must be remembered that Palestinian citizens are British-protected persons, and that, in accordance with the second sentence of article 12 of the Palestine mandate, they are accorded British protection while resident outside Palestine. The creation of the status of Palestinian citizenship, therefore, only creates a division in the classes of individuals who look to His Majesty as the authority under whose diplomatic protection they live when in foreign countries. As both classes look to His Majesty for protection, they do not, by the mere creation of a division between them, become classes of individuals which are foreign to each other.

8. Should the fact that the Palestine Order in Council refers in the preamble to the Foreign Jurisdiction Act be advanced as an argument that Palestine is a foreign or third State within the meaning of British commercial treaties, it could be pointed out that British Protectorates are administered under Orders in Council issued under that Act. No foreign State has questioned the right of His Majesty's Government in Great Britain to accord Imperial Preference to goods emanating from Protectorates so administered.

9. Turning now to article 59 of the Palestine Order in Council, which defines the expression "foreigner" in terms which include a British subject in Palestine, it may be pointed out that the definition in that article is for the limited purposes of Part V of the Order in Council. The intention of articles 59-67 of the Order in Council is to ensure that the judicial system established in Palestine shall, in the words of article 9 of the Palestine mandate, "assure to foreigners . . . a complete guarantee of their rights." Had the guarantee for which the Order in Council provides not been extended to British subjects, those subjects would, in this matter, have been placed in a less favourable position than nationals of other States members of the League of Nations. Should it be felt that the inclusion of British subjects within the definition of the term "foreigners" in article 59 of the Order in Council would provide a foreign Power with a substantial argument in favour of the view that Palestine is a foreign or third State within the meaning of British commercial treaties, the matter could, of course, be remedied by a change in the phraseology of that article not affecting the substance.

10. If the question is regarded from the point of view enunciated in the second paragraph of this letter—that is to say, in the light of the degree of authority, control or administration exercised by the mandatory—the position in Palestine, so long as the mandate in its present terms remains in force, is, it is submitted, in all respects similar to that obtaining in the territories administered under B Mandates by His Majesty's Government in Great Britain. If and when the Palestine mandate ceases to be in force, or is modified on the ground that the territory has reached a stage at which it can be recognised as an independent nation, then Palestine would no doubt become an entity which would be a foreign or third State within the meaning of British commercial treaties. In that case, any privilege in the nature of Imperial Preference would have to be withdrawn. For that reason, should any grant of Imperial Preference be given to Palestine, it could not be extended to Transjordan, where an independent Government has been set up and is about to be formally recognised by His Majesty.

11. In these circumstances, Mr. Amery would invite you to give further consideration to the question of the extension of Imperial Preference to Palestine. In your report of the 19th June, 1925,* you pointed out that this question depended upon whether or not Palestine must be regarded as a foreign or third State within the meaning of most-favoured-nation clauses of British commercial treaties, and the view that you there expressed that internationally Palestine is an independent nation was said to follow from the fact that Palestine falls within the category of territories included in the fourth paragraph of article 22 of the Covenant. In the light of the full facts, as now placed before you, it is submitted that the mere circumstance that Palestine is one of the communities referred to in the fourth paragraph of article 22 does not in itself constitute that territory a foreign or third State *vis-à-vis* Great Britain. It is further submitted that neither the Palestine

* Confidential 13004, p. 30.

Order in Council nor the mandate supports the view that Palestine is for any purpose a foreign State *vis-à-vis* His Majesty, and that, in consequence, there is not in international law any ground on which it could be contended that those documents constitute Palestine a foreign or third State within the meaning of British commercial treaties. Indeed, since it would appear that the mandatory is also the Government of Palestine, the result of holding that the Government of Palestine is a foreign State for any purpose would be somewhat of a *reductio ad absurdum*, seeing that it would place His Majesty in the position of being a foreign State *vis-à-vis* himself.

12. I am, therefore, to request you to be good enough to advise Mr. Amery whether, in view of the full facts now placed before you, you are still of the opinion that the extension to Palestine of Imperial Preference would infringe the obligations arising from the most-favoured-nation clauses of commercial treaties. Mr. Amery is all the more anxious to be assured on the point since the matter might, under an article embodied in certain recent treaties, be taken to international arbitration.

13. The draft of this letter has been referred to the Secretary of State for Foreign Affairs, and he has concurred therein.

14. Copies of the reports referred to, the Palestine Order in Council and the mandates for Syria and for Palestine are enclosed for convenience of reference.

I am, &c.

O. G. R. WILLIAMS.

List of Enclosures.

Law Officers to Foreign Office, February 18, 1921. [Confidential 11933, p. 35.]
Law Officers to Colonial Office, September 21, 1921. [Confidential 11933, p. 30.]
Law Officers to Colonial Office, January 3, 1923. [Confidential 12470, p. 17.]
Law Officers to Colonial Office, June 19, 1925. [Confidential 13004, p. 30.]
Palestine Order in Council, 1922. [Confidential 11940.*]
Mandate for Palestine. [Parliamentary 5152.]
Mandate for Syria. [Confidential 12074.*]

Report.

WE are of the opinion that the extension to Palestine of Imperial Preference would infringe the most-favoured-nation clauses of British commercial treaties, notwithstanding the arguments in favour of the contrary view set out in the Colonial Office letter of the 25th January, 1929, to which we have given careful consideration.

The declaration contained in the fourth paragraph of article 22 of the Covenant is the foundation of the status of Palestine, and questions which depend upon the interpretation of the municipal laws of this country are unsafe tests of that status. The position of His Majesty in relation to Palestine, and, indeed, the whole conception of a mandated territory coming under paragraph 4 of article 22, are admittedly novel and to some extent anomalous; but a fresh consideration of the terms of the mandate, and particularly of articles 5, 7, 12 and 18 thereof, as well as of article 22 of the Covenant, confirms us in adhering to the opinions expressed in the Law Officers' Reports of the 3rd January, 1923, and the 19th June, 1925.

T. W. H. INSKIP.
F. B. MERRIMAN.

Law Officers' Department,
February 7, 1929.



1929

12

PALESTINE.

[E 1805/204/65/1929]

No. 1^c.

[Colonial Office.]

[February 16, 1929.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, January 9, 1929.

Western or
Wailing
Wall in
Jerusalem,
and rights
of Jewish
worship-
pers.

I AM directed by Mr. Secretary Amery to invite your attention to an extract from "Hansard" of the 12th November last (Enclosure A), from which it will be seen that he has stated in the House of Commons that he proposes to take the highest legal advice open to him before coming to a decision as to the action to be taken in regard to a construction erected by the Moslem authorities in Jerusalem on the top of the Western or Wailing Wall in that city.

2. A paper was recently presented to Parliament (Enclosure B) on the subject of incidents which occurred at the Western Wall on the Jewish Day of Atonement in September last. Following on those incidents, demands were made in the local Jewish press for the compulsory expropriation of the pavement in front of the wall. The Moslem, on the other hand, represented that this demand and the claims put forward by the Jews for additional and new privileges at the Western Wall are a cloak for Jewish designs on the Haram-al-Sharif. The responsible Jewish authorities, in a petition to the League of Nations, have repudiated in unmistakable terms the report that they wish "to menace the inviolability of the Moslem Holy Places." Nevertheless, the mutual recriminations in which Jews and Arabs have indulged have had the effect of removing the matter from the purely religious orbit and have made of it a political and racial question. In the atmosphere thus engendered, the Moslem authorities have asserted what they regard as their rights by continuing the construction of a building on the top of the Wailing Wall, by converting into a hospice certain houses (which are Waqf property) in the neighbourhood of the Wall, and by calling to prayer from a roof adjacent to the pavement, thereby disturbing Jewish worshippers.

3. As might be expected, the result is that either party is constantly appealing to the Government of Palestine to prevent actions taken or about to be taken by the other party, the complaint made invariably being that these actions constitute an infringement of the *status quo*; that is to say, that the Palestine Government are failing to carry out the obligations imposed by article 13 of the mandate to preserve existing rights.

4. In this difficult position, the Officer Administering the Government of Palestine, in paragraph 6 of his despatch of the 26th October (Enclosure C), has asked for the advice of His Majesty's Government. While the matter is not one governed entirely by legal considerations, the Palestine Government, in arriving at their decision on complaints such as those indicated above, must, in a large measure, be guided by the position as determined by the Palestine Mandate. Articles 13 and 14 of that instrument read as follows:—

"Article 13. All responsibility in connexion with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the mandatory, who shall be responsible solely to the League of Nations in all matters connected herewith, provided that nothing in this article shall prevent the mandatory from entering into such arrangements as he may deem reasonable with the Administration for the purposes of carrying the provisions of this article into effect; and provided also that nothing in this mandate shall be construed as conferring upon the mandatory authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed."

Article 14. "A special commission shall be appointed by the mandatory to study, define and determine the rights and claims in connexion with the Holy Places and the rights and claims relating to the different religious communities in Palestine. The method of nomination, the composition and the functions of this commission shall be submitted to the Council of the League for its approval, and the commission shall not be appointed or enter upon its functions without the approval of the Council."

PALESTINE.

13

It should here be explained that, owing to the difficulty of obtaining agreement as to the composition of the commission for which article 14 of the mandate provides, effect has not yet been given to that article. The responsibility for the delay does not rest with the mandatory Power. Proposals for constitution of the commission were submitted by His Majesty's Government to the Council of the League of Nations in 1922, but they met with so much criticism, especially from the representatives of the Roman Catholic Powers (France, Italy and Spain), that it was considered desirable to withdraw them. The objecting Powers undertook to frame alternative proposals for the consideration of the Council, but they have never done so, and the question remains *in statu quo*.

In order to ensure that the matters to be determined by the commission should not be prejudiced by prior legal decisions, His Majesty in Council by the Palestine (Holy Places) Order in Council, 1924 (Enclosure D), ordered that: "No cause or matter in connexion with the Holy Places or religious buildings or sites in Palestine, or the rights or claims relating to the different religious communities in Palestine, shall be heard or determined by any Court in Palestine." It would appear, therefore, that, even were it considered that such an act as the construction of a building on the top of the Western Wall (which is within a Holy Place) is an infringement of Jewish rights in connexion with the Wall, the Palestine Government would not be able to apply to the courts in Palestine for an injunction restraining the Moslem authorities from continuing the construction of the building, or for any other appropriate relief.

5. Reverting now to article 13 of the mandate, it will be seen that the mandatory thereby assumes responsibility for "preserving existing rights and securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum" provided that nothing in the mandate "shall be construed as conferring upon the mandatory authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed."

6. It is common ground that—

- (1.) The Haram-al-Sharif, which is bounded on one side by the Western Wall and the surface of which is at a much higher level than the level of the pavement in front of the Wall, is a Moslem holy place;
- (2.) Legally, the Western Wall is a portion of the Haram-al-Sharif; as such, it is holy to Moslems; moreover, it is legally the absolute property of the Moslem community;
- (3.) The pavement facing the Wall is Waqf property (*i.e.*, the subject of a Moslem charitable bequest);
- (4.) The Jews have unrestricted right of access to the pavement in front of the Wall. That they have certain rights of worship also is admitted by the Government, but contested by the Moslem authorities.

7. Copies are enclosed of a memorandum (Enclosure E) compiled in 1925 by the District Commissioner in Jerusalem, which gives the historical background of the disputes in connexion with the Western Wall, and of a memorandum (Enclosure F) prepared by the Attorney-General in Palestine setting out various facts and considerations bearing on the points at issue.

8. Mr. Amery would be glad to be favoured with your advice on the following questions:—

- (1.) Having regard to the Jewish practice of prayer, as described in Part 2 of Enclosure F, is the Western Wall to be deemed a purely Moslem shrine within the meaning of the second proviso to article 13 of the mandate for Palestine, which is quoted in this letter?
- (2.) Is the proviso to Section 23 of the Palestine Antiquities Ordinance, 1920, quoted on p. 8 of Enclosure F, inconsistent with the second proviso to article 13 of the Palestine mandate? If so, is the proviso to Section 23 of the ordinance *ultra vires* in view of the last paragraph of article 18 of the Palestine Order in Council, which reads: "No ordinance shall be passed which shall be in any way repugnant to or inconsistent with the provisions of the mandate"?
- (3.) Whether it will be an infringement of Jewish rights, as safeguarded by article 13 of the mandate, for the Moslem authorities to construct, either with or without the consent of the Director of Antiquities, a building



which (a) altered the appearance of a part of the Western Wall but did not impede or limit in any way the Jewish practice of worship at the Wall, or (b) which is calculated to impede Jewish worship or to make access to the Wall by the Jews more difficult?

- (4.) If the answer to either part of question (3) is in the affirmative, what steps can the Palestine Government take to prevent or to put a stop to the construction of a building if its nature or position is such as to bring it within the provisions of the Holy Places Order in Council?

9. On the 26th November (see extract from "Hansard," Enclosure G) it was alleged in the House of Commons that certain acts of the Moslem authorities, including the establishment of a hospice near the Western Wall and a calling to prayer by a muezzin, constituted "infringements of the *status quo* at the Western Wall." Mr. Amery realises that the matters raised in the question asked in the House are not entirely governed by legal considerations. Nevertheless, he would be grateful to receive any advice which you may feel able to give him as to the test which the Palestine Government should apply in determining whether or not such acts as a calling to prayer, which disturb Jewish worshippers at the Wall, are an infringement of Jewish rights in connexion with the Wall. It will be appreciated that, even if it should be held that actions of this character infringe Jewish rights, it may be difficult for the Palestine Government to intervene effectively in the matter, since it is probable that under the terms of the Holy Places Order in Council it will not be open to that Government to apply to any court for a remedy.

In addition to an answer to the questions set out in paragraphs 8 and 9, Mr. Amery would be glad of any advice generally upon the whole matter which you may feel able to offer.

I am, &c.
O. G. R. WILLIAMS.

Schedule of Enclosures.

- (A.) Extract from "Hansard" of November 12, 1928.
(B.) White Paper on the Western or Wailing Wall (Cmd. 3229). [Parliamentary 5494.]
(C.) Despatch Confidential "A" of October 26, 1928, from the Officer Administering the Government of Palestine, without enclosures.
(D.) The Palestine (Holy Places) Order in Council, 1924. [Confidential 12137*.]
(E.) Memorandum by Sir Ronald Storrs.
(F.) Memorandum by Mr. Bentwich.
(G.) Extract from "Hansard" of November 26, 1928.

Report.

1. The Western Wall is not, in our opinion, "a purely Moslem sacred shrine" within the meaning of article 13 of the Palestine Mandate. The phrase must be read as descriptive of a place or building which is a shrine sacred exclusively to Moslems. The long-established Jewish practice of praying at the Wall and the sanctity due to the history of the lowest stratum of the fabric prevent the Wall from being exclusively sacred to Moslems.

2. We are clearly of opinion that the first and second paragraphs of the proviso to Section 23 of the Antiquities Ordinance, 1920, are inconsistent with the second proviso to article 13 of the mandate. The third paragraph may possibly be supported as a necessary provision to secure the public safety, but, on the whole, having regard to the inclusion of cases where reparation only is required, we are of opinion that this paragraph also is inconsistent with the second proviso to article 13.

3. The answer to the first part of this question depends to some extent on the nature of the erection, inasmuch as we can conceive a building of such a character as to be offensive to Jewish religious sentiment and to intrude upon the traditional right of Jews to pray at the Wall. Subject to this reservation, we answer (a) in the negative and (b) in the affirmative.

4. The Palestine Government may, in our opinion, take such police measures or executive action as may be necessary to prevent the erection of a structure which would by its nature or position interfere with the customary Jewish worship at, or right of access to, the Wall. The action taken in September last on the Day of Atonement to prevent an encroachment by Jewish worshippers on the rights of the

legal owners of the Wall and pavement is an example of action which we think would be permissible in view of the responsibility cast upon the mandatory by article 13 of the mandate. Apart from such action as we have suggested above, the only step that can be taken is to amend the Holy Places Order in Council in such a way as to restore the jurisdiction of the courts to the extent which is required. Whether this step is feasible it is not within our province to consider.

5. The establishment of a hospice near the Wall and the call to prayer by a muezzin may be so provocative or challenging as to be infringements of Jewish rights at the Western Wall. It must be a question of degree in each case. If the erection of the hospice results in the observance of Moslem rites in the presence of Jewish worshippers or in an invasion by Moslems during the customary times of Jewish worship so as to cause genuine annoyance or disturbance, we should regard this as an interference with existing rights. Similarly, the nearness and the loudness of the call to prayer must be taken into consideration in estimating its effect. The Jews are entitled, in our opinion, to conduct their worship without any greater disturbance than has occurred in the past, or may be inevitable by reason of changes in the habits of the population of Jerusalem, or otherwise.

We desire to add that the general position has clearly become more difficult owing to the failure to carry into effect article 14 of the mandate. In our judgment, every possible step should be taken without further delay to secure the appointment of the special commission.

T. W. H. INSKIP.
F. B. MERRIMAN.

*Law Officers' Department,
February 16, 1929.*

PORTUGAL.

[W 5328/307/36/1929]

No. 2.

[June 21, 1929.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, June 3, 1929.

I HAVE the honour, by direction of His Majesty's Principal Secretary of State for Foreign Affairs, to bring the following facts to your notice and to request that you will furnish him with your opinion on the following matter:—

2. On the 16th March, 1893, the "Companhia do Nyassa" was incorporated as a Portuguese company to take over a concession granted by the Portuguese Government by a decree of the 28th September, 1891, "to a Portuguese company to be formed in accordance with existing laws." In this connexion attention is invited to Paper (A). Article 2 of the articles of association of the "Companhia do Nyassa" stated that the company should be considered Portuguese for all purposes and should have its registered and head offices at Lisbon. It was contemplated at the time that some of the capital of the company should be obtained outside Portugal and article 32 provides for the formation of subsidiary boards of directors in foreign countries. In this connexion attention is invited to Paper (B). These articles of association were duly approved by the Portuguese Government by a decree of the 9th March, 1893. The "Companhia do Nyassa" has an authorised capital of £1,000,000 and an issued capital of £436,530 in £1 shares.

3. In virtue of the decree of September 1891 the "Companhia do Nyassa" acquired in an area of some 100,000 square miles in the northern part of Portuguese East Africa various sovereign or administrative rights; the exclusive right to construct railways, roads, &c.; the exclusive right of navigation; the exclusive right of mining, &c.; the right of acquiring land and the right of carrying on all branches of trade and industry.

[21571]

E

Grievances of "Companhia do Nyassa" and right of His Majesty's Government to intervene.



4. Article 29 of the decree of September 1891 ran as follows:—

"The Government may at the end of 25 years (subsequently altered to 35 years) reckoned from the date of the definitive contract entered into with the company in virtue of this decree and after that at the end of each period of ten years, add to, modify or revoke one or more of the dispositions of that same contract, or decree new clauses in substitution of, or to amplify the first ones, provided that the faculty thus reserved to the Government shall only be used with regard to the dispositions and clauses relative to the concession of exclusive rights, to the dominion of lands, and to the attributes of the State delegated by the Government."

5. No contract of the nature referred to in this article was in fact ever concluded between the Portuguese Government and the "Companhia do Nyassa," but the latter nevertheless entered into the possession of its concession.

6. In 1908 a British company known as "The Nyassa Consolidated Company" was registered with an issued capital of £368,844. The Nyassa Consolidated Company acquired and still holds 219,615 shares, and thereby a controlling interest, in the Companhia do Nyassa. Further, of the total debts of the Companhia do Nyassa, some £600,000 are owed directly or indirectly to the Nyassa Consolidated Company.

7. Shortly before the war a syndicate of German banks, acting at the instigation or with the assistance of the German Government, acquired a controlling interest in the Nyassa Consolidated Company. The shares in this company held by these German banks were sequestrated during the war by the British authorities. It was considered undesirable that these shares should again fall into German hands, and His Majesty's Government therefore arranged in 1918 that they should be sold by the Custodian of Enemy Property to the Union Castle Mail Steamship Company, Limited. That this arrangement was made primarily to serve British Imperial interests in East Africa and not for the benefit of the Union Castle Company is clear from the following passage in a letter written by the Colonial Office to Lord Kysant, the chairman of the Union Castle Company, on the 4th October, 1918:—

"One of the principal motives which have induced His Majesty's Government to agree to these arrangements is a desire to ensure that the control of the company in question (Nyassa Consolidated), and through that company the control of the Companhia do Nyassa, should remain permanently in British hands and in the hands of a person or company enjoying the full confidence of His Majesty's Government."

8. The Portuguese Government have for some time past made no secret of their desire to rescind the Companhia do Nyassa's concession, and on the 20th April last they published a decree announcing that as from the 27th October, 1929, all the administrative rights granted to the Companhia by the decree of 1891 would revert to the State, that all the "exclusive" commercial rights enjoyed by the Companhia under the decree of 1891 would be cancelled and that, in fact, the Companhia was to be deprived of everything except its right to carry on trade. In this connexion attention is invited to Paper (C). Lord Kysant at once complained that this action of the Portuguese Government was illegal and requested that His Majesty's Government should make representations to the Portuguese Government on his behalf, and should urge that the Companhia do Nyassa should be left in undisturbed possession of its rights. At the same time he intimated that the Union Castle Company had received an offer from a German source for the shares held by them in the Nyassa Consolidated Company, and he indicated that he would have no hesitation in accepting this offer should the Portuguese Government decline to withdraw their decree of the 20th April, 1929. This possibility of the controlling interest in the Nyassa Consolidated Company falling into the hands of a German syndicate was received with considerable apprehension by the Colonial Office, who feared lest such an eventuality might react unfavourably on British interests in East Africa. The Colonial Office, therefore, also urged that representations should be made to the Portuguese Government in the sense desired by Lord Kysant. In view of the attitude of the Colonial Office, and of the fact that His Majesty's Government were under a distinct obligation to assist Lord Kysant as far as possible, since it was at their request that he originally acquired his holding in the Nyassa Consolidated Company, the Secretary of State felt that it would be very difficult to refuse Lord Kysant's request if it could be shown that the Portuguese Government's action was in fact illegal. Steps were therefore taken in this Department fully to examine the various legal issues involved with a view to

establishing to what extent Lord Kysant's contentions were justified. As a result of this examination, Sir Austen Chamberlain was advised that the Portuguese Government were acting illegally in issuing the decree of the 20th April and in announcing their intention of depriving the Companhia do Nyassa of its administrative and "exclusive" commercial rights. In the first place the Portuguese Government had no right to exercise in October next whatever powers it might possess under article 29 of the decree of 1891, since in virtue of this same article such powers could only be employed thirty-five years after the signature of the contract between the Government and the Companhia, which had not yet taken place. Furthermore, quite apart from this question of date, the power of revocation and cancellation which the Portuguese Government by the decree of the 20th April announced their intention to exercise, seemed considerably to exceed the rights conferred upon the Portuguese Government by the decree of 1891. In these circumstances, and in view of the necessity, as explained above, of assisting Lord Kysant as far as possible, Sir Austen Chamberlain has felt justified in instructing His Majesty's representative in Lisbon to inform the Portuguese Government that His Majesty's Government consider their action illegal and must request them to withdraw the decree of the 20th April and to refrain from taking any further action which might prejudice the legal rights of the Companhia do Nyassa. The Portuguese Government have been informed that should they decline to meet this request, His Majesty's Government will have no alternative but to insist on the question being referred to arbitration by the Permanent Court of International Justice, in accordance with the terms of the Anglo-Portuguese Arbitration Treaty.

9. No reply has yet been received to these representations, but it is possible that the Portuguese Government may argue that His Majesty's Government have no right to intervene on behalf of the Companhia do Nyassa, since the latter is a Portuguese company. The Secretary of State is anxious to obtain your advice as to the best method of meeting such an argument, which has indeed already been advanced unofficially by the Portuguese Minister for Foreign Affairs.

10. The rule hitherto adopted in such cases by His Majesty's Government is that a State can only offer diplomatic support to its own nationals, and in the case of companies, to companies created by its own law. In a report addressed by the Law Officers to this Department on the 4th November, 1925,* with regard to the claim on behalf of the Standard Oil Company in respect of the destruction of certain oil wells in Roumania, it is stated that this rule is a recognised maxim of international law. The only exception to this rule, hitherto admitted by His Majesty's Government, and supported by some international authority, occurs when it can be shown that the interests of the shareholders, as distinct from those of the company, are directly affected. In such cases a State may intervene on behalf of shareholders who are its own nationals, even if the company in question is a foreign company. The most usual instance of this exception is when a company has by reason of certain actions ceased to be a going concern and has gone into liquidation, so that the company's assets really belong to its creditors and shareholders. An example of such an instance is afforded by the Delagoa Bay Railway Company case, when as you will be aware His Majesty's Government successfully intervened with the Portuguese Government in respect of the infringement by the latter of a concession granted to a Portuguese company in which a British company held the majority of the shares.

11. It may be possible to argue on the facts of the present case that the "Companhia do Nyassa" is covered by this exception and that the Portuguese Government have deprived the Companhia of its privileges and rights to such an extent that it is unable to carry on as a going concern, in which case His Majesty's Government would be justified in making representations to the Portuguese Government on behalf of the British shareholders. It is not, however, certain that this contention could be established.

12. The Secretary of State, however, is anxious to learn whether it would not be possible to argue, as an alternative contention, that an exception to the general rule that a State cannot properly intervene on behalf of a company, which although some or all of its capital is held by its nationals, is not of its own nationality, can be made when the action of which such a company complains has been taken by the State to which the company does in fact belong. Such an argument appears reasonable since if this exception were not allowed, then there would be no body properly capable of supporting the rights of such a company and therefore of the shareholders against the offending State, the injury being done by that State in which in international law the right of protection is vested.

* Confidential 13004, p. 33.



13. This exception is consistent with the action taken in the Delagoa Bay Railway Company case, where His Majesty's Government intervened with the Portuguese Government on behalf of a Portuguese company. Nor is it inconsistent with the attitude adopted by His Majesty's Government in two recent cases of importance—the "Romano-Americana Company" case, and the "Armes automatiques Lewis" case. In these cases His Majesty's Government resisted intervention by the United States Government against them on behalf of Roumanian and Belgian companies respectively. In the memorandum of the Assistant Legal Adviser to the Foreign Office, which was one of the papers laid before the Law Officers in connexion with the case of the Standard Oil Company, the following passage occurs:—

"An examination of the cases where States have in the past achieved recognition of a right to intervene on behalf of such companies leads to the conclusion that the right is limited to two classes of cases:—

"(a.) Where the company is being unjustly treated by its own national State and has no remedy in its national courts (the cases are nearly all instances of the exercise of sovereign rights by the company's national State resulting in the actual or virtual destruction of the company and consequent loss to the shareholders of their capital invested in it).

"(b.) Where the company is being actually (or is in a condition where it must be) wound up and its assets distributed proportionately amongst the shareholders (on the ground that in these circumstances the shareholders have an equitable right to their share of the corporate property, a right which does not come into existence so long as the company is continuing to carry on business).

"In all the cases I have been able to find, where the right to intervene has been successfully asserted, both these sets of circumstances have existed simultaneously and both have been relied upon in support of the right."

For convenience of reference a copy of the reference to the Law Officers in the case of Standard Oil Company and their report thereon and of the memorandum above referred to are submitted in paper D.

14. The Secretary of State realises that there is no direct authority for this argument, but he feels that such an argument would stand a chance of success before an arbitral tribunal because it seems to meet the real requirements of international intercourse. He would, therefore, be glad if you would take this matter into consideration and if you would inform him whether there is any reason why, in the present case of the "Companhia do Nyassa," His Majesty's Government should not contend that under the rules of international law they have the right to intervene with the Portuguese Government in connexion with the alleged grievances of a Portuguese company, in which the capital is mainly British owned, when the State, whose action is complained of, is Portugal.

15. In considering this matter the effect of the principle involved, if this contention should be admitted, must not be lost sight of.

While it is true that in this case His Majesty's Government will be contending that they have a right to intervene in connexion with the wrongs done to a Portuguese company, in which the participation of foreign capital in the company was clearly contemplated as being necessary for the object for which the company was created and where the capital was in fact *mainly* British owned, it may be said that if the principle of intervention in such cases is admitted, it is not easy to see any clear limit to its operation based on the amount of capital owned by nationals of the State claiming to intervene. On the other hand, if the principle is not admitted, British capital in foreign companies may be without means of redress in cases where it is the State in which the company is incorporated, which is responsible for the action complained of and where that action, though very injurious to the interests of the British shareholders, just falls short of reducing the company to liquidation.

16. The following papers are enclosed herein:—

- (A.) A translation of the Portuguese Government's decree of the 28th September, 1891.
- (B.) A translation of the Articles of Association of the Companhia do Nyassa. [W 5328/307/36/1929.]
- (C.) A translation of the Portuguese Government's decree of the 20th April, 1929. [W 4047/307/36/1929.]

- (D.) A copy of a letter from this Department to the Law Officers of the Crown of the 20th July, 1925, and a copy of the Law Officers' report of the 4th November, 1925, together with a copy of a memorandum dated the 6th March, 1925, by the Assistant Legal Adviser to the Foreign Office. [Confidential 13004, pp. 33-37.]

I have, &c.

A. W. A. LEEPER.

Report.

We observe that it may be possible to argue on the facts of the present case that the Companhia do Nyassa is unable to carry on as a going concern, and we agree that, if this could be established, His Majesty's Government would be justified in making representation to the Portuguese Government on behalf of the British shareholders. The Delagoa Bay case and the Salvador Commercial Company case would be precedents for such action.

2. With regard to the proposed alternative contention, we are of opinion that it would be difficult, but not impossible to argue. We assume that the Portuguese Government by its Decree of the 20th April, 1929, has infringed the legal rights of the Companhia, and that the Decree was an act of sovereign power against which the Companhia has no redress by Portuguese law, so that, unless diplomatic protection can be afforded, there will be a denial of justice. The protection would have to be afforded to the Companhia and not to the British shareholders, since no interests of the British shareholders distinguishable from those of the Companhia or opposed to those of the other shareholders have emerged. From this point of view it seems to us that neither of the two cases mentioned in paragraph 1 of this Opinion would afford a satisfactory precedent.

A claim which could have been framed on the lines suggested was put forward by the American Government against the Austro-Hungarian Government arising out of the alleged injustice done to an Austro-Hungarian Company involving losses to American shareholders in such company. We are not aware of the grounds on which such claim was formulated.

A similar claim was made by the French Government. (A reference to these cases is to be found in the 27th Report of the International Law Association at page 379.)

In both cases the Austro-Hungarian Government objected to the validity of the intervention, and both cases were settled amicably so that no decision was ever given.

So far as we are aware there is no authority establishing the right of intervention on behalf of a foreign corporation, so long as the corporation remains a going concern and the interests of the group of shareholders seeking protection remain identified with the general interests of the corporation. On the other hand, we do not think that the limits of the right of intervention in such cases have been so clearly laid down or defined as to render it impossible to argue that a State has a right to afford diplomatic protection to a foreign corporation where—

- (i) nationals of the State are very substantially interested in the corporation;
- (ii) grave injury has been inflicted on the corporation by a wrongful act of its own State;
- (iii) the corporation has no other means of redress.

3. With regard to the consideration referred to in paragraph 15 of Mr. Leeper's letter, we would point out that questions of policy are concerned upon which we are not competent to express a useful opinion.

If the suggested exception (*viz.*, that intervention on behalf of a Portuguese corporation can be allowed because the wrong complained of has been committed by the Portuguese Government) were admitted, it is obvious that the effects might be far reaching.

If His Majesty's Government were to interfere with the rights of a British company, without bringing it to an end, the principle contended for would apparently justify the right of foreign Governments to intervene.

This might produce serious results.

WILLIAM A. JOWITT.
J. B. MELVILLE.

Law Officers' Department,
June 21, 1929.

TURKEY.

[E 4767/28/44/1929]

No. 2^d.

[Treasury Solicitor.]

[August 10, 1929.]

Case for the Opinion of the Law Officers of the Crown.

Claim of
the Imperial
Ottoman
Bagdad
Railway
Company
against His
Majesty's
Govern-
ment in
respect of
Concession
granted to
the Com-
pany by
Turkey in
1903.

ARTICLE 65 of the Treaty of Lausanne (with Turkey) provides *inter alia* that all "identifiable property, rights and interests," situate in territory detached from the Ottoman Empire under the Treaty, which, after being subjected by the Ottoman Government to an "exceptional war measure," were at the date of the Treaty in the hands of a contracting Power exercising authority over the said territory, shall be restored to their legitimate owners in their existing State.

A Protocol (No. XII), which was annexed to the Treaty, provides that the contracting Powers "being desirous of settling by agreement questions relating to certain concessions granted in the Ottoman Empire" agree that concessionary contracts entered into between the Ottoman Government and nationals (including companies) of the Allied Powers shall be maintained (Article 1).

Article 4 provides that these concessionary contracts are to be "put into conformity with the new economic conditions" (this provision is described in the Protocol, as a provision for "readaptation").

Article 6 provides that beneficiaries who at the date of the Protocol have not begun to put their concessions into operation cannot claim readaptation: they may claim cancellation of their concessions with compensation for survey and investigation work.

Article 9 subrogates the State acquiring any territory detached from Turkey under the Treaty to the rights and obligations of the Ottoman Government under concessionary contracts granted before the 29th October, 1914, to nationals of Allied Powers and companies in which the capital of Allied nationals is preponderant.

Article 10 applies to such concessions *inter alia* the provisions of Articles 1, 4 and 6 already mentioned.

The general effect of these provisions is that under Article 65 of the Treaty the legitimate owners of any property, rights and interests situate in detached territory are entitled to have it returned in its existing state, provided—

- (a.) That it has been subjected to an exceptional war measure by the Ottoman Government,
- (b.) That it is in the hands of a contracting Power,
- (c.) That it can be identified,

And, under the Protocol, concessions in detached territories granted to Turkish Companies in which Allied capital was at the material date preponderant, if they have been begun to be put into operation, are maintained and have to be readapted to meet the new economic conditions.

The Bagdad Railway Company possessed a concession granted to them before the war, and questions arose as to the extent of their rights under the Treaty.

The Law Officers (the present Lord Chancellor and the present Attorney-General) advised on the 17th October, 1927,* that the material date for the purposes of the Protocol was the 30th October, 1918, and as at that date the greater part of the capital of the Bagdad Railway Company was held by enemy subjects, the Company were not entitled to have their concession maintained. They further advised, that under Article 65 of the Treaty the Company were entitled to the restoration of any immovable property physically situate in Iraq, "but that the provisions of Article 65 do not apply to rights which were conferred on the Company by the concession but have not been exercised."

The High Commissioner of Iraq asked whether the concluding words of this Opinion were to be taken as meaning that the Law Officers considered that rights conferred by the concession which had been exercised by the Company ought to be restored. Certain railway services had in fact been operated by the Company on a

* Confidential 13403, p. 17.

TURKEY.

small portion of railway in Iraq constructed before the war, and the question raised by the High Commissioner was whether the Company were entitled to claim the right to continue to operate a service over that portion of line.

A further Case was accordingly submitted to the present Law Officers, who advised on the 10th December, 1928,* that where rights conferred on a concessionaire have been exercised in whole or in part the concessionaire has rights which are not limited to the return of the physical property involved divorced from the right of user, and that the Bagdad Railway Company were entitled under Article 65 of the Treaty to rights with regard to the future running of traffic over the part of railway worked by them before the war.

This opinion of the Law Officers gives rise to extremely difficult and serious questions touching a number of concessions in the detached territories. The view had hitherto been held and acted upon that concessionary rights fell exclusively under the Protocol and that Article 65 of the Treaty dealt merely with tangible property as opposed to contractual rights. This view was considered to be justified both by the construction of the Treaty and the other instruments annexed to or forming part of it and by dicta in the judgments of the International Court in relation to the Mavrommatis Concessions. One sentence from the judgment of Mr. J. B. Moore, the American representative on the Tribunal, may be cited by way of illustration, at p. 72 of the *Recueil des Arrêts*, "There can be no doubt that the Protocol was understood by the contracting parties to cover the entire subject of concessions." Moreover, although there is no case expressly dealing with concessionary contracts, the Mixed Arbitral Tribunal at Constantinople have shown a marked tendency to restrict the provisions of Article 65 to tangible property and to exclude anything in the nature of abstract rights.

If the view hitherto held be wrong, it would seem that any concessionaire who had before the war exercised in whole or in part the rights conferred on him by his concession is entitled to demand restoration of at any rate some part of those rights, even though, by reason of the fact that he is an enemy subject, his concession is not maintained by the Protocol. In some cases indeed his position may well be more advantageous than that of a concessionaire falling under the Protocol, since under the Treaty there are no provisions for readaptation. In many cases it would be practically impossible to disentangle the rights in fact exercised by the concessionaire from the general rights conferred by the concession. For example, the concessionaire under a mining concession may have surveyed his area, is he for that reason only to have the right to exploit the area, or is his right merely to continue his survey? The accompanying letter from the Colonial Office explains in detail the practical difficulties which ensue.

There is also, it is respectfully urged, a consideration which, apart from any general question of the construction of the Treaty documents, precludes this construction of Article 65, namely, the fact that one condition precedent to the right to demand restoration under Article 65 is that the property or right must be "in the hands of a contracting Power." It seems difficult to maintain that where a concessionaire had before the War a concession which gave him the right, *e.g.*, to operate a railway, that concessionary right can ever be said to be "in the hands of" the Power which now exercises authority over the territory in question, since its right to operate railways arises by title paramount and is not dependent on any concession; nor, it is submitted, is it material that it has itself prevented the concessionaire from operating the railway. To prevent the carrying out of a contract is not to step into the shoes of the original contractor and is essentially different from the taking of his rights into one's own hands.

List of Papers.

- (a.) Law Officers' Opinion, October 17, 1927. [Confidential 13403, p. 17.]
- (b.) Law Officers' Opinion, December 10, 1928. [Confidential 13565, p. 23.]
- (c.) Mr. J. H. Hall (Colonial Office) to Mr. C. Stuart King (Treasury Solicitor's Department), January 14, 1929 (Extract). [E 253/28/44/1929.]
- (d.) Treaty of Peace with Turkey and other instruments. [Cmd. 1929. (Treaty 1681.)]
- (e.) British Agent, Anglo-Turkish Mixed Arbitral Tribunal, Constantinople, to Treasury Solicitor, July 25, 1929 (with enclosures). [E 4802/28/44/1929.]

* Confidential 13565, p. 23.



TURKEY.

Opinion of the Law Officers of the Crown.

We have had under our consideration further arguments and information with regard to this matter which were not before our predecessors when they advised in December 1928, and more particularly two decisions of the Mixed Arbitral Tribunal given in the cases of the Heirs of Mrs. T. B. Rees and H. J. Whittall (Smyrna International Ferry) v. Turkish Government, and R. F. Whittall v. Turkish Government and Others. It appears to us that these two decisions are very material and justify us in reconsidering the whole matter *ab initio*, as indeed we understand our predecessors were not unwilling to do; and without expressing any opinion on the advice given by our predecessors on the 10th December, 1928, on the information then before them, we think that in view of the adoption by the Mixed Arbitral Tribunal of the principles laid down in these decisions a claim by the Bagdad Railway Company to have restored to them under Article 65 of the Treaty of Lausanne any rights conferred by their concession in Iraq, whether in part exercised or not, ought not to be entertained.

WILLIAM A. JOWITT.
J. B. MELVILLE.

Law Officers' Department,
August 10, 1929.



1930

THIS DOCUMENT IS THE PROPERTY OF HIS BRITANNIC MAJESTY'S GOVERNMENT

Printed for the use of the Foreign Office.

CONFIDENTIAL.

(13925)

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1930.



(ii)

LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 1^A, &c.

FRANCE.

No.		Date.	SUBJECT.	Page.
1	Law Officers ..	Dec. 22, 1930	Repayment in paper francs, instead of gold, of investments of British holders of French Rentes..	1

GENERAL.

1 ^A	Law Officers and Mr. E. J. MacGillivray [Board of Trade]	Aug. 2, 1930	Musical Copyright Bill: conflict with international treaty obligations	4
----------------	---	--------------	--	---

GERMANY.

2	Law Officers ..	Jan. 6, 1930	German reparation obligations: effect of Young Plan on question of sanctions.. ..	11
---	-----------------	--------------	---	----

IRAQ.

2 ^A	Law Officers .. [Colonial Office]	June 16, 1930	Exemption from taxation in Iraq of date gardens of Sheikhs of Koweit and Mohammerah	15
----------------	--------------------------------------	---------------	---	----

PALESTINE.

2 ^B	Law Officers .. [Colonial Office]	May 28, 1930	Dead Sea salts concession and question of arbitration	21
2 ^C	Attorney-General .. [Colonial Office]	Aug. 5, 1930	Application by Palestine for loan under Colonial Development Act	24

RUSSIA.

2 ^D	Attorney-General and Mr. H. V. Willink [Board of Trade]	Oct. 22, 1930	Form of guarantee by Soviet trade representative in London of contracts of Russian State economic organisations	26
----------------	--	---------------	---	----

(iii)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1930.

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

ABB—CON.

A.

Abbiati, 22.
Agreement. *See* Treaties.
Arbitration: claim for payment of British holders of French Rentes in gold francs instead of paper, 1-3.
" ditto; as to arbitration on basis of equity and justice, and not of strict law, 2, 3.
" immunity from taxation of date gardens in Iraq of Sheikhs of Koweit and Mohammerah, 15-19.
" ditto; bearing of provisions of Anglo-Iraq Treaty of 1922 on reference to arbitration, 15-19.
" liability for costs on losing party, 22, 23.
" Dead Sea salts concession, 21-23.
" claims arising out of disorders in Syria, 22, 23.

B.

Bills of exchange: for exports from United Kingdom to Russia: form of guarantee, 26-30.

C.

Claims: State may not claim pecuniary indemnity for damage suffered by private person on territory of foreign State unless he is a national of claimant State, 21, 22.
" arising out of disorders in Syria; as to arbitration, 22, 23.
Colonial Development Act: loan to Palestine Government under, 24, 25.
Compensation: pecuniary, for damage suffered by private person on territory of foreign State, 21, 22.
" ditto; a State may not put forward claim unless injured person is its national, 21-23.
Concessions: granted by Government of ceded or conquered territory; practice in regard to, not yet part of system of international law, 23.
" ditto; reasonable principles for dealing with, 23.
" Dead Sea salts, 21-23.
Conventions. *See* Treaties.

5951 [5699]

COP—GUA.

C—(contd.).

Copyright: Act, 1911; whether section 4 is contrary to treaty obligations, 7.
" Musical Copyright Bill a breach of treaty obligations, 10.
" scope of "protection" accorded by international conventions, 9, 10.
" British legislation providing for grant of compulsory licences; whether conflicting with treaty obligations, 4-10.
" national treatment under Copyright Convention of 1908, 7-10.
" convention. *See* Treaties.
Costs: liability of losing party in arbitration case, 22, 23.
Courts: submission by U.S.S.R. to jurisdiction of, in regard to matters covered by Commercial Agreement, 1930, 26-29.
" submission of foreign sovereign or sovereign State to jurisdiction of, 29.
" ditto; submission has not effect of rendering liable to execution any property belonging to the foreign Government within the jurisdiction, 29.
cy: payment to British holders of French Rentes in paper, and not gold, francs, 1-3.

D.

Dawes Plan. *See* Reparation.
Dead Sea: salts concession, 21-23.
Duff Development Company v. Kelantan Government, 27, 29.

E.

Exports: to Russia from United Kingdom; guaranteeing of bills of exchange, 26-30.

G.

Germany: default in reparation obligations. *See* Reparation.
" sanctions. *See* Reparation.
Guarantee: Soviet, in respect of payments for exports from United Kingdom to Russia, 26-30.



1930

(iv)

IND—REP.

I.

Indemnity. *See* Compensation.
Iraq: responsibility of Government for obligations incurred by its predecessor, 17.
" taxation of date gardens of Sheikhs of Koweit and Mohammerah, 15-19.
" *See also* Arbitration.
Treaties.

J.

Jurisdiction. *See* Courts.

K.

Koweit (Sheikh of): exemption from taxation of date gardens in Iraq, 15-19.
" " immunity from taxation as consequence of his independent sovereignty, 18, 19.

L.

Licences: for public performance of copyright works. *See* Copyright.
Lloyd's Banking Company v. Ogle, 27.
Loans: French Rentes; repayment of investments of British holders in paper francs instead of gold, 1-3.
" ditto, ditto; question of arbitration on basis of equity and justice, 2, 3.
" British, to Palestine Government, 24, 25.
" ditto; whether the condition that materials bought out of loan should be purchased in Great Britain is permissible under article 18 of Palestine Mandate, 24, 25.

M.

Mandate: Palestine, whether article 18 allows British loan to Palestine on condition that materials purchased should be purchased in Great Britain, 24, 25.
Mohammerah (Sheikh of): exemption from taxation of date gardens in Iraq, 15-19.
Musical Copyright Bill. *See* Copyright.

P.

Palestine: loan to, under Colonial Development Act, 24, 24.
" *See also* Mandate.
Palestine Potash (Limited), 22, 23.

R.

Rentes. *See* Loans.
Reparation: German obligations; sanctions in event of default, 11-15.
" ditto; provisions as to sanctions in Treaty of Versailles, 11, 13-15.

REP—YOU.

R—(contd.).

Reparation: German obligations; whether Versailles Treaty sanctions can be applied to Young Plan default, 14, 15.

S.

Salts. *See* Dead Sea.
Sanctions. *See* Reparation.
Sovereign: submission to jurisdiction of foreign courts, 29.
Soviet Union: submission to jurisdiction of British courts in regard to matters covered by Commercial Agreement of 1950, 26-29.
" " form of guarantee for payment of bills of exchange in respect of exports to Russia, 26-29.
" " extent of responsibility for transactions of Russian State economic organisations, 26, 28, 30.
State: acknowledgment of contractual rights and obligations of its predecessor, 17.
" damages suffered by private person on territory of foreign State. *See* Claims.
" submission to jurisdiction of foreign courts, 29.

T.

Taxation: of date gardens in Iraq of Sheikhs of Koweit and Mohammerah, 15-19.
Trade: Soviet delegation in London; guaranteeing of export transactions, 26-30.
Treaties: Anglo-Iraq, 1922; reference to arbitration under provisions of articles 4, 10 and 17, 17-19.
" Anglo-Soviet Commercial Agreement, 1930, 26.
" ditto; bearing of, on submission by U.S.S.R. to jurisdiction of British courts, 26-29.
" international copyright conventions; scope of protection accorded by, 4-10.
Treaty of Lausanne. *See* Treaty of Peace (Turkey).
Treaty of Peace (Germany): provisions regarding sanctions in event of default in German reparation obligations, 11, 13-15.
" " ditto, whether applicable to Young (Reparation) Plan, 14, 15.
" " (Turkey): Treaty and Concessions Protocol do not cover Dead Sea salts concession, 23.
Treaty of Versailles. *See* Treaty of Peace (Germany).

U.

Union of Soviet Socialist Republics. *See* Soviet Union.

Y.

Young Plan. *See* Reparation.

Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN. &c.: 1930.

FRANCE.

[W 13751/37/17/1930]

No. 1.

[December 22, 1930.]

Foreign Office to the Law Officers of the Crown.

(Immediate.)

Gentlemen,

Foreign Office, December 17, 1930.

I HAVE the honour, by direction of Mr. Secretary Henderson, to request your advice in the following matter:—

2. On four occasions during the war the French Government, with the approval and consent of His Majesty's Government, issued prospectuses in this country inviting subscriptions to French loans. Copies of the prospectus of the issue made in November 1915 are sent herewith (Paper (A)), and it may be assumed that, so far as is material, the other prospectuses are in similar terms. It will be observed that the prospectus is an invitation for applications for 5 per cent. Rentes, capital and interest to be exempt from all French taxes, present and future, the price of issue being expressed as £3 4s. per 100 fr. nominal capital (being the equivalent at the exchange of 27·50 of 88 fr., the price at which the loan is "being issued in Paris"). The prospectus requires applications to be accompanied by a deposit of 7s. per 100 fr. applied for and to be sent to the Bank of England. The amount payable in respect of each 100 fr. was required to be paid in four instalments, each of which was expressed in terms of shillings. Provision was made for the whole amount to be paid up in full at the time of application if desired by a single payment of £3 3s. 6d. in respect of each 100 fr. applied for; in the case of some of the later issues there was no provision for payment by instalments. The issues were in the form of bonds which might, at the option of the holder, be inscribed in the "Grand livre de la dette publique" of France.

3. Some £60½ million worth of these Rentes were taken up by British investors. The French Government have been, and are, paying the interest upon them in paper francs, and the question has arisen whether under the terms of issue the French Government are entitled to pay the British investors, both as regards capital and interest, in paper francs at the current rate of exchange.

4. Continued representations on the subject have been made to His Majesty's Government by a committee of British holders of French war bonds, of which the Right Honourable Edward Shortt, K.C., is chairman, and in July last His Majesty's Ambassador at Paris was instructed to address a note to the French Government urging that "an equitable measure of compensation" should be granted to the British holders of these Rentes. Copies of the note and of the French Government's reply (with translation) will be found annexed (Papers (B) and (C)).

5951 [5699]

B

Repayment
in paper
francs of
investments
of British
holders of
French
Rentes, and
question of
arbitration.



5. It will be seen that the French contention as to the legal position is that no distinction can be drawn between the French Rentes issued in London and those issued in Paris, and that, as the bonds issued in London are denominated solely in francs without any stipulation being included as to payment in gold francs or as to the adoption of a basis of gold value, the obligations of the French Government are discharged by a payment in paper francs. It has always been recognised, and the contrary is not contended by the representatives of the bondholders, that there is no case to be made in strict law for holding the French Government bound to pay on a gold basis, and it is not necessary to trouble the Law Officers with this point. On the other hand, it is felt that, if the case be regarded from the broader point of view of equity and justice, strong arguments can be brought against the French contention. These arguments are set out in a note prepared for the use of the British delegation at The Hague Reparation Conference in 1929, copies of which are enclosed (Paper (D)).

6. In view of the pressure which is being exercised by the representatives of the bondholders, and to implement the promise given to Mr. Shortt by the Chancellor of the Exchequer, it is accordingly thought desirable to make an attempt to have the question settled by means of an arbitration on the basis, not of strict law, but of equity and justice. It is realised that the consent of the French Government is, in the circumstances, necessary, both for the reference of the matter to arbitration at all and for the arbitration taking place on the suggested basis. These points are fully dealt with in a minute by the Legal Adviser to the Foreign Office, copies of which are sent herewith (Paper (E)).

7. The draft of a note, which it is proposed should be addressed to the French Government, is sent herewith for your consideration (Paper (F)). Your attention is particularly directed to the passage in paragraph 3 of the note which sets out the proposed terms of reference. It will be observed that it is proposed that the arbitrator should be asked to decide—

"The basis on which, having regard to all the circumstances of the case, it would be just and equitable that the interest on and the principal of the French Rentes issued in the United Kingdom in the years 1915, 1916, 1917 and 1918 should have been and should be paid."

8. The object of the proposed terms of reference is, of course, to enable the matter to be dealt with on a wide basis of equity, and, in particular, to enable His Majesty's Government to rely upon the arguments set out in Paper (D) and on any similar arguments which can be adduced.

9. In these circumstances, I am to request you to take the enclosed papers into your consideration and to favour Mr. Henderson with your opinion upon the following points:—

- (i) Whether the terms of reference proposed in paragraph 3 of the draft note to the French Government are sufficiently wide to ensure that the arbitration would be conducted on a broad basis of equity and justice, and not on one of strict law, and, in particular, whether under such terms of reference it would be open to His Majesty's Government to employ the arguments suggested in Paper (D) and any other arguments of this nature which may be available to them?
- (ii) If your answer to question (i) is in the negative, what form of words would be sufficient and appropriate for the purpose indicated above?
- (iii) Generally, whether the terms of the draft note are suitable for the purpose in view? and
- (iv) Whether, assuming that the consent of the French Government can be obtained to suitable terms of reference, the case of His Majesty's Government is one which can reasonably be put forward?

Mr. Henderson would also be grateful for any observations of a general character which you may desire to offer.

10. The matter is one of considerable urgency, since the first of the loans in question is repayable next month, and it is therefore desired to address the proposed communication to the French Government at the earliest possible date. Mr. Henderson would therefore be grateful to receive your opinion at your early convenience.

I have, &c.
C. HOWARD SMITH.

List of Papers.

- (A) Prospectus of London Issue of National Defence Loan of the Government of the French Republic, issue of 5 per cent. Rentes, dated November 29, 1915. [W 13498/37/17/1930.]
- (B) Note addressed to the French Government by His Majesty's Ambassador in Paris on July 24, 1930. [W 7650/37/17/1930.]
- (C) Reply (with translation) of the French Government to the above note, dated October 28, 1930. [W 11357/37/17/1930.]
- (D) Note prepared for the use of the British Delegation at The Hague Reparation Conference in 1929. [W 13498/37/17/1930.]
- (E) Minute by the Legal Adviser of the Foreign Office, dated July 21, 1930. [W 7566/37/17/1930.]
- (F) Draft of note which it is proposed should be addressed to the French Government. [W 13498/37/17/1930.]

Report.

1. In our opinion the terms of reference contained in paragraph 3 of the draft note might with advantage be widened in two respects:—

- (a) In order to ensure admittance of the argument set out in paragraph 5 (b) of Paper (D), which, not having any direct relation to the issue or redemption of the bonds, might be held not to be one of "the circumstances of the case."
- (b) In order that the powers of the arbitrator should not appear to be limited to deciding only a basis of payment as distinct from a basis of compensation.

2. In our opinion the following form of words would be sufficiently wide to ensure that the arbitration would be conducted on a broad basis of equity and justice, and not on one of strict law, and to permit of the employment by His Majesty's Government of the arguments suggested in Paper (D): "Who should be asked to decide the equitable and just basis upon which, having regard to all circumstances affecting the case and to international custom in such cases, the payment of interest on and repayment of capital of the French Rentes issued in the United Kingdom in the years 1915, 1916, 1917 and 1918 should have been and should be made."

3. The general terms of the draft note are suitable for the purpose in view.

4. Upon the terms of reference set out in paragraph 2 of this letter the case of His Majesty's Government is one which can reasonably be put forward.

We would also desire to draw your attention to the fact that the draft note, no doubt designedly, does not refer to the arbitrator anything more than the correspondence which has passed on the subject. You have no doubt assured yourself that the arguments available on behalf of His Majesty's Government are set out in the correspondence with sufficient fullness and cogency.

WILLIAM A. JOWITT.
R. STAFFORD CRIPPS.

Law Officers' Department,
December 22, 1930.



GENERAL.

[W 10283/929/43/1930]

No. 1^A.

[Board of Trade.]

[August 2, 1930.]

Case for the Opinion of the Law Officers of the Crown and Counsel.

THE following papers are sent herewith:—

Musical
Copyright
Bill:
conflict
with inter-
national
treaty
obligations

- (1) Report of Select Committee.
- (2) Musical Copyright Bill.
- (3) Cd. paper 4467 containing—
 - (a) Original Berne Convention 1886.
 - (b) Revised Berne (Berlin) Convention 1908.
- (4) Convention of Rome 1928.

The Law Officers will no doubt remember that the Musical Copyright Bill was referred to a Select Committee and that the Committee made a special report reporting the Bill without amendment.

This report contains the following paragraphs:—

"18. Your committee consider that such a monopoly" (*i.e.*, a super-monopoly of the monopolies in regard to the public performance of musical works conferred upon composers by the Copyright Act, 1911) "can abuse its powers by refusing to grant licences upon reasonable terms so as to prejudice the trade or industry of persons carrying on business in this country and to be contrary to the public interest and that it should be open to those persons to obtain relief in respect of such abuse by appeal to arbitration or to some other tribunal. This should apply only in those cases where the ownership or control of copyright has been transferred to an association.

"19. It has been suggested to your committee that any legislation to give effect to this proposal would be contrary to the terms of the revised Berne Copyright Convention of 1908. There appears, however, to be considerable difference of opinion upon the matter and your committee recommend that His Majesty's Government should consider whether such legislation would conflict with the treaty obligations of this country, and if so, should make a reservation or declaration which would permit of such legislation before ratifying the Rome Copyright Convention of 1928."

For the purpose of further consideration of this matter the Board of Trade now desire to obtain the opinion of the Law Officers of the Crown upon the question whether the legislation suggested by the Select Committee would conflict with the existing obligations of His Majesty's Government under the revised Berne (Berlin) Convention of 1908 and the obligations to be assumed upon ratification of the Rome Copyright Convention of 1928.

By article 2 of the Revised Berne (Berlin) Convention, 1908, the expression "literary and artistic works" is defined to include:—

"any production in the literary, scientific or artistic domain, whatever may be the mode or form of its reproduction such as (*inter alia*) musical compositions with or without words";

and by the same article it is provided that:—

"The contracting countries shall be bound to make provision for the protection of the above-mentioned works (*i.e.*, as defined above)."

By article 11 it is provided (*inter alia*) that:—

"The stipulations of the present convention shall apply to the public representations of dramatic or dramatico-musical works, and to the public performance of musical works, whether such works be published or not";

GENERAL.

and by article 13 that authors of musical works shall have the "exclusive right" of authorising the adaptation thereof to instruments which can reproduce them mechanically.

The attention of the Law Officers is called to the difference in the language of articles 2 and 13.

By the former it is provided that:—

"The contracting countries shall be bound to make provision for the protection of the above-mentioned works (*i.e.*, as defined above).

"Works of art applied to industrial purposes shall be protected so far as the domestic legislation of each country allows."

By the latter it is provided that:—

"The authors of musical works shall have the exclusive right of authorising—

- "(1) The adaptation of those works to instruments which can reproduce them mechanically;
- "(2) The public performance of the said works by means of these instruments.

"Reservations and conditions relating to the application of this article may be determined by the domestic legislation of each country in so far as it is concerned; but the effect of any such reservations and conditions will be strictly limited to the country which has put them in force."

It is, amongst other things, provided by article 4 of the convention as follows:—

"Authors who are subjects or citizens of any of the countries of the Union shall enjoy in countries other than the country of origin of the work, for their works, whether unpublished or first published in a country of the Union, the rights which the respective laws do now or may hereafter grant to natives as well as the rights specially granted by the present convention.

"The enjoyment and the exercise of these rights shall not be subject to the performance of any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the express stipulations of the present convention, the extent of protection, as well as the means of redress secured to the author to safeguard his rights, shall be governed exclusively by the laws of the country where protection is claimed."

Under the Copyright Act, 1911, the composer, or his assignee, enjoys the sole right to authorise the performance of his copyright work in public (sections 1 (2) and 5 (2)) and both civil and summary remedies against any unauthorised performance are provided (sections 2, 6 and 11). Consequently, the copyright owner has an unrestricted right to fix the terms upon which he will authorise public performance of a work. The Rome Convention of 1928 contains similar provisions to those of the revised Berne (Berlin) Convention of 1908 quoted above.

The suggestion of the committee that in certain circumstances an appeal to arbitration against the terms demanded by the copyright owner is in reality a suggestion for statutory provision for the grant of compulsory licences in respect of the rights of public performance in musical works at a price and on the terms fixed by the arbitrator.

The Musical Copyright Bill, which the Select Committee was considering, contained in clauses 2 (c) and 3 provisions which in effect resulted in the grant of a compulsory licence at a fixed charge of two pence. As will be seen, the committee report against this proposal, but when the Bill was being considered a statement was put in by the Board of Trade on the question (*inter alia*) whether the principle of a compulsory licence is a contravention of the stipulations of the revised Berne (Berlin) Convention of 1908. This statement was as follows:—

"15. The main principle underlying clauses 2 (c) and 3 of the Bill is that of a compulsory licence in respect of performing rights, in so far as they are retained, with a compulsory limitation of the royalties which the copyright owner may demand. The only limitation placed upon such rights in the 1911 Act is that contained in section 4, which provides that if at any time after the death of the author of a literary, dramatic or musical work which has been performed in public complaint is made to the Judicial Committee of the Privy



Council that the copyright owner has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owners of the copyright may be ordered to grant a licence to perform the work in public, on such terms and subject to such conditions as the Judicial Committee may think fit. So far as is known, no case under this section has arisen. This section as originally drafted provided that application for a compulsory licence should be made to the Comptroller of Patents, but the proposal aroused strong opposition in the House of Commons, and in committee the section was altered to its present form, which substantially reproduces section 5 of the Literary Copyright Act of 1842. It is difficult, however, to see how this section can apply to a foreign copyright owner, since the necessary petition could not be served upon a person outside the jurisdiction.

"16. The first question which arises on this clause is whether in principle it is a contravention of the stipulations of the revised Berne Copyright Convention of 1908.

"17. The relevant stipulations of that convention are to be found in article 11, paragraphs 1 and 2, which read: 'The stipulations of the present convention shall apply to the public representation of dramatic or dramatico-musical works and to the public performance of musical works, whether such works be published or not. Authors of dramatic or dramatico-musical works shall be protected during the existence of their right over the original work against the unauthorised public representation of translations of their works.'

"18. Article 4 of the convention stipulates that authors of one country of the Union shall enjoy in the other countries of the Union the same rights as native authors as well as the rights specially granted by the convention. Apart from the express stipulations of the convention, the extent of protection, as well as the means of redress secured to the author to safeguard his rights, are to be governed exclusively by the laws of the country where protection is claimed.

"19. This question, which depends mainly upon the interpretation to be given to the word 'protection,' was discussed at considerable length at the Conference of the International Union held at Rome in 1928, without any decision being reached.

"20. On the one hand, the view was expressed that the convention merely stipulated for national treatment as regards performing rights, and that, as long as no distinction was made between nationals and foreigners, the protection to be given under article 11 might be limited by a compulsory licence, since the extent of protection was to be determined by the law of the country where protection was claimed.

"21. On the other hand, it was argued that, although the extent of the author's rights in respect of public performance might vary according to the law of the country where protection was claimed, the convention required that the rights so given must be the author's sole rights, and must not be exercised without his consent. For instance, the extent of performing rights might be limited by not giving protection against the performance in public where admission was free, or when the receipts were for a charitable object and the performers were not paid, but to whatever extent protection was given against unauthorised public performance it must not be further limited by imposing a compulsory licence.

"22. A third theory was that nothing in the convention could interfere with the right of any State to take measures to prevent abuse of monopoly rights, and delegates supporting this view objected to any amendment of the convention which might cast doubt upon such theory.

"23. Delegations of British countries had, in fact, submitted to the conference amendments of article 11 intended to reserve in general terms the rights of the countries of the Union to prevent possible abuse arising from the exercise of performing rights, but they did not receive the unanimous approval of the conference, which is essential to any amendment of the convention.

"24. It is clear from the discussions at Rome that some, at any rate, of the parties to the convention would regard a compulsory licence as inconsistent with British obligations under the convention. If any of these countries had signed the optional clause of the Statute of the Permanent Court of International Justice, it would be able, after the signature of this country has been completed by ratification, and in the event of the Bill becoming law, to bring the question before the Permanent Court, in which case a definite decision

on the question would be given. Pending such a decision, it could not be assumed that the Permanent Court would hold that the grant of compulsory licences which is the effect of clause 3 would not contravene the terms of the convention in so far as the Bill applies to the performance in public of works originating in the countries of the Copyright Union other than the United Kingdom. If the grant of compulsory licences is so limited as to place foreign composers in a better position than British composers, this may be thought to be unfair, and may in practice leave the position of the music user substantially unchanged."

Oral evidence was also given by representatives of the Board of Trade before the Select Committee and an explanation was asked for as to what actually took place at Rome, and the following statement was made elaborating paragraph 23 quoted above:—

"Before we went to Rome, we were aware of circumstances similar to those which exist at present and we felt that it might be advisable, before the Government ratified a new convention, that we should be able to place in the hands of the Government power to deal with such a situation, with the least damage to composers' rights. We were quite aware that there were two views of the convention; one being that the national treatment is the basis of the convention, and that there should be no limit in respect of national treatment; so long as national treatment is given to foreigners there can be no complaint; the other being that, national treatment or not, the Government under the convention undertakes to protect the rights of the authors and composers; and protection limited by a compulsory licence is no protection. Those were the two views of which we were aware. So we tabled an amendment of article 11. The only amendment of article 11 tabulated prior to the conference was that submitted by His Majesty's Government, which read as follows: article 11 deals with performing rights, and this was an addition to article 11: 'Nevertheless, the right to regulate the exercise of the right of authorisation of public performance so as to prevent such abuse of monopoly rights, arising from the refusal of the author to grant permission for the public performance of his work upon reasonable terms, as would prejudice the trade or industry of any person or class of persons carrying on business in any country to which the convention applies, and would be contrary to the public interest, is reserved for the domestic legislation of each country.' That amendment was put forward by His Majesty's Government because it was felt that if such an abuse of monopoly as that defined in the proposed amendment did arise in this or any other convention country, the public sense of grievance and the demand for a remedy would be such that action might be taken which would be detrimental to the interests of British authors generally. It was therefore considered prudent, in accepting afresh the obligation to grant foreign authors the very valuable rights mentioned in this article, to retain if possible the liberty to take measures for the prevention of the abuse, but in such a way as to reduce the prejudice to authors' rights to the minimum.

"141. Was that supported by any countries? Yes.

"142. Which countries? It was attacked from both sides. Norway attacked it from the point of view that, so long as national treatment was given, it did not matter what the national treatment was, France objected to it on the other side, from the other point of view. It was supported by, I believe, most of our Dominions."

As stated above in paragraph 23, the amendment proposed was not accepted.

Apart from the provisions of section 3 of the Act relating to reproductions for sale after the expiration of the first twenty-five years of the period of protection, the only limitation on the right of a copyright owner at present imposed under our municipal law is that contained in section 4 of the Act of 1911, whereby provision is made for the grant by the Judicial Committee of a compulsory licence in cases where, after the death of an author, the copyright owner has refused to allow performance in public.

As stated above in paragraph 15, no case, so far as is known, has arisen under this section. In the circumstances, the question has never arisen as to whether this statutory provision is contrary to our treaty obligation.

The Law Officers will see that the question is one as to the interpretation to be given to the word "protection" in article 2 of the convention, that is to say, whether it means protection which must be in no way restricted or controlled by the municipal



law of a contracting State, or only such protection as such law provides for native authors.

If the true view is that, in the absence of any express stipulation in the convention that the authors of musical works are to have the "exclusive right" of authorising the public performance of their works, similar to that appearing in article 13 of the Revised Berne (Berlin) Convention and in articles 8, 11 *bis* (1), 13 (1) and 14 of the Rome Convention of 1928 in respect of other rights, obligations to give more than national treatment are not imposed, then legislation of the kind suggested by the Select Committee would probably not be inconsistent with the conventions.

The history of the matter may be important and is as follows:—

In the original Berne Convention of 1886, article 9, paragraph 3, read as follows:—

"The stipulations of article 2 shall apply equally to the public performance of unpublished musical works, and of published works as to which the author has expressly declared upon the title-page or at the commencement of the work that he forbids their public performance."

Since article 2 of the convention of 1886 stipulated only for the rights granted by the national laws to natives, it is clear there was no other obligation under the convention of 1886 than to give national treatment (putting aside the questions of formalities and of term of protection—see paragraph 2 of the article) and even that was made subject to the condition of a printed notice on the work. There was, in fact, no obligation to give any protection to performing rights if the national law made no provision therefor.

At the Conference of the International Copyright Union in 1896 Germany proposed to insert in the convention a provision which would have made it illegal to impose a compulsory licence upon the performing rights in musical works, but this proposal was lost owing to the opposition of Switzerland, whose national law at that date imposed a compulsory licence upon such rights.

The 1908 conference abolished the requirement of the printed notice, and by the insertion of the third paragraph of article 2, it became essential that some protection should be given to performing rights by every country of the Union.

The provision for a compulsory licence in the Swiss Law continued in operation after Switzerland had ratified the convention of 1908, and was not repealed until 1922.

In support of the view that there was no intention to grant an "exclusive right," the following extract from the Report of the Drafting Committee, in regard to the new article 11, may be quoted:—

"Toutefois, il ne faut pas que les compositeurs de musique, dont le droit se trouve ainsi mieux affirmé, croient que, désormais, leurs œuvres ne pourront plus être exécutées publiquement dans le territoire de l'Union sans leur autorisation. Ils ont à compter avec les législations nationales, qui peuvent, dans des conditions déterminées, autoriser cette exécution, et auxquelles, sur ce point, se contente de renvoyer la convention de 1886 ainsi que notre projet." Cd. 4467 of 1909, page 137.

On the other hand, no agreement to amend article 11 could be obtained at the conference in Rome in 1928, and certain countries are strongly opposed to any interpretation of the convention which would permit of the application of a compulsory licence to authors' rights (unless, of course, specifically permitted by the convention, as in paragraph 2 of article 11 *bis* and paragraph 2 of article 13). In fact, the French delegation at Rome threatened to refuse protection to British works during the last twenty-five years of copyright, on the ground that during that period French works are subject to the compulsory licence in respect of reproduction for sale which is contained in Section 3 of the Copyright Act, 1911.

It being clear from the discussions at Rome that some, at any rate, of the parties to the convention would regard a compulsory licence as inconsistent with British obligations under the convention, any of these countries who have signed the optional clause of the Statute of the Permanent Court of International Justice might, in the event of the Bill becoming law, bring the question before the Permanent Court.

In the circumstances, the Board of Trade feel unable to accept the responsibility of advising His Majesty's Government to introduce the suggested legislation so long as this country is bound by article 11 of the Convention of 1908 or 1928, unless

the Law Officers of the Crown are able to advise His Majesty's Government that they could defend the consistency of such legislation with the Conventions of 1908 or 1928 before the Permanent Court.

The Law Officers of the Crown are accordingly asked to advise—

- (1) Whether the stipulations of the Revised Berne (Berlin) Convention of 1908, in respect of the public performance of musical works, impose an obligation to give more than national treatment, provided that the national law gives reasonable protection.
- (2) If so, whether legislation, providing that where an association owning or controlling performing rights in musical works creates an abuse of monopoly by refusing to grant licences upon reasonable terms so as to prejudice the trade or industry of persons carrying on business in this country, contrary to the public interest, those persons should be entitled to apply for the grant of a compulsory licence on appeal to arbitration or to some other tribunal, would be inconsistent with the provisions of that convention.

Opinion of the Law Officers of the Crown and Mr. E. J. MacGillivray.

WE are of the opinion that the obligation imposed by article 2 of the convention "to make provision for the protection of the above-mentioned works," requires the grant of an exclusive right in respect of the reproduction of the work in its original form.

The protection demanded is "protection of the rights of authors over their literary and artistic works." The rights are to be those which are granted to natives by the law of the country where protection is claimed, and the extent of protection and means of redress are to be regulated by the same law. If the question turned on the construction of the first four articles of the Berlin Convention standing alone, we should be of opinion that no exclusive right was demanded, and that the convention would be satisfied if the author had no more than the right to receive compensation for the use of his work under a compulsory royalty system.

We are of opinion, however, that many provisions in the remaining articles of the convention and in the Rome Convention are inconsistent with that conclusion, and point definitely to the exclusive right of the author to reproduce his work in its original form as a basic principle of the conventions.

There are a number of provisions which expressly sanction the qualification of the exclusive right, and thereby compel the inference that *primâ facie* that right exists.

Article 9, paragraph 2, of the Convention of Berlin provides that, with the exception of serial stories and tales, any newspaper article may be reproduced by another newspaper, unless the reproduction is forbidden. Paragraph 1 of the same article provides in terms that serial stories, tales and all other works, whether literary, scientific or artistic, whatever their object, published in the newspapers and periodicals of one of the countries of the Union may not be reproduced in the other countries without the consent of the authors. It is clear that it cannot have been intended by this article to give a greater measure of protection to any work published in a newspaper than the same work would have had published separately. We read this paragraph as meaning that publication in a newspaper is not to deprive a work of that full measure of protection to which it is *primâ facie* entitled, that is to say, that it may not be reproduced in other countries without the author's consent.

Article 10 of the Convention of Berlin provides that the convention does not affect the liberty of extracting portions from literary or artistic works for use in educational works, &c., which is permitted by domestic legislation. This special provision seems to assume that, *primâ facie*, absolute protection against any unauthorised reproduction of a work or any substantial part thereof is demanded.

Article 2 *bis*, paragraph (1), of the Convention of Rome provides that the right of partially or wholly excluding political speeches and speeches delivered in legal proceedings from the protection provided by the preceding article is reserved for domestic legislation. This also points to absolute protection against any unauthorised reproduction as the basic principle upon which these exceptions are



grafted. Paragraph (2) of the same article gives further clarity to the matter in the concluding words "nevertheless the author shall have the sole right of making a collection of the said works."

It will be observed that the right, protection for which is demanded by article 2, does not *prima facie* extend beyond the right of reproducing the work in its original form. Further rights are specifically demanded by subsequent articles. Article 8 of the Berlin Convention demands in respect of translations that the authors shall enjoy during the whole term of the right in the original work the exclusive right of making or authorising a translation of the work. It would be unreasonable to suppose that a foreign author was to have an exclusive right to produce an English translation, but that the original work in a foreign tongue might be reproduced without his authority on payment of a royalty under a compulsory licensing system. Article 14 of the Berlin Convention provides that an author shall have the exclusive right of authorising the reproduction of his work by cinematography. The right is unqualified by any provision permitting reservation and conditions to be imposed by domestic legislation, and, again, it seems unreasonable to suppose that this unqualified monopoly would be demanded in respect of reproduction by cinematography if the same unqualified monopoly was not assumed in respect of reproduction of the work in its original form.

In some cases where protection is demanded in respect of reproduction of the work in some form other than its original there is a special provision permitting the qualification of the exclusive right by reservations and conditions imposed by the domestic legislature. This is to be found in article 13 of the Berlin Convention (reproduction in mechanical contrivances) and article 11 *bis* of the Convention of Rome (communications by radio). The inference is that, where there is no provision permitting such reservations and conditions, an absolute monopoly is demanded, and we cannot think that the convention can be construed as demanding an absolute monopoly in respect of the reproduction of the work in certain forms other than the original and yet permitting by inference reservations and conditions qualifying the right in respect of the reproduction of the work in its original form.

In our opinion, some assistance may also be derived from article 16 of the Convention of Berlin, which provides that "pirated works may be seized by the competent authorities of any country of the Union where the original work enjoys legal publication." It is not conclusive, but it seems more consistent with a demand for an absolute monopoly than a demand for no more than a qualified right which permitted unauthorised reproduction on payment of a royalty.

It may be worth while in this connexion drawing attention to the legislation in Canada. The Canadian Copyright Act, 1921, contains provisions for the granting of compulsory licences if the owner of the copyright has not printed the book in Canada (sections 13, 14, 15 and 27). Objections were made that these sections contravened the provision of the convention in depriving a foreign author belonging to a Union country of the unconditional and unqualified protection to which he was entitled. These objections prevailed, and an amending Act was passed in 1923 providing that these sections shall not apply to any work the author of which is a British subject (other than a Canadian citizen) or the subject or citizen of a country which has adhered to the Convention of Berlin and the Additional Protocol of the 20th March, 1914.

In our opinion, article 2 of the Berlin Convention demands an exclusive right in respect of the reproduction of a musical work in its original form, and article 11 demands the same exclusive right in respect of the public performance of the work. The protection demanded is against any unauthorised public performance. No qualification of that protection is permitted to the domestic legislature, and in our opinion an Act containing any provisions similar to those contained in the Musical Copyright Bill would constitute a breach of our treaty obligations.

WM. A. JOWITT.
J. B. MELVILLE.
E. J. MacGILLIVRAY.

Law Officers' Department.
August 2, 1930.

GERMANY.

[C 408/56/18/1930]

No. 2.

[January 6, 1930.]

Foreign Office Memorandum for the Law Officers of the Crown.

THE advice of the Law Officers is requested on the question whether the sanctions which the Treaty of Versailles provides for in the case of a default by Germany upon her Reparation obligations will continue to be applicable in the event of a default by Germany on her obligations under the Young Plan.

German
reparation
obligations:
effect of
Young Plan
on question of
sanctions.

2. The Treaty of Versailles provided for the appointment of the Reparation Commission which was constituted as the exclusive agency of the Creditor Governments for receiving and distributing the Reparation payments to be made by Germany. The Commission had to determine the amount of damage for which Germany was responsible and to draw up a schedule of payments for discharging the entire obligation. Under the Treaty of Versailles, therefore, Germany's Reparation obligation consisted of a schedule of payments laid down by the Reparation Commission. As regards sanctions, the Treaty provided that the Reparation Commission should forthwith give notice to each of the interested Powers of any German default and make such recommendations as it thought necessary; and the Commission could decide that a default had occurred by a majority. (Part VIII, Annex II, paragraph 17.) The Treaty continues (paragraph 18) :—

"The measures which the Allied and Associated Powers shall have the right to take in case of voluntary default by Germany, and which Germany agrees not to regard as acts of war, may include economic and financial prohibitions and reprisals and in general such other measures as the respective Governments may determine to be necessary in the circumstances."

Article 430 further provides that

"in case . . . the Reparation Commission finds that Germany refused to observe the whole or part of her obligations under the present Treaty with regard to reparation, the whole or part of the areas specified in Article 429" (i.e., the Rhineland) "will be reoccupied immediately by the Allied and Associated forces."

3. The French Government interpreted the Treaty provisions as permitting the Allied Powers to act individually, and to take measures going beyond "economic and financial prohibitions and reprisals" or anything of the same character. On this interpretation they occupied the Ruhr in January 1923 without the consent of the British Government.

4. The London Agreements of the 30th August, 1924, putting into effect the Dawes Plan, did not abrogate the Treaty provisions which had given rise to the Ruhr occupation, but contained provisions intended to prevent any repetition of isolated action on the part of individual Powers. They provided that if the Reparation Commission declared (or refused to declare) a German default by a majority, any member of the Commission could appeal to an independent Arbitral Commission of three whose decision would be final. It was further provided that for the purposes of the Dawes Plan an American citizen (not representing the United States Government) should be appointed as an additional member of the Reparation Commission. Finally, if a default* was declared under the above conditions, the Allied Governments were

* Such a default was defined by Mr. Ramsay MacDonald (House of Commons, the 5th August, 1924) as being a "default which is a serious one and which comes before the Reparation Commission as a large German default, a flagrant default, a default which cannot be judged to be a mechanical default, a default about which it can be alleged (and about which evidence can be presented) 'This could not have taken place unless there were a conspiracy in high places to throw off obligations undertaken in August 1924 by the German Government to put this Report into operation.' " This definition was accepted by the Heads of the Allied Delegations at the London Conference and by Herr Marx on behalf of Germany on the 7th August, 1924.



to confer at once on the nature of the sanctions to be applied and would safeguard any specific securities pledged for the Dawes Loan. Further, the London Agreement contained the following clause (Annex IV, Article 5): "Unless otherwise expressly stipulated in the preceding Articles of this Agreement, all the existing rights of the Signatory Governments under the Treaty of Versailles read with the Report of the (Dawes) Experts are reserved."

5. The Dawes Plan did not purport to be a final settlement of Germany's obligations. It laid down annuities which would be accepted in full satisfaction of Germany's obligations for reparation and other Treaty charges so long as the Dawes Plan was in force, but did not fix the number of years for which the annuities should be paid. The Young Plan, on the contrary, is intended as a complete and final settlement of Germany's obligations.

6. A copy of the Young Plan is attached (Paper (A)), but for the purposes of the present reference it is thought that the following summary of the relevant provisions of the Plan will be sufficient. The Plan fixes 59 annuities to be paid by Germany in full discharge of her obligations for reparation and other Treaty costs. It provides that the relations between Germany and the Reparation Commission shall come to an end, and that the annuities shall be paid to the new Bank for International Settlements, to which will be transferred such of the functions of the Reparation Commission as continue to exist under the Young Plan.

7. The Young Plan deals in a number of passages with the commercial character of Germany's obligations under it, and the nature of the security for the payments, but it is completely silent on the question of the application of sanctions in the event of a default by Germany on her obligations under the Plan. These two questions appear to be quite distinct; for example, a mortgage on a house constitutes security for an ordinary commercial debt in private life, while imprisonment for failure to pay debts constitutes a sanction.

As regards security, the Experts record their view (paragraphs 101 and 102 of the Report) "that the basis of security for the payment of the annuities is the solemn undertaking of the German Government to which no further guarantee can add anything whatsoever."

"The Committee accordingly recommends that the Creditor Governments should take steps to release all controls, special securities, pledges or charges which may remain in their hands other than those specifically referred to above, and should recognise that their acceptance of the solemn undertaking of the German Government replaces any securities, pledges, charges or controls as may in fact exist." Thus the Young Plan abolishes the Industrial Bonds and the Railway Bonds provided for by the Dawes Plan; the payment of the assigned revenues to the Allied Commissioner will cease and all that will be required is that these revenues should be kept free of any prior charge or from any second charge not approved by the International Bank. The Agent-General for Reparation Payments will cease to exist and there will no longer be foreign members of the German Railway Company and of the Industrial Bank. Most important of all, the Commission and foreign Directors of the Reichsbank, whose duty was to ensure that the currency and credit policy of Germany should be so directed as to facilitate the transference of Reparations, are to be withdrawn. These changes are described in paragraph 161 of the Plan as the "attainment of financial autonomy" by Germany.

The Plan contains numerous references to the assimilation of the Reparation Debt to a commercial obligation, freedom from interference and supervision, and the liquidation of all political controls. The following passages illustrate this.

Paragraph 21, in referring to the International Bank, says that "its members shall engage themselves to banish the atmosphere of war, to obliterate its animosities, its partisanships, its tendentious phrases, and to work together for a common end in a spirit of mutual interest and goodwill."

In paragraph 31, the Young Committee state that they are recommending a scheme of annuities that are "closely assimilated to commercial and financial obligations; it carries with it welcome freedom from interference and supervision."

In paragraph 32, they refer to "machinery of a non-political character in the realm of general finance," and to "a system of handling the annuities in a way which, so far as it leads to their commercialisation, would remove them from the sphere of inter-Governmental relations."

In paragraph 38, they refer to "the problem of substituting authority of an external financial and non-political character for the present machinery and controls of the Dawes Plan."

In paragraph 52, they refer to the need for a banking institution which "makes logical the liquidation of all political controls and provides instead machinery essentially commercial and financial in character, which carries with it all the support and at the same time all the responsibilities that economic engagements imply."

In paragraph 76, they refer to Germany as "undertaking a responsibility identical in its nature with the solemn covenants of a debtor on a commercial and financial basis."

In paragraph 148, they refer to the "creation of the Bank for International Settlements in order to provide machinery for the removal of the Reparation obligation from the political to the financial sphere" and to the procedure "necessary in order to assimilate this obligation as closely as possible to an ordinary commercial obligation."

In paragraph 166, the Experts say "the organisation and machinery of the Dawes Plan were based on the conviction that it must find its proper guarantee in the interest of all parties to carry it out in good faith. In aiming as it did at the transference of the Reparation payments from the political to the economic and business sphere, it presumed constant co-operation between debtor and creditor alike. The new system goes further along the same road, replacing the collaboration of separate administrative and Governmental organisation by common work in a wholly financial institution, in the management of which Germany is to take an appropriate part."

In paragraph 137 of the Annexes, the Experts said that "the financial service of these mobilisable or mobilised portions of the annuities shall constitute a final, absolute, and unconditional international obligation in the ordinary financial sense of the word."

8. A further point of importance is that Germany's obligation under the Plan replaces her previous obligations.

Paragraph 96 of the Plan states that, "as from the date of the putting into force of this Plan, Germany's previous obligation shall be entirely replaced by the obligation laid down in this Plan."

9. These passages show that the effect of the Young Plan is to replace Germany's obligations under the Treaty, which were of a political character, by her obligations under the Young Plan, which are of a commercial and financial character. It will be seen that, in the view of the Young Committee, the commercial character to be given to the German obligation would improve the security of the debt. The Treasury, however, for the reasons explained in a memorandum, of which an extract is attached (Paper (B)), consider that, despite the language of the Plan, the Reparation debt must to a large extent remain a political debt, and that accordingly the view that the security would be improved by the quasi-commercial character given to it is open to serious doubt.

10. There is no reference whatsoever in the Plan to what would happen if Germany were to default on these commercial obligations or whether it was intended that the sanctions applicable in the event of default under the Treaty of Versailles should continue to be applicable in the event of default under the Young Plan. On this latter point divergent views have been expressed by the French and English lawyers who have so far had to consider the question.

11. The view of the English lawyers is that the putting into force of the Young Plan will put an end to the possibility of the application in accordance with the Treaty of Versailles of the sanctions provided for in paragraph 18 of Annex II to Part VIII and Article 430, unless special provision is made for the application in given circumstances of the sanctions in question. Their view is that since under paragraph 96 of the Plan (see paragraph 8 above) Germany's previous obligation is to be "entirely replaced by the obligation laid down in this Plan," it will no longer be possible for Germany to default "in the performance of any obligation under this part of the present Treaty" (see paragraphs 17 and 18 of Annex II), or to refuse "to observe the whole or part of her obligations under the present Treaty with regard to Reparation" (Article 430). This view may be supported by the consideration that since the Young Plan provides for the discharge of the whole of Germany's financial obligations resulting from the Treaty of Versailles, whether under the head of Reparation or under the other provisions of the Treaty, it will no longer be possible to say that any particular default by Germany in the performance of her obligations under the Young Plan is a default in respect of Reparation. Moreover, since an essential condition of the application of the sanctions provided by the Treaty of Versailles is a finding of Germany's default by the Reparation Commission, it would not be possible for the sanctions in question to be applied unless either the Reparation Commission were



continued in existence for this particular purpose, or its functions in this respect were transferred to some other body, such as the Bank for International Settlements. No such provision exists in the Young Plan. This view is developed in the note dated the 5th December (Paper (C)) by Sir John Fischer Williams, the British member of the Legal Service of the Reparation Commission, who will be the Legal Adviser of the British Delegation at The Hague, and in a letter (Paper (D)), dated the 12th December, from the Legal Adviser of the Foreign Office to Mr. Leith-Ross, of the Treasury.

12. The only statement of the French view which is at present in the possession of His Majesty's Government is contained in a note (Paper (E)), dated the 28th December, by M. Lyon, the French member of the Legal Service of the Reparation Commission, who will be the Legal Adviser of the French Delegation at The Hague. Generally speaking, the French view appears to be that the experts who prepared the Young Plan had no authority to deal with the question of the application of the Versailles sanctions, and that it is inconceivable that the acceptance of their Report can have the effect of terminating the possibility of such sanctions. The effect of the adoption of the Young Plan will not be to replace the existing obligation of Germany by a new one, but to substitute new machinery for its discharge for that already existing, and, therefore, the sanctions provided by the Treaty in the case of a default by Germany will remain applicable in the event of a default by her in the payments contemplated by the Young Plan. The French view is understood to be that even though no specific provision were made for the continuance of the functions of the Reparation Commission in relation to a default by Germany, the Commission would still theoretically remain in existence and could be called upon to act in the event of such default.

13. In these circumstances the Law Officers are requested to advise whether, in the event of no reference being made to sanctions in the instruments by which the Young Plan is put into force, it will still be open to the Creditor Powers to avail themselves of the provisions of paragraph 18 of Annex II to Part VIII and of Article 430 of the Treaty of Versailles. In view of the fact that The Hague Conference reassembles to-morrow and that the question is almost certain to come up at an early stage, the Secretary of State would be most grateful if he could receive the Law Officers' opinion at the earliest possible date.

Foreign Office, January 2, 1930.

List of Papers.

- (A.) Copy of the Young Plan [Cmd. 3343].
- (B.) Extract from a Treasury Memorandum, dated December 10, 1929. [C 9521/1/18]
- (C.) Note by Sir John Fischer Williams, dated December 5, 1929. [C 9521/1/18]
- (D.) Letter from Mr. Malkin, Legal Adviser of the Foreign Office, to Mr. Leith-Ross, of the Treasury, dated December 12, 1929. [C 9521/1/18]
- (E.) Note by M. Lyon, dated December 28, 1929. [C 57/56/18/1930]

Report.

As a matter of strict legal interpretation, we do not consider that the provisions of the Article referred to will be available to the Creditor Powers in the event specified. In arriving at this opinion we are guided by the following considerations:—

- (a.) The Young Plan, herein differing fundamentally from the Dawes Plan, is designed to replace entirely the previous obligations undertaken by Germany.
- (b.) The omission of any statement regarding sanctions in the instruments by which the Young Plan is put into force would be doubly significant in view of the presence of such a statement in the Dawes Plan.
- (c.) The sanctions provided for under paragraphs 17 and 18 of Annex II to Part VIII of the Treaty of Versailles arise only in the event of failure to perform an obligation "under this Part of the present Treaty."

Any failure there may be to carry out the obligations of the Young Plan will not be a failure to perform an obligation under Part VIII of the Treaty of Versailles, and will therefore not be a failure "under this Part of the present Treaty."

- (d.) The sanctions provided for by Article 430 can be taken advantage of only in the event of a finding by the Reparation Commission as provided in the Article. In view of the Young Plan, no such finding will in future be possible, as the Reparation Commission is to cease to exist, and this notwithstanding that some of its functions are to be transferred to the proposed International Bank.

For the above reasons we express the opinion that, if it is still desired to retain such sanctions as those provided for by the Treaty of Versailles, an express statement to this effect must be incorporated in the Young Plan.

WILLIAM A. JOWITT.
JAS. B. MELVILLE.

Law Officers' Department,
January 6, 1930

[E 3301/1192/93/1930]

No. 2^d.

[Colonial Office.]

[June 16, 1930.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, May 17, 1930.

I AM directed by Lord Passfield to state that he desires to refer to you certain questions regarding the exemption from taxation of certain date gardens the property of the Sheikhs of Koweit and Mohammerah in Iraq.

Exemption
from tax-
ation of date
gardens of
Sheikhs of
Koweit and
Moham-
merah in
Iraq.

1. In November 1914, in order to ensure the assistance of the Sheikh of Koweit in connexion with the military operations then proceeding against the Turks in the Persian Gulf, a letter dated the 3rd November, 1914, was addressed by the Resident and His Britannic Majesty's consul-general in the Persian Gulf to the Sheikh of Koweit in which he was promised *inter alia* that the date gardens then in his possession situate between Fao and Qurnah should remain in his possession and in possession of his descendants without being subject to payment of revenue or taxes. A copy of the letter is enclosed—(Paper A). On the 21st November, 1914, a letter (copy enclosed herewith—Paper B) was addressed by the British Resident in the Persian Gulf and His Majesty's consul-general for Fars to the Sheikh of Mohammerah in which he was also promised that in consideration for the assistance he had rendered to the British Government the date garden he then possessed on the Turkish side of the Shatt-el-Arab should remain in full possession of himself and his heirs and immune from taxation. The date gardens referred to in these letters are situated in territory which has now become part of Iraq.

2. On the 10th October, 1922, a Treaty of Alliance between Great Britain and Iraq was signed at Bagdad, a copy of which is enclosed—(Paper C). Ratifications were exchanged at Bagdad on the 19th December, 1924. Article 1 of the treaty provides that His Britannic Majesty shall be represented in Iraq by a High Commissioner. By article 4 of the treaty the King of Iraq without prejudice to the provisions of articles 17 and 18 of the treaty agrees to be guided by the advice of His Britannic Majesty tendered through the High Commissioner on all important matters affecting the international and financial obligations and interests of His Britannic Majesty for the whole period of the treaty. His Majesty the King of Iraq also agrees that he will fully consult the High Commissioner on what is conducive to a sound financial and fiscal policy and that he will assure the stability and good organisation of the finances of the Iraq Government so long as that Government is under financial obligations to the Government of His Britannic Majesty.

By article 10 of the treaty the high contracting parties agree to conclude separate agreements to secure the execution of any treaties, agreements or undertakings which His Britannic Majesty is under obligation to see carried out in respect of Iraq. His Majesty the King of Iraq undertakes to bring in any legislation necessary to ensure the execution of these agreements.

This article also provides that such agreements shall be communicated to the Council of the League of Nations.



By article 17 of the treaty any difference which may arise between the high contracting parties as to the interpretation of the provisions of the treaty is to be referred to the Permanent Court of International Justice provided for by article 14 of the Covenant of the League of Nations.

3. On the 26th March, 1924, Sir H. Dobbs, the High Commissioner for Iraq, communicated to the Prime Minister of Iraq by letter a list of the treaties, agreements and undertakings which His Majesty's Government considered were referred to in article 10 of the treaty and requested that he might receive an official reply notifying the concurrence of the Government of Iraq. A copy of this letter is enclosed—(Paper D). It will be observed that in this letter no reference is made to the agreements with the Sheikh of Koweit or the Sheikh of Mohammerah regarding the exemption from taxation of their date gardens.

On the 17th April, 1924, Mr. Davidson, the counsellor to the High Commissioner for Iraq, wrote to the Prime Minister of Iraq pointing out that in the letter of the 26th March no reference was made to the obligations to the Sheikh of Koweit and Mohammerah that their date gardens should always be exempt from taxation, on the ground that the matter was a minor obligation in respect of Iraq which the British Government contracted at the very commencement of the campaign for the liberation of Iraq in 1914. A copy of this letter is enclosed herewith—(Paper E). Mr. Davidson also pointed out that the High Commissioner felt sure that the Iraq Government would recognise the obligation as a debt of honour to those who helped in the campaign in its early and most doubtful stages and that in view of the difficulties of settling the matter at that juncture His Britannic Majesty's Government had decided not to include these obligations to the sheikhs concerned among the agreements covered by article 10 of the treaty, unless the Iraq Government desired to do so, and that the matter might be reserved for subsequent settlement between the two Governments. On the 10th July, 1924, the Prime Minister of Iraq replied (copy attached—Paper F) to the letter dated the 26th March, 1924, stating that the Iraq Government had accepted the agreements, treaties and obligations referred to in article 10 of the Anglo-Iraq Treaty and mentioned in the High Commissioner's letter of the 26th March, 1924. It will be observed that in this letter no reference is made to Mr. Davidson's letter of the 17th April, 1924, as to the obligation to exempt the date gardens of the two sheikhs from taxation.

The Iraq Government did, however, continue to accord exemption from taxation of the date gardens in question and the matter was not reopened by the Iraq Government until December, 1926, after the lapse of more than two years.

On the 10th August, 1927, the secretary to the Council of Ministers informed the secretary to the High Commissioner that the provisions of the organic law were clear as to the necessity of collecting the tax and that it was impossible to continue the exemption except by a special law and that it was doubtful whether the law would be passed having regard to the political and economic conditions of the country (a copy of the letter is enclosed herewith—Paper G).

4. On the 14th December, 1927, a new Anglo-Iraq Treaty was entered into, but such treaty has not been ratified and has not entered into force. At the time of the negotiation of the Anglo-Iraq Treaty of the 14th December, 1927, the Iraqi delegates asked for and were furnished with a memorandum containing a list of the British international obligations in respect of Iraq. The promises given to the two sheikhs of immunity from taxation in respect of their date gardens in Iraq were mentioned in the memorandum and no objection to the terms of that memorandum was raised by the Iraqi delegates during the course of the negotiations. His Majesty's Government had therefore reason to conclude that the Iraq Government were prepared to recognise the obligations to the two sheikhs, though they had not expressly stated that they were willing to do so or expressly accepted the memorandum as an accurate statement of British international obligations in respect of Iraq.

It was not until the middle of last year that it again became evident that the Iraq Government were unwilling to honour these obligations.

The matter had in the meanwhile been considered by the Financial Mission appointed by the Secretary of State in March 1925 to enquire into the financial position and prospects of the Government of Iraq, and such mission recommended that the Government of Iraq should withdraw any claim that the obligation to the two sheikhs should be made a charge upon Great Britain. (See Cmd. 2438, paragraph VIII of appendix at pp. 61 and 62, copy enclosed—Paper H.) It will be observed that the revenue involved is stated to have originally amounted to 87,000 rupees per annum, and that the amount has since been increased by a change in the rate of taxation to 1,20,000 rupees per annum.

The total amount of taxation remitted by the British Government between 1914 and 1920 was 6,12,048·8 rupees, namely, in respect of the properties of the Sheikh of Koweit 4,04,998·2 rupees and in respect of the properties of the Sheikh of Mohammerah at 2,07,050·6 rupees.

While the taxes not collected by the Iraq Government between 1921 and 1923 amount to 8,49,030·4 rupees, namely, 5,65,086·14 rupees on the Sheikh of Koweit's garden and 2,83,943·6 rupees on the Sheikh of Mohammerah's garden.

5. Apart from any definite treaty obligations on the part of the Iraq Government to honour these obligations it appears to Lord Passfield that there are other considerations which justify the contention of His Majesty's Government that the Iraq Government should continue to honour these obligations.

In the first place Iraq was captured from the Turks at great cost to the British nation and the territory so captured has been handed over to the new state of Iraq, and the obligations given by His Majesty's Government to the two sheikhs were only a very small part of the price paid by His Majesty's Government for victory in Iraq.

In the second place in the general financial settlement between His Majesty's Government and Iraq which was effected as from the 1st April, 1921, the Iraq Government took over all the assets of the civil administration (with the exception of certain assets derived from military expenditure, vote of credit, or army funds) and assumed responsibility for all civil charges in the future in return for the assumption by His Majesty's Government of responsibility for the net deficit of the civil administration on the 31st March, 1921. It is accordingly open to contention that the liability to continue to accord exemption from taxation to the two sheikhs in accordance with the promise made to them on behalf of His Majesty's Government was one of the liabilities for which the Iraq Government assumed responsibility in this general settlement.

Thirdly, although Lord Passfield understands that it cannot be said that there is any definite accepted rule of international law which automatically subrogates a succeeding State to the contractual rights and obligations of its predecessor, modern usage of nations has tended to the acknowledgment of such obligations, and his Lordship understands that it is the generally accepted practice that on the transfer from one State to another of responsibility for the administration of any area the State to which the responsibility is transferred should, in the absence of any express provision to the contrary, at the same time take over the contractual assets and liabilities attaching to the area in question.

It would appear, therefore, that it could fairly be contended that, when the responsibility for the administration of Iraq passed from His Majesty's Government to the Iraq Government the latter Government *ipso facto* assumed responsibility for continuing the exemption from taxation promised to the two sheikhs.

6. Having regard to all the circumstances, it appears to Lord Passfield that there are good reasons from the point of view of equity, international practice and treaty obligations for contending that the undertakings given to the two sheikhs are obligations which the Iraq Government are bound to implement, and that if the Iraq Government are not prepared to honour these obligations the question should be referred to arbitration under article 17 of the treaty of 1922.

7. There are, however, certain difficulties in the way of arbitration. Article 17 of the Anglo-Iraq Treaty of 1922 provides that any difference that may arise between the contracting parties as to the interpretation of the provisions of the treaty shall be referred to arbitration and it would therefore appear that the only question which could be referred to arbitration is the question whether the obligations to the two sheikhs are covered by the provisions of the treaty. Having regard to the fact that the obligations to the sheikhs were not mentioned in the letter dated the 26th March, 1924, from the High Commissioner to the Prime Minister of Iraq, there would appear to be some difficulty in maintaining that such obligations are covered by article 10 of the treaty. On the other hand, it seems probable that reliance could be placed on article 4 of the treaty. The undertakings to the sheikhs could, Lord Passfield considers, reasonably be described as an important matter affecting the international and financial obligations of His Britannic Majesty, and thus a matter upon which the Iraqi Government are under an obligation to be guided by the advice of His Britannic Majesty tendered through the High Commissioner. It should be mentioned here that Lord Passfield is advised that if there is any possibility of the question of the obligations to the two sheikhs being submitted to arbitration or to the Permanent Court of International Justice at The Hague care should be taken, in the meantime, to make no statement or admission which might prejudice



the use of any argument before that court including an argument founded on article 10 of the treaty. Lord Passfield is also advised that if the matter is referred unilaterally to the Permanent Court of International Justice at The Hague it could only be so referred under article 17 of the treaty and that under that article His Majesty's Government could only ask for the decision of the court on the matters in dispute in so far as such matters arise out of the interpretation or application of the treaty. In such circumstances it appears to be desirable that the Government of Iraq should be induced to submit the question to arbitration by special agreement and that the agreement should be drafted in the widest possible terms in order that the terms of reference may include not only the question whether the Iraqi Government are obliged to continue the exemption from taxation under the terms of the treaty but also whether they are so obliged under the rules of international law.

Should the Iraqi Government refuse to enter into a special agreement to refer the matter in dispute to The Hague and the matter has to be referred to The Hague by the unilateral application of His Majesty's Government, Lord Passfield is advised that the application should be framed in general terms with reference to the whole treaty and not with reference to any particular article or articles of the treaty.

8. A further point arises in that the Sheikh of Koweit is an independent sovereign and would presumably be recognised by King Feisal as such.

In that case neither the courts nor the authorities of Iraq would have any legal right to make any order for taxation against him, nor to enforce any such order, if made.

9. In these circumstances I am to request that you will be good enough to furnish Lord Passfield with your opinion generally and in particular on the following questions:—

- (1) Do you agree that it would be advisable, if possible, to induce the Iraqi Government to agree to a special reference to the Permanent Court of International Justice at The Hague and that such reference should be framed in the widest possible terms in order to include not only the question whether the Iraqi Government are obliged to continue the exemption from taxation under the terms of the treaty, but also by reason of the financial settlement of 1921 and under the rules of international law?
- (2) In view of the fact that a definite pronouncement in confirmation of the view expressed in paragraph 8 above might strengthen the position of His Majesty's Government *vis-à-vis* the Iraq Government, do you consider that the reference to The Hague Court should be so framed as to cover the question whether, in view of the status of the Sheikh of Koweit as an independent sovereign, it would be in accordance with international law and usage that his properties in Iraq should be immune from taxation?
- (3) If it is impossible to induce the Iraqi Government to agree to submit a special reference to The Hague, do you agree that it would be open to His Majesty's Government to refer the matter to The Hague under the provisions of article 17 of the treaty?
- (4) If the answer to question (3) is in the affirmative, would such reference, in your opinion, by reason of the provisions of article 17 be confined to the interpretation of the provisions of the treaty and to the question whether the obligations to the two sheikhs are covered by article 4 or article 10 of the treaty?
- (5) If it is possible and becomes necessary to refer the matter to The Hague do you agree that the reference should be framed in general terms with reference to the whole treaty and not with reference to any particular article or articles of the treaty, and that in the meantime no admission should be made by or on behalf of His Majesty's Government which might be construed as an abandonment by His Majesty's Government of the right to rely on article 10 of the treaty?
- (6) Whether, in your opinion, there is a reasonable prospect of success if the matter is (a) referred to the Permanent Court of International Justice at The Hague by His Majesty's Government pursuant to article 17 of the treaty; (b) referred to arbitration in virtue of a special reference framed upon the lines suggested in paragraph 9 (1) above.

I am, &c.
O. G. R. WILLIAMS.

List of Papers.

- (A.) From the Resident and His Britannic Majesty's Consul-General in the Persian Gulf to the Sheikh of Koweit, November 3, 1914. [E 4047/4047/65/1927.]
- (B.) From the British Resident in the Persian Gulf and His Majesty's Consul-General for Fars to the Sheikh of Mohammerah, November 21, 1914. [E 4047/4047/65/1927.]
- (C.) Treaty of Alliance between Great Britain and Iraq, signed at Baghdad, October 10, 1922. [Treaty 1760.]
- (D.) High Commissioner for Iraq to the Prime Minister of Iraq, March 26, 1924. [E 7443/232/65/1924.]
- (E.) Counsellor to the High Commissioner for Iraq to the Prime Minister of Iraq, April 17, 1924. [E 4047/4047/65/1927.]
- (F.) Prime Minister of Iraq to the High Commissioner for Iraq, July 10, 1924. [E 7443/232/65/1924.]
- (G.) Secretary to Council of Ministers, Iraq, to the Secretary to High Commissioner for Iraq, August 10, 1927. [E 4047/4047/65/1927.]
- (H.) Report of Financial Mission to Iraq, 1925. [Parliamentary 5303.]

Report.

(1) We think that the Iraq Government should, if possible, be induced to agree to a special reference being made to the Permanent Court of International Justice and that such reference should be framed in the widest possible terms.

(2) We think that the reference should be framed so as to cover the question whether it is in accordance with international law that the properties of the Sheikh of Koweit should be immune from taxation as a consequence of his independent sovereignty.

(3) We think it is open to His Majesty's Government to refer the matter to the court under article 17 of the treaty.

(4) We think that a reference under article 17 would be confined to an interpretation of the provisions of the treaty and to the question whether the obligations to the two sheikhs were covered by the treaty.

(5) We think that such reference under article 17 should be framed so as to cover the whole treaty, and that the right to rely on article 10 should not be abandoned.

(6) (a) If the reference is made by virtue of article 17, we think there is reasonable chance of success.

(b) Yes.

WILLIAM A. JOWITT.
JAMES B. MELVILLE.

Law Officers' Department,
June 16, 1930.

Annex A.

The Resident and His Britannic Majesty's Consul-General in the Persian Gulf to the Sheikh of Koweit.

Dated Dhilhijjah 14, 1332
(November 3, 1914).

(After compliments.)

In continuation of previous letter intimating the outbreak of war between the British Government and Turkey, I am ordered by the British Government to convey to your Excellency gratitude for your loyalty and your offer of assistance, and to request you to attack Umm Qasr Safwan and Bubiyan and to occupy them. You should endeavour, afterwards, in co-operation with Sheikh Sir Khazal Khan, Amir Abdul Aziz-bin-Saud and other reliable Sheikhs, to liberate Basra from Turkish possession. Should this prove to be beyond your ability, you should make arrangements, if possible, to prevent Turkish reinforcements from reaching Basra or even Qurnah, until the arrival of the British troops, whom we shall send, please God, as soon as possible. I also hope that two of our men-of-war will reach Basra before the arrival of your troops there. And though it should be your highest aim, in this connexion, to liberate Basra and its people from Turkish rule, still we request that you should use your utmost endeavour in preventing troops and others from plundering the merchandise belonging to British merchants in Basra and its dependencies, to protect the European residents of Basra, and to safeguard them



from loss and oppression. In return for your valuable assistance in this important matter, I am ordered by the British Government to promise to your Excellency that if we succeed therein—and we shall succeed therein, please God—we will not return Basra to the Turkish Government and we will not surrender it back to them at all. Furthermore, I make to you, on behalf of the British Government, certain promises concerning your Excellency personally, viz. :—

- (1) That your gardens which are now in your possessions, viz., the date gardens situate between Fao and Qurnah, shall remain in your possession and in possession of your descendants without being subject to the payment of revenue or taxes.
- (2) That if you attack Safwan, Umm Qasr and Bubiyan and occupy them, the British Government will protect you from any consequences arising from that action.
- (3) That the British Government does recognise and admit that the Sheikdom of Koweit is an independent Government under British protection.

I request that you will be good enough to read the enclosed letter and transmit the same to the Amir of Nejd at the earliest convenience. I have addressed a letter to the Sheikh of Mohammerah similar to this I am writing you.

I am confident of your old-established friendship with the exalted Government, and I believe that your Excellency will use your endeavour, in these important matters, in every respect.

I avail myself of this opportunity to assure you of my high esteem, and may you continue to remain preserved, and salaams,

S. G. KNOX,
*Resident and His Britannic Majesty's
Consul-General in the Persian Gulf.*

Annex B.

British Resident in the Persian Gulf to the Sheikh of Mohammerah.

(A.C.) November 21, 1914.

With reference to the assurances conveyed to your Excellency in my letter No. 307, dated the 15th October, 1910 (11th Shawwal, 1328), and having regard to the further valued services and co-operation which your Excellency has rendered to the British Government and to British interests in Arabistan and the Shatt-el-Arab, I am now authorised to assure your Excellency personally, and to do so by this writing, that, whatever change may take place in the form of the Government of Persia, and whether it be Royalist or Nationalist, His Majesty's Government will be prepared to afford you the support necessary for obtaining a solution satisfactory both to yourself and to us in the event of any encroachment by the Persian Government on your jurisdiction and recognised rights or on your property in Persia. In like manner, they will safeguard you to the best of their ability against any unprovoked attack by a foreign Power or against any encroachment by such Power on your jurisdiction and recognised rights or on your property in Persia. These assurances are given for yourself and for your successors from among your male descendants, and shall hold good so long as you and they do not fail to observe your and their obligations towards the Persian Government, provided that the nomination of your successors from among your male descendants shall be subject to confidential consultation with, and the approval of, His Majesty's Government, and so long as you and they shall continue to be guided by the advice of His Majesty's Government and to maintain an attitude satisfactory to that Government.

Vis-à-vis the Persian Government, we shall do our best to maintain your Excellency in your present state of local autonomy.

Further, the date gardens which you now possess on the Turkish side of the Shatt-el-Arab shall remain in full possession of you and your heirs and immune from taxation.

P. Z. COX, *Lieutenant-Colonel,
British Resident in the Persian Gulf, and
His Majesty's Consul-General for Fars, &c.*

PALESTINE.

[E 2919/506/65/1930]

No. 2^B.

[Colonial Office.]

[May 28, 1930.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, April 10, 1930.

I AM directed by Lord Passfield to request you to favour him with your observations on the following matter :—

Dead Sea Salts
Concession :
Question of
arbitration.

2. In 1913 the Imperial Ottoman Government granted a concession to certain Turkish nationals (Selah Djimdjoz Bey, Suad Bey, and Djenab Chehabeddin Bey) for the extraction of salts from the Dead Sea. In March 1923 the concessionnaires agreed to transfer their concession to a Colonel Maitland Edwards, and on the 19th April of that year, a Captain J. G. Bennett reported to His Majesty's Government that he had acquired the concession, and asked His Majesty's Government to recognise it. Captain Bennett was informed that the concession could not be recognised, on the ground that the Treaty of Lausanne and the Concessions Protocol signed at the same time did not provide for the maintenance of such a concession. Copies of the correspondence with Captain Bennett, including a copy of the Firman of Concession, are enclosed (Papers 10 and 11). Captain Bennett subsequently transferred the concession to a Major Burton Stewart. On the 31st July, 1925, a Major J. D. Henry, an Australian, endeavoured to induce the Commonwealth Government to secure the agreement of His Majesty's Government to the arbitration at The Hague of the question of the validity of this concession. The matter was then referred to the Law Officers of the Crown, and I am to invite your attention to a case and an opinion on it given by Sir Douglas Hogg and Sir Thomas Inskip on the 13th January, 1926.* Copies of this case and opinion are enclosed (Paper 2). As a result, the Commonwealth Government declined to support Major Henry.

3. On the 18th October, 1927, Messrs. Edwards and Henry's solicitors stated that their clients were completing arrangements to take their claim to The Hague. On the 29th October, the solicitors asked for an interview, and stated that certain non-English associates of their clients would be available. At an interview held on the 3rd November, it was stated that several groups of English, French and other nationals then had an interest in the concession. Copies of the relevant correspondence and of the record of the interview in question are enclosed for your information (Papers 6, 7 and 8).

4. On the 21st February, 1928, the French Government communicated a note calling the attention of His Majesty's Government to the fact that a French financial group had acquired certain rights in this concession (Paper 1). The French Government were informed on the 16th April, 1928 (Paper 3), that His Majesty's Government could not recognise the concession, and it was pointed out to the French Government that two successive groups of British nationals had preferred claims in respect of it in the past, and that it must be assumed that the French group, when they acquired their interests in the concession, were well aware of the previous attitude of His Majesty's Government.

5. No further communication was received until the 9th February, 1929, when the French Ambassador left a second note with the Secretary of State for Foreign Affairs containing a reasoned statement of the French case prepared by the French group (Paper 4). It is material to note that the French Government do not state definitely that they either adopt or accept the argument put forward by the French group in this document. A reply was sent to the French Ambassador on the 14th March, 1929, in which the refusal of His Majesty's Government to recognise the concession was supported by legal arguments.

6. On the 21st June, 1929, the French Ambassador informed the Foreign Office that the French Government wished the matter to be referred to arbitration. The matter received further consideration by the Departments concerned, who were advised that in international law it is well settled as a principle that a State may



not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign State, unless the injured person was its national at the moment when the damage was caused, and retained its nationality until the claim was decided. This proposition forms Basis No. 28 of the Bases of Discussion at The Hague at the Conference for the Codification of International Law, and is at present being supported there by representatives of His Majesty's Government. The necessity of a continuous national character for a claim is based on a long line of decisions of international arbitral tribunals, and the principle is well emphasised in the Abbiati case (United States and Venezuelan Claims Commission 84—Moore 2347, cited by Ralston "Law and Procedure of International Tribunals" (1926 ed.) at page 162).

7. Subject to your concurrence in the suggestions contained in the next subsequent paragraph of this letter, Lord Passfield is disposed, having regard to the arguments contained in the letter from the Foreign Office to the Colonial Office of the 13th November, 1929 (Paper 5), to agree to the French Government's proposal to submit the question to arbitration to the Permanent Court of International Justice at The Hague, in which event it is necessary to decide on the terms of the *compromis*.

8. It is suggested that an agreement to arbitrate on this matter should be made conditional on the acceptance by the French Government of the following four provisions:—

- (a) That the French Government must agree to adopt and accept responsibility for the claims.
- (b) That the French Government must agree that the point to be submitted for decision to the Court is whether any right possessed by the French Government in international law has been infringed.
- (c) That (subject to the consent of the Treasury) the French Government should agree to the insertion of a provision enabling the Court to make the losing party pay costs up to a maximum figure of, possibly, £1,000.
- (d) That the consent of His Majesty's Government to arbitrate the claim should be conditional upon the French Government agreeing to some form of arbitration of the Syrian claims.

As regards condition (d), I am to explain that for some time past His Majesty's Government have been pressing the French Government to agree to the arbitration of several claims arising out of disorders in Syria during the years 1925 and 1926. The French Government have persistently declined to refer this question to arbitration, and it is, therefore, thought convenient and suitable to insert this provision as a condition for agreeing to arbitration in the case of the Dead Sea Salts concession.

9. Lord Passfield would be glad of your opinion on the suitability of the four conditions suggested in the preceding paragraph, with particular reference, as regards suggestion (b), to the question whether the considerations set out in paragraph 6 of this letter constitute a good and valid defence in international law. In addition, Lord Passfield will be glad to receive any observations of a general character that you may care to offer.

10. A further point arises in connection with a concession which has actually been granted to a firm called Palestine Potash (Limited) to extract salts from the Dead Sea. This firm signed, on the 1st January, 1930, an indemnity, of which a copy is enclosed, binding themselves to do all such things as may be necessary to enable the Governments of Palestine and Transjordan to give effect to the decision of any tribunal which may hold that the claim of the French claimants is well founded. I am to explain that at the time that this agreement was negotiated it was only contemplated that reference to arbitration would become necessary in the event of the claimants so formulating their claim as to compel His Majesty's Government to agree to arbitration under Clause 26 of the Palestine mandate. Lord Passfield would be glad to be assured that, in your opinion, Palestine Potash (Limited) would not be released from their obligations under this indemnity by voluntary submission to arbitration of the French claims.

I am, &c.

O. G. R. WILLIAMS.

Schedule of Papers.

1. French Ambassador to Foreign Office, February 21, 1928. [E 925/275/65/1928.]
2. Law Officers' Opinion, January 13, 1926. [Confidential, 13206, p. 7.]
3. Foreign Office to French Ambassador, April 16, 1928. [E 1721/275/65/1928.]
4. French Ambassador, February 9, 1929. [E 773/80/65/1929.]
5. Foreign Office to Colonial Office, November 13, 1929. [E 5856/80/65/1929.]
6. Messrs. Montagu and Cox to Colonial Office, October 18, 1927.
7. Messrs. Montagu and Cox to Colonial Office, October 29, 1927.
8. Notes of an interview at the Colonial Office on the 3rd November, 1927. [E 5285/5146/65/1927.]
9. Colonial Office to Foreign Office, December 9, 1927. [E 5285/5146/65/1927.]
10. Captain J. G. Bennett to Colonial Office, June 7, 1923. [E 7131/3118/65/1925.]
11. Colonial Office to Captain Bennett, December 14, 1923. [E 7131/3118/65/1925.]
12. Treaty of Lausanne. [Treaty, 1681.]

Report.

1. We approve of the four conditions set out in paragraph 8 of that letter, subject to this reservation in regard to condition (c) that it would form a precedent for imposing a liability for costs on the losing party in international arbitrations, and the question whether it is desirable to establish such a precedent is a question of policy rather than of law.

2. We consider that the matters set out in paragraph 6 of the letter should constitute a good and valid defence in international law, in view of the authorities cited in that paragraph of the letter and also "Moore's International Law Digest," vol. 6, pp. 248, 638-9; "Wharton's International Law Digest," vol. 2, pp. 544-5. Borchard on "Diplomatic Protection of Citizens Abroad," pp. 660-1.

3. We think that Palestine Potash (Limited) will not have any legitimate ground of complaint and will not be released from their obligations by reason of a submission to arbitration in the manner proposed.

4. We are of opinion that the Treaty neither affirms nor denies the validity of the concession, which does not fall within the terms either of article 1 or of article 9 of the 12th Protocol. Accordingly, the validity or invalidity of the concession is to be determined by the rules, if any, of international law applicable to the subject. It appears to us to be doubtful whether the practice of nations in regard to concessions granted by the Government of a ceded or conquered territory is sufficiently settled to be regarded as forming part of the system of international law. Reasonable principles for the guidance of a Government in dealing with concessions in respect of conquered territory were laid down in the Report of the Transvaal Concession Commission, which is set out in Pitt-Cobbett's "Leading Cases," 4th ed., vol. 2, pp. 349-358. The commission did not put forward those principles as being legally binding, but only as suggestions as to the manner in which the discretion of the Government should be exercised. Westlake, on the other hand, expressed the view ("International Law," Part 1, pp. 74-83, and "L.Q.R.," vol. 17, pp. 392-401) that a conquering State had not an unfettered discretion in regard to such concessions, but was subject to obligations in international law, and, in the absence of special reasons, could not cancel such concessions without paying compensation.

In the present case, however, if we are right in our answer to the second question, the defence to the arbitration should succeed whatever view may be taken with regard to these difficult and unsettled problems.

WILLIAM A. JOWITT.
JAS. B. MELVILLE.

Law Officers' Department,
May 28, 1930.



1930

24

PALESTINE.

[E 4488/400/65/1930]

No. 2^c.

[Colonial Office.]

[August 5, 1930.]

Colonial Office to the Law Officers of the Crown.

Application
by Palestine
for loan
under
Colonial
Develop-
ment Act,
1929.

Gentlemen,

Downing Street, May 29, 1930.

I AM directed by Lord Passfield to inform you that he has under consideration an application by the Government of Palestine for a loan under the Colonial Development Act, 1929, and that certain questions, on which he would be glad to be favoured with your opinion, have arisen in connexion with this application.

2. It will be observed that under Section 1 (1) of the Act, a copy of which is enclosed for convenience of reference, the Treasury may make advances to the Government of any territory to which the Section applies for the purpose of aiding and developing industry in the territory and thereby promoting commerce with or industry in the United Kingdom, and that by Section 1 (2) of the Act such advances may be made on such terms, and subject to such conditions, as the Treasury may think fit. It has been suggested that the Treasury should, pursuant to their power under Section 1 (2), make it a condition of a loan to the Palestine Government that material, &c., to be bought with the money so advanced should be purchased in the United Kingdom, wherever possible.

3. The question on which Lord Passfield would be glad to receive your opinion is:—

Whether, if such a condition were made, there is anything in article 18 of the Palestine Mandate which would render it a breach of the obligations of His Majesty's Government as the Mandatory that a loan should be accepted by Palestine under these conditions?

A copy of the Palestine Mandate is also enclosed.

4. In this connexion I am to invite attention to the Law Officers' opinions of the 16th March, 1926, regarding the proposed British Guaranteed Loans for Palestine and East Africa. Your predecessors advised at that time that the attachment, to a guarantee by His Majesty's Government of a local loan, of a formal condition that any contracts for development to be paid for out of the loan should be given to British firms, was not inconsistent with article 18 of the Palestine Mandate, and, in view of this fact, it may be argued that *a fortiori* a similar term would not be inconsistent with the Palestine Mandate where it is imposed as a condition of the actual advance of the money by His Majesty's Government itself.

5. It is thought desirable to draw attention also to the opinions given by the Law Officers on the 24th May* and 12th November, 1928,† in connexion with the construction of the harbour works at Haifa, although it will be seen that the point dealt with in those opinions was of a different character from that under consideration in the present case. In both these opinions, however, stress is laid upon the principle that "the interests of the Mandated Territory afford the test of the propriety of the course proposed." If it should be held that this principle must also apply to the present case, it would appear to follow that His Majesty's Government ought to be in a position to show that the acceptance of a loan by Palestine under these conditions was in the real interests of Palestine itself; and to satisfy the test His Majesty's Government would have to show that capital was required by Palestine for its development and that the loan with the conditions attached constituted a grant of capital on terms on the whole more favourable than Palestine could secure elsewhere.

If such a test is to be applied to the application of the Government of Palestine at present under consideration, it is submitted that the following circumstances would amply fulfil the requirements of the test: A sum of about £150,000 is required by the Government of Palestine to enable a part of a drainage scheme to be carried out in Jerusalem upon which the extension of the water supply of that city is dependent. The provision of improved drainage and water supply is regarded by the Palestine Government as of great importance to the proper development of Jerusalem under present-day conditions. The financial position of Palestine makes it essential that money required for development purposes should be obtained at the most economical rates.

* Confidential, 13565, p. 14.

† Confidential, 13565, p. 19.

PALESTINE.

25

6. Failing the issue of a further guaranteed loan (which is contrary to the policy of His Majesty's Government and would require fresh statutory authority), the alternatives open in the present case are:—

- (a) Assistance under the Colonial Development Act;
- (b) The raising of the necessary money on the security of the revenues of Palestine.

The rate of interest which would be paid if assistance were obtained under the first alternative would not be based on the credit of Palestine, but would be nearly related to the rates at which the British Government could borrow. The comparison between the two alternatives is thus, broadly, a comparison between the respective credits of the British and Palestine Governments. At any time this comparison could not fail to be markedly in favour of the former alternative, while in present circumstances, having regard to recent events in Palestine, the difference in favour of the former would be appreciably increased. Indeed, it is open to doubt whether in present circumstances Palestine could raise an appreciable sum on her own credit on any reasonable terms.

Your opinion is especially desired, because recent proceedings in the Permanent Mandates Commission and elsewhere have shown that the action of His Majesty's Government in Palestine in connexion with commercial matters is likely to be subjected to searching scrutiny, and His Majesty's Government are liable to be called upon to defend any action they may take which is alleged to contravene the Mandate before the Permanent Court of International Justice under article 26 of the Mandate.

I am, &c.

O. G. R. WILLIAMS.

List of Enclosures.

Colonial Development Act, 1929 [20 Geo. V, Ch. 5].
Palestine Mandate [Cmd. 1785].

Opinion of the Attorney-General.

The proposal in effect appears to be that Great Britain should lend money to Palestine at a lower rate of interest than Palestine could otherwise obtain, upon the condition, which is necessary in order to justify the advance from the point of view of British interests, that the materials to be purchased by means of the sum lent should be purchased in Great Britain. If it is in the interests of Palestine to borrow money at such a rate of interest and subject to such a condition, we do not think the proposal falls within the prohibition of article 18 of the Mandate. We think it essential that the condition should be made one of the express terms upon which the loan is granted, and it should be made clear that it is entirely for the Palestine Government to make up their mind whether they desire to accept the loan on these terms.

WM. A. JOWITT.

Law Officers' Department,
August 5, 1930.

[5699]

E



RUSSIA.

[N 7538/423/38/1930]

No. 2^o.

[Board of Trade.]

[October 22, 1930.]

Case for the Opinion of the Law Officers of the Crown and Mr. Willink.

COPIES of the following documents accompany this case:—

1. Temporary Commercial Agreement, 1930, between His Majesty's Government and the Government of the U.S.S.R. [Cmd. 3552 (Treaty 1985)].
2. Letter dated the 10th October from the manager of the Export Credits Guarantee Department to the Solicitor's Department of the Board of Trade [N 7538/423/38/1930].
3. Record of interview between the Foreign Secretary and the Russian Ambassador [N 6921/423/38/1930].
4. Record of interview between M. Bogomoloff and Mr. Gillett [N 6921/423/38/1930].
5. Letter dated the 4th October, 1930, from Mr. Major to Mr. Caulcutt [N 7538/423/38/1930].
6. Form of contract in use by Export Credits Guarantee Department for guaranteeing accepted bills.

Questions have arisen in regard to safeguarding, as far as possible, the position of the British Government, acting through the Export Credits Guarantee Department of the Board of Trade, in guaranteeing bills which have been endorsed or guaranteed by the Russian Government, and Mr. Gillett, the secretary for the Department of Overseas Trade, is anxious that the Export Credits Guarantee Department and their Advisory Committee should be guided by the advice of counsel.

Counsel will remember that the Export Credits Guarantee Department (hereinafter referred to as the E.C.G.D.) is engaged in trying to help the export trade of this country by giving guarantees in connexion with export transactions. Until recently Russia was excluded from the scope of their operation, but now that the recent Commercial Agreement between the Government and the U.S.S.R. has been signed the E.C.G.D. has been guaranteeing bills drawn in respect of exports to Russia.

By article 2 of this Commercial Agreement the U.S.S.R. are authorised to establish a trade delegation in London consisting of the trade representative and his two deputies forming part of the Russian Embassy. By paragraph 4 of this article, the trade delegation acting in respect to trade for and on behalf of the U.S.S.R., the Government of the latter will assume responsibility for all transactions lawfully concluded in the United Kingdom by the trade representative or by persons duly authorised by him. The Government of the U.S.S.R. will not, however, accept any responsibility for the acts of State economic organisations which, under the laws of the U.S.S.R., are exclusively responsible for their own acts, except in cases where responsibility for such acts has been clearly accepted by the trade representative, acting for and on behalf of the Government of the U.S.S.R. By paragraph 6 any questions arising in respect of commercial transactions entered into by the trade delegation are to be determined by the courts of the United Kingdom in accordance with the laws thereof. By paragraph 7 the property of the U.S.S.R. in the United Kingdom is subjected to such measures as may lawfully be taken to give effect to the orders of courts of the United Kingdom with certain exceptions. By an additional protocol it is provided, with reference to paragraph 6 of article 2, that the privileges and immunities conferred on the head of the trade delegation and his two deputies by paragraph 2 of article 2 shall not be claimed in connexion with any proceedings before the courts of the United Kingdom arising out of commercial transactions entered into in the United Kingdom by the trade delegation of the U.S.S.R.

Before giving their guarantee, it is the practice of the E.C.G.D. to obtain the approval of their advisory committee, which consists of well-known bankers and

Form of
guarantee
by Soviet
trade
representa-
tive in
London of
contracts of
Russian
State
economic
organisa-
tions.

other financial and commercial experts in the City of London. This committee, as business men, are very concerned with the risks involved in guaranteeing payments for exports to Russia, and they and the department are very anxious that every possible step should be taken to safeguard the position of His Majesty's Government in respect of such guarantees so far as is legally possible. They have accordingly decided that all transactions should be guaranteed by the endorsement of the trade representative of the U.S.S.R. upon the acceptances given for exports to Russia. It is thought likely that from time to time there may be substantial balances in this country belonging to the Government of the U.S.S.R.

As counsel will see from the record of the interview between the Russian Ambassador and the Foreign Secretary, the Russians are now raising objections (into which it is unnecessary to enter) to the endorsement of the acceptances by the trade representative, and they have made the suggestion that a letter of guarantee from the trade representative might be accepted in lieu of his endorsement of an acceptance. The Export Credits Advisory Committee naturally prefer the endorsement of an acceptance, since it is a commercial usage with which they are very familiar, and they think that, if it became necessary to resort to legal proceedings against the U.S.S.R. in the courts of this country, it would be easier and more expeditious to obtain judgment on an indorsement of an acceptance rather than on a letter of guarantee of an acceptance.

It seems to be well settled that a foreign Government cannot be impleaded in the municipal courts of this country, but is subject to the jurisdiction only when they submit to it.

The Commercial Agreement may in effect be regarded as a general undertaking by the U.S.S.R. to submit to the jurisdiction of our courts in regard to matters covered by the agreement, but the question arises whether the U.S.S.R. can be sued in our courts if, it may be in breach of their undertaking, they decline to enter an appearance to a writ. Counsel will remember that the House of Lords (Viscount Cave, Viscount Finlay, Lord Dunedin and Lord Sumner; Lord Carson dissenting) in the case of the Duff Development Company v. Kelantan Government (1924 Appeal Cases, 797) held in effect that where a Sovereign, having agreed to submit to jurisdiction, refuses to do so when the question arises, he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the court. Lord Sumner stressed the point that the submission to the jurisdiction must be taken towards the court itself. If these views are correct, therefore, it seems that it will be impossible ever to proceed against the U.S.S.R. in the courts of this country unless the U.S.S.R. submits to the jurisdiction in those particular proceedings by entering an appearance.

Assuming, however, for the moment that the U.S.S.R. will be prepared to enter an appearance in any proceedings taken against them in our courts, the question arises whether there is much practical advantage in an indorsement of an acceptance by the trade representative of the U.S.S.R. in preference to a letter of guarantee given by him. Under Order 3, Rule 6, a writ may be specially endorsed for a debt arising under a guarantee equally with a bill of exchange. It may be, however, that it would be easier for the U.S.S.R. to obtain leave to defend under Order 14 procedure where they had given a letter of guarantee than if they had given their indorsement (see per Bramwell, L.J., in *Lloyds Banking Company v. Ogle*, 1 Ex. D. 263), although it is a little difficult to see why in principle there should be any distinction between the two cases as an indorsement is in effect a guarantee of payment. Even in the case of an indorsement, there would seem to be ample opportunity of obtaining leave to defend by alleging, e.g., fraud, or want of authority of the trade representative or his deputy.

The Minister for Overseas Trade is very anxious that counsel should approve the form of a letter of guarantee for use if necessary, and in this connexion it has to be considered whether the letter of guarantee can properly be given so as to cover generally a number of intended bills of exchange, or whether it should be given in respect of each specific transaction.

A further question arises on the construction of paragraph 4 of article 2 of the Commercial Agreement and the view taken by some City solicitors will be found in the letter from Mr. Leonard Major to Mr. Caulcutt. The first sentence states that the Government of the U.S.S.R. assumes responsibility for all transactions lawfully concluded in the United Kingdom by the trade representative or by persons duly authorised by him. In the second sentence, however, the Government of the U.S.S.R. disclaims responsibility for the acts of State economic organisations except



in cases where responsibility has been accepted by the trade representative. It will be observed that in the second sentence persons duly authorised by the trade representative are not included. It is submitted that this merely means that, apart from any express acceptance of responsibility, the U.S.S.R. are not liable for transactions entered into by such organisations as Arcos, Centrosojus or Selosojus. The question arises whether, in the case of exports to these or similar organisations, where it is desired to obtain the guarantee of their acceptances by the Government of the U.S.S.R., the acceptance of responsibility on behalf of the U.S.S.R. should be by the trade representative himself, or whether it could be delegated by him to persons duly authorised within the meaning of the first sentence. It is submitted that, if a bill is endorsed by a person duly authorised by the trade representative within the meaning of the agreement, that is a substantive transaction for which the Government of the U.S.S.R. is responsible in the terms of the first sentence. Unless this is so, the practical advantage of the first sentence is very greatly reduced by the second, since most of the commercial activities of the U.S.S.R. in this country are conducted through Arcos and similar organisations.

Counsel are requested to advise:—

- (1) Whether, notwithstanding the express undertakings of the U.S.S.R. contained in the Commercial Agreement of 1930 and the Additional Protocol, it would be open to the U.S.S.R. successfully to refuse to submit to the jurisdiction of our courts in an action brought by His Majesty's Government against the Government of the U.S.S.R. in respect of a guarantee properly given by the latter Government's trade representative for the due payment of an acceptance on account of goods exported to Russia, and so escape any legal liability under the guarantee.
- (2) Whether, if the Government of the U.S.S.R. were to submit to the jurisdiction in such an action and judgment were given against them, it would still be open to them successfully to decline to submit to the jurisdiction of the courts to levy execution on the judgment against any assets of the Government of the U.S.S.R. within the jurisdiction.
- (3) Whether there is any practical legal advantage in securing a guarantee of the Government of the U.S.S.R. by means of an endorsement of an acceptance by the trade representative rather than a letter of guarantee signed by him.
- (4) If the answer to (3) is in the negative, whether a letter of guarantee in the following form would be effectual:—

To the E.C.G.D.

For and on behalf of the Government of the U.S.S.R., I hereby guarantee the due payment of a bill of exchange dated the 1930, for £ , drawn by Messrs. of , and accepted by Messrs. of , payable (here state usance of the bill).
Dated , 1930.

(Signature)

Trade Representative of the
U.S.S.R. in United Kingdom.

- (5) Whether a letter of guarantee in similar terms, but referring generally to bills to be accepted by a specified importer or specified importers, could be regarded as effectual and binding on the Government of the U.S.S.R.
- (6) Whether an endorsement of an acceptance or a letter of guarantee in respect of a transaction between a British exporter and Arcos, Centrosojus or Selosojus (or any other State economic organisation which under the laws of the U.S.S.R. is exclusively responsible for its own acts) signed by one of the "persons duly authorised by" the trade representative could be safely relied upon without the signature of the trade representative himself.

Opinion of the Attorney-General and Mr. H. U. Willink.

There are six questions submitted for our opinion. It will be convenient if the questions and our opinions are set out in order:—

Question 1.—Whether, notwithstanding the express undertakings of the U.S.S.R. contained in the Commercial Agreement of 1930 and the Additional Protocol, it would be open to the U.S.S.R. successfully to refuse to submit to the jurisdiction of our courts in an action brought by His Majesty's Government against the Government of the U.S.S.R. in respect of a guarantee properly given by the latter Government's trade representative for the due payment of an acceptance on account of goods exported to Russia, and so escape any legal liability under the guarantee.

In our opinion, the fundamental principles of international law compel the answer "Yes." The matter has been recently dealt with exhaustively by the House of Lords in *Duff Development Company (Limited) v. Government of Kelantan* (1924), A.C. 797, from which case the principle emerges clearly that an agreement by a foreign sovereign to submit to the jurisdiction of an English court is not equivalent to an actual submission and that nothing short of actual submission can confer jurisdiction over the property or person of a foreign sovereign or sovereign State. Lord Cave says (at p. 810): "If a sovereign having agreed to submit to jurisdiction refuses to do so when the time arises, he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the court." Lord Dunedin says (at p. 821): "He has broken his contract, but the court has no jurisdiction to enforce any performance of it. It seems to me to say that by agreeing to submit he did submit is to argue in a circle." Lord Sumner says (at p. 829): "There is no principle upon which such consent" (viz., to the jurisdiction) "can be deemed to have been given short of action taken towards the court itself."

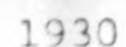
The only distinction between the Kelantan case and the present lies in the fact that there the foreign sovereign had contracted with a subject of the Crown, whereas here the agreement is with the Crown itself. This distinction, however, does not affect the principle above set forth.

Question 2.—Whether, if the Government of the U.S.S.R. were to submit to the jurisdiction in such an action and judgment were given against them, it would still be open to them successfully to decline to submit to the jurisdiction of the courts to levy execution on the judgment against any assets of the Government of the U.S.S.R. within the jurisdiction.

This question is more open and is treated as not settled in the last edition of "Oppenheim's International Law." It is, however, open only in the House of Lords: for the Court of Appeal in *Duff Development Company (Limited) v. Government of Kelantan and the Crown Agent for the Colonies (Garnishees)*, (1923, 1 Ch. 385) adjudicated upon an attempt to attach moneys due to the Kelantan Government in satisfaction of the costs of the arbitration proceedings, the motion to set aside the award and the Government's unsuccessful appeal to the Court of Appeal. The decision of the Court of Appeal was that, although the Government of Kelantan had by initiating proceedings to set aside the award of the arbitrator submitted to the jurisdiction of the court, that submission had not the effect of rendering liable to execution any property belonging to the Government within the jurisdiction. This decision was an affirmation of the decision of Mr. Justice Russell (as he then was) and though Lord Dunedin and Lord Carson expressed their disagreement with it in the case cited under Question 1, where the point did not arise for actual decision, we think it not improbable that the decision of the Court of Appeal would be upheld if the matter came before the House of Lords. As the law stands, the answer to this question is in the affirmative.

Question 3.—Whether there is any practical legal advantage in securing a guarantee of the Government of the U.S.S.R. by means of an endorsement of an acceptance by the trade representative rather than a letter of guarantee signed by him.

In our opinion, no.



RUSSIA.

Question 4.—If the answer to 3 is in the negative, whether a letter of guarantee in the following form would be effectual :—

To the Export Credits Guarantee Department,

To the Export Credits Guarantee Department,
For and on behalf of, the Government of the U.S.S.R., I hereby guarantee
the due payment of a bill of exchange dated the _____, 1930, for
£ _____ drawn by Messrs. _____ of _____ payable
and accepted by Messrs. _____ of _____
(here state usance of the bill).

Dated _____, 1930.

(Signature)

Trade Representative of the
U.S.S.R. in United Kingdom.

Yes, subject to two minor alterations. (1) We think it desirable for certainty, that after the usage of the bill there should be added the words "and any interest due thereunder." (2) If the supplemental agreement suggested in the answer to Question 6 under (b) is concluded, the form should admit of signature by the trade representative or any of the empowered representatives referred to in article 2 (5).

Question 5.—Whether a letter of guarantee in similar terms, but referring generally to bills to be accepted by a specified importer or specified importers could be regarded as effectual and binding on the Government of the U.S.S.R.

A letter of guarantee covering more bills than one in respect of one contract if properly drawn would be no less effective than a letter of guarantee covering one bill only; but where a series of contracts is concerned we think the course indicated in our answer to Question 6 advisable.

Question 6.—Whether an endorsement of an acceptance or a letter of guarantee in respect of a transaction between a British exporter and Arcos, Centrosojus or Selojojus (or any other State economic organisation which, under the laws of the U.S.S.R., is exclusively responsible for its own acts) signed by one of the “persons duly authorised by” the trade representative, could be safely relied upon without the signature of the trade representative himself.

In our opinion there is room for doubt upon this question, and we think it desirable that all room for doubt should, so far as possible, be removed. If we were to be content with a mere general acceptance by the trade representative or with a particular acceptance in each case by one of the empowered representatives referred to in article 2 (5), it might be open to argument that this was not contemplated by the Commercial Agreement and that it was only in cases where a special *ad hoc* acceptance had been given by the trade representative himself that the U.S.S.R. would be responsible.

Without assenting to this argument, it occurs to us that it is advisable to prevent this position arising either (i) by insisting on an express *ad hoc* acceptance in each case by the trade representative himself, or (ii) by a supplemental agreement to the effect that, whether or not the State Economic Organisation concerned has acted within its powers, (a) *ad hoc* acceptances by the empowered representatives of the trade representative shall be binding upon the U.S.S.R. or alternatively (b) general acceptance of responsibility in respect of the contracts of a named State economic organisation by the trade representative himself shall be equivalent to *ad hoc* acceptances by the trade representative or responsibility for the individual contracts of such organisation.

WILLIAM A. JOWITT.
H. U. WILLINK.

*Law Officers' Department,
October 22, 1930.*



1931

THIS DOCUMENT IS THE PROPERTY OF HIS BRITANNIC MAJESTY'S GOVERNMENT

Printed for the use of the Foreign Office.

CONFIDENTIAL.

(14105)

REPORTS

BY THE

LAW OFFICERS OF THE CROWN, &c.

1931.



(ii)

LIST OF REPORTS.

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 1^A, &c.

AUSTRIA.

No.		Date.	SUBJECT.	Page.
1	Attorney-General ..	Mar. 31, 1931	Proposed Austro-German Customs Union: whether compatible with treaty obligations	1

GENERAL.

1 ^A	Law Officers .. [Colonial Office]	Jan. 19, 1931	Loans or grants to mandated territories under Colonial Development Act: as to attaching conditions for purchase of materials, &c., in United Kingdom	6
1 ^B	Law Officers .. [Air Ministry]	May 20, 1931	Power under Air Navigation Act, 1920, to declare prohibited areas	28
2	Law Officers ..	June 3, 1931	Heading for confidential official documents ..	10
2 ^A	Attorney-General .. [Board of Trade]	Sept. , 1931	Prohibition of imports into United Kingdom: treaty position	11
2 ^B	Law Officers .. [Home Office]	Nov. 6, 1931	Nationality of posthumous legitimate child born out of His Majesty's dominions and of illegitimate child born in extra-territorial country, and as to when declaration by wife of desire to retain British nationality is exercisable ..	12

PORTUGAL.

3	Law Officers ..	May 13, 1931	Anglo-Portuguese commercial treaty of 1914: interpretation as regards discrimination in favour of Portuguese as against foreign shipping	18
---	-----------------	--------------	--	----

RUSSIA.

4	Attorney-General ..	July 2, 8, 1931	Immunity from process in English courts of U.S.S.R. trade delegation in United Kingdom	22
---	---------------------	-----------------	--	----

(iii)

ALPHABETICAL INDEX.

(NAMES AND SUBJECTS.)

1931.

The figures refer to the numbers of the pages.

Cases cited are indicated by italics.

ACT—CUS.

A.

Act. See Air Navigation Act.
Aerial Navigation Convention. See Treaty.
Agreement. See Treaty.
Aircraft: power to prohibit flight over Windsor Castle, 28-38.
" flight over Crown land; as to amending Air Navigation Convention to prevent, 28-38.
Air Navigation Act, 1920: power to declare Windsor Castle a prohibited area under, 28-38.
" " " whether binding on Crown, 28-38.
Austria: proposed customs union with Germany 1-6.
" ditto; compatibility with treaty obligations, 1-6.
" ditto; effect on "economic independence," 2-6.

C.

Cameroons. See Mandated Territories.
Colonial Development Act: loans or free grants to mandated territories under, 6-9.
Confidential documents. See Documents.
Courts: immunity from process of trade delegation of U.S.S.R. in United Kingdom, 22-27.
Crown: whether bound by Air Navigation Act, 1920, 28-38.
Crown land: whether subject to Air Navigation Convention, 28-38.
" " as to power to prohibit aircraft flying over, 28-38.
Customs: duties of prohibitive character on imports into United Kingdom not legally a breach of treaty obligations, 11.
" preferential treatment for imports into Portugal in Portuguese ships, 18-21.
" ditto; position under Anglo-Portuguese commercial treaty, 19-21.
Customs union: proposed Austro-German, 1-6.
" ditto; whether compatible with Austria's treaty undertakings, 1-6.
" " proposed Franco-Belgian in 1840: attitude of Powers, 3-4.

6442 [7190]

DIP—MAN.

D.

Diplomatic privilege: of Trade Delegation of U.S.S.R. in London, 22-27.
" " ditto: waiver of immunity from process in matters arising out of commercial transactions, 22-27.
Documents: heading to indicate confidential and official nature of, 10, 11.
Duties: import. See Customs.

E.

Economic independence: definition, 2, 5
" " effect on, of customs union, 1-6.
Engelke v. Musmann, 27.

G.

Germany: proposed customs union with Austria, 1-6.

I.

Imports: direct prohibition of, into United Kingdom would be breach of treaty rights, 11.
" duty on, amounting to prohibition of, not breach of treaties, 11.
Independence: effect on, of customs union, 2-6.

L

Loans: to mandated territories from Colonial Development Fund for public works, 6-9.

M.

Magdalena, 27.
Mandated Territories: Tanganyika, Togoland, Cameroons; loans or free grants to, for public works, 6-9.
Mandates: whether purchase of materials in United Kingdom as condition of loans or free grants from Colonial Development Fund is compatible with terms of, 6-9.



1931

(iv)

NAT—PUB.

SEC—WIN

N.

Nationality: of posthumous legitimate child born out of His Majesty's dominions if his father, at time of death, was British subject, 12, 17.
 " of posthumous legitimate child born out of His Majesty's dominions but in an extra-territorial country, 12-15, 17, 18.
 " of illegitimate child born in an extra-territorial country if the mother was at the child's birth a British subject, 12-18.
 " British declaration of wife to retain; when exercisable, 16-18.
 " interpretation of section 1 (1) (b), first proviso to section 1 (1), and first proviso to section 10 of British Nationality and Status of Aliens Act, 12-14, 17, 18.

O.

Official Secrets Acts: heading to be used on official documents to allow of proceedings under, 10-11.
 Order-in-Council: Power to declare Windsor Castle prohibited area for aircraft by, 28-38.

P.

Preferential treatment: for goods imported into Portugal in Portuguese ships, 18-21.
 Prohibited area: for aircraft, power to declare Windsor Castle, 28-38.
 Public safety: meaning of term in commercial treaty with Germany, 11.
 " meaning of term, in Air Navigation Convention, 31, 37.
 Public works: in mandated territories; principles for organisation of, 8.
 " ditto; attaching of conditions to moneys advanced for, 8-9.

S.

Secret and official: use of, for official documents, 11.
Shedden v. Patrick, 12.
 Shipping: discrimination by Portuguese Government in favour of Portuguese; whether violation of Anglo-Portuguese treaty of 1914, 18-21.
 Soviet Union: trade delegation in United Kingdom; immunity from process of courts, 22-27.

T.

Tanganyika Territory. *See* Mandated Territories.
 Togoland. *See* Mandated Territories.
 Treaty: use of "travaux préparatoires" in interpretation of, 20-21.
 " obligations of Austria; whether compatible with customs union with Germany, 1-6.
 " commercial, with Germany; direct prohibition of imports with United Kingdom would conflict with, 11.
 " ditto; meaning of term "public safety" in, 11.
 " Anglo-Portuguese, 1914; interpretation of articles 5 and 11, 21.
 " ditto; whether preferential treatment for goods imported into Portugal in Portuguese ships is violation of, 18-21.
 " temporary commercial agreement with U.S.S.R.; interpretation of provisions respecting diplomatic privilege of U.S.S.R. trade delegation in United Kingdom, 22-27.
 " Aerial Navigation Convention; whether it covers question of flying over Crown land, 28-38.

W.

Windsor Castle: power to declare it prohibited area for aircraft, 28-38.

Printed for the use of the Foreign Office.

CONFIDENTIAL

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.: 1931.

AUSTRIA.

[C 2013/673/3]

No. 1.

[March 31, 1931.]

Foreign Office to Law Officers of the Crown.

Foreign Office, March 27, 1931.

Gentlemen,

I HAVE the honour, by direction of the Secretary of State for Foreign Affairs, to submit to you certain papers relating to a proposed customs union between Germany and Austria, and to request you to furnish him with your opinion as to whether the conclusion of a treaty between Germany and Austria, establishing a customs union in accordance with the proposals contained in these papers, would be contrary to the treaty obligations of Austria under article 88 of the Treaty of Saint-Germain or under the Protocol No. 1, signed at Geneva on the 4th October, 1922. The papers submitted for your consideration in furnishing an opinion on this question are the Peace Treaty between Austria and the Allied and Associated Powers, signed at Saint-Germain; a resolution of the Council of the League of Nations of the 4th October, 1922, and three protocols and their annexes, signed at Geneva on the 4th October, 1922, between the Government of the United Kingdom, the French Government, the Italian Government and the Czechoslovak Government on the one part, and the Austrian Government on the other part; and a translation of a document handed to the Under-Secretary of State for Foreign Affairs by the German Ambassador and the Austrian Minister setting out the results of negotiations between the Austrian and German Governments in the form of proposals upon which these two Governments have agreed to enter into negotiations for the conclusion of a treaty.

2. It would appear that the Protocol No. 1 of the 4th October, 1922, reiterates and affirms all the obligations contained in article 88 of the Treaty of Saint-Germain with certain amplifications and additions, and the question would appear to turn principally upon whether the régime between Germany and Austria contemplated in the proposals which have been communicated, is or is not within the meaning of Protocol No. 1 of October 1922, a special régime or exclusive advantage granted by Austria to Germany which either violates or is calculated to threaten the economic independence of Austria.

3. The principal features of the régime contemplated in these proposals would appear to be (a) free trade between Germany and Austria (subject possibly to certain exceptions for a provisional period); (b) a customs tariff drawn up by agreement between Germany and Austria and thereafter, while the treaty remains in force, incapable of alteration either by Germany or Austria without the consent of the other party; (c) the collection of customs duties at the frontier of a territorial unit comprising Germany and Austria by the German customs administration upon the German portion of this frontier and by the Austrian

6442 [7190]

B

Proposed
Austro-
German
Customs
Union.



customs upon the Austrian portion of the frontier; (d) the division of the proceeds so collected between Germany and Austria in certain proportions calculated presumably upon some basis which is considered to represent in the aggregate the relative amount and value of imports into Austria and into Germany respectively. It would appear that the consent of the Committee of Control, created under article 6 of Protocol No. 2, of the 4th October, 1922, would be necessary (articles 3, 7 and 10 of Protocol No. 2) before the arrangements in the present Austro-German proposals could be carried out, but assuming that these proposals, if carried out, would not reduce the yield of the securities assigned to this loan below the amount required to meet its service it would appear that the Committee of Control would have no grounds for refusing their approval.

4. The words "economic independence" are words whose precise meaning it is perhaps difficult to define. It would appear that the word "indépendance" (the French text of the protocol is alone made authentic) has like the English word "independence" two significations, namely, non-subordination and separation. As the proposals seem to place Germany and Austria respectively in a position of complete legal equality it would appear that it is the second sense of the word "indépendance" which is most relevant in the present connexion, *i.e.*, separation.

5. In favour of the view that the present Austro-German proposals are not inconsistent with the obligations of Austria under Protocol No. 1, the following arguments might perhaps be advanced: (a) In ascertaining the meaning of the words "economic independence" in Protocol No. 1 regard must be had to the circumstances and the occasion on which the protocol was concluded. This protocol was part of the arrangements made for the financial and economic reconstruction of Austria under the auspices of the League of Nations and one of the principal arrangements made for the purpose of this reconstruction was the guarantee by the other four Governments, parties to the protocol, of a loan to Austria, and it might, therefore, be argued that the principal object of these four Governments in securing this undertaking on the part of Austria to preserve her "economic independence" (article 88 of the Treaty of Saint-Germain having referred simply to the independence of Austria, meaning political independence in the ordinary sense), was to secure and safeguard the interests of the guarantor Governments in the loan which they had guaranteed, and these words must not, therefore, be given a wider meaning than is necessary to give effect to the main object of the instrument. (b) Under Protocol No. 1 it is expressly provided that the undertaking "shall not prevent Austria from maintaining her freedom in the matter of customs tariffs and commercial or financial agreements and in general in all matters relating to her economic régime or her commercial relations," subject to the proviso that Austria "shall not violate her economic independence by granting to any State a special régime or exclusive advantages calculated to threaten this independence." It is the common practice of many continental countries to conclude commercial treaties in which they undertake not to levy upon imports from the territories of the other party to the treaty duties higher than those specified in a schedule to the treaty, and the effect of such treaties is to render it impossible for the country giving such an undertaking to raise its customs tariffs on such imports during the term of the treaty without the consent of the other party. In practice, the effect of this limitation on the country's freedom to raise its import duties will not be confined to imports from the other party to the treaty, because a number of other countries will probably be entitled to claim most-favoured-nation treatment under treaties with them. The situation, therefore, that a country is, by reason of its treaty obligations, unable to raise its import duties on several classes of goods without the consent of the other party to the treaty, is, therefore, a common one, and the limitation of Austria's freedom to alter her customs duties, without the consent of Germany, under the proposal is the same in kind, though it may be different in degree. For this reason it might be argued that this feature of the proposal, *i.e.*, the inability of Austria to alter her customs tariffs without the consent of Germany during the term of the treaty, is not inconsistent with economic independence, and is further reserved to Austria under the protocol which provides that Austria shall have freedom in the matter of customs tariffs and commercial agreements. (c) The proposals contemplate that the future treaty between Germany and Austria shall be capable of denunciation at comparatively

short notice. Austria will be free to terminate the customs union and regain full freedom of action as regards customs tariffs if she finds that the arrangements are prejudicial to her economic position. (d) The proposals do not create any financial or budgetary union between Germany and Austria; the customs proceeds are to be divided and the customs administrations of the two countries are kept distinct, each undertaking the collection of a portion of the customs. (e) The proposed arrangements are not "exclusive advantages" granted by Austria to Germany within the meaning of Protocol No. 1, in view of the fact that the proposals provide that both parties shall agree to enter into negotiations with any other State which expresses a desire to do so, for the conclusion of an agreement on similar lines.

6. Against the view that these proposals are compatible with the undertaking of Austria under Protocol No. 1, it may be argued: (i) That the object of the undertaking by Austria in Protocol No. 1, not to compromise by arrangements with any other State her "economic independence," was not merely to secure the interests of the guarantor Governments in respect of the loan. The guarantor Governments took advantage of this opportunity to reinforce and strengthen the existing obligations of Austria under article 88 of the Treaty of Saint-Germain. The text of the protocol shows the conviction of the guarantor Governments that political independence was endangered by economic dependence, and the real character of Protocol No. 1 is shown by article 1 of Protocol No. 3, in which the Austrian Government undertakes "to ask its Parliament to ratify the political declaration, signed by it, which is the subject of Protocol No. 1." (ii) That countries united in a customs union can no longer be said to be economically independent (separate). (This is an argument which perhaps in part depends upon the extent to which the economy of Austria is dependent upon and governed by customs tariffs.) (iii) That countries united by a customs union tend increasingly to become economically dependent upon each other, and that this is particularly the case in respect of a relatively small and economically weak country like Austria united with a large and economically powerful State like Germany. In practice, in the fixing of the common customs tariffs by negotiations, the German interests would always be preponderant. The words of the protocol are "which are calculated to threaten this independence" ("qu'elle ne pourra porter atteinte à son indépendance économique"). In this respect, however, the English text is perhaps stronger than the French text, which is the only authentic one.

7. The events which took place in the early half of the last century in connexion with proposals for a customs union between France and Belgium appear to merit being taken into consideration in regard to the present question. Article 7 of the Treaty of London of the 17th April, 1839, between Great Britain, Austria, France, Prussia and Russia on the one hand and the Netherlands on the other, was in the following terms:—

"La Belgique, dans les limites indiquées aux articles I, II et IV, formera un Etat indépendant et perpétuellement neutre. Elle sera tenue d'observer cette même neutralité envers tous les autres Etats."

The second Treaty of London of the same date and between the same five Powers of the first part and Belgium of the second part confirms the treaty with the Netherlands. The text of these treaties will be found in "State Papers," vol. 27 (1838-39), at pp. 990 and 1000. Article 7 is upon p. 994. At various times proposals for a customs union between France and Belgium in various forms were made, the proposals emanating in general from the French Government. It appears that all these proposals were strongly opposed by Great Britain, and Prussia in particular, and also by Russia and Austria, on the ground that they were inconsistent with the independence and neutrality of Belgium; which was guaranteed under article 7. Time has not yet permitted the preparation of a full memorandum dealing with these events, but such a memorandum is being prepared and will be transmitted to you with the least possible delay. In connexion with a project submitted in the year 1840, Sir Hamilton Seymour, His Majesty's Minister at Brussels, presented a note dated the 25th December, of which the following is an extract from what may be a French translation of the note:—

"Votre Excellence apprendra sans surprise que le bruit d'un projet d'union commerciale entre la Belgique et la France, qui a été discuté



AUSTRIA.

publiquement dans ce pays et sur lequel j'ai eu l'honneur de vous faire quelques observations à différentes reprises, a attiré l'attention sérieuse du Gouvernement anglais.

"Le Gouvernement de Sa Majesté est en effet bien persuadé qu'un arrangement qu'il considère comme devant avoir les plus funestes conséquences pour le pays, et qui sera sans doute regardé de la même manière par trois des autres Puissances qui sont intervenues dans les traités qui ont séparé la Hollande de la Belgique, ne recevra jamais la sanction du Cabinet belge. Il regarde cependant cette affaire sous un point de vue tellement important qu'il croit nécessaire d'en exprimer sa pensée clairement. Je n'ai pas besoin de vous faire observer qu'un des principaux points que les cinq Puissances se sont efforcées d'atteindre par l'arrangement qu'elles ont conclu avec la Belgique en 1831 et 1839 a été d'assurer l'indépendance politique de la Belgique comme Etat, et que c'est dans cette vue que son indépendance a été garantie par les cinq Puissances.

"Mais il est évident qu'une union commerciale entre la Belgique et la France tendrait à affaiblir l'indépendance politique de la Belgique, parce qu'une semblable union, contractée entre un petit et un grand Etat qui se lient étroitement, doit nécessairement avoir pour résultat de donner au plus puissant des deux une influence prépondérante sur l'autre.

"Il est inutile d'entrer dans les détails de la manière dont les relations commerciales et politiques de la Belgique deviendraient, par suite d'une telle union avec la France, soumises à la politique et à l'action de la France. Mais le Gouvernement de la Reine croit de son devoir, envers lui-même et envers la Belgique, de déclarer franchement qu'il regarde une semblable union comme étant incompatible avec les stipulations des traités de 1831 et 1839.

"Il me reste à vous exprimer l'espoir que la déclaration franche que j'ai reçu ordre de vous faire sera considérée par vous comme une preuve, non seulement de l'importance qu'attache le Gouvernement de la Reine à l'indépendance de ce pays, mais aussi de la franchise, avec l'absence de toute réserve, qu'il met à exprimer son désir de voir ses relations avec la Belgique continuer sans entraves."

It would seem extremely probable that, in connexion with the present controversy over the Austro-German proposals, reference will be made to these negotiations for a Franco-Belgian customs union, and to the opposition to such union by this country and by Prussia.

8. As the Law Officers will be aware, the Austro-German proposals seem likely to provoke an acute controversy, the French Government having already taken up the position that they are incompatible with Austria's treaty obligations. The Secretary of State has already suggested to the German and Austrian Governments that the question is one which should be referred to the Council of the League of Nations. It will be necessary for him to state the views of His Majesty's Government in Parliament. For these reasons, while realising that the question is not purely a legal one and depends in a great measure upon information which only economic experts can supply, Mr. Henderson is anxious to obtain your opinion at a very early date upon the question whether the Austrian-German proposals are consistent with the international obligations of Austria under the Treaty of Saint-Germain and the Protocols signed at Geneva on the 4th October, 1922. He would also be grateful for any observations of a general character which you may be good enough to offer.

I have, &c.

OWEN O'MALLEY.

List of Papers.

- (1) Treaty of Peace with Austria. [Cmd. 400 (Treaty 1565).]
- (2) Resolution of League of Nations and Protocols signed at Geneva, October 4, 1922. [Cmd. 1765 (Treaty 1660).]
- (3) Protocol communicated by German Ambassador and Austrian Minister, March 23, 1931. [C. 1879/673/3/1931.]

Report of the Attorney-General.

ARTICLE 1 of the 3rd Protocol of the 4th October, 1922, indicates that Austria's undertaking in the 1st Protocol is a political declaration. Moreover, the 3rd Protocol contains specific provisions (*e.g.*, in article 5) for protecting the security of the creditors and the guarantor Powers. I think that the economic provisions of the 1st Protocol have a political object which may be distinct from the protection of the security, and that those provisions should not be read as limited to what is necessary for the protection of the security.

2. The independence of Austria referred to in article 88 of the Peace Treaty and in the first paragraph of Austria's undertaking in the 1st Protocol appears to be political independence.

But in the second paragraph the economic independence of Austria is mentioned, and "cette indépendance" in the last line (line 2 of p. 6) according to the natural construction of the sentence, relates to this economic independence and not to the political independence previously mentioned.

3. The immediate question is whether Austria has by the recently concluded agreement impaired or prejudiced ("porté atteinte à") her economic independence by granting to Germany a special régime or exclusive advantages calculated to threaten the economic independence of Austria. A question which may arise in the future and cannot conveniently be entirely separated from the immediate question, is whether Austria is likely in pursuance of the agreement to make a treaty which will have that effect. There may be a doubt whether at the present stage there has been any "octroi d'un régime spécial ou d'avantages exclusifs." But it is to be observed that the treaty is to be made first between Austria and Germany, and subsequently there may be negotiations for a similar treaty with any other country that desires such a treaty. Thus Germany has already a priority which gives her a privileged position, and might, perhaps, be said to give her exclusive advantages. It seems to me fairly clear that if the treaty were made, there would then be a special régime and exclusive advantages in favour of Germany, unless and until they were generalised by the accession of other countries.

4. The most difficult question is whether the special régime and exclusive advantages conferred upon Germany by this agreement, or likely to be conferred upon her by the proposed treaty, are calculated to threaten the economic independence of Austria. That is partly a question for economists, but also may depend partly upon legal considerations and I will give my opinion upon it as requested.

5. This agreement carefully preserves the political sovereignty of Austria in all respects (articles 1 (1), 5 (1), 6 (1), 9 (1) (3), 11 (3), 12 (2)). If economic independence means no more than political sovereignty in regard to economic policy, I think it is and will be unimpaired by the agreement or proposed treaty. But since the protocol contemplates that economic independence may be impaired by granting to another State a special régime or exclusive advantages (which would not naturally involve any diminution of sovereignty), I think the phrase "economic independence" must have a wider meaning.

6. I think the phrase "economic independence" cannot be paraphrased adequately as meaning either "non-subordination" or "separation": those words would be more appropriate as explanatory of political independence. It is difficult to conceive an economically subordinate country, unless it were actually tributary: and it is difficult to find much meaning in the phrase "economically separate countries."

I think a better paraphrase would be "effective liberty of action in economic policy."

I think economic independence in that sense implies a power to bind oneself by agreements, and the making of such agreements is an exercise of economic freedom. Austria's economic independence would not be impaired by making ordinary commercial or tariff treaties.

But I think it not improbable that the proposed treaty between Austria and Germany might have the eventual effect of rendering Austria economically dependent upon Germany in the sense that, while Austria would remain legally free to take such action as she chose in the economic sphere, it would, for commercial and other practical reasons, become impossible for her to act otherwise



1931

6

GENERAL.

than in accordance with the wishes of Germany or to sever the partnership without disastrous consequences to herself. Much would depend upon the part which customs play in the national economy and internal administration and commercial life of Austria. The immediate effect of the treaty would be to constitute an Austro-German free trade area enclosed by a tariff wall. That position would probably continue for three years or more, and it might well be that no similar treaty would be concluded with any other country. In the meantime, Austria's external markets would be increasingly found in Germany, and her external supplies would be increasingly obtained from Germany, since the tariff arrangement would tend to deflect Austria's trade with other countries into Germany. Eventually, Austria might become a part of the economic system of Germany as fully as Florida is part of the economic system of the United States of America, or Wales is part of the economic system of Great Britain, and might find herself in a position in which she could not sever the partnership without dislocating her industrial and commercial organisation.

7. These are conceivable consequences of the proposed treaty. Whether such consequences are or not likely to ensue is not a question upon which a lawyer as such can express an opinion.

A lawyer can merely express his view as to the meaning of the term "economic independence."

It is for economists to determine what consequences would in all probability follow from the proposed treaty, and whether the economic independence of Austria, in the sense in which I have explained this phrase, would be threatened.

Upon the hypothesis that the economists would answer this question in the affirmative, I express my opinion that the proposed treaty probably would be a breach by Austria of her undertaking in the 1st Protocol of 1922.

8. The attitude of the Powers to the proposed customs union between France and Belgium after the Treaty of London of 1839, appears to afford general support to my view as expressed above, but the question is narrower in this case, because the protocol expressly allows to Austria freedom in the matter of customs tariffs and commercial or financial agreements, subject only to the proviso.

WILLIAM A. JOWITT.

Law Officers' Department,
March 31, 1931.

GENERAL.

[W 11474/5/98/1931]

No. 1^A.

[Colonial Office.]

[January 19, 1931.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, December 23, 1930.

I AM directed by Lord Passfield to refer to Mr. Bowker's letter of the 6th August, 1930, forwarding an opinion* of the Attorney-General on a question which arose as to the position of Palestine in relation to the Colonial Development Act, 1929, and the Palestine mandate.

2. The question then referred to you was—

Whether, if a loan was made to the Government of Palestine under Section 1 (1) of the Act on the condition (Section 1 (2)) that material, &c., to be bought with the money so advanced should be purchased in the United Kingdom wherever possible, there is anything in article 18 of the Palestine mandate which would render it a breach of the obligations of His Majesty's Government as a mandatory that a loan should be accepted by the Palestine Government on this condition.

* Confidential, 13525, p. 24.

Loans or grants to mandated territories under Colonial Development Act, 1929: as to attaching conditions for purchase of materials, &c., in United Kingdom.

GENERAL.

7

3. The Attorney-General expressed the opinion that, if it was in the interests of Palestine to borrow money at the rate of interest specified and subject to the condition mentioned above, the proposal would not fall within the prohibition of article 18 of the mandate. But he considered it essential that the condition should be made one of the express terms upon which the loan was granted, and that it should be made clear that it was entirely for the Palestine Government to make up their minds whether they desired to accept the loan on these terms.

4. The further question has now arisen as to the position of the other mandated territories (viz., Tanganyika Territory, Togoland, and the Cameroons) in a similar respect. A copy of Command Paper 1794, containing the texts of the mandates for these three territories, is enclosed for convenience of reference and for return in due course; your attention is invited to article 7 of the East Africa (i.e., Tanganyika Territory) mandate (p. 20), and article 6 of each of the other two mandates (p. 3 and p. 11). It will be observed that the terms of all these articles are identical. I am to enquire whether in your view the opinion of the Attorney-General regarding Palestine would apply equally to the three territories mentioned above in this paragraph, in the event of it being decided to make a loan under Section 1 (1) of the Colonial Development Act to the Government responsible for the administration of any one of them, viz., the Government of Tanganyika Territory, the Government of the Gold Coast in respect of Togoland, or the Government of Nigeria in respect of the Cameroons.

5. I am also to enquire whether the said opinion may be taken as being equally applicable, *mutatis mutandis*, to the purchase of materials in the United Kingdom with moneys advanced as a free grant from the Colonial Development Fund to the Government of any of the following four territories, viz., Palestine, Tanganyika Territory, Gold Coast in respect of Togoland, or Nigeria in respect of the Cameroons.

6. It will be seen that the previous reference regarding the making of a loan to the Palestine Government and the preceding paragraph of the present reference deal only with the purchase of materials in the United Kingdom with moneys advanced from the Colonial Development Fund whether by way of loan or grant. Frequently, however, assistance given from the fund (whether loan or grant) represents only a portion of the total cost of a scheme of development, and this measure of assistance is given on the condition that the balance of the cost of the scheme shall be met from the funds of the local Government concerned. In such cases it is usually impossible to say precisely what items of expenditure are properly to be regarded as chargeable to the Colonial Development Fund contribution and what as properly chargeable to local funds. I am, therefore, further to enquire whether it would be contrary to the articles of the mandates previously quoted to make it a condition of any such loan or grant that materials, &c., to be bought for the purpose of a scheme towards which any measure of assistance whatever is being given from the fund shall be bought in the United Kingdom wherever possible, irrespective of whether such purchases are regarded as being actually met from the moneys advanced from the fund or from the moneys contributed by the local Government (from whatever source they are found).

7. It may be convenient to summarise briefly the questions under reference to you. They concern the purchase of materials in the United Kingdom:—

- (i) With moneys advanced on loan from the Colonial Development Fund to the Governments of Tanganyika Territory, Gold Coast in respect of Togoland, and Nigeria in respect of the Cameroons.
- (ii) With moneys advanced as free grants from the Colonial Development Fund to the Governments mentioned in paragraph 5 above.
- (iii) With moneys spent by any of the Governments mentioned in paragraph 5 above upon a scheme of development towards which assistance is being given from the fund, irrespective of the actual source of such moneys.

I am, &c.

R. V. VERNON.



GENERAL.

Enclosure.

Mandates for Tanganyika Territory, Togoland and Cameroons.

[Cmd. 1794 (Parly. 5160).]

Report.

As the material portions of the three mandates in question are similar in their terms, we deal with the East Africa mandate in the observations that follow.

Article 7 of this mandate, in so far as it is material to the questions submitted, is in the following terms:—

"The mandatory shall ensure to all nationals of States members of the League of Nations, on the same footing as to his own nationals, . . . complete economic, commercial and industrial equality; provided that the mandatory shall be free to organise essential public works and services on such terms and conditions as he thinks just."

This article must be read together with the more general provisions of the whole mandate, and especially article 3, the material portion of which is as follows:—

The mandatory shall undertake to promote to the utmost the material and moral well-being and the social progress of the inhabitants. The mandatory shall have full powers of legislation and administration.

It is clear in our opinion from the general tenor of the whole mandate that the primary consideration of any administrative act by the mandatory must be the well-being and social progress of the inhabitants of the mandated territory. At the same time the administration must be such as to give equal opportunities in all commercial and industrial matters to the nationals of all States members of the League of Nations.

It is important to notice that article 7 is positive in its form and calls for positive action by the mandatory to ensure equality and not merely negative action to see that no inequality is brought about. There is, however, the proviso to the second paragraph of this article which from its position in the article is in our opinion intended to qualify the duty of the mandatory as to equality of treatment in the case of the organisation of essential public works and services. In such cases the mandatory is entitled to organise the works and services on such terms and conditions as he thinks just even though these terms and conditions may lead to inequality of treatment between nationals of different States. This provision was no doubt inserted in order that where there existed undertakers of public works and services in the mandated territory or in a neighbouring territory belonging to the mandatory, he might entrust the new public works and services in the mandated territory to such undertakers, whatever their nationality. In our opinion, the "organisation" of public works and services would include amongst other things the construction of public works and plant for public services. We presume that the moneys dealt with in the questions submitted to us would all of them be expended upon "essential public works and services" within the mandated territory.

The general principles as to the administration of the territory by the mandatory in respect of such essential public works and services are therefore as follows:—

- (1) It must be for the well-being and social progress of the inhabitants.
- (2) It must be on such terms and conditions as the mandatory thinks just.
- (3) Unless there is some reason to the contrary under (2), it must be so carried out as to ensure complete commercial and industrial equality to all nationals of States members of the League of Nations.

In applying these general principles the mandatory must, of course, consider the matters involved from the point of view of the mandated territory and its inhabitants, and not from the point of view of the inhabitants of the country of the mandatory. We turn now to the specific questions submitted to us.

- (1) If it is necessary for the mandated territory to obtain a loan, and if it is to the pecuniary advantage of the mandated territory to obtain these loans with

GENERAL.

conditions as to the purchase of materials in this country attached to them, then it is obviously just that the conditions should be carried out. Unless there is some alternative proposal for a loan upon more favourable terms from other quarters, or unless there is some reason why the condition is unduly onerous, it would in our opinion *prima facie* be to the advantage of the mandated territory to accept the loan and to carry out the conditions attached to it. It must be borne in mind in deciding whether the mandated territory is advantaged by such a loan that enhanced price of materials may be so great as to offset the advantage in reduced interest charges, and this is one of the matters that must be considered in arriving at a conclusion as to whether the mandated territory obtains any pecuniary advantage by obtaining a loan from the Colonial Development Fund.

A great difficulty would no doubt arise if some other country or combine of manufacturers (*e.g.*, Germany) were to offer a loan on better terms with a condition attached that all purchases of materials should be made in some other country (*e.g.*, Germany). In this event it would in our opinion be almost impossible for the mandatory to advise the Administration to refuse such an offer once the offer of the mandatory to lend money on similar conditions had been justified on the basis above set out.

We mention this aspect of the matter as it is suggested that questions may be raised internationally in respect of the condition attached to the loan from the Colonial Development Fund, and great care will be required in justifying the acts of the mandatory in such a way as to preclude the possibility of such an offer from another country or group of foreign manufacturers.

(2) In the case of free grants from the Colonial Development Fund no difficulties can arise in our opinion. As the money is a free gift to the mandated territory, it must in our opinion obviously be to the advantage of the territory unless the conditions attached are so onerous as to make the gift valueless.

(3) This case is in our opinion the most difficult and must to a considerable extent depend upon the precise facts, more especially upon the proportion which the loan from the fund bears to the total expenditure to be undertaken.

In cases where the scheme of development could not be undertaken even in a modified form without a loan, the considerations would in our opinion be somewhat similar to those under (1) above, although it would be far more difficult to demonstrate that the condition as to expenditure in this country of moneys not loaned was a genuine condition of the loan, and was not merely an attempt to get round the provisions as to equality of treatment in article 7 of the mandate. It would in our opinion be dangerous and unwise to attach any such condition as to the expenditure of moneys not loaned unless the loan were substantially of the whole of the moneys to be expended.

Section 1 (2) of the Colonial Development Act, 1929, gives power to the Government, to whom loans or grants are made, to apply them "either directly or through any person or body of persons." Under this section, therefore, the Governments of the mandated territories could apply the loan through undertakers or contractors. Under the proviso to paragraph 2 of article 7 of the mandate the mandatory is free to organise essential public works and services on such terms and conditions as he thinks just. It would therefore be possible to arrange for the construction or organisation of public works and services through an undertaker or contractor and for the undertaker or contractor to apply the loans. If such undertaker or contractor purchased all his materials in this country, it would, we think, be difficult for anyone to question the transaction or to raise the question of inequality of treatment, as the whole transaction would come under the proviso of paragraph 2 of article 7, and so would be taken out of the main words of that paragraph.

The words of article 7 differ so considerably from the words of article 18 of the Palestine mandate that we have thought it better to deal with the whole matter afresh rather than go into a detailed comparison of the two articles in order to see whether in the result the same principle applies in the present cases as applied in the case of Palestine.

WILLIAM A. JOWITT.
R. STAFFORD CRIPPS.

Law Officers' Department,
January 19, 1931.

[For No. 1^B, see p. 28.]



1931

10

GENERAL.

[U 407/14/750]

No. 2.

[June 3, 1931.]

*Foreign Office to the Law Officers of the Crown.*Heading of
confidential
official
documents.

Gentlemen,

Foreign Office, May 15, 1931.

I HAVE the honour, by direction of Mr. Secretary Henderson, to request the favour of your advice on the following matter:—

2. At present all confidential documents printed for His Majesty's Government in the United Kingdom are headed: "This Document is the Property of His Britannic Majesty's Government." This practice is understood to have been introduced in 1892 by an administrative decision of the then Secretary of State for Foreign Affairs (Lord Rosebery) at a time when the Foreign Office had occasion to consider the position as regards the retention by public servants upon retirement of documents supplied to them in the course of their official duties. At present the object of the practice may be regarded as twofold: (1) to indicate to the recipients that the document in question is an official one and will not become their private property, and to impress upon them the necessity of its careful custody; (2) to facilitate, so far as possible, proof of the offence in the event of it becoming necessary to take proceedings in relation to the document in question under the Official Secrets Acts.

3. It has, however, been pointed out that the phrase in question is probably inaccurate as a statement of law, since "His Britannic Majesty's Government" is not an entity known to the law as one in which property can be legally vested. The correct statement would appear to be that the document is the property of His Majesty.

4. Moreover, there was, as you are aware, considerable discussion at the recent Imperial Conference as to the use of the term "His Britannic Majesty" as a convenient abbreviation of the King's full title for treaty and other purposes. Certain Dominions raised, and refused to withdraw, objections to the use of the term in relation to matters with which they were concerned, on the ground that the word "Britannic" implied an exclusive connexion with the United Kingdom and could not properly be employed of His Majesty in relation to the Empire as a whole or in relation to any Dominion. In support of this view, they adduced the phrase now under consideration, arguing that, since the Government to which the document belonged was certainly the Government of the United Kingdom and no other, the use of the phrase showed that the Government of the United Kingdom regarded the phrase "His Britannic Majesty's Government" as denoting themselves and no other of His Majesty's Governments. To this argument it was difficult to find a convincing reply, and, in view of the desirability of ultimately securing acceptance of the use of the phrase "His Britannic Majesty," whether in connexion with the Empire as a whole, the United Kingdom or any one of the Dominions, it may well be desirable to make a change in the practice which leads to misconstructions of the nature indicated above. You will appreciate that it is not a question of any of the Dominions asking for such a change; the Dominions who used the argument in question would doubtless prefer that the present practice should continue; the object of any change would be solely to deprive those Dominions of an argument which at present they are in a position to use with some effect.

5. In these circumstances, it is proposed, as the result of discussion between the Departments concerned, to submit to the Cabinet the question of the desirability of making a change in the existing practice. But, before doing so, it is desired to obtain your opinion as to the phrase which, in the event of a change being made, should be substituted for that now in use.

6. From the point of view of possible proceedings under the Official Secrets Acts, there would seem to be considerable advantages in using the phrase "Official Document," since this is the phrase employed, without definition, in Section 1 (2) of the Official Secrets Act, 1920, which is the provision under which proceedings in relation to such documents would most probably be taken. This being so, and in view of the considerations mentioned in paragraph 3 above, it is suggested that the most convenient phrase to employ would be "Official Document. This Document is the Property of His Majesty."

GENERAL.

11

7. I am accordingly to request you to be good enough to favour Mr. Henderson with your opinion as to whether, in the event of its being decided to make a change, the phrase suggested in the preceding paragraph could properly be adopted, or whether there is any alternative phrase which would, in your opinion, be preferable.

I have, &c.

PERCY A. KOPPEL.

Report.

We are of the opinion that the statement that a document is the property of His Majesty is more accurate in law than the statement that it is the property of His Majesty's Government. We think that, from the point of view of possible proceedings under the Official Secrets Acts, the words "Secret and Official" would be the most satisfactory to employ. We are therefore of opinion that the most convenient phrase to employ would be: "Secret and Official. This Document is the Property of His Majesty."

WILLIAM A. JOWITT.

R. STAFFORD CRIPPS.

*Law Officers' Department,
June 3, 1931.*

[W 11573/11082/50/1931]

No. 2^d.

[Board of Trade.]

[September 1931.]

Memorandum by the Attorney-General.

I HAVE considered whether the policy of preventing or restricting direct prohibition of import would or would not bring us in conflict with our existing treaties. The two treaties to be considered are: (1) The Treaty with Germany of the 2nd December, 1924; and (2) the International Convention of the 8th November, 1927.

It is to be observed that, although the first treaty only applies to Germany, yet under the "most-favoured-nation" clause other nations would be able to object unless prohibitions applied equally to Germany. If, therefore, we are prevented by the German treaty, we are effectively prevented from prohibition against all countries. In my view, the direct prohibition of import with the object of restoring the balance of trade would be a breach of the German treaty. The only words under which such prohibition could be justified would be the words "public safety," and I do not think that these words could be construed as having any such wide meaning as would be necessary to support the direct prohibition. It will be observed that, in article 5 of the international treaty, an express exception is made authorising prohibition of importation in extraordinary and abnormal circumstances, and this article is inserted notwithstanding the fact that article 4 has already authorised prohibition relating to "public security," which phrase I cannot distinguish from "public safety." Moreover, the interchange of notes attached to the German treaty appears to indicate that the phrase "public safety" therein contained is to have a narrow, and not a wide, construction. It will be observed that I have throughout used the phrase "direct prohibition of import." I desire to make it plain that I do not think that the treaties in any way prevent our putting on an import duty on any particular article, even although this duty was at such a rate as to amount, in fact, to a prohibition.

For example, though there would, in fact, be no distinction between putting a duty of 1,000 per cent. and prohibiting importation, the former method, as a matter of law, would be in accord with the treaty, the latter method would not.

WILLIAM A. JOWITT.

Prohibition
of imports
into United
Kingdom:
treaty
position.

[7190]

c 2



[T 15272/691/378/1931]

No. 2ⁿ

[Home Office.]

[November 6, 1931.]

Case for the Opinion of the Law Officers of the Crown.

British
Nationality
and Status
of Aliens
Act, 1914,
as amended
in 1918 and
1922.

THE Law Officers are requested to advise the Secretary of State for the Home Department and the Secretary of State for Foreign Affairs on the following questions:—

(I) Is a posthumous legitimate child born anywhere out of His Majesty's Dominions to be deemed to be a natural-born British subject, if his father was at the time of his death a British subject and one or more of the conditions specified in paragraphs (i)–(v) of section 1 (1) (b) of the Act were fulfilled?

(II)—(a) If the answer to question (I) is in the negative, is a posthumous legitimate child born out of His Majesty's Dominions, but in a place where His Majesty exercised extra-territorial jurisdiction, to be deemed to be a British subject by virtue of the first proviso to section 1 (1) of the Act, if his father was at the time of his death a British subject?

(b) If the answers to questions (I) and (II) (a) are in the negative, is a posthumous legitimate child born out of His Majesty's Dominions, but in a place where His Majesty exercised extra-territorial jurisdiction, to be deemed to be a British subject by virtue of the first proviso to section 1 (1) of the Act if his mother, being the widow of a British subject, was still, at the time of the child's birth, a British subject?

(c) Is an illegitimate child, born in a place where His Majesty exercises extra-territorial jurisdiction, to be deemed to be a British subject by virtue of the first proviso to section 1 (1) of the Act, if his mother was at the time of the child's birth a British subject?

(III) Is the power conferred on a wife by the first proviso to section 10 of the Act to make a declaration of her desire to retain British nationality exercisable (a) at any time, or (b) only at the date when the husband ceases to be a British subject, or (c) within any reasonable time after that date?

Question (I).

2. The relevant words of section 1 (1) (b) are "whose father was, at the time of that person's birth, a British subject, and . . ."

The view has been taken that in cases where the father has died before the birth of the child, he cannot be said to have been a British subject at that moment, and therefore the posthumous child does not fulfil the requirements of the Act. This view is expressed in Dicey's "Conflict of Laws" (4th edition, p. 166, note (e), and p. 172), where it is pointed out that the same point may arise in the interpretation of the older statute, 4 Geo. II, c. 21, section 1. The point has never, so far as either the Home Office or the Foreign Office are aware, been decided judicially, although the statement made in *Shedden v. Patrick*, and quoted in the note on p. 166 of Dicey referred to above, may be relevant. In the limited number of cases which have arisen administratively, the view expressed by Dicey has been followed, but it is doubtful whether the point was present to the minds of the framers of the Act and whether, if it had been, the posthumous children of British fathers would have been deliberately excluded.

Questions (II) (a), (b), and (c).

3. Questions (II) (a), (b), and (c) all turn upon the interpretation of the first proviso to section 1 (1) of the Act, which reads as follows:—

"Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance, if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects."

It is desirable in the first instance to make some reference to the history and subject matter of the above proviso.

Under the common law birth "within His Majesty's allegiance" was the only principle recognised for the purpose of determining whether a person was a natural-born subject (see *Calvin's Case* 7 Co. Rep. 18ⁿ). Generally speaking, the result of applying this principle was that British nationality was always acquired by birth within His Majesty's dominions and could only be acquired in that way, since, apart from the exceptional cases of the children of foreign ambassadors and the children of an invading enemy born on British territory, all persons born in His Majesty's dominions were by virtue of that fact born within His Majesty's allegiance. Cases where at common law a person whose birth took place outside the realm or dominions of His Majesty might, nevertheless, be born within the allegiance and thus become a natural-born British subject occur, for instance, whenever the child of a British ambassador is born in the foreign state to which the father is accredited (see *Calvin's Case* 7 Co. Rep. 16ⁿ).

Before the Act of 1914 was passed, it was open to question whether the children of British parents born in a foreign country where the capitulatory régime existed, or in any other place where His Majesty exercised jurisdiction under the Foreign Jurisdiction Act, could be regarded as born "within His Majesty's allegiance," so as to give such children the status of natural-born British subjects at common law. Clearly such children, if of the third or later generation born abroad, had no statutory claim to British nationality by descent under the enactments providing for the acquisition of British nationality in the cases of persons born abroad, since these enactments were limited to the children and grandchildren in the paternal line of natural-born British subjects (British Nationality Act, 1730, 4 Geo. II, c. 21: British Nationality Act, 1772, 13 Geo. III, c. 21). Accordingly, the advice of the Law Officers was sought in 1903 on the question "whether persons of British descent in the paternal line born in Turkey, but not within the Acts of 1730 and 1772, are or are not British subjects." In their opinion, dated the 18th August, 1904, the Law Officers (Sir Robert Finlay and Sir Edward Carson) advised that such persons are British subjects at common law on the ground that they were persons born within His Majesty's allegiance. The submission to the Law Officers and their opinion thereon is contained in the print* annexed hereto; the Law Officers expressed the view that, in order to dispose of doubts, the question should be settled by the enactment of a clause in the Nationality Bill then in preparation on the lines of the provision which now appears as the proviso to section 1 (1) of the Act of 1914. The clause was drafted in 1903, and was submitted to the Law Officers in draft. It will be seen that they advised that it should not be presented to Parliament as a special Bill, but should await and be incorporated in a general Bill with regard to British nationality, with the result that it was not enacted until 1914. At the time this clause was drafted the remainder of section 1 of the Act as it now stands was not in existence, and this clause was later inserted in the section in the form in which it had been approved by the Law Officers in 1903. It would seem, however, that insufficient attention was paid to the assimilation of the language of the new section and the proviso.

As already indicated, the object of inserting this proviso was to declare in effect that all children born in the circumstances therein described are natural-born British subjects at common law. Unfortunately, for the reason already explained, the language chosen to produce this result was not clear, and doubts have been expressed whether the proviso has the effect which it was the undoubted intention of those who framed it to secure. As an example of such doubts, reference may be made to the view expressed in Dicey, "Conflict of Laws," 4th edition, p. 855, to the effect that the proviso cannot be interpreted as a substantive enactment conferring British nationality on the children of a British subject by reason of birth in a place where the Crown exercises extra-territorial jurisdiction, and that the effect of the proviso is merely to extend the application of the expression "born within His Majesty's allegiance" in paragraph (i) of section 1 (1) (b) of the Act. The result of such an interpretation would be to confine the scope of the proviso within very narrow limits, and its effect would be merely to confer on persons born in extra-territorial countries, who, under the relevant provisions of the Acts, acquire British nationality at birth, the capacity

* Confidential 8493, p. 152.



to transmit such nationality to their children, so that the latter, although born out of His Majesty's dominions, would become British subjects under paragraph (i) of section 1 (1) (b). This interpretation is, of course, based on the use of the words "His Majesty's dominions and allegiance" in section 1 (1) (a), and the absence of the words "dominions and" in the corresponding expression in section 1 (1) (b) (i), and in this proviso, and, though some justification may be found for it on the principle of construction that all differences of terminology imply differences of meaning, it produces a result which is clearly contrary to that which was intended.

This interpretation has never been adopted administratively, and the British nationality of a very large number of persons who have been recognised and treated as British subjects from 1903 to the present day depends on its rejection.

The proviso has been interpreted administratively as giving statutory effect to the opinion of the Law Officers in 1904 as to the position under the common law of children born in extra-territorial countries of British subjects. This opinion is based on the view that the children of British subjects born in a country where His Majesty has extra-territorial jurisdiction are born within His Majesty's allegiance, and persons born within His Majesty's allegiance are British subjects.

4. Question (II) (a).

This question (relating to the posthumous legitimate children born in extra-territorial countries of British fathers) only arises if the answer to Question (I) is in the negative.

The attention of the Law Officers is invited to the difference between the language employed in paragraph (b) of section 1 (1), which deals with the acquisition of British nationality by persons born out of His Majesty's Dominions, and the language of the proviso. Under paragraph (b) the acquisition of British nationality by any person is expressly confined to cases where the father was, *at the time of that person's birth*, a British subject, and is in substance a reproduction of section 1 of the British Nationality Act, 1730, which provided that "all children born out of the ligeance of the Crown of England or of Great Britain, whose fathers were or shall be natural-born subjects of the Crown of England or of Great Britain at the time of the birth of such children respectively . . . are hereby declared to be natural-born subjects of the Crown of Great Britain." In the case of the proviso under consideration, the expression is merely "the child of a British subject," without any words implying the requirement that the father must have been alive at the time of the child's birth. If it is held that it follows from the language of paragraph (b) of section 1 (1) that a posthumous child, born abroad of a father who was a British subject, is excluded under that paragraph, it does not necessarily follow that the expression "the child of a British subject" in the proviso excludes posthumous children.

It is submitted that the language of the proviso in its natural and ordinary meaning is not only capable of being construed as inclusive of posthumous children, but that it ought to be construed in that sense unless it is clear that the subject matter or the context of the section otherwise requires. So far as the subject matter is concerned, this construction is quite consistent with the object of the proviso, which is, in substance, to confer British nationality on the children of persons who are British subjects under British jurisdiction in a foreign country. For that purpose, there appears to be no ground for withholding the acquisition of British nationality from the child of a British subject merely because the British subject died before the child was born. Further, the difference in the language used may be invoked as a reason for giving one provision a different sense from that given to the other. On the other hand, upon the hypothesis that question (I) is answered in the negative, it may be contended that this view of the proviso is inconsistent with the principle preserved throughout all the enactments relating to the acquisition of British nationality by descent, that the father must be a British subject at the time of the child's birth. It seems doubtful if the proviso should be considered exclusively as a case of nationality by descent; it appears to be as much an extension of paragraph (a) of section 1 (1) as of paragraph (b).

Question (II) (b).

5. This question differs from Question (II) (a) in raising the point whether, in the case of a posthumous legitimate child born in an extra-territorial country of a British father, British nationality can be acquired under the proviso by reason of the fact that the mother was still a British subject at the time of the birth. In other words, it raises the question whether the expression "the child of a British subject" in the proviso should be read as meaning exclusively the child of a British father, or whether it should be construed as including the child of a British mother. In this connexion, the first point to which it is desired to invite the attention of the Law Officers is the difference between the expression "child of a British subject" in the proviso and the language used in the body of the section dealing with British nationality by descent. Under section 1 (1) (b), which deals with nationality by descent, any person is a natural-born British subject though born out of His Majesty's Dominions if his "father was at the time of that person's birth a British subject." As has already been stated above, the acquisition of British nationality by descent was not recognised at common law. The statutory enactments, to which reference is made above, expressly apply the principle of descent or transmission of British nationality through the male line only; and, as pointed out in paragraph 4, the words quoted above merely reproduce in substance the phraseology of the Act of 1730.

It may, however, be contended with some force that Parliament deliberately adopted the more general language used in the proviso with special regard to the circumstances in which it applies. The basis of, and justification for, the acquisition of British nationality in an extra-territorial country is that persons born there of British parents are subject to British jurisdiction and are, therefore, persons living "within His Majesty's allegiance." His Majesty exercises jurisdiction in these countries equally over women who are British subjects as over men; and the words "British subjects" at the end of the proviso include women. It might be argued that, in principle, if His Majesty's jurisdiction over the parents and their subjection in the extra-territorial country to British law (instead of the local law) are the grounds on which the child born there is to be held to be born with His Majesty's allegiance, the same grounds apply with equal force to posthumous children of British fathers whose widows are still British at the time of the birth. It may further be contended that as the legislature has deliberately refrained from repeating in the proviso the language used in the body of the section and has adopted words which are wide enough to include children of British mothers, it is a fair inference that it was the intention that British nationality should be conferred on the posthumous legitimate child born of a British mother in an extra-territorial country.

Question (II) (c).

6. This question (II) (c) raises the point whether, on the assumption that the words "child of a British subject" in the proviso include the children of British mothers, these words can be construed so as to cover the illegitimate children as well as legitimate children of British mothers. The considerations mentioned in paragraph 5 above in favour of the more extended interpretation of the words "British subject" apply to some extent in this connexion in favour of the wider interpretation of the word "child." On the other hand, it cannot be denied that British nationality law does not, when it comes to deal with nationality by descent, recognise birth other than birth in lawful wedlock. If judicial authority is needed in support of this proposition, it is to be found in the well-known case of *Shedden v. Patrick*, 1, McQueen 535. In that case it was held by the House of Lords that an illegitimate child born abroad, whose father was a British subject, could not acquire British nationality by the subsequent marriage of his parents because the child was at birth *filius nullius*. To this argument the observation already made in paragraph 4 applies; namely, that the cases covered by the proviso are not cases exclusively of nationality by descent, and the proviso is as much an extension of paragraph (a) of section 1 (1) as of paragraph (b).

Another argument against this interpretation is the general principle of construction that the word "child" in an Act of Parliament always applies



exclusively to a legitimate child (per Pollock, C.B., *Dickinson v. N.E. Ry.*, 12 W.R. 52; 33 L.J. Ex. 91; 2 H. & C. 735; *Vf. R. v. Maude*, 6 Jur. 646; 2 Dowl. N.S. 58; *R. v. Totley*, 7 Q.B. 598; *Sv. R. v. Hodnett*, 1 T.R. 96; judgment of Cotton L.J., *Northwich v. St. Pancras*, 58 L.J., M.C. 73; 22 Q.B.D. 164).

Although it does not affect the legal position, it may be desirable to add, for the information of the Law Officers, that the position of illegitimate children born in extra-territorial countries of British mothers is one of some difficulty if they are not to be held to be British subjects under this proviso. The British consular courts have jurisdiction over British subjects only. Upon this hypothesis, the mothers, who would normally be the guardians of the children, would be subject to the British consular courts, but the children would not be so subject, except in so far as it may be possible to treat them as British protected persons. Consequently, the jurisdiction of the court in proceedings relating to the guardianship of the child is doubtful. On the other hand, no other court would have jurisdiction in such matters over the mother. The children born in these circumstances, if not British subjects, will often be stateless. Similar questions of difficulty arise with reference to the application of Acts like the Legitimacy Act, 1926, under the Orders in Council regulating the exercise of His Majesty's jurisdiction in these countries. It not infrequently happens that the father of an illegitimate child is also a British subject and marries the British mother after the birth. If, however, the child is not a British subject, the Acts as applied under the Order in Council would not effect the legitimization of the child. Similar questions arise with regard to the application of the Adoption of Children Act, 1926. These two Acts are made applicable to British subjects in Egypt under articles 102 and 103 of the Egypt Order in Council, 1930.

Question (III).

7. Section 10 of the British Nationality and Status of Aliens Act, 1914, is as follows:—

"(10) The wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien: Provided that, where a man ceases during the continuance of his marriage to be a British subject, it shall be lawful for his wife to make a declaration that she desires to retain British nationality, and thereupon she shall be deemed to remain a British subject, and provided that where an alien is a subject of a State at war with His Majesty, it shall be lawful for his wife, if she was at birth a British subject, to make a declaration that she desires to resume British nationality, and thereupon the Secretary of State, if he is satisfied that it is desirable that she be permitted to do so, may grant her a certificate of naturalisation."

The point on which it is desired to obtain the opinion of the Law Officers is whether the power given to the wife to make a declaration pursuant to the first proviso to this section is exercisable (1) at any time after the date when her husband ceased to be a British subject, or (2) only at the date when the husband ceases to be a British subject, or (3) only within a reasonable time after that date.

In accordance with regulations made by the Secretary of State under section 19 (1) of the Act of 1914, every declaration of alienage and declaration of retention or resumption of British nationality, wherever made, shall be registered in London at the Home Office (see Regulation 16 (1) in the annexed copy of the Naturalisation Regulations, 1931, which reproduces verbatim Regulation 10 (1) of the Regulations made on the 30th December, 1914). There is nothing in the Act to render invalid any declaration merely by reason of the fact that it has not been registered. The primary function of registration is to provide an authentic record of the fact that the declaration registered has been made, but, in addition to this, registration, of course, is regarded as an official recognition of the validity of the declaration. It has been the practice of the Home Office ever since the passing of the Act of 1914 to refuse registration of declarations made under section 10 more than six months after the date when the husband ceased to be a British subject, though exceptions from this rule have occasionally been made in cases where the Secretary of State has been satisfied that the wife had no

opportunity of making the declaration within the six months' period. This practice is based on the view that the proviso contemplates that the declaration is to be substantially contemporaneous with the husband's loss of British nationality. In the view of the Home Office, the language of the proviso justifies this interpretation, since the words "where a man ceases during the continuance of his marriage to be a British subject," followed by the words enabling the wife to make a declaration that she desired to retain British nationality, appear to contemplate that the declaration shall be made, if not actually at the date of the husband's loss of British nationality, at least within a reasonable time after that date, and shall have the effect of enabling the wife to continue to be a British subject without any substantial break in the continuity of her British nationality. This view of the proviso is further supported by the operative words "and thereupon she shall be deemed to remain a British subject."

On the other hand, it has been suggested that the view on which the Home Office practice is based is tantamount to inserting a temporal limitation into the Act which is not provided for in the Act; and that if any temporal limitation could be implied from the words "retain" and "remain" in the Act, it would mean that the declaration must be made actually at the moment when the husband ceases to be a British subject by obtaining a certificate of naturalisation in a foreign State or otherwise. It would, therefore, in many cases, be quite impracticable for the wife to make any declaration. In particular, she would not be in a position to make the declaration in any case where, for any reason, she did not know that her husband was about to become naturalised abroad. Consequently, since the only temporal limitation which can be implied from the words of the Act must be rejected as being impracticable and the Act has laid down no other, the section must be interpreted as being without any such limitation at all.

It is submitted that, while the language of this proviso does not expressly require that the declaration should be simultaneous with the loss of the husband's nationality, the practice of the Home Office since the commencement of the Act of 1914 corresponds with what must have been the intention of Parliament in inserting this proviso. Under this practice the registration of a considerable number of declarations has been refused on the ground that they were made too late. Further, it would appear that, apart from legislation specifying the period within which such a declaration may be made, the only alternative to the existing Home Office practice would be to accept for registration declarations irrespective of the period, however long, which may have elapsed since the date when the husband ceased to be a British subject. For example, it would be necessary to register a declaration made as long as ten years after that date. The result would be that a woman who had been in fact an alien for a period of ten years might merely by making a declaration put herself into the position of being deemed to have "remained" a British subject during those ten years.

Enclosures.

Law Officers, August 18, 1904 (Confidential 8498, p. 152)
Naturalisation Regulations, 1931.

Opinion.

1. No. The words of the Act "whose father was at the time of that person's birth a British subject" are clear and decisive.
2. (a), (b) and (c). We feel driven to take the view that the first proviso deals with the status of the father of the person whose nationality is in question and not with the status of that person. The history of the proviso and indeed its language if considered apart from its setting in Section 1 (1) (b) are in favour of the view that the proviso applies directly to the child and has the effect of conferring British nationality upon the child of a British subject, if such child is born in a place where His Majesty exercises extra-territorial jurisdiction. In favour of this view (which would give rise to the questions we are asked) it may be said that the statute does not in terms abrogate the common law rule that a person born within the allegiance of His Majesty is a natural-born



British subject, and that the proviso merely enlarges what is ordinarily meant by the phrase "within His Majesty's allegiance." This argument, however, in our opinion, breaks down upon the language of Section 1. The proviso cannot be read as an enactment having no reference to Section 1 (1) (b), but as bearing upon the status of a separate class of natural-born British subjects, namely, those born outside His Majesty's dominions but within His Majesty's allegiance.

For the above reasons we answer these three questions in the negative. On the construction of the proviso which we think is the right one, the questions do not really arise.

3. In our opinion a declaration must be made as soon as a wife is aware of the fact that her husband has ceased to be a British subject. It may be difficult in practice to ascertain the true facts as to the wife's knowledge, but that is a difficulty in administration which only legislation can remove. Moreover, the onus will always be upon the wife. There is nothing in the section to lead to the conclusion that a wife loses her right of option when she is in fact wholly ignorant of her husband's change of nationality. On the other hand, it seems to us equally unreasonable to hold on the words of the section that a wife may lie by for years or even months and then claim the right to exercise an option which in fact has been already exercised by her omission to make any declaration as to her retention of her British nationality.

WM. A. JOWITT.
T. W. H. INSKIP.

*Law Officers' Department,
November 6, 1931.*

PORTUGAL.

[W 5614/856/36/1931]

No. 3.

[May 13, 1931.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 22, 1931.

Anglo-
Portuguese
Commercial
Treaty of
1914:
interpreta-
tion as
regards dis-
crimination
in favour of
Portuguese
shipping.

I HAVE the honour, by direction of Mr. Secretary Henderson, to transmit to you the papers noted in the attached list and to request the favour of your advice on a question in relation to the Anglo-Portuguese Commercial Treaty of the 12th August, 1914 (Paper A). The point which arises is stated in the enclosed letter, dated the 18th February, 1931, from the Board of Trade, and its enclosures (Paper B).

2. For some years past the Portuguese Government have adopted a policy of discrimination in favour of Portuguese as against foreign shipping. The methods adopted in pursuance of this policy are many and varied; they are briefly described in a despatch from His Majesty's Ambassador at Lisbon, dated the 16th January, 1930 (Paper C), but the only one which it is now necessary to consider is the system (described in paragraph 5 of Sir F. Lindley's despatch) under which goods imported in Portuguese bottoms receive a remission (in most cases amounting to 10 per cent.) of the ordinary customs duties, which are paid in full by goods imported in foreign vessels. The question which arises is whether this system constitutes a violation of the provisions of the Anglo-Portuguese Commercial Treaty.

3. His Majesty's Government in the United Kingdom, in common with other interested Governments, have during recent years addressed to the Portuguese Government a series of protests against the policy of discrimination adopted by them. But it has not so far been suggested in this correspondence, either by His Majesty's Government or, so far as Mr. Henderson is aware, by any other Government, that the discriminatory system in general, or this particular matter of the 10 per cent. remission of customs duties, was inconsistent with Portugal's obligations under her commercial treaties. As regards the

Anglo-Portuguese Commercial Treaty, it has hitherto been considered that the relevant provision was article 11, and that, as that article gives only most-favoured-nation, and not national, treatment, Portugal retains the right to discriminate in favour of cargoes imported in Portuguese bottoms. As will be seen later, there can be little doubt that this was the intention of the parties at the time when the treaty was concluded.

4. It will be seen, however, from the enclosures to the Board of Trade letter (Paper B), that the Association of British Chambers of Commerce has now been advised by Sir John Simon and Sir Robert Aske that the fact of goods imported in a British ship not receiving the remission of customs duties accorded to goods imported in Portuguese bottoms constitutes (1) in the case of British goods imported in a British ship, a violation of article 5, and (2) in the case of foreign goods imported in a British ship, a violation of article 1, of the treaty. The arguments by which such a contention would be supported will be found in the opinion in question.

5. In the first of the two cases referred to above, Mr. Henderson conceives that the reply of the Portuguese Government to such arguments (so far as it was based on the wording of the treaty alone) would run somewhat as follows: The subject-matter of articles 5 and 11 is quite different, and in the present case the latter is alone relevant. Article 5 is a provision in favour of goods; article 11 is one in favour of ships. Article 5 prevents discrimination between British and any other foreign goods on the ground of their origin. Article 11, so far as it deals with goods, regards them merely in the capacity of cargo of ships, and prevents discrimination against goods (whatever their origin) based on the nationality of the ship on which they are carried; this is really a provision in favour of the ship. If article 5 were by itself sufficient to protect goods against discrimination based on the nationality of the ship on which they were imported, the reference to cargoes in article 11 would (at any rate so far as British goods are concerned) be surplusage. Since the existing discrimination is dependent exclusively on the nationality of the ship, article 11 is the article applicable to the present case, and as this article gives only most-favoured-nation and not national treatment, discrimination in favour of goods carried in Portuguese bottoms is in terms permitted by this article.

6. The Board of Trade point out in their letter that the application of different customs tariffs on different frontiers has not been regarded as inconsistent with treaty provisions securing most-favoured-nation treatment for British goods. It may perhaps be added that, on the arguments adduced by Sir John Simon and Sir Robert Aske, it would not be open to the Portuguese Government (*e.g.*) to encourage the development of air routes to Portugal by granting a rebate on goods imported by air, since that would result in German goods imported by air paying a lower rate of duty than British goods imported by land or sea.

7. As regards the second case (that of foreign goods imported in a British ship), Mr. Henderson is inclined to share the doubts expressed by the Board of Trade as to the validity of the suggested contention. The only provision in the treaty on which it would be possible to rely is the sentence in article 1 which says that "The subjects or citizens of each of the two contracting parties shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other to which natives subjects or citizens are or may be permitted to come"; coupled with the immediately preceding sentence, which provides for "full and complete freedom of commerce and navigation" between the territories of the two parties. These provisions are, however, of the most general character, and it appears to Mr. Henderson that on the principle that *Generalia particularibus non derogant*, it is difficult to rely on such provisions in order to over-ride the specific terms of article 11. It seems impossible to contend that these provisions are in themselves sufficient to secure most-favoured-nation treatment to British goods, and, indeed, if the provisions of article 1 really govern matters such as that now in question, a considerable portion of the treaty would become unnecessary.

8. But whatever may be the effect of a strict construction of the treaty, there can be little doubt that, as is stated in the Board of Trade letter (Paper B), the intention of the parties to the treaty was that it should not prevent discrimination of this nature in favour of Portuguese shipping. The text of article 11, as originally proposed by His Majesty's Government, was on the lines



of that which then usually figured in our commercial treaties, and ran as follows:—

"Each of the contracting parties shall permit the importation or exportation on the vessels of the other of all merchandise which may be legally imported or exported, and also the carriage of passengers from or to their respective territories on the vessels of the other; and such vessels and their cargoes and passengers shall enjoy the same privileges, and shall not be subjected to any other or higher duties or charges than national vessels and their cargoes and passengers."

This provision, which, as it will be seen, gives national treatment, would clearly have prevented the Portuguese Government from granting the present rebates to cargoes carried in Portuguese bottoms without extending the same privilege to goods imported in British ships. The Portuguese Government, however, refused to accept a provision in that form, and insisted that they could not give anything more than most-favoured-nation treatment in matters of navigation, on the ground, according to a verbal statement made by the Minister for Foreign Affairs to the British Minister, that "a differential treatment was necessary for the protection of the Portuguese mercantile marine." In order to secure the conclusion of the treaty, the Board of Trade were prepared, though with great reluctance, to agree to the original draft being replaced by the provision which now figures as article 11 and gives only most-favoured-nation treatment. It seems to follow that it cannot have been the intention of the parties that article 5 of the treaty should have the effect of depriving the Portuguese Government, so far as cargoes are concerned, of the right to discriminate which they had secured by the alteration in the text originally proposed for article 11.

9. The point raised in the preceding paragraph may be material, since, in the event of the question being taken to arbitration, the Portuguese Government would no doubt seek to rely in support of their contention on the alterations made in the text originally proposed for article 11; and since it could hardly be contended that the text of the treaty was only consistent with the contention which His Majesty's Government would be putting forward, so that there was, in fact, no doubt as to its meaning, Mr. Henderson regards it as almost certain that the court would be prepared to take the "travaux préparatoires" of the treaty into consideration if the Portuguese Government requested it to do so. In this connexion it may be material to refer to the discussion of the practice of the Permanent Court of International Justice on this point which will be found at pp. 50, 107-108 and 186-187 of the "British Year Book of International Law" for 1930.

10. I am accordingly to request you to take the enclosed papers into your consideration and to favour Mr. Henderson with your opinion as to whether, in the circumstances, it could be successfully contended before an international tribunal that the refusal to goods imported in British bottoms of the remission of customs duty which is accorded to goods imported in Portuguese ships constitutes a violation of the Anglo-Portuguese Commercial treaty—

- (1) In the case where the goods imported in the British vessel are British produce or manufacture.
- (2) In the case where they are of foreign origin.

11. Mr. Henderson would also be grateful for any observations of a general character which you may be good enough to offer.

I have, &c.

C. HOWARD SMITH.

List of Papers.

Paper A: Anglo-Portuguese Commercial Treaty, August 12, 1914 [Treaty 1539].

Paper B: Board of Trade to Foreign Office, February 18, 1931 [W 1940/856/36].

Paper C: Despatch from His Majesty's Ambassador at Lisbon, January 16, 1930 [W 800/105/36].

Report.

(1) The articles mentioned in the first sentence of article 5 are not co-extensive with the cargoes referred to in article 11. The articles mentioned in article 5 are only the produce or manufacture of one of the contracting parties, whereas the cargoes referred to in article 11 may include articles which are not the produce or manufacture of either of the contracting parties. We think there is no need to depart from the natural and literal meaning of either of these provisions in order to reconcile them, and that the meaning of the two articles taken together (so far as relevant) is that—

- (a) Portugal shall not subject any cargo of a British ship, wherever produced or manufactured, to higher duties than those imposed upon the cargoes of other foreign ships.
- (b) Portugal shall not subject articles of British produce or manufacture (whatever the nationality of the importing vessel) to higher duties than those imposed on articles produced or manufactured in any foreign country (whatever the nationality of the importing vessel).

The effect is that—

- (i) British produce or manufacture imported in a British ship is protected by both articles.
- (ii) British produce or manufacture imported in a non-British ship is protected by article 5 only.
- (iii) Non-British produce or manufacture imported in a British ship is protected by article 11 only.

(2) We think that evidence of the "travaux préparatoires" mentioned in paragraphs 8 and 9 of the Foreign Office letter of the 22nd April, 1931, would not affect the interpretation of article 5. The text of article 11, as originally proposed by His Majesty's Government, gave national treatment to all cargoes of British ships, whether or not of British produce or manufacture. The revised text gave most-favoured-nation treatment to the same cargoes. In our opinion the change does not involve any change in the interpretation of article 5, which relates to a different class of goods. The classes of goods are different, although particular goods may happen to belong to both classes.

(3) We think that article 1 should be read subject to article 11, and should not be read as securing to the cargoes of British ships treatment better than the most-favoured-nation treatment expressly accorded by article 11.

(4) Accordingly, with reference to the specific questions asked in paragraph 10 of the Foreign Office letter of the 22nd April, 1931, we are of opinion that in Case (1) the suggested contention would probably be successful, but in Case (2) it would probably be unsuccessful.

WILLIAM A. JOWITT.

R. STAFFORD CRIPPS.

*Law Officers' Department,
May 13, 1931.*



1931

22

RUSSIA.

[T 8719/161/373/1931]

No. 4.

[July 2 and 8, 1931.]

(1)

Sir William Malkin to the Attorney-General.

Diplomatic
privilege of
officials of
Trade
Delegation
of the
U.S.S.R. in
London.

My dear Attorney,

Foreign Office, July 2, 1931.

I SHOULD be grateful if we might consult you informally on a matter as to which we should very much like to know your views, but which is hardly one which we can refer to you formally at the present moment.

2. I enclose a letter⁽¹⁾ from Messrs. Field, Roscoe and Co. and its enclosures, and also the draft⁽²⁾ of a reply from the Foreign Office to this letter, together with a copy of the Temporary Commercial Agreement with the U.S.S.R. of April 1930.⁽³⁾

3. May I ask you to be so good as to look particularly at paragraphs 4, 5, 6 and 7 of the draft reply, which has been prepared after discussions with the Treasury Solicitor and the Solicitor to the Board of Trade?

4. So far as the present case is concerned, we feel fairly confident here that it does not come within the class of cases with respect to which in the Commercial Agreement the U.S.S.R. undertook not to claim immunity from the jurisdiction (paragraph 5). The question mentioned in paragraph 4 (b) of the draft reply does appear to be a somewhat important one, and the question whether the courts can give effect to the protocol of the Commercial Agreement is one with respect to which it is not unlikely that questions may be sometime asked in the House.

5. There seem to be three possible views which might be taken on this question, namely—

- (a) That the provisions of article 2, paragraph 6, and the additional protocol to the agreement merely constitute undertakings having effect only in international law as between the Government of the U.S.S.R. and His Majesty's Government, under which the Government of the U.S.S.R. are under an obligation, whenever a case coming within their scope arises, not to claim immunity from process in the English courts; *i.e.*, an obligation which could only be made the subject of diplomatic representations if it were not fulfilled, and which in no way qualifies or affects the diplomatic immunity of the Soviet trade representative and his deputy under English statute and Common Law, as members of the staff of the Soviet Embassy, received and recognised by His Majesty's Government as having diplomatic status.
- (b) That these provisions constitute, as regards a case which came within their scope, a general waiver of immunity or submission to the jurisdiction to which the English courts could give effect, even if in the particular case there was no waiver or submission to the jurisdiction.
- (c) That the acceptance by His Majesty's Government of the trade representative and his deputy in a diplomatic capacity after the conclusion of the agreement should be regarded as conditional only, and as subject to the qualification that no diplomatic immunity should exist as regards cases coming within the scope of these provisions of the agreement.

6. Of these three views we are inclined to think that (a) is the right one, but if the opinion given in paragraph 5 of the draft reply is correct, this case need not necessitate any decision on this more important point, and we are inclined to think that it would be desirable to secure, if possible, that the case should be decided on the more limited ground of paragraph 5 of the draft reply.

(1) See (2).

(2) See (3).

(3) Cmd. 3552 [Treaty 1985].

RUSSIA.

23

7. Field, Roscoe, of course, state in their letter that the court desired a statement from you, but we think that this may be a mistake. In any case, we think that the normal procedure is that if the court desires information on some point such as this, it writes to the Department concerned and asks for it, the information being given in a reply to the court, written by, or on behalf of, the Secretary of State, and that the Attorney-General does not give statements in writing, but appears in (or is represented before) the court in proper cases, and presents arguments to assist the court.

8. The awkward possibility about this case is that if the court were to hold that the protocol to the agreement is a waiver or submission upon which it could act, and to interpret it as covering cases which it was not meant to cover, the plaintiff might get judgment by default and then proceed to execute his judgment against the property of the U.S.S.R. under paragraph 7 of article 2, and in this case we should probably be faced by representations from the Soviet Ambassador, which would be distinctly awkward. It is for this reason that we are inclined to think that it would be desirable that you should be represented at the hearing of this summons, and argue, if you share our view on this point, that in the present case the protocol to the Commercial Agreement does not cover the matter which is the subject of this action. Subject to your views, we are disposed to think that it would be best to endeavour to get the case decided on this point, and to avoid a decision on the more important point mentioned in paragraph 4 (b) of the draft reply, though we should, of course, be very glad to know what your opinion upon this point is, and, in particular, whether you think that any view should be expressed in the reply on the alternative enumerated in paragraph 5 above, as, for instance, by suggesting that of those alternatives (a) is the right one.

9. In view of the possibility of your taking part in the proceedings, we do not like to reply to Field, Roscoe's letter without consulting you, and we should therefore be very grateful if you would let us know whether you approve of our sending the draft letter, or what modifications you would wish made.

Yours very sincerely,

WILLIAM MALKIN.

(2)

Messrs. Field, Roscoe and Co. to Foreign Office.

36, Lincoln's Inn Fields,

London, June 15, 1931.

Dear Sir,

SHENKMAN v. Trade Delegation of the U.S.S.R. in Great Britain.

We are the solicitors for the plaintiff in this action, Mr. I. M. Shenkman, who on the 8th May, 1931, commenced proceedings against the defendants for damages for wrongful dismissal from their employment as financial adviser.

Certain steps were taken by us in an endeavour to effect service of the writ, and, failing in this respect, an affidavit was lodged at the central office for an order for substituted service of the writ upon the defendants.

In view of the circumstances, the court have requested us to instruct you to obtain a statement by the Attorney-General as to the status of the defendants, and as to whether they can rightfully claim immunity from judicial process on the ground of diplomatic privilege.

We cannot do better than send you herewith a copy of the affidavit and the correspondence⁽¹⁾ exhibited thereto, which we think will give you all the necessary details, and we shall be glad to hear from you upon the matter in due course.

Yours truly,

FIELD, ROSCOE AND CO.

(1) Correspondence will be found in [T 7669/161/373/1931].



1931

Enclosure in (2).

Affidavit in Support of Application for Substituted Service of Writ of Summons.

1931 S. No. 1962.

In the High Court of Justice, King's Bench Division, between Ilia Michailovitch Shenkman (*plaintiff*) and the Trade Delegation of the Union of Soviet Socialist Republics in Great Britain (*defendants*).

I, JOHN HODGES, of 36, Lincoln's Inn Fields, in the County of London, managing clerk with Messrs. Field, Roscoe and Co. of the same address, solicitors for the above-named plaintiff, make oath and say as follows:—

1. This is an action commenced by the plaintiff for damages for his wrongful dismissal by the defendants from their employment as financial adviser. There is now produced and shown to me and marked "A" a print of the temporary commercial agreement of the 16th April, 1930, made between His Majesty's Government in the United Kingdom and the Government of the Union of Soviet Socialist Republics, this agreement (*inter alia*) giving leave for the Government of the Union of Soviet Socialist Republics to establish in London a trade delegation consisting of the trade representative of the Union of Soviet Socialist Republics and his two deputies. I refer this honourable court to clause 2 of article 2, which states that the trade representative and his two deputies shall be accorded all diplomatic privileges and immunities . . . , but that no member of the staff of the trade delegation other than the trade representative and his two deputies shall enjoy any privileges or immunities.

I also refer this honourable court to the additional protocol forming part of the agreement aforesaid, which provides that the privileges and immunities conferred by paragraph 2 of article 2 of the said agreement shall not be claimed in connexion with any proceedings before the courts of the United Kingdom arising out of commercial transactions entered into in the United Kingdom by the defendants.

2. The plaintiff was for many years past in the employ of the Russian Government in various forms in this country. When the trade delegation arrived in this country pursuant to the agreement hereinbefore referred to, the plaintiff was in the employ of Arcos (Limited) in this country. Upon the arrival of the trade delegation it was arranged that the plaintiff should leave the direct service of Arcos (Limited) and be employed by the delegation. On the 18th December, 1930, he was dismissed from the service of the delegation by M. Saul Bron, the chairman, without any notice, without any complaint, and without any reason being given for such dismissal.

Following this dismissal, my firm had certain correspondence on the plaintiff's behalf with the defendants and their solicitors. No attempt was made in such correspondence to defend the plaintiff's dismissal, and apparently the real defence to this action is a claim to diplomatic privilege.

3. My firm has been advised by counsel that, in his view, this claim to diplomatic privilege is an arguable question, and he has advised that these proceedings should be commenced.

4. A writ was therefore issued on the 8th May, 1931, and on the same day my said firm wrote the defendants' solicitors, Messrs. Wynne, Baxter and Keeble, sending them the original writ and a copy, and enquiring whether they would accept service thereof on behalf of the defendants. A reply was received by my said firm to this letter, which, omitting formal parts, was as follows:—

"May 9, 1931.

"We have your letter of yesterday's date with the writ and copy, which we return herewith. We have no instructions to authorise us to accept service. Should we obtain them we will let you know."

5. In view of this letter, and paragraph 5 of article 2 of the agreement hereinbefore referred to, I attended at the office of the Board of Trade on the 12th May, 1931, to ascertain the names at that date of the trade representative and of the persons empowered to represent him. I was informed that at that time M. Saul Bron was still chairman of the delegation, and that M. V. Karpoff was his deputy.

6. Thereafter steps were taken by me to effect service of the writ upon the defendants, and there is now produced and shown to me, marked "B," a true copy of the correspondence evidencing such efforts. I say that I, on behalf of the said Messrs. Field, Roscoe and Co., wrote the letters numbered 1, 2, 4, 6 and 7 in Exhibit "B" to this my affidavit, that I made the attendances as therein set out, and that the results of such attendances are accurately set out in such letters. As to letter 7, I duly attended on the 1st June, 1931, at 12 o'clock at the defendants' office, as mentioned therein, but was informed by a clerk that the secretary was not in and that his movements were unknown. None of the said letters have been returned to the said Messrs. Field, Roscoe and Co. through the Dead Letter Office.

7. In my respectful submission, the question whether the contract between the plaintiff and the defendants is of a commercial nature or not is a matter for the decision of this honourable court, and leave is asked that the writ may be served upon the defendants by service upon their secretary by pre-paid post at Bush House, Aldwych, London, W.C. 2.

Sworn at 37, Lincoln's Inn Fields, in the County of London, the 9th day of June, 1931.

JOHN HODGES.

Before me,

ADOLPHUS TOOTH,

A Commissioner for Oaths.

(3)

Draft of Letter from Foreign Office to Messrs. Field, Roscoe and Co.

Gentlemen,

Foreign Office, July , 1931.

WITH reference to your letter of the 15th ultimo in connexion with the proceedings brought by your client, Mr. I. M. Shenkman, as plaintiff, against the trade delegation of the U.S.S.R., as defendant, to obtain damages for alleged wrongful dismissal from the employment of the trade delegation as financial adviser, in which you state that the court have requested you to obtain a statement by the Attorney-General as to the status of the defendants, and as to whether they can rightfully claim immunity from judicial process on the ground of diplomatic privilege, I am directed by Mr. Secretary Henderson to inform you that he observes, from the correspondence enclosed in your letter, that the trade representative of the U.S.S.R., M. Bron, has declined to accept service of the writ on the ground that he is entitled to diplomatic privilege in non-commercial matters, and has referred to the agreement between His Majesty's Government in the United Kingdom and the Government of the U.S.S.R. of the 16th April, 1930, and that attempts to effect service upon M. Bron's deputy, M. Karpoff, and upon the secretary of the delegation have not been successful, and that an application has now been made to the court for an order for substituted service.

2. With regard to the questions raised in your letter, I am to inform you that if a statement is desired by the court, it will be furnished by the Secretary of State on receipt of a letter in the ordinary way addressed to him by the court requesting information.

3. I am to state, however, for your information, that the trade delegation of the U.S.S.R. in London, which was established in virtue of the Temporary Commercial Agreement of the 16th April, 1930, consists of the trade representative of the U.S.S.R. and his deputy, and forms part of the Embassy of the U.S.S.R. M. Bron, the trade representative of the U.S.S.R., and his deputy, M. Karpoff, are members of the staff of the Embassy of the U.S.S.R. and have been received in this capacity. Their names appear in the list compiled under the Diplomatic Privileges Act, and they are entitled to full diplomatic privilege and immunity, including immunity from process.

4. In order to establish that the court shall be entitled to exercise jurisdiction in the action brought by your client in the circumstances of the

[7190]

E



1931

26

RUSSIA.

present case, it appears to Mr. Henderson that it would be necessary to show not only—

- (a) That the contract of employment which forms the subject-matter of the proceedings brought by your client comes within the terms of article 2, paragraph 6, and of the additional protocol of the Temporary Commercial Agreement between His Majesty's Government in the United Kingdom and the Government of the U.S.S.R., signed on the 16th April, 1930; but also
- (b) That these provisions had the effect of entitling the court to exercise jurisdiction in respect of matters coming within their scope over the trade representative of the U.S.S.R. and his deputy, even if in the particular case the trade representative had declined to submit to the jurisdiction.

5. Mr. Henderson is advised that, in the present case, it would not be possible to establish that the contract which forms the subject-matter of the action instituted by your client comes within the scope of these provisions. He is advised that the meaning of the words "commercial transactions" in the additional protocol and in paragraph 6 of article 2 is shown by a reference to paragraphs 1 and 3 of article 2 of the agreement, and that these words refer to the transactions of the trade delegation conducting the foreign trade of the U.S.S.R. in the United Kingdom, for, and on behalf of, the U.S.S.R., and do not include contracts of employment and service concluded between the trade delegation and persons in their employment.

6. Mr. Henderson considers that, in view of the position on the first point, as set out in the preceding paragraph, it is unnecessary for him to express any opinion on the question indicated in paragraph 4 (b).

7. Mr. Henderson would, however, be grateful if he might be informed of the date and time at which your client's application for substituted service would be heard in order that he may consider whether it is desirable that *consult* the Attorney-General *should appear as to the desirability of his being present at the hearing of your application.*

(4)

Attorney-General to Sir William Malkin.

Dear Malkin,

SHENKMAN v. U.S.S.R. Trade Delegation.

July 2, 1931.

I approve your draft answer to Messrs. Field, Roscoe, subject to an alteration in the last three lines so as to make it read: "in order that he may consult the Attorney-General as to the desirability of his being present at the hearing of your application."

I will write you with regard to the further point you mention when I have had further time to consider the question.

In view of the fact that Field Roscoe's letter is dated the 15th June, I thought it better to let you know at once that I approve your letter, so that it may be despatched forthwith.

Yours sincerely,

WILLIAM A. JOWITT.

(5)

Attorney-General to Sir William Malkin.

My dear Malkin,

SHENKMAN v. U.S.S.R. Trade Delegation.

July 8, 1931.

I have now looked further into your letter of the 2nd July relating to diplomatic privilege of the officials of the U.S.S.R.

The real question seems to me to be whether the courts in any given case have the right to decide whether any particular dispute can be said "to arise in respect of a commercial transaction," or whether the true view is that there is

RUSSIA.

27

merely an honourable undertaking, the legal effect of which is that immunity is only waived in any particular case which the Russian officials acknowledge to be a commercial transaction. Upon the whole, with very great hesitation, I think the view expressed in paragraph 5 (a) of your letter to me is to be preferred.

I would point out that it seems generally to have been assumed that an Ambassador engaging in trade lost his immunity *quoad* the commercial transaction; but even on this assumption it would not, I think, have been possible to implead such an Ambassador in our courts to have it determined by the courts whether the particular transaction the subject-matter of the action fell within the description of a commercial transaction. So, at any rate, I understand the Magdalena case, 2 Ellis & Ellis, 94. At p. 114, Lord Campbell says:—

"In countries where there may be a citation by seizure of goods if an Ambassador loses his privilege by engaging in commerce, he not only may be cited but all his goods unconnected with his diplomatic functions may be arrested to force him to appear."

I infer from this that in countries where there could not be a citation by seizure of goods, it would be impossible to implead the Ambassador personally to ask the court to determine without his consent whether or not a transaction was commercial.

I have no doubt that where a question of status was in issue the defendant Ambassador would have to establish his diplomatic status; and to do this in the old days he frequently had to submit himself to the courts. In the recent case of *Engelke v. Musmann*, 1928 A.C. 432, where the defendant sought to establish his immunity by affidavit, he would have had to submit to cross-examination on this affidavit but for the statement of the Attorney-General. In the present case, however, no question of status can arise, the sole question being whether a man admittedly enjoying diplomatic status has lost it by virtue of the fact that a particular transaction falls within a particular description. I do not think the courts would embark upon a consideration of this question, since this would make the immunity nugatory; but I regard the whole matter as one of great difficulty (see particularly the observations of Lord Warrington in *Engelke v. Musmann* at the top of p. 457).

I hope that on the lines of your previous letter any discussion of this very difficult point will be unnecessary.

Yours very sincerely,

WILLIAM A. JOWITT.

[7190]

E 2



1931

28

GENERAL.

[W 9425/72/50/1932]

No. 1^b.

Air Ministry.]

[May 20, 1931.]

Case for the Opinion of the Law Officers of the Crown.

HEREWITH are sent :—

Power
under Air
Navigation
Act, 1920,
to declare
prohibited
areas.

1. Copy Correspondence and Departmental Minutes.
2. Convention for the Regulation of Aerial Navigation.
3. Air Navigation (Consolidation) Order, 1923, as amended to May 1930 [Confidential 13758*].
4. Protocol relating to Amendments to Article 3, &c., of the Convention relating to the Regulation of Air Navigation [Cmd. 3541 (Parly. 5579)].
5. Papers laid before Law Officers in 1920 in relation to the Air Navigation Bill, 1920.

The first question upon which the advice of the Law Officers is desired is whether there is power under the Air Navigation Act, 1920, to declare by Order in Council the precincts of Windsor Castle a prohibited area from which all aircraft are excluded. The Law Officers will see from the copy correspondence and departmental minutes herewith (document 1) that Sir Frederick Ponsonby has communicated with the Secretary of State for Air, enquiring whether it would not be possible to have Windsor Castle and the Home Park Private made a prohibited area during their Majesties' residence at Windsor.

Certain areas have been declared prohibited areas by the Air Navigation (Consolidation) Order, 1923, as amended by subsequent orders, under the powers contained in the Air Navigation Act, 1920, and the Secretary of State desires to be advised whether Windsor Castle and such surrounding area as may be considered necessary could be declared a prohibited area, so as to make such area an area prohibited to aircraft from time to time during such times as Their Majesties may be in residence at Windsor.

As the Law Officers are no doubt aware, the International Convention for the Regulation of Aerial Navigation, which was signed in 1919 and came into force (as respects Great Britain and other signatory States who had notified their adhesion) in 1922, makes provision for the freedom of passage of aircraft of contracting States over the territory of other States, and with regard to the regulation and control of such aircraft.

Certain of the provisions of the original convention have from time to time been modified in manner provided in the convention, that is to say, through a permanent body established by the convention and known as the International Commission for Air Navigation. A print of the convention as now in force is herewith (document 2), and the Law Officers may be referred in particular to the provisions of the following articles of the convention :—

Article 1—which provides that the high contracting parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory.

Article 2—which provides that each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of other contracting States, provided that the conditions laid down in the convention are observed.

Regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality.

Article 3—which provides that each contracting State is entitled, for military reasons or in the interest of public safety, to prohibit the aircraft of the other

GENERAL.

29

contracting States, under the penalties provided by its legislation and subject to no distinction being made in this respect between its private aircraft and those of the other contracting States, from flying over certain areas of its territory.

In that case the locality and extent of the prohibited areas shall be published and notified beforehand to the other contracting States.

Article 4—which provides that every aircraft which finds itself above a prohibited area shall, as soon as aware of the fact, give the signal of distress provided for in paragraph 17 of Annex D, and land as soon as possible outside the prohibited area at one of the nearest aerodromes of the State unlawfully flown over.

Article 15—which provides that every aircraft of a contracting State has the right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so by means of the signals provided in Annex D.

Article 25—which provides that each contracting State undertakes to adopt measures to ensure that every aircraft flying above the limits of its territory, and every aircraft wherever it may be, carrying its nationality mark, shall comply with the regulations contained in Annex D.

Each of the contracting States undertakes to ensure the prosecution and punishment of all persons contravening these regulations.

And article 34—which deals with the constitution and duties of the International Commission for Air Navigation above referred to.

The Air Navigation Act, 1920, which received the Royal assent in December 1920, is described as “An Act to enable effect to be given to a convention for regulating air navigation and to make further provision for the control and regulation of aviation,” and in the preamble (after reference to the convention) it is recited that it is expedient to make further provision for controlling and regulating the navigation of aircraft, whether British or foreign, within the limits of His Majesty's jurisdiction, and that it is also expedient that provision should be made by Parliament for enabling effect to be given to the convention.

Section 1 of the Act provides that His Majesty may make such Orders in Council as appear to him necessary for carrying out the convention, and for giving effect thereto or to any of the provisions thereof, or to any amendments which may be made under article 34 thereof.

Section 2 provides that His Majesty may by Order in Council direct that the provisions of the convention for the time being in force, or any of them, shall apply to or in relation to any aircraft in or over the British islands or the territorial waters adjacent thereto, and may make such consequential and supplementary provisions as appear necessary or expedient for the purpose of such application.

Section 3 provides that, without prejudice to the generality of the powers thereinbefore conferred, an Order in Council under Part I of the Act may make provision for certain specified matters, among which the Law Officers' attention may perhaps be directed in particular to (j) supplementing the convention in such manner as appears necessary or expedient by general safety regulations; and (m) for the imposition of penalties . . . to secure compliance with the order or the convention, . . . and authorising any steps to be taken for preventing aircraft from flying over prohibited areas or entering the British islands in contravention of the order or the convention, which were authorised to be taken under section 2 of the Aerial Navigation Act, 1913, for the purposes of that section.

[NOTE.—Section 2 of the Aerial Navigation Act, 1913, provides that, if an aircraft flies or attempts to fly over any area prescribed under that Act for the purposes of the defence or safety of the realm, . . . it shall be lawful for any officer designated for the purpose by regulations made by the Secretary of State to cause such signal as may be prescribed by those regulations to be given, and if after such signal has been given the aircraft fails to respond to the signal by complying with such regulations as may be made by the Secretary of State prescribing the action to be taken on such a signal being given, it shall be lawful for the officer to fire at or into such aircraft, and to use any and every other means necessary to compel compliance. . . .]



Section 17 of the Air Navigation Act, 1920, should be referred to as containing provisions as to Orders in Council under the Act.

Orders in Council dealing with air navigation under the powers conferred by the Air Navigation Act, 1920, have been made from time to time. The orders at present in force (so far as material) are the Air Navigation (Consolidation) Order, 1923, as amended by further orders. A copy of these orders in consolidated form is herewith (document 3).

The Law Officers' attention is directed to article 6 of the Consolidated Order, which provides that the provisions in Schedules I to VIII inclusive to the order shall have effect as part of the order, and shall be duly observed by all persons concerned in the cases to which they apply; and to Schedule VII of the order, which makes the places named therein prohibited areas, and provides (paragraph 2) that every aircraft which finds itself above a prohibited area in contravention of the order shall, as soon as aware of the fact, give the signal of distress provided in paragraph 17 of Schedule IV, and land as soon as possible outside the prohibited area at one of the nearest aerodromes in Great Britain and Northern Ireland. Provided that it shall not, unless compelled by stress of weather or other unavoidable cause, fly further into the prohibited area, nor commence to descend while still above the prohibited area. And provides (paragraph 3) that to warn an aircraft that it is in the vicinity of a prohibited area . . . the signals prescribed in paragraph 18 of Schedule IV shall be used. And provides (paragraph 4) that the signals which may be given when an aircraft flies or attempts to fly over a prohibited area in contravention of the order shall be those prescribed in paragraph 19 of Schedule IV. And provides (paragraph 5) that upon the signals referred to in paragraph 4 being given, an aircraft shall immediately give the signal referred to in paragraph 2 and land in accordance with that rule. And provides (paragraph 6) that if any aircraft flies or attempts to fly over any prohibited area . . . in contravention of the order, and if after signals referred to in paragraph 4 have been given . . . the aircraft fails to respond thereto by complying . . . the officer may fire at or into such aircraft, and use any and every other means necessary to compel compliance. . . .

[NOTE.—The prohibition contained in the foregoing paragraphs of Schedule VII is apparently limited to flying at lower altitudes than 6,000 feet (see article 4 (1) (iii) of the Consolidated Order).]

The attention of the Law Officers should also be directed to paragraph 7 of Schedule VII, which contains an amendment made by the Air Navigation (Amendment) (No. 2) Order, 1929, and provides that where it is brought to the notice of the Secretary of State (a) that a large number of persons are likely to gather in any district in Great Britain and Northern Ireland for the purpose of witnessing some event of public interest, or (b) that it is intended to hold in any district in Great Britain and Northern Ireland an aircraft race or contest or exhibition of flying, the Secretary of State may, by directions,⁽¹⁾ impose such temporary restrictions on the flying of aircraft within or in the neighbourhood of that district as he may consider expedient in the interest of public safety, and no aircraft shall fly in contravention of any such directions: Provided that any such restrictions . . . shall apply to British aircraft and aircraft registered in any other contracting State without distinction.

And that any directions issued under this paragraph shall specify the area or areas to which the restrictions extend, and the time or times during which the restrictions are to be in force. . . .

And that any area specified in such directions shall during the specified time or times be deemed to be a prohibited area for the purpose of paragraphs 2, 3, 4 and 5 of Schedule VII, but not for the purposes of any other provisions of the order.

Article 27 of the Consolidated Order, which deals generally with penalties for offences under the order, provides (1) that if an aircraft flies in contravention of, or fails to comply with, the order or any provision thereof, or if in or in respect of any aircraft any act is committed which is or is deemed to be a contravention of the order or any provision thereof, the owner or hirer of the aircraft (if other than the Crown) and the pilot or commander thereof shall be

(1) See article 30 of the Air Navigation (Consolidation) Order.

deemed to have contravened or, as the case may be, failed to comply with the order.

(3) That if any person contravenes or fails to comply with the order or any provision thereof he shall, on summary conviction, be liable to imprisonment for a term not exceeding six months, or to a fine not exceeding £200, or to both such imprisonment and fine.

And (4) that any aircraft which flies or attempts to fly over a prohibited area or enters Great Britain and Northern Ireland in contravention of the order is liable to be fired on, in accordance with the provisions of Schedule VII to the order.

In view of the express reference to the convention in the heading and preamble of the Air Navigation Act, 1920, and to the fact that Part I of the Act which contains the powers with regard to the making of Orders in Council is headed "power to apply convention", and to the specific reference in terms to the convention in sections 1 and 2, it would seem that an Order in Council made under the powers contained in sections 1, 2 and 3 of the Air Navigation Act, 1920, must not be in opposition to the definite provisions of the convention. If this is so, it would seem to follow that an Order in Council declaring an area to be a prohibited area must conform to the limits imposed by article 3 of the convention. Apart from any actual limitation which may thus be imposed upon the power of declaring a prohibited area by Order in Council under the Air Navigation Act, 1920, international comity would appear to require that the provisions of article 3 should be adhered to. It is assumed, therefore, that any Order in Council declaring a prohibited area must be limited by the provisions of article 3; the Law Officers will, however, no doubt kindly consider this aspect of the matter.

Assuming that this is the case, then the first question which appears to arise in the present case is whether an order declaring an area, such as that now contemplated, to be a prohibited area could be considered to be made "for military reasons or in the interest of public safety" as provided in article 3 of the convention. The Law Officers will observe from the minute of the 8th April, No. 6 in the copy departmental minutes and correspondence herewith (document 1—p. 4) that doubt has been felt by the Air Ministry whether the present purpose could be regarded as coming within the terms of article 3. The expression "for military reasons" must, it is submitted, clearly be taken to mean reasons of a military or defensive nature and it might be contended that the words which follow "in the interest of public safety" were intended to have a corresponding meaning, namely, the defensive security of the State. If reference is made to the French text of the convention, it will be observed that the expression used is "dans l'intérêt de la sécurité publique." The Law Officers will observe, however, from the provisions of paragraph 7 of Schedule VII in the Consolidated Order that the view appears to have been taken that "public safety" includes the safety or security of the "public," that is to say, persons who may be present at, or resort to, the place which is made a prohibited area and is not limited to public safety in the narrower sense of the military security of the State, but is analogous rather to the provision contained in section 3 (j) of the Air Navigation Act, 1920, empowering the making of "general safety regulations."

Even, however, if a narrower sense must be given to the expression "public safety," it does, it is submitted, seem that it might be argued with some force that to prohibit the access of aircraft, which it must be remembered includes not only British aircraft but foreign aircraft from all over Europe, to the Royal residences, where the King may presumably be present at any time and in some cases will be present the greater part of the time, may properly be regarded as a military or defensive purpose, or at any rate in the interest of the public safety within the meaning of those words in article 3.

The question is perhaps one of first impression, with regard to which it is not of much assistance to elaborate arguments, but this appears to be the important point in the present case for the decision of the Law Officers.

Assuming that the Law Officers should be of opinion that the declaration of an area, such as is now proposed, to be a prohibited area is within the powers conferred by the Air Navigation Act, 1920, it would seem to follow that if the area is to be declared to be a prohibited area from which aircraft are excluded from time to time only and not at all times, it will be necessary that the periods at which aircraft are excluded should be definitely fixed, and fixed in such a manner



that foreign aircraft arriving from places outside the British islands may be able to know beforehand whether the area is, or is not, closed at any particular time. This might make it inexpedient to use any indefinite expressions, such as "when the Court is in residence," and might make it necessary to fix specific dates for the notification of which machinery would presumably have to be devised and provided for in the Order.

This aspect of the matter has not yet been investigated, but presumably it could be carried out on some such lines as those adopted in paragraph 7 of Schedule VII of the Consolidated Order. In case, however, any difficulty should arise with regard to this or for any other reason it should be desired to declare the area to be a prohibited area permanently and at all times and not only when the Court is in residence at Windsor, it is desired that the Law Officers should extend their opinion, if they will kindly do so, to that state of circumstances also, viz., the making of an Order in Council declaring the area to be a prohibited area at all times (as in the case of the other prohibited areas named in paragraph 1 of Schedule VII of the Consolidated Order).

This is the second question upon which the advice of the Law Officers is desired.

It is perhaps desirable that it should be brought to the notice of the Law Officers that article 3 of the convention is in process of being amended. The proposed amendment has been approved by the International Commission for Air Navigation and is included in a protocol of the 15th June, 1929 (document 4). This protocol has not, however, yet been ratified by all the States concerned, and it is not anticipated that the ratification will be completed very immediately.

The proposed amendment does not involve any alteration in the existing first paragraph of article 3 (which is the material paragraph in the present case), but it provides for the inclusion in article 3 of a further paragraph to the following effect:—

"Each contracting State reserves also the right in exceptional circumstances in time of peace and with immediate effect temporarily to restrict or prohibit flight over its territory or over part of its territory, on condition that such restriction or prohibition shall be applicable without distinction of nationality to the aircraft of all the other States. Such decision shall be published, notified to all the contracting States and communicated to the International Commission for Air Navigation." (A print of the protocol is herewith, in which the amendment is shown on p. 3.)

Inasmuch as this amendment is not yet in force and if and when brought into operation it would apparently be applicable only to temporary restriction or prohibition of flight in exceptional circumstances, it would not seem that it can affect the question now submitted to the Law Officers in any way. It is, however, thought that the Law Officers should be made aware of the existence of and the present position with regard to this amendment of article 3 of the convention.

In the event of the Law Officers being of opinion that there is no power under the Air Navigation Act to declare by Order in Council the precincts of Windsor Castle a prohibited area from which all aircraft are excluded, it is desired by the Secretary of State that the Law Officers should, if they will kindly do so, also advise on the further question of what remedy (if any) there is to prevent airmen from flying over the land in question. In particular, the land in question being the property of the Crown, whether the Air Navigation Act, 1920, and the International Convention for the Regulation of Aerial Navigation, or either of them, affect such Crown land or authorise airmen to fly over it, and if not, what summary remedy exists to prevent airmen from flying over such Crown land without permission from the Crown. If there is no summary remedy available, whether a notice such as that issued by the Air Council on the 2nd April, 1931, is the best effective way of preventing airmen from flying over the land in question, or, alternatively, whether it would be within the power of the Secretary of State or the Air Council to issue some more effective warning or notice other than the declaration of a prohibited area under an Order in Council.

The points above referred to constitute the third question upon which the advice of the Law Officers is desired.

In reference to the third question, it may be stated that, as the Law Officers will observe from the copy correspondence and departmental minutes herewith (document 1), immediately on the receipt of Sir Frederick Ponsonby's letter of

the 30th March, 1931, a notice to airmen was issued on the 2nd April in the name of the Air Council, requesting pilots to refrain from flying, during the residence of the Crown at Windsor Castle, above an area named in the notice (see copy correspondence and departmental minutes, document 1, p. 13).

As the Law Officers will observe, this notice is issued as one of a series. It is the practice of the Air Ministry from time to time to issue notices to airmen dealing with matters which it is material for airmen to know. Such notices are not issued in pursuance of any specific authority or provision of the Air Navigation Act, 1920, or the regulations made by Order in Council thereunder, and do not therefore appear to have of themselves the effect of imposing any binding obligation upon airmen to obey or have regard to the matters with which they deal, except in so far as they may (as the Treasury Solicitor understands they sometimes do) refer to regulations or directions made or given under the provisions of the Air Navigation Act and the regulations made thereunder, which are binding.

By section 6 of the Air Navigation Act, 1920, it is provided that the purposes of the Air Council established under the Air Force (Constitution) Act, 1917, shall extend so as to include all matters connected with Air Navigation, and the Treasury Solicitor understands that notices to airmen are regarded as issued under the general authority of the Air Council so to supervise air navigation.

The area which it is desired should be made a prohibited area for aircraft, consisting of Windsor Castle and the Home Park Private, is the property of the Crown under the management and control of the Commissioners of Crown Lands. The first point which arises for consideration in connexion with the third question appears to be how far the flight of aircraft thereover would be a trespass which could be restrained by virtue of the Crown's ownership in the land in the same way as trespass to land can be restrained by the Crown or any other landowner in ordinary circumstances.

As the Law Officers may be aware, in the early part of 1920, in connexion with the preparation of the Bill which subsequently became the Air Navigation Act, 1920, the Law Officers of the day were asked to advise upon the question of trespass and nuisance arising from the flight of aircraft over land in the ordinary law and as between subject and subject.

The Law Officers advised that the principle that ownership of the soil carried with it ownership of the space above it to an undefined distance upward was so well established that it would, in their opinion, be applied to cases of aircraft, with the result that the flight of aircraft over land in private ownership would be held to constitute a trespass irrespective of the height at which the flight took place. That no means existed of restraining such a trespass except an injunction, and that the granting of an injunction was discretionary. To obtain an injunction the owner or tenant of the land would have to satisfy the court that the defendant purposed, unless restrained, to fly over the plaintiff's land, and that an injunction should properly be granted. The height at which the threatened flight was likely to be made, therefore, became material. The court might refuse to restrain by injunction flight at such a height as to constitute a purely technical invasion of the plaintiff's rights. That an action would lie for nuisance in respect of the flight of aircraft, if either by reason of the danger or of the annoyance caused by their flight or by the crowds they collected or otherwise by their use any occupier of property has his convenience unreasonably curtailed.

The Law Officers added that they doubted whether it was intended to do more by articles 2 and 15 of the International Air Navigation Convention than to undertake that the State should impose no restriction on the innocent passage of the foreign aircraft in question above its territory. But the language of the article was open to the wider interpretation, and it would obviously be undesirable that aircraft belonging to contracting Powers passing over the country with the assent of the Crown should be liable even technically to actions for trespass at the suit of individuals, and, generally, that in their view it was desirable that the question of law involved should be dealt with by legislation (see opinion of the Law Officers of the 31st March, 1920—papers herewith) (document 5).

As a result of this opinion provision was made in the Air Navigation Act, 1920, to deal with the matter.

Section 9 (1) of the Air Navigation Act, 1920, provides "that no action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of



aircraft over any property at a height above the ground which, having regard to wind, weather, and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight, so long as the provisions of the Act and any order made thereunder and of the convention are duly complied with; but where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, or by any article falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft.

Attention should perhaps be directed to the provisions of section 10, which provide for the imposition of fine or imprisonment on summary conviction where an aircraft is flown in such a manner as to be the cause of unnecessary danger to any person or property on land or water.

By section 18 (1) of the Act it is provided that the Act shall not apply to aircraft belonging to or exclusively employed in the service of His Majesty: Provided that His Majesty may, by Order in Council, apply to any such aircraft, with or without modification, any of the provisions of the Act, or of any orders or regulations made thereunder.

As indicated in the minute of the 20th April of Parliamentary Counsel (copy correspondence and departmental minutes, document 1, p. 11), while the position of Crown aircraft, and, in particular, aircraft of the Royal Air Force, was discussed during the preparation and passage of the Bill, so far as the Treasury Solicitor is aware the question whether section 9 might in any way affect the rights of the Crown in respect of the flight of aircraft over Crown land was not considered. Nor so far as the Treasury Solicitor is aware has the question hitherto received consideration since the passing of the Act.

Some consideration has been given to the position of Royal Air Force aircraft in relation to section 9, and in this connexion it may be convenient to state that in 1922 the Law Officers of the day were asked to advise, and advised very fully, as to the position of the pilots of R.A.F. aircraft against whom (in the particular case) complaints had been made of low flying over private property adjoining the aerodrome of the Royal Aircraft establishment at Farnborough (opinions of the Law Officers of the 18th and the 10th May, 1922, in the case of Mrs. Jessep's claim).

It is not thought necessary to trouble the Law Officers by including the papers relating to Mrs. Jessep's claim herewith, in view of the questions with which these opinions deal, but the case is mentioned because among the papers placed before the Law Officers with the case was the minute by Sir John Mellor which is referred to in Mr. Stainton's minute of the 20th April, and other minutes and memoranda with reference to the consideration which was given to the position of Crown aircraft in relation to clauses (now sections 9 and 10) during the passage of the Air Navigation Bill in 1920.

Although, as the Law Officers may recollect, from papers which have been recently before them with regard to the form of an Order in Council applying section 9 of the Act to Crown aircraft, while the question of so applying section 9 has been under consideration, no Order in Council has yet been made so applying this section, except to the limited extent to which it is applied by article 26 of the Air Navigation (Consolidation) Order, 1923, which does not include "military aircraft" as defined in article 31 (1).

Turning to the provisions of section 9 (1) of the Air Navigation Act, the section does not purport to alter the law by providing that flight of aircraft shall no longer constitute a trespass (or nuisance), but it provides that no action shall lie in respect of trespass (or nuisance) by reason only of the flight at a height which is reasonable, provided the provisions of the Act, any Order in Council and the convention are complied with. In return for this limitation upon the enforcement of the common law right of the landowner, a special remedy is given against the owner of the aircraft in respect of damage or loss caused by the aircraft.

The question seems to be whether this limitation upon the common law right of action applies to the Crown in the case of Crown land being flown over.

The general rule with regard to statutes binding the Crown has been stated in the text books to be that the Crown is not bound unless named either expressly or by necessary implication.

The Law Officers may, perhaps, be referred to a statement of the rule in Bacon's Abridgement: "That where an Act of Parliament is made for the public

good, the advancement of religion and justice or to prevent injury and wrong, the King shall be bound by such Act, though not particularly named therein. But where a statute is general and thereby any prerogative, right, title or interest is divested or taken from the King, in such case the King shall not be bound unless the statute is made by express words to extend to him." (See Bacon's Abridgement, "Prerogative" E (5), 7th Ed., Vol. VI, p. 461. Reference may also be made to Comyns's Digest "Parliament" (R. 8), and Chitty on the Prerogatives of the Crown, pp. 382 and 383.)

It is submitted that the Air Navigation Act is clearly not a statute of the class of statutes for the advancement of religion and justice or the suppression of wrong referred to in Bacon's Abridgement, by which the Crown may be bound though not named, but that the statute is a statute of a general character, which can only bind the Crown if named expressly or referred to by necessary implication to be derived from the provisions of the statute itself.

The Crown is not named expressly in section 9 of the Act or elsewhere in the Act otherwise than in section 18. Section 18 (1) provides that the Act shall not apply to aircraft belonging to or exclusively employed in the service of His Majesty. Can it be said that it is to be implied from this express saving as respects Crown aircraft that the Crown is intended to be bound by the Act except in so far as the saving extends?

It is submitted that the consideration of the Law Officers that no such implication arises from the provisions of section 18. The real purpose of the section appears to be that which is to be found in the proviso, viz., that His Majesty may by Order in Council apply, with or without modification, to Crown aircraft any of the provisions of the Act or of any orders or regulations made thereunder. On this basis the provision contained in the first paragraph of sub-section (1) may, it is suggested, be regarded rather as a declaratory statement than as a substantive provision making a specific exception of Crown aircraft from provisions of the Act within which they would otherwise come.

Moreover, the provisions of section 9 (1) appear to be in the nature of a limitation upon the bringing of actions, and the Crown would not appear to be bound by such statutes as, e.g., the Statute of Frauds (see Bacon's Abridgement, p. 464; Chitty on the Prerogatives of the Crown, p. 383).

The attention of the Law Officers should also perhaps be drawn to the use in section 9 (1) of the expression "*no action shall lie*," inasmuch as this expression does not appear to be appropriate to proceedings by or on behalf of the Crown in respect of trespass to Crown lands, which would presumably have to be by information by the Attorney-General.

The point is raised in Parliamentary Counsel's minute of the 20th April in regard to the difficulty which might arise if aircraft are to be excluded from the large areas of Crown land in the country, and that the position that the Crown is not bound by section 9 (1) of the Act might be inconsistent with article 2 of the convention. Section 9 does not, however, legalise trespass by aircraft; it only prevents proceedings from being taken in respect of flight of aircraft at a reasonable height and subject to the observance of the provisions of the Act, any Order in Council and the convention. In the case of the Crown, however, if and so far as it may be necessary in order to implement and observe the convention, and in particular the freedom of innocent passage accorded to aircraft of other contracting States by article 2, it would be open to the Crown to submit so far as necessary to the technical trespass without objection. There would seem to be no necessity to legislate to enable the Crown to do this, nor does there seem, it is submitted, to be any necessity on this ground that the Crown should strip itself by legislation of the right to restrain flights over Crown land. The reason for legislation such as that contained in section 9 (1) of the Act which exists in the case of subjects, viz., to prevent action by subjects which would be inconsistent with what the Crown had undertaken to do by the convention, does not exist in the case of the Crown itself.

The fact that the Crown raises no objection in respect to technical trespass to Crown land by flight of aircraft in the case, e.g., of foreshore, and the large areas of land owned by the Crown in various parts of the country, would not, it is submitted, prevent the Crown from forbidding flight over certain special areas of Crown property which the Crown wished to reserve. The exercise of the right to forbid flight over such areas to a reasonable extent would, it is suggested, not be inconsistent with the convention, as it would leave the general right of innocent



passage quite unaffected in substance and in practical effect, though this is perhaps rather a matter of policy and international comity than law.

It is further submitted that unless the Crown is bound by section 9 of the Act, and that section affords legal justification to any airman who trespasses upon Crown land by flying over it, no airman so trespassing could justify the trespass before the courts of this country administering the municipal law of this country by reference to the provisions of the International Convention. The provisions of the convention may be relevant (with other factors) to the consideration of the question whether or not there is any implication that the Crown is bound by section 9 of the Act, but, if the Crown is not so bound, the provisions of the convention cease, it is submitted, to be any further relevant to the question whether or not the flight has amounted to a trespass under the law of this country.

Assuming, as is submitted is the case, that the Crown is not bound by section 9 (1) of the Act, the next point which appears to require consideration in connexion with the third question appears to be with regard to the nature of the remedy which the Crown would have in respect of trespass by aircraft over the land in question.

Windsor Castle and the Home Park is vested in the Crown and is under the management and control of the Commissioners of Crown Lands. It has not been thought necessary at the present stage, having regard to the urgency of the matter, to consult the Commissioners of Crown Lands with regard to the matter. The Treasury Solicitor believes, however, that in the event of trespass to Crown Lands in the charge of the Commissioners of Crown Lands, proceedings against the trespasser would usually be by information by the Attorney-General, as has already been indicated.

No damages would presumably be recoverable in a case such as that under consideration, inasmuch as no damage in the legal sense would have been suffered; the only remedy which the court would be able to afford would therefore appear to be an injunction restraining the offending pilot or any persons under whose directions he was acting from any further acts of trespass.

It would hardly seem that proceedings of this nature would afford a remedy such as could be regarded as a "summary" remedy, since the ordinary procedure of the issue and service of a subpoena would have to be followed, and some time might elapse before the matter could be brought before the court.

The attention of the Law Officers should perhaps be drawn to the provisions of section 14 (2) of the Air Navigation Act, which provides that His Majesty may by Order in Council make provision as to the courts in which proceedings may be taken for enforcing any claim under the Act or any other claim in respect of aircraft, and in particular may provide for conferring jurisdiction in any such proceedings on any court exercising Admiralty jurisdiction. This power has been exercised by Order in Council of the 10th August, 1921, but this order appears to relate only to claims in respect of wreck and salvage under section 11 of the Air Navigation Act, and it does not appear to affect procedure with regard to claims in respect of trespass by aircraft. A copy of this Order in Council will be found with the copy of the Air Navigation (Consolidation) Order herewith.

Proceedings under the Summary Jurisdiction Acts (see Summary Jurisdiction Act, 1879, section 51) can be taken under section 10 (1) of the Air Navigation Act, 1920, in respect of dangerous flying, and under article 27 of the Air Navigation (Consolidation) Order, 1923, in respect of contravention of or non-compliance with any of the provisions of the order, and under section 14 (1) of the Act any offence under the Act or an Order in Council or regulations made thereunder, and any offence whatever committed on a British aircraft, shall for the purpose of conferring jurisdiction be deemed to have been committed in any place where the offender may for the time being be, but the Treasury Solicitor is not aware of any statutory provision which would enable summary proceedings to be taken in respect of trespass to land.

With regard to the query raised alternatively in the final portion of the third question with regard to the issue of some more effective warning or notice than that which has already been issued (but other than the declaration of a prohibited area), there does not appear to be any provision of the Air Navigation (Consolidation) Order, 1923, which provides for the issue of any such warning or notice, and the breach of which could consequently be regarded as a contravention or non-observance of the order. Nor would the issue of such a warning or notice seem to come within the objects indicated in (a) to (m) of

section 3 of the Air Navigation Act, 1920, as objects or purposes in respect of which regulations may be made by Order in Council. The Law Officers will, however, no doubt kindly take into consideration the provisions of sections 1, 2 and 3 of the Air Navigation Act, and of section 6 of the Air Navigation Act (which extends the purposes of the Air Council to include all matters connected with air navigation), so far as they may consider relevant in connexion with this question.

The Law Officers are requested to advise the Secretary of State—

1. Whether or not there is power under the provisions of the Air Navigation Act, 1920, to declare by Order in Council or otherwise Windsor Castle and the Home Park Private or other the required area in the vicinity of Windsor Castle to be a prohibited area during their Majesties' residence at Windsor, as desired in Sir Frederick Ponsonby's letter of the 30th March, 1931, and to prohibit under penalties prescribed or to be prescribed the flight of aircraft thereover.
2. If the answer to question 1 should be in the affirmative, whether such area can equally (if so desired) be declared to be a prohibited area permanently and at all times.
3. If the answer to question 1 is in the negative, what remedy (if any) is there to prevent airmen from flying over the land in question?
The land in question being the property of the Crown, does the Act of 1920, and the convention of 1922, or either of them, affect it or authorise airmen to fly over it?
If not, what summary remedy is there to prevent airmen from flying over such land without permission from the Crown?
If there is no summary remedy, is a notice such as that issued by the Air Council on the 2nd April, 1931, the best effective way of warding off airmen? or, alternatively, is it within the power of the Secretary of State or the Air Council to issue some more effective warning or notice other than the declaration of a prohibited area under an Order in Council? and
4. Generally upon the case.

Opinion of the Law Officers of the Crown.

1. No. In our opinion, any Order in Council issued under the Air Navigation Act, 1920, Part I, must be such as to give effect to the convention. Article 3 of the convention provides for the creation of prohibited areas "for military reasons or in the interest of public safety." In our view, the suggested prohibition cannot properly be said to be either "for military reasons" or "in the interest of public safety."

We have considered the possibility of using the power of the Secretary of State to issue directions under paragraph 7 of Schedule VII, and also that given by paragraph 30 of the Air Navigation (Consolidation) Order, but are of opinion that these powers cannot be used to deal with the question under consideration.

The proposed amendment to article 3 of the convention, if and when it comes into operation, will not alter the position, as this case does not fall within the words of the new provisions: "in exceptional circumstances."

2. In view of our answer to question 1, this does not arise.

3. We feel considerable doubt as to whether or not the Act of 1920 is binding on the Crown, even though not expressly mentioned. The argument that the Crown must be bound by necessary implication by the statute giving effect to a convention of such a nature as this is of such force, particularly in view of the Crown's rights over the foreshore, that we feel it would be unsafe to base any line of conduct on the assumption that the Crown is not bound.

If the declaration of Windsor Castle as a prohibited area were to be justified upon such grounds, it would necessarily involve the enunciation of the proposition that no Crown land, whether in its nature public or private, had been subjected to the convention. Such a proposition might be regarded by foreign Powers as a breach of faith. Therefore we are of opinion that the present problem is one which ought to be dealt with by the convention itself, and that steps should be



1931

38

GENERAL.

taken to secure amendment of the convention and the insertion in article 3 of a power to prohibit aircraft from flying over the residence of the Sovereign or other head of a State. This would, of course, have to be followed by an amendment to the Act of 1920.

Until that can be done, we are of opinion that a notice such as that issued by the Air Council on the 2nd April, 1931, is the most effective way of warding off airmen, and we do not think it is within the power of the Secretary of State or the Air Council to issue any other more effective warning or notice.

4. We have nothing to add.

WM. A. JOWITT.
STAFFORD CRIPPS.

*Law Officers' Department,
May 20, 1931.*



1932

THIS DOCUMENT IS THE PROPERTY OF HIS BRITANNIC MAJESTY'S GOVERNMENT

Printed for the use of the Foreign Office

CONFIDENTIAL

(14251)

REPORTS BY THE
LAW OFFICERS OF THE CROWN, &c.

1932



1932

(ii)

LIST OF REPORTS

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 1^A, &c.

BELGIUM.

No.		Date.	SUBJECT.	Page.
1	Law Officers ..	July 15, 1932	Belgian claims for expenditure in part of former German East Africa transferred from Belgian to British administration ..	1

FINLAND.

1 ^A	Law Officers and Mr. Bowstead [Board of Trade]	April 20, 1932	Claim of Finnish Government against His Majesty's Government in respect of Finnish ships requisitioned during the war ..	13
----------------	---	----------------	--	----

FRANCE.

2	Law Officers ..	July 29, 1932	Sovereignty over uninhabited islands. Spratley Island and Amboyna Cay ..	16
---	-----------------	---------------	--	----

GENERAL.

2 ^A	Law Officers .. [Colonial Office]	Mar. 8, 1932	Grants to mandated territories from Colonial Development Fund ..	24
2 ^B	Law Officers and Counsel [Air Ministry]	June 9, 1932	Power to make Orders in Council to give effect to Air Navigation Convention ..	25
2 ^C	Law Officers .. [Dominions Office]	July 29, 1932	Assertion of British title to part of Antarctic Continent ..	37
2 ^D	Law Officers and Counsel [Treasury Solicitor]	July 29, 1932	Jurisdiction of British courts to try foreigners committing acts of violence on high seas. Whether actual robbery is essential element of piracy ..	43

ITALY.

2 ^E	Law Officers .. [Colonial Office]	Oct. 19, 1932	Malta: teaching of Italian and other languages ..	48
----------------	--------------------------------------	---------------	---	----

PALESTINE.

2 ^F	Law Officers .. [Colonial Office]	Feb. 11, 1932	Imperial Preference for Palestine: whether infringement of most-favoured-nation clauses ..	52
2 ^G	Law Officers .. [Colonial Office]	Mar. 16, 1932	Imperial Preference for Palestine: as to bringing case before Permanent Court of International Justice. Measure of damages ..	55

(iii)

PERSIA.

No.		Date.	SUBJECT.	Page.
3	Law Officers ..	Dec. 7, 1932	Dispute between His Majesty's Government and Persian Government respecting Anglo-Persian Oil Company's concession: jurisdiction of Permanent Court of International Justice ..	58

SUDAN.

4	Law Officers ..	July 4, 1932	Imperial Preference for Sudan: effect of most-favoured-nation obligations ..	59
---	-----------------	--------------	--	----

[8717]

a



(iv)

ALPHABETICAL INDEX

(NAMES AND SUBJECTS)

1932

The figures refer to the numbers of the pages.

Cases cited are indicated by italics.

ACT—COL.

A.

- Act. *See* Air Navigation Act.
See British Settlements Act.
 Air Navigation Act: issue of Orders in Council under, to give effect to provisions of Air Navigation Convention, 25-37.
 Air Navigation Convention: issue of Orders in Council to give effect to provisions of, 25-37.
 Amboyna Cay: 16-24.
 Anglo-Persian Oil Company: concession; unilateral cancellation by Persian Government, 58, 59.
 Annexation: formal act of, unnecessary, for assertion of British title to Antarctic territory, 42.
 Antarctic: assertion of British title to territory in, 37-42.
 " ditto; formal act of annexation unnecessary, 42.
 " ditto; issue of Order in Council to provide for administration of, 40-42.
 Arbitration: necessity of exhausting municipal remedies before claiming, 13-16.
 " as to referring extension of Imperial preference to Palestine to, 55, 58.
 Arctic: "sector" principle, 39, 40.

B.

- Belgium: claim against Great Britain for expenses of military occupation of former German East Africa, 1-12.
 British Settlements Act: provisions of, inappropriate in case of Antarctic territory, 41, 42.

C.

- Claims: Belgian, against Great Britain, for expenses during Belgian occupation of part of former German East Africa, subsequently transferred to Great Britain, 1-12.
 " Finnish shipowners, against His Majesty's Government, 13-16.
 " ditto; whether municipal remedies in United Kingdom exhausted, 14-16.
 Clipperton Island: French sovereignty over, 22, 24.
 Colonial Development Fund: grants from, to mandated territories, 24, 25.
 Colonies: not foreign countries within meaning of British commercial treaty articles, 60.

COM—IMP.

- Compensation: for permanent improvements effected by Power in military occupation of territory subsequently transferred to another Power, 12.
 " measure of damages, for breach of most-favoured-nation clause in commercial treaty, 57, 58, 63-65.
 Concession: of Anglo-Persian Oil Company; unilateral cancellation by Persian Government, 58, 59.
 " ditto: jurisdiction of Permanent Court of International Justice, 58, 59.
 Conferences: international, position of Sudan, 61, 71, 72.
 Convention. *See* Treaties.
 Courts: necessity of exhausting recourse to, in claim against His Majesty's Government, 13-16.
 " jurisdiction over foreigners for crimes on high seas, 45, 46, 48.
 " ditto; case of piracy *jure gentium*, 43-48.

D.

- Damages: measure of, for breach of international engagement, 57, 58, 63-65.
 Dominions: not foreign countries within meaning of British commercial treaty articles, 60.

E.

- Exchange: rate, for payment of debts, 9, 12.
 " ditto; case of compensation to Belgium for permanent improvements in former German East Africa, 9, 12.

H.

- High seas: offences committed on; jurisdiction of British courts, 45-48.

I.

- Imperial Preference: extension to Palestine, 52-54.
 " " ditto; whether breach of most-favoured-nation clauses of commercial treaties, 52-54.

IMP—MUN

- Imperial Preference: right of United Kingdom to accord to Dominions, colonies, &c., 56-58, 60.
 " for Sudan, 59-65.
 Interest: on Belgian claim against His Majesty's Government, 10, 12.
 Islands: sovereignty over uninhabited, 16-24.
 " desirability of administrative attachment to British colony or protectorate, 24.

J.

- Jurisdiction. *See also* Permanent Court of International Justice.
 " of British courts over crimes committed by foreigners on high seas, 43-48.
 " ditto; acts of piracy *jure gentium*, 43-48.

L.

- Language: teaching of Italian in Malta schools, 48-52.
 Letters Patent: whether appropriate, to place Antarctic territory under Commonwealth of Australia, 40-42.
 Loans: to mandated territories from Colonial Development Fund, 24, 25.

M.

- Malta: teaching of Italian and other languages in schools, 48-52.
 " ditto; powers under Malta constitution to control, 48-52.
 Mandated territories: grants from Colonial Development Fund, 24, 25.
 " ditto; attaching of condition as to purchase of materials in United Kingdom, 24, 25.
 Military occupation. *See* Occupation.
 Most-favoured-nation clause: Palestine as "foreign country" within meaning of, 53, 54.
 " form of wording of, to allow extension of Imperial Preference to Palestine, 54.
 " consequences of non-compliance with, 54.
 " as to application of, to cases of preferential treatment between parts of British Empire, 56-58, 60.
 " breach of; measure of damages, 57, 58, 63-65.
 " in British commercial treaties; position of Sudan, 60-62, 64.
 " ditto; grant of Imperial Preference to Sudan a breach of, 64.

Municipal remedies. *See* Claims.

6921 [8717]

OCC—SHI

O.

- Occupation: Belgian military, of German East Africa; Belgian claim for expenses against Great Britain, to whom territory was subsequently entrusted, 1-12.
 " ditto, ditto; admissibility in respect of permanent improvements, 12.
 Optional clause. *See* Permanent Court of International Justice.
 Order in Council: power under Air Navigation Act to issue, to give effect to provisions of Air Navigation Convention, 25-37.
 " to place certain Antarctic territory under authority of Commonwealth of Australia, 41-42.

P.

- Palestine: extension of Imperial Preference to, 52-54.
 Permanent Court of International Justice: as to referring question of extension of Imperial Preference to Palestine to, 55, 58.
 " optional clause; scope of Persian acceptance, 58, 59.
 " ditto, ditto; jurisdiction of court in Anglo-Persian dispute as to Persian cancellation of Anglo-Persian Oil Company's concession, 58, 59.
 Persia: scope of acceptance of optional clause of statute of Permanent Court of International Justice, 58, 59.
 " cancellation of Anglo-Persian Oil Company's concession, 58, 59.
 Piracy: definition, 47.
 " whether actual robbery an essential element, 47, 48.
 " offences outside 3-mile limit, 45, 46.
 Preferential treatment. *See also* Imperial Preference.
 " right of United Kingdom Government to accord, to Dominions, colonies, &c., 56-58, 60.
 Protectorates: not foreign countries within meaning of British commercial treaty articles, 60.

R.

- R. v. Dawson*, 47.
 Rate of Exchange. *See* Exchange.
Reg. v. Keyn, 45, 46.
 Reparation. *See* Damages.
 Requisitions: of Finnish ships, by His Majesty's Government, 13-16.
Rea v. Chung Tam Kwong, 43, 44.

S.

- Schools: Malta, teaching of Italian and other languages in, 48-52.
 Ships. *See* Vessels.

b



(vi)

SOV—TER

Sovereignty: acquisition of, over uninhabited islands, 16-24.
" over Spratley Island and Amboyna Cay, 16-24.
" assertion of, over Antarctic territory, 37-42.
Spratley Island, 16-24.
Storm Island. *See* Spratley Island.
Sudan: status, 61, 62, 64.
" grant of Imperial Preference to, 59-65.
" ditto; breach of treaty obligations, 64.
" participation in international conventions and conferences, 61, 62.

T.

Territory: acquisition of title to, 16-24, 38, 39, 42.
" Antarctic, assertion of British title, 37-42.

TER—VES

Territory: claimed in Arctic and Antarctic; "sector" principle, 39, 40.
Treaties: Air Navigation Convention; power to issue Orders in Council to give effect to, 25-37.
" commercial, measure of damages for breach of most-favoured-nation clause, 57, 58, 63-65.
" international, position of Sudan, 61, 62.
" commercial; Dominions, colonies, protectorates not foreign countries within meaning of, 60.
" *see also* Most-favoured-nation clause.

V.

Vessels: Finnish ships requisitioned by His Majesty's Government, 13-16.

Printed for the use of the Foreign Office.

CONFIDENTIAL

REPORTS BY THE
LAW OFFICERS OF THE CROWN, &c.: 1932

BELGIUM.

[W 8194/265/4/1932]

No. 1.

[July 15, 1932.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, February 25, 1932.

I HAVE the honour, by direction of Secretary Sir John Simon, to request the favour of your advice on a question which has formed the subject of prolonged correspondence between His Majesty's Government in the United Kingdom and the Belgian Government, as to the amount of compensation to be paid by the former to the latter under an agreement resulting from correspondence which took place between them in the year 1919. The facts of the case are set out in the following paragraphs, and the documents therein referred to, with one exception, will be found in Colonial Office print "African 1127," of which copies are sent herewith (Paper A).

2. During the campaign in German East Africa a force of Belgian troops from the Congo acted in co-operation with the British forces, and, by the end of the war, had occupied a stretch of country extending roughly from Tabora to the eastern shores of Lake Tanganyika. After hostilities were concluded, however, the Supreme Council of Allied Powers decided that the mandate for the whole of the former German territory in East Africa should be entrusted to Great Britain. The Belgian Government protested against this decision, but no formal answer was made to their protest. Subsequently, however, the matter was discussed between the British and Belgian Governments, and an arrangement was reached, and ratified by the Supreme Council, under which Belgium gave up all the portion of German East Africa which she was occupying, except for the greater portion of Ruanda and Urundi, for which territories in due course she received a mandate.

3. The discussions leading up to this arrangement were conducted between Lord Milner (then Secretary of State for the Colonies) and M. Orts. In the course of these discussions the Belgians raised the question of a money indemnity to compensate them for giving up the territory which their troops had occupied.

4. In a letter of the 19th May, 1919, M. Orts proposed that, in view of the fact that Great Britain was to acquire the greater part of the former German territory—

"La renonciation de la Belgique doit être compensée. . . . Une Afr. 1127, indemnité pécuniaire à déterminer de commun accord par des experts choisis p 5. en nombre égal par la Belgique et la Grande-Bretagne sera attribuée à la Belgique. . . ."

6921 [8717]

B

Belgian claims in respect of expenditure incurred in part of former German East Africa transferred from Belgian to British administration. Questions of rate of exchange and of interest.



In a note which accompanied this letter it was stated, in support of this proposal, that—

Afr. 1127,
p. 6.

"Il conviendrait de faire rentrer aussi dans l'indemnité à payer à la Belgique le remboursement de la quote-part des frais d'administration des territoires définitivement acquis à la Grande-Bretagne du fait de l'action militaire belge, pour autant que ces dépenses n'aient pas été imputées sur les avances des alliés dont quitus a été donné à la Belgique en vertu de l'accord financier conclu il y a quelques jours" (*i.e.*, the decision of the Supreme War Council as to Belgian treatment in connexion with inter-Allied debts).

5. In his reply of the 26th May Lord Milner said:—

Afr. 1127,
p. 6.

"I am afraid I do not understand how any question of pecuniary compensation can arise in this matter. . . . I do not think that your withdrawal from portions of East Africa at present occupied by you, outside Ruanda and Urundi, would entitle you to compensation. . . . I contend that Belgium in receiving Ruanda and Urundi would be amply rewarded for her share in the East African campaign. It is true that in geographical extent these districts are only a small part of German East Africa, but their economic importance is out of all proportion to their size. They are healthy and fertile highlands, they contain something more than one-third of the population of the whole colony, and, according to my information, more than two-thirds of its chief economic asset—cattle. Therefore, they represent a very important share of the former German possession. It is true that they are only a part of the country actually occupied by Belgians and a still smaller part of the country at one time overrun by the Belgian forces, but, on the other hand, I may remind you that the Belgian conquest of this portion of the country, however valuable in itself (and I should be the last to belittle the importance of Belgian assistance), was only rendered possible by the fact that the transport and the greater part of the supplies were provided by Great Britain. It was, in fact, an Allied, and not a purely Belgian expedition, though I do not wish in the least to deprive Belgium of any military credit which is due to her. From a financial point of view, I am quite sure that the value of Ruanda and Urundi goes much further to indemnify Belgium for any expenses incurred by her in that expedition than the value of all the rest of East Africa ever can to indemnify Great Britain for the enormous cost of our East African campaign, not to mention what we spent in assistance to the Belgian forces co-operating with us."

6. To this letter M. Orts replied on the 30th May:—

Afr. 1127,
p. 8.

"Je regrette de n'avoir pu vous amener à reconnaître la légitimité de la demande d'indemnité pécuniaire faite par la Belgique. En présence du refus formel que vous avez opposé à cette demande, la délégation belge renonce à insister. Mais l'Administration belge a effectué au cours des trois dernières années à Kigoma et ailleurs des dépenses qui se sont traduites en améliorations permanentes. Le profit en restera à l'Administration britannique, c'est pourquoi il n'est que juste que ces dépenses soient remboursées à la Belgique."

"Cependant, je suis prêt à recommander à mon Gouvernement qu'aucun compte ne soit présenté à ce sujet ni aucun autre compte, non encore liquidé, pour des services d'ordre militaire rendus aux autorités britanniques dans l'Est-Africain si du côté anglais l'on renonce à exiger le paiement des comptes non liquidés pour des services d'ordre militaire rendus à la Belgique à l'occasion des campagnes de l'Est-Africain."

7. To this Lord Milner replied on the 31st May:—

"I note with satisfaction that you withdraw the demand for a pecuniary compensation to Belgium in respect of that part of the territory at present occupied by her which you will have to evacuate. It would have been quite impossible for me to consent to such a proposal."

"On the other hand, I have always recognised that Belgium might claim to be indemnified for the cost of any permanent improvements effected in the territory hitherto occupied by her, but now to be transferred to Great

Britain. You say, however, that you are willing to advise your Government not to make any claim on this score or for any military expenses incurred by you in East Africa on British account, which have not yet been settled, provided we make no claim for similar expenses still unsettled incurred by us on your account. Personally, I think it most desirable to get rid of all these claims and counter-claims, none of which can be of great amount, and, while I cannot commit myself on the point without consulting the British Treasury and War Office, I will do my best to bring about an arrangement on the lines you suggest."

8. This concluded the correspondence between Lord Milner and M. Orts, which constitutes the so-called "Milner-Orts Agreement," and invokes an undertaking by His Majesty's Government to "indemnify" Belgium "for the cost of any permanent improvements effected in the territory" in question. A few days later the British and Belgian Governments made a joint recommendation to the Supreme Council for the partition of German East Africa in the manner agreed between Lord Milner and M. Orts, and the Council approved it. In 1920 a Belgian delegation arrived in London to implement the arrangements come to with regard to the division of the territory. This resulted in due course in the signature, on the 15th March, 1921, of an Anglo-Belgian Traffic Convention giving the Belgians special facilities at Dar-es-Salaam and Kigoma for through Belgian traffic on the central railway, and, on the same day, the transfer of Kigoma and the adjacent territory to the control of the Tanganyika Government.

9. In the course of these negotiations it was discovered that the War Office claim against the Belgian Government in respect of East African military expenditure had already been settled, and it was therefore impossible to give effect to the suggestion of M. Orts, in his letter of the 30th May, 1919, that this claim should cancel out the Belgian claim for "permanent improvements." It was therefore agreed that this question of compensation for permanent improvements was still outstanding and should be settled as soon as possible.

10. On the 17th December, 1920, the Belgian Foreign Minister addressed a note to the British Ambassador at Brussels, stating that the Belgian Government were ready to hand over the territories which they were to transfer. The note added that it would be necessary, however, as a preliminary, for delegates of the two Governments to draw up an inventory showing the expenditure of the Belgian Government in the territories to be ceded, the benefit of which expenditure would remain to the British authorities; Lord Milner and M. Orts had undertaken to recommend to their respective Governments that they should produce vouchers for expenditure which they had a right to recover in connexion with the African campaign and the provisional occupation of East Africa.

11. On the 26th February, 1921, the Governor of Tanganyika was informed by telegram that it would be necessary for delegates of the two Governments to draw up an inventory jointly showing the expenditure incurred by Belgium on works of permanent improvement in the transferred territory, and was requested to arrange accordingly with the local Belgian authorities. Afr. 1127, p. 13.

12. On the 19th December, 1922, the Governor reported that claims had been received from the Belgian authorities in respect of the works of permanent improvement, and forwarded copies. The claims amounted to 323,617·95 fr. in respect of non-railway works, and 1,026,960·18 fr. in respect of improvements to the railway. The letters from the Belgian Commissaire Royal enclosing these claims were dated the 17th October, 1921, and the 30th November, 1921, respectively. Afr. 1127, p. 23.

13. The Governor explained in his despatch that for various reasons he was unable to accept either figure, and he drew attention to the fact that the Commissaire Royal had added 100 per cent. to the second claim to compensate for the depreciation of the Congo currency since the date when the expenditure was incurred. The despatch stated: "While it may not be possible to withhold some compensation on this account, I have considered it wise to reject the proposal in the first instance, and thereafter to leave the question for settlement by arrangement between the British and Belgian Governments."

14. In reply to this telegram, the Secretary of State pointed out (the 29th January, 1923) to the Governor that the arrangement made with the Belgian Government was that delegates of the two Governments should draw up an inventory jointly, and asked that this should be done with a view to the revision



Afr. 1127, p. 32. of claims already furnished and the submission of a more agreed figure. This was followed by a despatch to the Governor, dated the 28th February, 1923, in which the view was expressed that the intention underlying the agreement reached by the British and Belgian Governments was that the payment to be made to Belgium should represent the actual value at the time of transfer to British administration of the works and permanent improvements, as agreed by local British and Belgian delegates. From this aspect the amounts spent originally on the works, on which the Belgian claims had been based, were immaterial. The Secretary of State also considered that the valuation should be made in francs, and payment made to the Belgian Government in francs at the current rate of exchange.

Afr. 1127, p. 36. 15. On the 30th June, 1923, the Governor forwarded a memorandum setting out the history of the Belgian claim, the reasons for which he was unable to accept it as it stood, and details of the revision proposed. This memorandum formed the basis of a note which was addressed to the Belgian Ambassador on the 31st August, and in which it is to be noted it was definitely stated (following the line taken in the despatch to the Governor of the 28th February, 1923) that the basis of the compensation payable was to be the actual value of the improvements at the time of the transfer of the territory to British administration.

Afr. 1127, p. 46. 16. The Belgian claim (details of which will be found on pp. 38-41 of Afr. 1127), as summarised in the note, and the attitude of His Majesty's Government upon it, were as follows:—

Claim A.—*Works and Improvements other than Railway.*

	Fr.
A (1)	130,000
A (2)	143,500
A (3)	6,500
A (4)	43,617-95
	323,617-95

His Majesty's Government were unable to accept Claims A (2) and A (3) in their entirety, and considered that the total of Claim A should be reduced to 220,367-95 fr.

Claim B.—*Claims in respect of Railways.*

	Fr.
B (1). Works and improvements ...	673,035-88
B (2). Materials and implements handed over ...	353,924-30

Claim B (1) was disputed on certain points of detail, while Claim B (2) was rejected in its entirety, except for 60,000 fr., on the ground that the stores, &c., in question were largely the property of contractors or of the old German East African Railway Company, and would be dealt with in accordance with article 297 of the Treaty of Versailles. In addition, part of the material claimed for in B (2) was included in the Kigoma workshops, for which a claim was made in B (1). His Majesty's Government were therefore only able to agree to claims under B as follows:—

	Fr.
B (1)	394,931-85
B (2)	60,000-00
	454,931-85

Total accepted by His Majesty's Government:—

	Fr.
A	220,367-95
B	454,931-85
	675,299-80

17. As regards the question of exchange compensation, the Belgians, in submitting Claim A, proposed payment on the basis of 25-50 fr. to the pound, on the ground that the money claimed had been spent when the franc was "au pair avec la livre sterling." In submitting Claim B, they had added 100 per cent. to the claim for exchange compensation. His Majesty's Government now pointed out that the expenditure was incurred in francs, and they saw no reason why reimbursement should be made on any other basis than that of franc for franc. His Majesty's Government accordingly urged that the Belgian Government should accept a round sum of 680,000 fr. in full in final settlement of the claims.

18. In the meantime, the Governor had cabled to say that the Belgian authorities had amended their claim, and now demanded 851,800 fr. only, as against 1,350,578-13 fr. previously demanded. In forwarding, in a despatch dated the 28th August, 1923, particulars of the amendments, the Governor pointed out that the reduction considerably strengthened the case for offering only 680,000 fr. Though the telegram was received before the issue of the Foreign Office note of the 31st August, 1923, it was decided not to complicate matters by referring in the note to this new point.

19. Though reminders were addressed to the Belgian Government from time to time, no reply was received to the Foreign Office note until on the 3rd January, 1928, the Belgian Ambassador in London addressed a note (dated in error the 3rd January, 1927) to the Secretary of State for Foreign Affairs, enclosing a memorandum containing the reply of the Belgian Foreign Office to the British Government's proposals. This reply may be summarised as follows:—

I.—*Original Claim.*

Claim A—	Fr.
A (1). Accepted by both sides ...	130,000
A (2). Reduction proposed by Great Britain now accepted by Belgium ...	45,000
A (3). Belgian Government now agree to reduced figure of ...	5,150
A (4). Accepted by both sides (included 11,064-08 fr. for "approvisionnement- ments"). See African 1127, p. 28 at foot ...	43,617-95
	223,767-95

Payment was claimed in sterling at 25-50 fr. to the pound, except for the item for "approvisionnements," which was claimed at 50 fr. to the pound.

Claim B—	Fr.
B (1). Belgium adheres to the original claim ...	673,035-88
B (2). Belgium agrees to the British reduction to ...	60,000
	733,035-88

This was claimed as to B (1) at 25-50 fr. to the pound, and as to B (2) at 50 fr.

No mention was made of the modified claim received by the Governor of Tanganyika in 1923 for 851,000 fr. in respect of A and B.

Claim C.

The Belgians added a further claim in respect of three houses at Kigoma handed over in 1925: 67,059-50 fr. at 25-50 fr. to the pound.

NEW CLAIMS PUT FORWARD BY BELGIUM IN 1928.

II.—*Administrative Deficits ("Déficits de Gestion").*

The Belgians claimed that, in equity Great Britain should reimburse them for losses incurred in the administration of the occupied territory, on the ground that, had we administered the territory from the start, we should have had to

Afr. 1127, p. 45.

Afr. 1127, p. 48.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.

Afr. 1127, p. 55.



bear the same deficits, which "corresponded, in a way," to works of improvement. They said, "Les dépenses faites sont le résultat d'une espèce de gestion d'affaires."

The claim was:—

	Fr.
(A) Tanganyika Marine	865,887.72
Kigoma-Tabora Railway	2,309,424.80
Kigoma Hospital	278,752.32
	3,454,064.84
(B) Losses on the occupied territory up to the 31st December, 1920	4,923,605.48

At 25.50 fr. to the pound, this claim amounted to £328,536 0s. 10d.

III.—Compensation to Individuals for War Damage.

The Belgians also claimed the reimbursement of sums paid by the Commission de Liquidation to individuals in the transferred territory whose property was damaged in the war. The commission was said to have been instituted at the request of the British authorities.

20. The total Belgian demand was thus largely swollen by these "new claims" and now stood at:—

Old claim—	Fr.	£	s.	d.
A (at 25.50 fr., except for 11,064.08 fr. at 50 fr.)	223,767.95	8,562	12	1
B (1) (at 25.50 fr.)	673,035.88	26,393	11	3
B (2) (at 50 fr.)	60,000	1,200	0	0
C	67,059.50	2,629	15	8
II.—Administrative deficits	8,377,670.32	328,536	0	10
III.—Compensation for War Damage	796,178.55	39,761	19	10
Total claim	10,415,464.47	407,084	0	8

As against this, Belgium allowed £1,883 3s. in respect of works of permanent improvement by Great Britain at Kisaka, which was handed back to Belgium. The net claim was, therefore, for £405,202 17s. 8d.

Afr. 1127,
p. 60.

21. On the exchange question, the Belgian memorandum rejected the principle that payment should be made in francs at the rate current at the time of payment. The rates of conversion proposed (25.50 fr. and in two cases 50 fr.) by the Belgian Commissaire Royal were intended to take account of the depreciation of the franc between the time when the expenses claimed for were incurred, and the time of making the claim. The Belgian Government had now, however, decided to present the claim in sterling only, a method which "corresponded with law and equity." (This was, of course, before the depreciation of sterling in terms of gold.)

Afr. 1127,
p. 68.

22. In a note addressed to the Belgian Ambassador on the 2nd March, 1928, His Majesty's Government categorically rejected both the new claims, on the ground that in the Milner-Orts correspondence in 1919 it had been decided to exclude any question of compensation other than for "works of permanent improvement." As regards the "old claim," it was stated that His Majesty's Government would examine this once again. The "old claim" was referred to the Governor for further enquiry in a despatch dated the 16th March, 1928.

23. In a note dated the 2nd August, 1928, the Belgian Government adduced further arguments in support of their "new claims." They contended:—

- (i) That the Orts-Milner correspondence related only to charges existing at the time, and could not be held to exclude consideration of charges which did not exist at that time, *e.g.*, the payments made, in compensation for war damage. (Claim III.)

- (ii) That the effect of the Orts-Milner correspondence was that M. Orts had demanded monetary compensation for the value of the transferred territories; that this had been rejected, and that the two plenipotentiaries had then agreed that the two Governments should set off against each other their claims arising out of the campaign in East Africa; but as the claim of the War Office against Belgium had already been settled, the Belgian claim remained unimpaired. The promise to pay for "works of permanent improvement" was not connected with the question of compensation; it constituted one element only in the account.
- (iii) That the files of the Belgian Government showed that M. Orts had understood the term "works of permanent improvement" in a wider sense than the British Government now gave to it, and had regarded it as including "administrative deficits." In claiming reimbursement of these, the Belgian Government was acting in conformity with general principles of law. They regarded the case as similar to that of a person who administers the estate of another party, and who is entitled to be indemnified for all expenses incurred. It was difficult to imagine that Belgium should have to bear expenses incurred in the temporary occupation of territory subsequently transferred to British authority.

24. After further correspondence between the Colonial Office, the Foreign Office, and the Governor of the Tanganyika Territory, a further note was addressed to the Belgian Ambassador on the 13th March, 1929, setting out at length the reasons for which His Majesty's Government was unable to accept the contentions of the Belgian Government. The note reviewed the history of the negotiations between M. Orts and Lord Milner, and pointed out that, until the territory was handed over to Great Britain, the Belgian Government was in the position of a Power in military occupation of enemy territory. His Majesty's Government knew of no principle of international law under which, apart from agreement, a Power so situated could claim repayment of expenses incurred by it from the Power to whom the territory was eventually entrusted. The suggestion that the occupying Power was in the position of *bonorum gestor* was opposed to all principles laid down in regard to military occupation. Any obligation on the Power finally succeeding to the territory could arise, if at all, only from some agreement forming part of the final settlement between the two Governments. In that final settlement, the Belgians had expected to obtain (1) territorial concessions in Ruanda-Urundi; (2) a pecuniary indemnity; and (3) certain transit facilities for Belgian goods. (1) and (3) had been obtained, but (2) had been definitely rejected by Lord Milner, and M. Orts, in a letter dated the 30th May, 1919, had renounced the insistence of Belgium on this point. Lord Milner, on the 31st May, recognised the justice of a claim in respect of permanent improvements, but recognised no other ground of claim. The terms of M. Orts's letter of the 30th May, 1919, seemed to show that he had decided, in view of Lord Milner's attitude, to abandon his original standpoint, and to concentrate on the question of compensation for improvements. This assumption was borne out by the fact that no claim other than for such improvements was made in 1921, nor, in fact, until the Belgian note of the 3rd January, 1928. So far, therefore, from the Orts-Milner correspondence supporting the Belgian claim for reimbursement of administrative deficits, His Majesty's Government considered that it showed clearly that, in agreeing to the claim for permanent improvements, and the proposals mentioned under (1) and (3) above, they were completely liquidating all claims which Belgium might have. His Majesty's Government also refused to admit the Belgian contention that the Orts-Milner correspondence only dealt with claims then existing, and did not exclude claims or payments made subsequently, in particular, the payments made in respect of war damages. (Claim III.) In short, His Majesty's Government were unable to admit any claim for compensation other than for permanent improvements (*i.e.*, the "old claim"), since (1) no obligation in international law rested upon them, and they had not voluntarily accepted any obligation except in respect of the "old claim," and (2) the "old claim" was the only category not debarred by the terms of the Milner-Orts correspondence, which they regarded as definitely settling all outstanding questions.

Afr. 1127,
p. 84.



BELGIUM.

25. As regards the "old claim," His Majesty's Government dealt with the matters on which the Belgians had been unable to accept the modifications made by the Tanganyika Government in the original claim. Their observations, in the course of which they referred to the fact that they had consistently maintained that the assessment of the works must be based upon their actual value at the time of transfer, will be found in paragraph 13 of the note. His Majesty's Government offered to pay the following sum:—

Old claim—	Claim in Belgian Note of January 3, 1928.		Now offered by His Majesty's Government.	
	Fr.		Fr.	
A ...	...	223,767·95	...	220,267·95
B ...	...	733,035·88	...	460,000·00
C ...	...	67,059·50	...	67,059·50
		1,023,863·33		747,327·45

In accordance with their view that the proper criterion in assessing the claim was the actual value of the works at the time of transfer, His Majesty's Government offered to pay this sum of 747,327·45 fr. in sterling at the rate of exchange ruling at the time of transfer, viz., 55 fr. to the pound (£13,587 15s. 6d.).

26. The Belgian Government replied in a note dated the 25th March, 1930 (Paper B), saying that, after careful consideration of His Majesty's Government's views, they regretted that they were unable to accept them, and that, in view of the amount at stake and of their responsibility to public opinion, they must continue to press their views. In the circumstances, they suggested that the question should be referred to a Conciliation Commission, which could examine the whole question and suggest an amicable solution. The commission might be composed of one representative of each Government, with a third jointly selected. No reply has yet been returned to this note.

27. In these circumstances, the questions now outstanding between the two Governments are as follows:—

28.—(A) *The so-called "new claims," i.e., the claims made by the Belgian Government for the first time in their communication of the 3rd January, 1928, in respect of administrative deficits resulting from their administration of the occupied territory and the sums paid by the Commission de Liquidation to individuals in the transferred territory whose property was damaged in the war.*—The legal arguments employed on both sides in respect of this claim are set out in the correspondence which has passed (the Belgian notes of the 3rd January, 1928, and the 2nd August, 1928, and the replies dated the 2nd March, 1928, and the 13th March, 1929), and reference may also be made to a further argument suggested in the first paragraph of a minute by the legal adviser to the Foreign Office, dated the 4th July, 1931 (Paper C). The views of the Departments concerned as to these claims are that they should be definitely rejected and that we should not agree to submit them to any form of judicial settlement; in their view, any claim of this description was categorically rejected by Lord Milner, and its rejection was accepted by M. Orts, during the negotiations which took place in 1919, and no further suggestion of any such claim was made by the Belgian Government until it was put forward in their note of the 3rd January, 1928. If, therefore, the legal arguments which have been put forward against the claim are sound, it cannot be regarded as possessing any merits in equity, and His Majesty's Government have so far successfully refused to submit to arbitration any claims arising out of the operations of the war, while the terms of their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice, which were specifically intended to exclude war claims, would prevent the Belgian Government from bringing this claim before the Permanent Court under that clause. It should perhaps be mentioned, however, that there is some reason to believe that the Belgian Government has a more comprehensive record of the conversations in 1919 between Lord Milner and M. Orts than is in the possession of His Majesty's Government. (See the Belgian note of the 8th August, 1928, on p. 73 of African 1127.)

29.—(B) *The difference in amount between the "old claim" (i.e., the claim in respect of permanent improvements, for which His Majesty's Government*

BELGIUM.

admit liability in principle) and the amount which His Majesty's Government are at present prepared to pay.—The Governor of Tanganyika has now recommended that the Belgian figure in respect of Claim A of the "old claim" should be accepted. The position as regards the "old claim" is, therefore, as follows:—

Claim A—	Belgian Claim. Fr.	His Majesty's Government's Figure. Fr.
Permanent improvements, non-railway ...	223,767·95	223,767·95
Claim B—		
Permanent improvements, railway ...	733,035·88	460,000·00
Claim C—		
Houses at Kigoma ...	67,059·50	67,059·50
	1,023,863·33	750,827·45

30. In this connexion you will observe that throughout the correspondence with the Belgian Government His Majesty's Government have maintained the contention that their obligation under the Milner-Orts Agreement was only to pay the actual value of the works of improvement at the time of the transfer. As the result, however, of subsequent consideration of the matter (see Papers D and E), the Departments concerned are now disposed to think that this contention cannot be reconciled with the terms of the Milner-Orts Agreement, and that the Belgian Government are entitled to claim the actual expenditure incurred by them on the construction of the works in question. Should you agree with this view, the difference between the Belgian and British figures will probably be reduced in so far as the Belgian Government may be able to produce evidence of their actual expenditure, and it is not thought necessary to trouble you with the details of particular items, though, from the point of view of the possibility of another attempt to reach a settlement by agreement (to which reference is made later), it may be material to observe that the difference between the contentions of the two Governments on this point may not be so great as would appear from the figures.

31.—(C) *The question of the rate of exchange at which the compensation payable to the Belgian Government should be paid.*—The contention which it is desired to put forward if this can be done with reasonable prospects of success is that what the Belgians are entitled to is the amount of Congo francs which they actually expended on the works in question. On this view the debt is one payable in Congo francs, and no question of conversion really arises. The Belgian claim, on the other hand, is now put forward in sterling (see paragraph 21 above), conversion being effected for the most part at the rate of 25·50 fr., and in two cases at 50 fr. It will be observed, however, that, in their note of the 13th March, 1929, His Majesty's Government offered to pay the sum of 747,327·45 fr., at the rate of exchange ruling at the time when the works in question were transferred to them, viz., 55 fr. to the pound.

32. As the result of inter-departmental discussion on this point (see the memorandum by the Second Legal Adviser to the Foreign Office enclosed in Paper D and Paper E), it was decided to obtain information as to the state of the law in France, Germany, Italy, Belgium and Holland on the question whether profits or losses resulting from fluctuations in the value of money fall upon the creditor, or whether a creditor is entitled to be indemnified by the debtor for losses suffered by reason of the depreciation of the currency in which the debt is expressed, and for this purpose a memorandum, copies of which are sent herewith (Paper F), was forwarded to His Majesty's representatives in those countries, with a request that they would obtain an opinion on the point. The opinions which have been received are annexed (Papers G, H, I, J and K). The legal position of this aspect of the claim is further discussed in the light of these opinions in the minute by the Legal Adviser to the Foreign Office (Paper C). A statement prepared by the Treasury, showing the quarterly quotations for the Belgian franc—the Congo franc has since the war been consistently maintained at the same rate as that of the Belgian franc—from October 1919 to October 1931 is sent herewith (Paper L).



33.—(D) *The question of interest.*—This question has as yet not been raised by the Belgian Government, but will no doubt arise in the event of its being necessary to submit the case to a judicial tribunal. While His Majesty's Government cannot fairly be held responsible for most of the delay which has occurred in settling this claim, it would seem probable that a tribunal would award interest for at any rate part of the time which has elapsed since the territory in question was handed over. This question is discussed in the minute by the Legal Adviser to the Foreign Office (Paper C), and a list of the material dates in the case is sent herewith (Paper M).

34. You will observe that in their note of the 25th March, 1930, the Belgian Government suggest that the questions at issue should be referred to a conciliation commission, which should propose a "solution amicale." Such a method of procedure would not seem appropriate in a case where the issues involved, except in so far as they relate to questions of amount, are entirely of a legal character, and its adoption would probably result in the payment by this country of a larger sum than would have been awarded by a judicial tribunal. So far, however, as the "old claim" is concerned, it is felt that, should it prove impossible to arrive at an agreed settlement, it would be difficult to refuse a request for the reference of the case to a judicial body, which it is thought would most conveniently be the Permanent Court of International Justice. It is not thought that such a reference would be inconsistent with the principle, referred to in paragraph 28, of refusing to submit to arbitration claims arising out of the operations of the war, since the present claim is based exclusively on the agreement reached by Lord Milner and M. Orts, and the question at issue is only that of the amount to be paid in respect of a claim which in principle has never been disputed. It is thought, however, that, in view of the facts that, (a) apart from the question of the rate of exchange, the difference between the amount claimed by the Belgian Government in respect of the "old claim" and that which His Majesty's Government are prepared to pay is not very great; (b) on the question of the rate of exchange the case of His Majesty's Government may not be as strong as could be wished; and (c) the probability that a reference to a judicial tribunal would result in an award of interest, for which no claim has at present been made, it might be desirable to make an attempt, by means of oral negotiations, conducted, of course, on a "without prejudice" basis, to reach a settlement of the case on the lines of the abandonment by Belgium of the "new claims," and the payment by His Majesty's Government of a sum between £13,587 15s. 6d., which they have offered to pay, and (1) £38,785 19s., which is the amount at present put forward by Belgium in respect of the "old claim," or (2) a correspondingly higher figure if an adjustment is claimed for depreciation of sterling in terms of gold.

35. I am accordingly to request you to take the enclosed papers into your consideration and to favour Secretary Sir John Simon with your opinion on the following questions:—

- (a) Whether His Majesty's Government are on strong ground in rejecting the "new claims" and refusing to submit them to any form of judicial settlement.
- (b) Whether the Belgian Government are entitled to claim the actual expenditure incurred by them on the construction of the permanent works handed over by them to the British authorities, and not merely the actual value of those works at the time of transfer.
- (c) Whether His Majesty's Government could successfully contend that their obligation is merely to pay the amount of Congo francs expended by Belgium on the works in question (or the actual value at the time of transfer, being a lesser number of Congo francs) or whether alternatively their obligation is to make in addition a supplementary payment in respect of the depreciation of the Congo franc; and in the latter case (1) whether the depreciation of the Congo franc should be measured by reference to (a) gold, (b) sterling, or (c) some other factor, and (2) at what point of time should the depreciation be measured. (It will be realised that the value of gold in terms of commodities fluctuates, and that the value of sterling in terms of gold fluctuates when sterling, as now, is off the gold standard.)
- (d) Whether in the event of the case being referred to a judicial tribunal, the Belgian Government would be likely to obtain an award of interest, and if so, for what period?

- (e) Whether (in the light of your answers to the above questions) it would be desirable that a further attempt should be made to reach a settlement of the case by negotiation on the lines suggested in paragraph 34 above?

36. Sir John Simon would also be grateful for any observations of a general character which you may be good enough to offer.

I have, &c.

C. HOWARD SMITH.

List of Papers.

- Paper A.—Colonial Office Print "African 1127." [W 7898/665/4/1931.]
 Paper B.—Note from the Belgian Ambassador, March 25, 1930. [W 3085/3085/4/1930.]
 Paper C.—Minute by the Legal Adviser to the Foreign Office, July 4, 1931. [W 7897/665/4/1931.]
 Paper D.—Foreign Office letter to Colonial Office, December 29, 1930, enclosing memorandum by the Second Legal Adviser to the Foreign Office. [W 13207/3085/4/1930.]
 Paper E.—Colonial Office letter to Foreign Office, January 28, 1931. [W 1107/665/4/1931.]
 Paper F.—Memorandum sent by the Foreign Office to His Majesty's representatives at Paris, Berlin, Rome, Brussels and The Hague on February 16, 1931. [W 13207/3085/4/1930.]
 Paper G.—Memorandum by the Legal Adviser to His Majesty's Embassy at Paris as to French law concerning rate of exchange for payment of debts. [W 3504/665/4/1931.]
 Paper H.—Opinion of Dr. Rudolf E. Kahn as to German law concerning rate of exchange for payment of debts. [W 3319/665/4/1931.]
 Paper I.—Opinion by the Legal Adviser to His Majesty's Embassy at Rome concerning Italian law as to rate of exchange for payment of debts. [W 3542 and W 4850/665/4/1931.]
 Paper J.—Opinion by Maître Gilon as to Belgian law concerning rate of exchange for payment of debts. [W 3411/665/4/1931.]
 Paper K.—Opinion of Legal Adviser to His Majesty's Legation at The Hague as to Dutch law concerning rate of exchange for payment of debts. [W 4672/665/4/1931.]
 Paper L.—Treasury statement showing quarterly quotations for the Belgian franc from 1919 to 1931. [W 11939/665/4/1931.]
 Paper M.—List of material dates in the case. [W 7898/665/4/1931.]

Report.

(a) The ground on which the "new claims" are put forward by the Belgian Government is not very clear. At one point the new claims seem to be regarded as covered in principle by the Orts-Milner Agreement that Great Britain should pay the cost of works of permanent improvements; at another point the contention of the Belgian Government is that the new claims represent outlays made for and on behalf of Great Britain. We have considered these and any other possible ways of putting the claim of the Belgian Government to be repaid the administration deficits and war-damage reparation payments, and we are of opinion that His Majesty's Government are on strong ground in rejecting these claims.

So far as the Orts-Milner correspondence is concerned, there may be some doubt as to what was included in the claim that was given up. On the other hand it may be said with great force that the correspondence was a binding agreement only to claim for the "permanent improvements." On the whole, though we do not suggest that the argument based on the agreement in the correspondence should be abandoned, we do not regard it as the best answer to the new claims. They may, in our opinion, be properly resisted on general principles. The Belgian Government cannot now assume the character of a *bonorum gestor* or quasi-agent for Great Britain for which there is no foundation of fact. Such a relationship depends upon contract, either express or to be implied from all the circumstances. These claims do not appear to have been conceived until long after the monies were expended, and at that time the ultimate disposal of the territory was, so far as we can ascertain, wholly uncertain. Nor is there any rule of international law by which an occupying Power can collect revenues and administer the territory on the footing of a right to recover administration expenses or deficits from an ultimate sovereign Power.



Notwithstanding our view, as to which we feel no doubt, that the new claims cannot be substantiated, we are impressed with the difficulty from a diplomatic point of view of declining indefinitely to submit any claims to any form of judicial settlement, but unless His Majesty's Government feel compelled for such reasons to agree to some reference to a judicial tribunal, they are, in our opinion, having regard to the lack of substance in the claims, entirely justified in resisting such a proposal.

(b) The Belgian Government are, in our opinion, entitled to be paid the actual expenditure on the permanent works handed over by them and not merely the value of the works at the time of transfer. This seems to us to have been the intention of the parties as expressed in the Orts-Milner correspondence and, apart from the letters, we think this claim is correct in law and would be upheld.

(c) On the footing that His Majesty's Government are willing, as we think they should be, in accordance with Lord Milner's offer, to indemnify Belgium for the cost of any permanent improvements effected on the territory transferred to Great Britain, we are of opinion that payment should be made of such an amount as will put Belgium in the same position as if the works had not been executed. The case would be different if there was an agreement which imposed on Great Britain an obligation to pay an ascertained sum of money on a definite date; in that event the loss resulting from the depreciation of the Congo franc during delay in liquidation of the debt would, in accordance with principles applied in the courts of Great Britain and so far as we have information of all other countries, fall on the creditor, namely, Belgium. But that is not, in our opinion, the true position. Whether the claim depends on the Orts-Milner correspondence or on its own merits, it is a claim for an indemnity, and we think the depreciation of the Congo franc should be measured by reference to sterling as from the time the expenses were incurred.

(d) There has undoubtedly been a great deal of delay on the part of Belgium, and we do not think any interest ought to be, or would be, awarded in respect of the period covered by that delay. But for the same reason as that mentioned in our answer to the last question, namely, the right of Belgium to be indemnified, we think a judicial tribunal would award some interest to cover the delay in settlement not attributable to Belgium.

(e) It is desirable that a further effort should be made to reach a settlement on the lines suggested. Any settlement for an amount substantially less than the sum required to confer complete reimbursement on Belgium in respect of the works in question, including sums to provide for depreciation in the value of the franc and for delay, would in our opinion be advantageous.

T. W. H. INSKIP.
F. B. MERRIMAN.

Law Officers' Department, July 15, 1932.

[N 2541/321/56/1932]

No. 1^d.

[Board of Trade.]

[April 20, 1932.]

Case for the Opinion of the Law Officers of the Crown and Mr. Bowstead.

Herewith are sent:—

- (1) Statement of Facts. [N 5627/1259/56/1931.]
- (2) Copy Judgment of the Admiralty Transport Arbitration Board. [N 5627/1259/56/1931.]
- (3) Extract from the Minutes of League of Nations Council, 14th September, 1931. [N 6336/1259/56/1931.]
- (4) Copy of British Memorandum dated 17th September, 1931. [N 6359/1259/56/1931.]
- (5) Copy of Finnish Memorandum dated 30th December, 1931. [N 659/321/56/1932.]
- (6) Copy of British Memorandum dated 25th January, 1932. [N 849/321/56/1932.]
- (7) Copy of the Report of the Committee of Three. [N 660/321/56/1932.]
- (8) Extract from the Minutes of the League of Nations Council dated 30th January, 1932. [N 732/321/56/1932.]

THE Board of Trade desire to have the opinion of the Law Officers and Mr. Bowstead upon a question which has arisen in connexion with a claim made by the Government of Finland against His Majesty's Government.

The question is whether, in the circumstances hereinafter appearing, certain Finnish shipowners have exhausted the remedies open to them under English municipal law. The facts of the dispute are somewhat voluminous, but it is thought that they sufficiently appear from the statement herewith (No. 1), which was recently made for other purposes, and from the judgment of the Admiralty Transport Arbitration Board sent herewith (No. 2).

Put very shortly, the facts are that during the late war, towards the end of 1915, an arrangement was made to constitute an Allied pool of shipping, in the management of which Great Britain took the predominant part. It was found that there were a number of Russian ships which were free of Government control at that time, and accordingly arrangements were made between His Majesty's Government and the Imperial Russian Government, that the Russian Government should charter or requisition vessels flying the Russian flag, which included certain Finnish-owned vessels, Finland then being part of the Russian Empire, and put them into the Allied pool. This was done, the arrangement between the two Governments being that, as between each Government and its nationals, the terms on which vessels were requisitioned or chartered were no concern of the other Government, the agreement being that His Majesty's Government should pay the Russian Government Blue Book rates for Russian vessels employed on British service, and, *vice versa*, the Russian Government should pay His Majesty's Government Blue Book rates for British vessels employed on Russian service.

The arrangement worked very well, as between the Governments, up till the time of the Soviet revolution in Russia. The Finnish owners looked, and were content to look, to the Russian Government for their hire, and there was never any suggestion that the British Government were under any financial liability to the owners of the steamships taken by the Russian Government and put into the pool. When, however, the revolution in Russia became effective, the owners of the Finnish steamships found that they had no hope of obtaining payment of what was due from the revolutionary Russian Government, and they therefore conceived the ingenious idea of making a claim on the British Government. As might be expected in the circumstances, the British Government repudiated any liability in the matter, with the result that the Finnish shipowners lodged a claim with the Admiralty Transport Arbitration Board, demanding compensation on the ground that their vessels had been requisitioned by the British Government.

The claim was heard by a court consisting of Lord Trevethin, Sir James Warrack and Sir Francis Danson, and, after a hearing which lasted eight days, during which every possible point which could be put forward on behalf of the claimants was most strenuously pressed by Mr. G. P. Langton, K.C.—as he then was—the court delivered a considered judgment on the 9th January, 1926, dismissing the Finnish shipowners' claim, which was, quite obviously, without any merits whatever.

Claim of Finnish Government against His Majesty's Government in respect of requisitioned Finnish ships. Question whether municipal remedies in United Kingdom have been exhausted.



Counsel will recollect that, under the provisions of the Indemnity Act, 1920, the claimants were entitled, as of right, to appeal to the Court of Appeal, and, with the leave of that court, to the House of Lords; but they did not take advantage of this right, acting, no doubt, on the advice of the eminent English lawyers whom they had consulted.

Having failed in their claim before the Admiralty Transport Arbitration Board, and having decided not to appeal from the decision of that tribunal, they took no other steps to attempt to enforce their claim, either in the English courts of law or before the War Compensation Court.

They appear, however, to have brought great pressure upon the Government of Finland, with the result that they persuaded that Government to espouse their cause, and to put forward, through diplomatic channels, a request to the British Government that the dispute should be referred to international arbitration.

The matter was very carefully considered by the Government Departments concerned, but they could find nothing in the arguments which were put forward by the Finnish Government which justified their consenting to submit a claim, which had already been rejected by the British municipal court concerned, to any form of international arbitration.

When the Finnish Government appreciated that nothing could be obtained from the British Government through diplomatic action, they brought the matter before the Council of the League of Nations in September last.

It has not been thought necessary to trouble counsel with the earliest Finnish and British memoranda which were presented to the Council of the League of Nations. These documents dealt in the main with the facts of the case, and the bearing which those facts had upon the question whether the Finnish Government were entitled to demand that His Majesty's Government should consent to submit the dispute to international arbitration.

A copy of the minutes of the discussion which took place is sent herewith (No. 3), from which counsel will see that one of the points taken by the United Kingdom delegate was that the Finnish Government were not entitled to demand international arbitration, because the Finnish shipowners had not exhausted the municipal remedies which were available to them in the United Kingdom.

The discussion took place on the 14th September, 1931, and on the 17th September, the United Kingdom delegate presented to the Council a memorandum (No. 4), a copy of which is sent herewith, dealing with this point at length.

At the meeting of the Council on the 19th September, after some discussion, the representative of Spain was appointed *rapporteur* to report on the questions which had been raised, and he was authorised to obtain the help of the Italian and Norwegian representatives.

On the 30th December, 1931, the Finnish Government presented a memorandum (No. 5) in reply to the British memorandum of the 17th September, and on the 25th January, 1932, the United Kingdom delegate presented a further memorandum (No. 6) in reply to the Finnish memorandum of the 30th December.

On the 30th January, 1932, the representative of Spain presented to the Council of the League the report of the committee of three, and a discussion took place upon it.

Copies of the report and of the minutes of the discussion are sent herewith (Nos. 7 and 8).

It will be seen that the report was on the whole in favour of His Majesty's Government, in that it upheld their view that they could not be taken to arbitration under articles 12 and 15 of the Covenant of the League, but, on the other hand, they reported that the League had power to conciliate under article 11, subject to the preliminary point as to whether the Finns had exhausted their municipal rights under British law.

The committee state in their report that they think it would be expedient to examine the following two questions:—

- (a) Have the Finnish shipowners, or have they not, exhausted the means of recourse placed at their disposal by British law?
- (b) Did the fact that those shipowners had not exhausted the means of recourse in question constitute an obstacle such as to prevent the Finnish Government from claiming compensation from the British Government?

The report went on to suggest that if, after discussion between the parties, any point relating to these two questions should still remain unsettled, the Council might ask the Permanent Court of International Justice for an advisory opinion.

The first of these questions, (a), raises an important and difficult point of English law on which the Board desire to have the advice of the Law Officers and Mr. Bowstead before they proceed to discuss it with the Finnish representative. The second question, (b), is a point of international law which it is unnecessary to consider at present.

As will be seen from the memoranda which have been presented to the Council by the United Kingdom delegate, the position taken up by the British Government is that the Finnish shipowners did not exhaust their municipal remedies in the United Kingdom for two reasons:—

- (1) In the first place, having gone to the Admiralty Transport Arbitration Board, they could have appealed from the judgment of that tribunal to the Court of Appeal, and, with the leave of the latter court, to the House of Lords, but they did not do so.
- (2) If they were satisfied that the decision of the Admiralty Transport Arbitration Board, that the Finnish steamers were not requisitioned by His Majesty's Government, could not be successfully attacked, it was open to them under the provisions of the Indemnity Act, 1920, to proceed either by petition of right, if they alleged that there was an implied contract on the part of His Majesty's Government arising out of the user of the ships to pay compensation for such user, or, if they were of opinion that what was done by His Majesty's Government amounted to an interference with their property or business in the United Kingdom, they could have claimed compensation for such interference from the War Compensation Court. They did neither.

Having regard to the very full manner in which the contentions of His Majesty's Government on this point are set out in the two memoranda, it is not thought necessary to do more than summarise them here.

In view of the attitude adopted by the Council of the League in the discussion on the 30th January last, it may be that if the Finns cannot be satisfied at the proposed discussion, it will be very difficult for His Majesty's Government to refuse to submit the question whether the Finnish shipowners have exhausted the means of recourse placed at their disposal by British law to some form of tribunal for an advisory opinion.

If His Majesty's Government are driven into this position, they propose to suggest to the Finns that, as the matter is entirely one of British law, it would be more satisfactory to submit it to an English jurist; but, before doing this, they would be glad to have the opinion of the Law Officers and Mr. Bowstead as to whether the attitude hitherto adopted by His Majesty's Government is the correct one.

The Law Officers and counsel are therefore requested to advise whether, in their opinion, the Finnish shipowners have, or have not, exhausted the means of recourse placed at their disposal by British law.

Opinion of the Law Officers of the Crown and Mr. Bowstead.

IT is suggested (see the contention of the British delegates set out in Memorandum No. 6) that the owners of the Finnish steamers have not exhausted their right of recourse to the British courts in the following respects:—

- (1) By appeal from the decision of the Admiralty Transport Arbitration Board.
- (2) By making a claim under section 2 (1) (b) of the Indemnity Act, 1920, based upon interference with their property in the United Kingdom.
- (3) By petition of right.

With regard to (1), we are of opinion that there was a right of appeal from the decision of the Admiralty Transport Arbitration Board, as this decision clearly raised questions of law. In our opinion, however, this decision was right, and the chances of an appeal being successful would have been remote.



With regard to (2), in any claim under section 2 (1) (b) it would have been necessary to show that the interference was through the exercise, or purported exercise, of a prerogative right of His Majesty, or of some power under an enactment relating to the defence of the realm, or of some regulation or order made or purporting to be made thereunder.

The War Compensation Court would, in our opinion, have reached the same decision as the Board on this point, and for the same reasons; and, if the matter could have been brought before that court after the Board's decision, would have been obliged to regard the matter as *res judicata*.

With regard to (3), it being conceded rightly, in our opinion, that there was no contract, express or implied, between the owners and the British Government, we do not think that any claim by petition of right was open to the owners.

In effect, therefore, in our opinion, the owners have only failed to take proceedings open to them, in the sense that they have refrained from taking proceedings which, in our opinion, were bound to be unsuccessful.

TH. H. INSKIP.
F. B. MERRIMAN.
W. BOWSTEAD

Law Officers' Department,
April 20, 1932.

FRANCE.

[W 8753/178/17/1932]

No. 2.

[July 29, 1932.]

Foreign Office to the Law Officers of the Crown.

Sovereignty
over
uninhabited
islands.
Cases of
Spratley
Island and
Amboyna
Cay.

Gentlemen,

Foreign Office, March 16, 1932.

I HAVE the honour, by direction of Secretary Sir John Simon, to lay the annexed papers before you, and to request the favour of your opinion upon certain legal questions arising out of a dispute with the French Government as to the sovereignty over certain uninhabited islands in the China Sea, which have been for many years past regarded by His Majesty's Government as British territory, but which the French Government claim to have annexed in 1930.

2. Spratley (or Storm Island) is a bare flat island about 8 feet high, $2\frac{1}{2}$ cables in length and $1\frac{1}{2}$ cables in breadth, situated in the South China Sea about 280 miles away from the coast of Sarawak and British North Borneo, and 240 miles away from French Indo-China.

Amboyna Cay (or the Ilôt Amboine) is situated 75 miles to the south-east of Spratley Island, and is 150 yards long and about 8 feet high.

Both islands apparently possess deposits of potash and guano. Spratley Island has been suggested by the director of the Royal Observatory, Hong Kong, as a desirable site for a meteorological observing station. The Admiralty and Air Ministry attach importance to the British sovereignty over these islands.

3. Spratley Island and Amboyna Cay were visited in 1864 by Commander Ward, R.N., who surveyed the seas in the neighbourhood in H.M.S. "Rifleman." The ship's log stated that he placed a beacon upon both islands and also planted cocoanut trees and vegetables.

In September 1877 Mr. G. F. Graham (an United States citizen) and Mr. H. Simpson (a British subject), in conjunction with Mr. H. G. James (a British subject, and a merchant at Hong Kong), having visited Spratley Island and Amboyna Cay, and discovered that they were entirely uninhabited, and that they contained considerable deposits of guano, proceeded to Labuan for the purpose of seeking the permission of the authorities there to hoist the British flag over the island and cay, and of registering their claim against all comers to the land and products of the island and cay.

Mr. Treacher (who held simultaneously the office of Acting Governor of Labuan and Acting Consul-General in Borneo, accordingly signed a document (Paper No. 1), dated the 25th October, 1877, in which it was recorded that the

claim was registered in the Colony of Labuan, and that permission was given to Mr. Graham and Mr. Simpson to hoist the British flag over the said island and cay, subject to the approval of Her Britannic Majesty's Secretary of State for Foreign Affairs. The document provided, however, that the claim should lapse if, within ten years from the 25th October, 1877, the said lands and products were not duly worked and turned to account, and if at any time subsequently they should be left unworked for the space of five years.

In reporting the above to the Foreign Office Mr. Treacher mentioned that it would be of advantage to ships navigating in those parts if there were some place at which shipwrecked mariners could obtain shelter and assistance, and it was the intention of Messrs. Graham, Simpson and James to erect some kind of building for their servants on one or both of the islands, should the venture prove practicable. He further stated that Spratley Island was in the main route to China, and Amboyna Cay was near the main route, and both were entirely uninhabited.

4. From investigations made at the Foreign Office at the time, it appeared that no foreign Government had officially claimed the sovereignty over those islands, and that both islands were so far distant from Borneo on the one side, and the Malay Peninsula on the other, that they could not fairly be claimed as dependencies of either of these territories on the ground of contiguity and geographical position.

5. On the Colonial Office being consulted by the Foreign Office they replied that, as far as the Colonies of Hong Kong and Labuan were concerned, there could be no objection to Messrs. Graham and Simpson exploiting guano from the islands in question. (Letter from the Foreign Office of the 7th January, 1878, and reply from the Colonial Office of the 18th January, 1878 (Paper No. 2).)

6. On the 29th January, 1878, the Colonial Office were asked by the Foreign Office to express an opinion as to whether the claim of these persons to Spratley Island and Amboyna Cay should be registered with Mr. Treacher as British Consul-General in Borneo or as Governor of Labuan, and whether permission should be granted to them to hoist the British flag on these islands, and what instructions should be sent to Mr. Treacher on this matter. The Colonial Office replied that the islands in question being beyond the limits of the Colony of Labuan, the matter had not appeared to be one in which that Department was directly interested; they considered that the office of the Consul-General in Borneo seemed to be the proper place for the registration of the claim now made to the ownership of Spratley Island and Amboyna Cay; and were of opinion that there appeared to be no objection to allowing the claimants to hoist the British flag in those localities. (Letter from the Foreign Office of the 29th January, 1878, and reply from the Colonial Office of the 5th February, 1878 (Paper No. 3).)

7. Mr. Treacher was, therefore, accordingly informed on the 13th February, 1878, that there appeared to be no objection to the registration in Her Majesty's Consulate-General in Borneo of the claims of Messrs. James, Graham and Simpson to these islands, nor any objection to their hoisting the British flag on them. (Despatch of the 13th February, 1878, from the Foreign Office (Paper No. 4).)

8. In a despatch of the 30th October, 1879 (Paper No. 5), reporting that operations had been commenced by Messrs. Graham and Simpson at Amboyna Cay in the previous May, Mr. Treacher stated that, there being no means of giving due publicity in Labuan to the claim of these persons to the localities, he had requested the Governors of Hong Kong and the Straits Settlements to publish in the "Government Gazette" of their respective Colonies copies of the documents signed by him in 1877. A copy of the notice which was, in response to this request, inserted in the "Government Gazette" of the Straits Settlement, dated the 19th November, 1879, is attached (Paper No. 6). It appears from this despatch that Mr. Graham did go to Amboyna Cay in 1879, in May and September, and took off two cargoes of guano, and, further, that he and his assistant, Mr. Helme, were attacked on Amboyna Cay by their own Chinese coolies, two of whom they shot dead. The other coolies were tried and sentenced at Labuan by Mr. Treacher for this attack. Minutes in Colonial Office Papers of 1888-89 raise the question of the jurisdiction of Mr. Treacher to try these men for an offence committed on Amboyna Cay, seeing that the papers of 1877-79 indicated that the islands were beyond the limit of the Colony of Labuan. Some work was therefore done on Amboyna Cay in 1879, but none on Spratley Island.

[8717]

D



9. No further development affecting Spratley Island occurred until 1888. In that year the Central Borneo Company gave notice to the Colonial Office of their intention to exploit guano upon Spratley Island and Amboyna Cay, and were informed by the Colonial Office that a prior claim to the islands was registered in 1877 at the consulate-general in Borneo. The company stated, however, that the claim lodged in 1877 having lapsed, a grant of the islands was given in 1887 to a Mr. Everett, of Singapore, who agreed to surrender his claim in favour of the company. On the matter being referred to the Foreign Office, the Colonial Office were informed that if the islands had been duly worked by Messrs. Graham and Simpson, the first period of their lease would have held good until the 25th October, 1887, and if the working had been continued after that date, the grant would have held good until the islands had been left unworked by them for the space of five years. The Colonial Office were informed at the same time that no record existed of Messrs. Graham and Simpson's grant having lapsed and of a grant having, in consequence, been made in 1887 to Mr. Everett, of Singapore. At the suggestion of the Foreign Office, the Colonial Office ascertained that there was no notice in the "Straits Settlements Government Gazette," relating to the two islands since the notification of the grant to Messrs. Simpson and Graham in 1877. The Colonial Office considered that it was also safe to assume that there was nothing in the "Hong Kong Gazette" on the subject beyond what appeared in those of the Straits Settlements.

10. In November 1888 the Colonial Office pointed out that the islands in question not being within the limits of any colony, applications in connexion with their commercial developments did not appear directly to concern that Department and that the application of Messrs. Graham and Simpson in 1877 had been dealt with by the Foreign Office. The Colonial Office also stated that as it seemed possible that the previous occupiers of the islands had abandoned their claims, they did not feel in a position to reply to the Central Borneo Company's application.

11. In November 1888 two despatches were received at the Foreign Office from Mr. Leys, Her Majesty's Consul-General for Brunei (Paper No. 7) from which it appeared that the ten years' grant made to Messrs. Graham and Simpson in 1877 had lapsed; that Mr. Everett, of Singapore, had applied for a lease of the guano on the islands, and that he had subsequently waived his claim in favour of the Central Borneo Company. Although Mr. Leys mentioned that the Acting Consul-General at Labuan had some doubts whether or not Messrs. Graham and Simpson's claim had lapsed, he recommended that the Central Borneo Company should be granted a "lease" for five years on the same terms as were granted in 1877 to Messrs. Graham and Simpson.

12. Upon receipt of these despatches the Foreign Office, in December 1888, transmitted copies of them to the Colonial Office, and stated (Paper No. 8) that provided that satisfactory proof were forthcoming that Messrs. Graham and Simpson had withdrawn from the island and cay in question and had thereby allowed their claim to lapse, and provided that no other parties had put forward a better claim, the Foreign Office had no objection to the issue of a document to the Central Borneo Company similar to that which was given to Messrs. Graham and Simpson, it being understood that such document should be registered by the Administrator of Labuan as such, but not in his capacity as consul-general. The Colonial Office instructed the Acting Governor of Labuan to proceed on the lines suggested by the Foreign Office and informed the Central Borneo Company that they might be granted a lease if satisfactory proof that Messrs. Graham and Simpson had withdrawn was forthcoming.

13. As the company stated that they had no further evidence on the point, the Colonial Office requested the Admiralty to instruct a naval vessel to call at the islands and make a report, and as a result in May 1889 Spratley Island and Amboyna Cay were visited by the Commander of H.M.S. "Wanderer." As regards Spratley Island, the commander reported that it was uninhabited and unoccupied, and that there were no remains of any kind whatever to show that anybody had ever lived upon the island or worked the guano. The commander observed footmarks and heaps of dead birds and he came to the conclusion that whoever had been there had landed from a ship or junk, got some birds' flesh and perhaps eggs, and then gone away again. On Amboyna Cay remains of huts, boxes and bottles were found, but the cay was then uninhabited and was thought to have been so for about five years at least.

14. In July 1889 Mr. Hamilton, the Acting Governor of Labuan, reported (Paper No. 9) having issued a notice, which was published in the "Hong Kong and Straits Settlements Gazette" (Paper No. 10) desiring any person having any claims in respect of Amboyna Cay and Spratley Island to communicate with him before the 30th April, 1889. As no claims were received, the Acting Governor granted authority to the Central Borneo Company to occupy and work the islands subject to the terms set forth in a proclamation (enclosure in Paper No. 9) similar to that issued in 1877. It will be seen that this authority was granted by the Acting Governor of Labuan in his capacity as such.

15. In forwarding to the Foreign Office the Admiralty report on the condition of the islands (paragraph 13) and the report of the Acting Governor of Labuan (paragraph 14), the Colonial Office stated that as the islands, having been formerly licensed by the Crown, remained British territory unless definitely abandoned by the Crown, and as it appeared that the former licensees had completely withdrawn, Lord Knutsford, Secretary of State for the Colonies, proposed to grant a guano lease (to be executed in the usual way by himself and the Lords Commissioners of the Treasury) of the islands to the Central Borneo Company (Limited) "in the form lately adopted, and on conditions as to rent which will be settled after consultation with the Treasury." The lease when issued would take the place of that issued by the Acting Governor of Labuan.

On the 3rd September, 1889, the Foreign Office concurred in the proposal to grant a guano lease of Spratley Island and Amboyna Cay, on the conditions mentioned by the Colonial Office to the Central Borneo Company.

16. A licence for three years as from the 1st July, 1889, and a rent of £15 per annum was granted to the Central Borneo Company (Paper No. 11).

On the 10th December, 1892, the Colonial Office asked the Central Borneo Company if they wished to renew the licence which had expired on the 30th July, 1892, and the company replied that they did not and the British North Borneo Company were asked to notify the Labuan Government of this fact. No further material correspondence on the subject of these islands is in the papers of any Department. There is no evidence that the Central Borneo Company ever took any action under their lease.

17. The Colonial Office list of 1891, an official publication "comprising (*inter alia*) historical and statistical information respecting the Colonial Dependencies of Great Britain," contained on p. 310 the following statement:—

"Miscellaneous Islands.

"A number of islands and rocks throughout the world are British territory, or under British protection, but are not included in any Colony or separate Protectorate. Among such may be mentioned:—

* * * * *

"Amboyna Cay and Spratley Island (latitude 8° 38' N., 111° 54' E. longitude; latitude 7° 52' N., 112° 55' E. longitude), two uninhabited sandbanks in the middle of the China Sea, lying about 240 miles north-west of Borneo and 100 miles north of Labuan, were annexed in 1877, and leased for guano collection. They are annually visited by Chinese junks for the purpose of collecting turtle. A fresh lease was granted in 1889 to the Central Borneo Company (Limited), Winchester House, Old Broad Street, E.C."

Subsequent Colonial Office lists have each year contained similar references to Amboyna Cay and Spratley Island. The corresponding passage on p. 526 of the Dominions Office and Colonial Office list of 1931 reads as follows:—

"A number of islands and rocks throughout the world are British territory, or under British protection, but are not included in any Colony or separate Protectorate. Many of these have no permanent inhabitants, but are, or have been, leased by the Lords Commissioners of the Treasury for guano collection, or for coconut planting. The rents are paid into the Exchequer. Among such may be mentioned the Ashmore Group (Indian Ocean), Bird Island and Cato Island (in the Norfolk Island Group), Sombrero (West Indies, with a Board of Trade lighthouse, costing £520 annually), Raine Island, Bell Cay and Bramble Cay (near British New



Guinea), Caroline Island, Flint Island and Vostoc Island (Pacific Ocean, 9° 56' S. latitude, 150° 6' W. longitude, and 11° 26' latitude, and 151° 48' W. longitude), Malden Island (4° 1' S. latitude, 155° 57' W. longitude), leased to Messrs. Grice, Sumner and Co., and Starbuck Island; also Gough, Nightingale and inaccessible islands (in the South Atlantic); and there are many others.

"The Great and Little Basses and Minicoy are small islets in the Indian Ocean, with lighthouses maintained by the Board of Trade out of shipping dues levied on vessels passing and collected at Ceylon, Mauritius, Straits and Indian ports.

"The Kuria-Muria Islands, five in number, off the south-east coast of Arabia, were ceded by the Imam of Muskat for the purpose of landing the Red Sea telegraph cable.

"Amboyne Cay and Sprattley Islands (latitude 8° 38' N., 111° 54' E. longitude; latitude 7° 52' N., 112° 55' E. longitude), two uninhabited sandbanks in the middle of the China Sea, lying about 240 miles north-west of Borneo and 100 miles north of Labuan, were annexed in 1877, and leased for guano collection. They are annually visited by Chinese junks for the purpose of collecting turtle."

The Colonial Office lists are official publications which may be purchased by any person on application to the publishers.

18. On a map of the Malay Archipelago, published by the London Geographical Institute, Sprattley Island is marked "Br." (British). About thirty modern atlases have been examined, and in no case is any sovereignty attributed to France or to any other nation with the following exceptions:—

In the 1929 (latest) edition of the "Atlante Internationale del Touring Club Italiana," Sprattley Island is clearly marked in red capital letters "BRIT." Amboyne Cay is similarly marked.

Philip's International Atlas of 1931 shows "Storm or Sprattley Island" as "BR."

With these three exceptions, no indication of sovereignty is shown on any map or atlas examined. This, although of negative value, may be of importance in that no mention can be found anywhere of French interests or possessions in that locality.

The Italian atlas mentioned is well known on the Continent as a standard authority.

19. It appears from a despatch of April 1930 from His Majesty's consul-general at Saigon that the authorities in French Indo-China had for some time been desirous of annexing for France a considerable number of the islands, islets and reefs in that portion of the China Sea where Sprattley Island is situated, for the sake (*inter alia*) of the deposits of potash and guano on these islands. Apparently, however, their action was delayed for some time owing to a doubt as to the extent to which the United States might claim sovereignty over them on the ground that they have been ceded to the United States as part of the archipelago of the Philippines under the treaty of the 10th December, 1898 (Paper No. 12), article 3.

20. By 1930, however, it would appear from a despatch of the 23rd April, 1930, from His Majesty's consul-general at Saigon (see Paper No. 13) that the French authorities had made up their minds with regard to the geographical implications of the treaty of 1898, and had determined to take the action which they had been contemplating. Accordingly, the French sloop "Malicieuse" on about the 13th April, 1930, visited a number of these islands, including Sprattley Island, and claimed sovereignty over them in the name of the French Republic. It is reported that on Sprattley Island the French vessel discovered four marooned Chinese, who were thus saved from starvation. After the visit of this vessel, the communiqué to the press in Saigon mentioned in Mr. Gorton's despatch was issued (see Paper No. 13). According to this communiqué, it appears that the French Government claim sovereignty over all the islands, islets and reefs situated in the zone between the seventh and twelfth degrees of north latitude, and to the west of the triangular zone reserved to American sovereignty under article 3 of the Treaty of the 10th December, 1898. This zone includes Sprattley

Island and certain islets situated close to it, and other islets which are described by the French as follows:—

"Les récifs du Trident, l'île Thi-Thai, l'île Loai Ta, le récif Tizard, le récif de la Découverte, la Croix de Feu, les récifs London, l'îlot Amboine, le banc du Rifleman, le banc Ardoisier, le récif de l'Hirondelle."

The area thus claimed by the French is shown on the annexed sketch map, on which Sprattley Island and the other principal islands mentioned by the French are shown (Paper No. 14).

21. His Majesty's consul-general at Saigon reported by telegram on the 23rd April, 1930, to the Foreign Office that the French authorities had announced the annexation of Sprattley Island and called attention to the fact that it appeared to be the same as the island which was shown in the Colonial and Dominions Office list as having been annexed by this country in 1877. He stated that he had called the attention of the local French authorities to this apparent mistake, but had only received the reply that their action had been taken under the direct instructions of the French Government.

22. On receipt of this telegram, Mr. Campbell, His Majesty's Minister in Paris, acting upon instructions from the Foreign Office, issued after consultation with the Colonial Office, Admiralty and Treasury, presented a note on the 21st May, 1930 (Paper No. 15), to the French Foreign Ministry, claiming that Sprattley Island and Amboyne Cay had been annexed and become British territory in 1877 by virtue of the permission given to Messrs. Graham and Simpson for the hoisting of the British flag on the islands and of the registration in His Majesty's consulate-general in Borneo of their claim—a claim which was confirmed subsequently by a formal licence from the Crown; that no abandonment of British sovereignty over these islands had taken place, and that they accordingly remained British territory. The French Ministry of Foreign Affairs were asked to be so good as to notify the French authorities in Indo-China to this effect. It will be seen that Mr. Campbell's note, which was presented upon instructions issued rather hurriedly and after an unfinished investigation, does not contain a complete or entirely accurate statement of the facts.

23. On the 13th July, 1930, the French Ministry of Foreign Affairs returned an interim reply to His Majesty's Minister's note (Paper No. 16), in which the claim that these islands were British territory was disputed on the grounds (*inter alia*) that there was no evidence that the British flag had in fact been hoisted on the islands; that Messrs. Graham and Simpson had been officially commissioned to take possession of the islands in the name of Her Britannic Majesty, or that they had in fact ever assumed effective possession of the islands.

This interim reply was followed by a further note of the 28th March, 1931, from the French Ministry of Foreign Affairs (Paper No. 17), in which the British claim to sovereignty over these islands was contested as being ill-founded under international law. In this note reliance was placed *inter alia* on the fact that these islands had not been placed under the administration of any British Colony or Protectorate,⁽¹⁾ and the claim of Messrs. Graham and Simpson had been registered only in the British consulate-general in Borneo, from which it was argued that His Majesty's Government must be presumed to have considered that these islands did not belong to the British Empire and that the only effect of the registration was to establish a right for the individuals in private law.

The French Government argued that there was no evidence of any exercise of authority by this country over these islands, and that they were therefore *terra nullius* at the time when the French authorities took formal possession of them.

24. The French Ministry of Foreign Affairs on the 30th November, 1931, informed His Majesty's Embassy in Paris, in reply to a request for information, that they know of no formal proclamation having been issued by the French Government annexing these islands and that they were in communication with the Governor-General of Indo-China requesting him to send copies of any proclamations he had issued. If it was found that no proclamation had been issued, they proposed forthwith to issue one, and send His Majesty's Government an official notification of their annexation.

⁽¹⁾ The note also contains a statement to the effect that there is no British island (even the smallest size) which is not attached to some Colony or Protectorate for administration. This statement is of course incorrect (see paragraph 17 above, quotation from Dominions and Colonial Office lists).



25. No further communication has at present been addressed to the French Government on this subject, and Sir John Simon desires your advice on the questions referred to in the following paragraphs, in order to assist him in deciding what (if any) further action should be taken in this matter.

26. The first question upon which your advice is desired is whether His Majesty possessed valid rights of sovereignty over Spratley Island and Amboyna Cay in April 1930 at the time when the French Government purported to annex them, a question which turns upon the application of certain principles of international law to the facts of this case. In this connexion, I am to invite your attention to the memorandum prepared by the legal advisers of this Department (Paper No. 18) and, in particular, to the Clipperton Island case therein referred to.

27. The facts upon which the British claim to sovereignty over those islands must be based would appear to be the following:—

(a) *Visits to the Islands—Actual Use and Occupation.*

The visit to both islands in 1864 by Commander Ward (paragraph 3) in H.M.S. "Rifleman"; the visits of Messrs. Graham and Simpson in 1877 to both islands (paragraph 3), and in 1879 to Amboyna Cay, when during a period of six months some work was done on this island, and when it is probable, though not absolutely certain, that the British flag was hoisted; the visit in 1889 by H.M.S. "Wanderer" to both islands. There is no evidence that the British flag was ever hoisted on Spratley Island. It appears that the Central Borneo Company never sent any persons to the islands at all.

(b) *Assumption of Sovereignty over the Islands by His Majesty's Government.*

The authorisation given to Messrs. Graham and Simpson in 1877 and 1878 to hoist the British flag over the islands, and the registration of their claim in the British consulate-general for Borneo, after a previous provisional registration with the Government of Labuan, and the advertisement of this claim in the "Government Gazettes" of Hong Kong and the Straits Settlements (paragraphs 3 and 8); the registration of the claim of the Central Borneo Company in 1889 with the Government of Labuan, after further advertisements in the "Government Gazettes" of Hong Kong and the Straits Settlements (paragraph 14); the subsequent issue of a formal lease to this company by Lord Knutsford, then Secretary of State for the Colonies; the passages in the Colonial Office lists from 1891 onwards, in which the statement is made that these islands were annexed in 1887.

Reliance might perhaps also be placed upon the exercise of jurisdiction in 1879 by the Acting Governor of Labuan, when he tried and sentenced the Chinese coolies who had assaulted Mr. Graham and Mr. Helme on Amboyna Cay, inasmuch as it would appear that he would have had no jurisdiction over offences committed in Amboyna Cay unless it had been made a dependency of the Colony of Labuan. Against this, however, it must be observed that in 1879 the Colonial Office had clearly disclaimed any intention of including these islands as dependencies of Labuan, and the claim of Messrs. Graham and Simpson had been registered with Mr. Treacher in his capacity as consul-general for Borneo, precisely for this reason, so that Mr. Treacher's action in trying these offenders may have been misconceived.

27A. The fact that neither of these islands had been attached for administrative purposes to any British Colony or Protectorate is relied upon by the French Government as an argument against the validity of any British claim to sovereignty over them. You will no doubt deal with this argument in giving your opinion in answer to the first question, and will observe that the statement in the Colonial Office list referred to in paragraph 17 makes it impossible to contend that these islands had, in fact, been attached for administrative purposes to any British Colony or Protectorate.

I am, however, to invite your attention to certain letters exchanged between the Foreign Office, the Colonial Office and the Admiralty (Paper No. 19 (1), (2) and (3)), and to request you to give your opinion as to the advisability of attaching for administrative purposes to some Colony or Protectorate the various other

miscellaneous islands which are claimed as British, in order to avoid the possibility of British sovereignty over them being challenged, on the ground that no provision had been made for their administration. This is the second question on which your advice is requested.

28. I am accordingly to request you to take the enclosed papers into your consideration and to favour Sir John Simon with your opinion:—

- (a) Whether in April 1930 His Majesty possessed under international law a claim to sovereignty over Spratley Island and/or Amboyna Cay which could be laid before the Permanent Court of International Justice with either the certainty or a reasonable prospect of success.
- (b) Whether it is desirable that the various miscellaneous islands over which His Majesty claims sovereignty should be attached for administrative purposes to some Colony or Protectorate in all cases where such action has not already been taken.

29. Sir John Simon would also be grateful for any observations of a general character which you may have to offer on this matter.

I have, &c.

C. HOWARD SMITH.

List of Papers.

1. Document signed by Mr. W. H. Treacher, October 25, 1877. [W 7183/2378/17/1931.]
- 2.—(1) Foreign Office to Colonial Office, January 7, 1878.
(2) Colonial Office to Foreign Office, January 18, 1878.
[W 7183/2378/17/1931.]
- 3.—(1) Foreign Office to Colonial Office, January 29, 1878.
(2) Colonial Office to Foreign Office, February 5, 1878.
[W 7183/2378/17/1931.]
4. Despatch to Acting Consul-General, Borneo, February 13, 1878. [W 4686/2378/17/1931—Annex (B).]
5. Despatch from Acting Consul-General, Borneo, October 30, 1879. [W 7183/2378/17/1931.]
6. Notice in "Straits Settlements Government Gazette," dated November 19, 1879.
[W 4686/2378/17/1931.]
- 7.—(1) Despatch from Mr. Leys, November 24, 1888.
(2) Despatch from Mr. Leys, November 29, 1888.
[Confidential 5769, Nos. 147 and 149.]
8. Foreign Office to Colonial Office, December 15, 1888. [Confidential 5769, No. 156.]
9. Despatch from Acting Governor of Labuan, July 3, 1889. [Confidential 5957, No. 32.]
- 10.—(1) Notice in "Hong Kong Government Gazette," April 5, 1889.
(2) Notice in "Straits Settlements Government Gazette," March 28, 1889.
[W 4686/2378/17/1931—Annex (C).]
11. Licence granted to Central Borneo Company, October 28, 1889. [W 13065/2378/17/1931.]
12. Treaty of December 10, 1898, between United States and Spain. [Confidential 7262.]
13. Despatch from His Majesty's Consul-General, Saigon, April 23, 1930. [W 5470/4099/17/1930.]
14. Map showing Spratley Island and neighbouring islands.
15. Note sent by His Majesty's Embassy in Paris to French Government, May 21, 1930.
[W 5305/4099/17/1930.]
16. Reply from French Government, July 13, 1930. [W 7274/4099/17/1930.]
17. Further reply from French Government, March 28, 1931. [W 3703/2378/17/1931.]
18. Memorandum by Foreign Office Legal Advisers, November 10, 1931. [Confidential 14102.]
- 19.—(1) Foreign Office to Colonial Office, May 12, 1931. [W 4951/2378/17/1931.]
(2) Colonial Office to Foreign Office, June 16, 1931. [W 7183/2378/17/1931.]
(3) Admiralty to Foreign Office, June 16, 1931. [W 7241/2378/17/1931.]

Report.

(a) In our opinion His Majesty's claim to sovereignty over Spratley Island and Amboyna Cay in April 1930 was of so doubtful a nature that it could only be laid before the Permanent Court of International Justice with a faint prospect of success.

It is now well settled in general that an inchoate title to sovereignty may be acquired either by discovery or by reason of circumstances having an effect similar to discovery, but that the inchoate title thus acquired must be perfected within a reasonable time by an open and continuous exercise of sovereignty, of which the most common form is occupation in fact.



In the present case, however, we are not able to infer from the events which took place in 1877-79 any acquisition of even an inchoate title to sovereignty, still less of a title perfected either by actual occupation or by some other open display of State authority. The visit of H.M.S. "Wanderer" in 1889, coupled with the lease granted in that year to the Central Borneo Company, and followed by the statements published from 1891 onwards in the Colonial Office list, would, having regard to the fact that the islands are uninhabited, probably have been held to be sufficient evidence of the continuous display of State authority to negative any suggestion of loss of sovereignty by abandonment, but the necessary foundation is, in our opinion, lacking.

We do not in the facts of this case regard the contention of the French Government, which is based upon the absence of any administrative attachment to a British Colony or Protectorate, as being at all conclusive. The circumstances of the islands, and especially the fact that they have no inhabitants, justify and explain the absence of administrative machinery.

(b) Notwithstanding our opinion as to the effect in this case of the absence of any attachment for administrative purposes to a British Colony or Protectorate, we regard it as most desirable that wherever it is possible in the cases of the various miscellaneous islands in question such an attachment should be formed. Such a connexion will afford good evidence of the continuous exercise of State authority.

(c) We have not overlooked the decision in the Clipperton Island case and the reasoning on which it was based. In that case there had been an act of unequivocal annexation by France. That fact being established, it was not difficult to hold in a case of an uninhabited island that the rights acquired by such annexation were perfected and were never lost.

T. W. H. INSKIP.
F. B. MERRIMAN.

Law Officers' Department,
July 29, 1932.

GENERAL.

[W 3033/22/98/1932]

No. 2^A.

[Colonial Office.]

[March 8, 1932.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Colonial Office, September 24, 1931.

Grants to
Mandated
Territories
from
Colonial
Develop-
ment
Fund:
attaching of
conditions
as to pur-
chase of
materials,
&c.

I AM directed by Mr. Secretary Thomas to refer to the Opinion,⁽¹⁾ dated the 19th January, 1931, given by the Law Officers in reply to Colonial Office letter of the 23rd December, 1930, in regard to the propriety of attaching to loans or grants made to mandated territories from the Colonial Development Fund conditions as to the purchase of materials, &c., in this country. That Opinion has been the subject of discussion with the Lords Commissioners of the Treasury, and their Lordships are in some doubt as to the precise application of the Opinion of the Law Officers on the third of the three questions mentioned in the seventh paragraph of Colonial Office letter of the 23rd December last.

2. The cases to which reference was made in that question may be classified as follows:—

- (i) A free grant or a loan of a portion of the total cost of the scheme; the portion may be either a definite sum or a percentage. Ordinarily, the free grant or loan is not given in respect of any particular items of expenditure, but in respect of the expenditure as a whole.
- (ii) A free grant to cover the interest charges for a period of years on a loan to be raised by the mandated territory on its own account (not from the fund) to meet the whole cost of the scheme.

⁽¹⁾ Confidential 14105, p. 6.

In all cases, the assistance, whatever form it takes, is given on the understanding that it will enable the mandated territory to undertake a scheme advantageous to the territory, which it would not have been able without assistance to carry out at all, or at any rate for some years.

3. I am accordingly to enquire whether, in your opinion, the condition as to purchase of materials, &c., in this country may properly be attached to the grant of assistance from the fund in cases where the assistance represents only a portion of the total cost of the scheme of development and takes the form of a free grant, whether of a definite sum, a percentage of the total cost, or to cover interest charges on a loan to be raised by the territory, if it is to the pecuniary advantage of the territory to obtain the assistance with the condition attached to it

I am, &c.

R. V. VERNON.

Report.

We are informed that in all cases the assistance given to the mandated territory, whatever form it takes, is given on the understanding that it will enable the mandated territory to undertake an advantageous scheme which would have been impracticable without such assistance. We draw the inference from this statement that the assistance would form in the cases under consideration a substantial part of the moneys to be expended and not a mere colourable contribution. We are further asked to assume that it will be to the pecuniary advantage of the territory to obtain the assistance with the proposed condition attached to it.

We are of opinion that in such circumstances the proposed condition as to purchase of materials may properly be attached to the grant of assistance.

F. W. H. INSKIP.
F. B. MERRIMAN.

Law Officers' Department,
March 8, 1932.

[W 8920/72/50/1932]

No. 2^B.

[Air Ministry.]

[June 9, 1932.]

Case for the Opinion of the Law Officers and Counsel.

HEREWITH are sent:—

1. Convention relating to the Regulation of Aerial Navigation, dated 13th October, 1919.
2. Air Navigation Act, 1920.
3. Air Navigation (Consolidation) Order, 1923, as subsequently amended.
4. Case and Opinion of Law Officers of 7th December, 1925.
5. Case and Opinion of Law Officers of 20th May, 1931.
6. Merchant Shipping (Safety and Load Line Conventions) Act, 1932.
7. Supplementary Memorandum and Minute by Secretary, Air Ministry, with regard to the position from the Administrative standpoint in respect of the Air Navigation Act and Air Navigation Order.

Power to
make
Orders in
Council
under "The
Air Naviga-
tion Act,
1920," to
give effect
to pro-
visions
of Air
Navigation
Convention.

1. The questions on which the advice of the Law Officers and Counsel is desired in this case are with regard to the scope and extent of the powers of making Orders in Council for carrying out, giving effect to or applying the International Convention for the Regulation of Air Navigation or for making special provisions in relation to Air Navigation which are conferred by Sections 1, 2 and 3 of the Air Navigation Act, 1920.

2. The Law Officers have already advised in two cases as to the power to give effect by Order in Council under the Air Navigation Act to specific restrictions on Air Navigation which it was then desired to impose, but it has

[8717]

E



now become necessary to revise and remake the Air Navigation (Consolidation) Order, 1923, which was made under the powers conferred by the Air Navigation Act, and for this purpose and in this connexion it is desired to obtain the opinion of the Law Officers and Counsel with regard to certain general questions which have arisen as to the application of the opinions above referred to.

3. As the Law Officers and Counsel are aware, the International Convention for the Regulation of Air Navigation, which was signed in 1919 and came into force (as respects Great Britain and other signatory States who had notified their adherence) in 1922, makes provision for the freedom of passage of aircraft of contracting States over the territory of other States, and with regard to the regulation and control of such traffic.

4. Certain of the provisions of the original Convention have from time to time been modified in manner provided in the Convention, that is to say by or through a permanent body established by the Convention (see Article 34) and known as "The International Commission for Air Navigation." A print of the Convention as now in force is herewith.

5. The Convention provides that contracting States undertake in time of peace to accord freedom of innocent passage to aircraft of other contracting States, provided that the conditions laid down in the Convention are observed and that regulations made by a contracting State as to admission over its territory of the aircraft of other contracting States are to be applied without distinction of nationality (Article 2).

6. It deals with the nationality, registration and marking of Aircraft (Articles 6, 7 and 10), and requires aircraft engaged in international navigation to be provided with a Certificate of Airworthiness (Article 11) and the Commanding Officer and operating crew of every aircraft to be provided with Certificates of Competency and licences (Article 12). It requires every aircraft engaged in International Navigation to be provided with Certificates of Registration and Airworthiness, Certificates and Licences of the Commanding Officer and Crew, passenger lists and bills of lading and log books and (if equipped with wireless) a wireless licence (Article 19). It prohibits the carriage by aircraft of explosives, arms and munitions of war (Article 26), and permits contracting States to prohibit or regulate the carriage of photographic apparatus or other objects (Articles 27 and 29). It enables contracting States to require aircraft passing from one State to another to land at an aerodrome fixed by the latter State, to visit aircraft upon departure or landing and to verify documents (Articles 15 and 21), and empowers contracting States to establish reservations and restrictions in favour of their national aircraft in connexion with carriage of persons and goods for hire between points on their own territory (Article 16).

7. Each contracting State undertakes (Article 25) to adopt measures to ensure that every aircraft flying above the limits of its territory and that every aircraft wherever it may be carrying its nationality mark shall comply with the Regulations contained in Annex D to the Convention. (These Regulations consist of rules as to lights, rules as to signals and rules for air traffic).

The provisions of the Convention are completed by the Annexes A to H.

8. It will be observed that while in most cases the provisions of the Convention are framed in mandatory form, so as to cast on each contracting State concerned a definite obligation to see that they are complied with, some provisions are framed in an optional form, so as to allow each contracting State a discretion as to whether any, and if so what, effect is to be given to them. Articles 11, 12 and 19 of the Convention (which are referred to above) are examples of the "mandatory" provisions; each of these Articles provides that something "shall" be done. Article 3, on the other hand (which provides that each contracting State is to be "entitled" for military reasons or in the interest of public safety to prohibit the aircraft of other contracting States from flying over certain areas of its territory under the penalties provided by its legislation, and subject to no distinction being made in this respect between its private aircraft and those of the other contracting States), is an example of the "optional" provisions. Further examples of the "optional" type of provision are to be found in Article 13 (second paragraph), Articles 16, 21, 27 and 28, Annex E, Section 1, and Annex H, paragraphs 6, 8 and 15.

9. Moreover, it will be observed that in two cases at least the words of the Convention imply that each contracting State may make regulations with respect to certain matters affecting air navigation for which no specific provision is made

by the Convention, see, for instance, Article 2 (which implies that each contracting State may make regulations as to the admission over its territory of the aircraft of other States), and Article 15 (which implies that each contracting State may make regulations as to the aerodromes at which aircraft coming from another State are to land).

10. The Air Navigation Act, 1920, is described as "An Act to enable effect to be given to a Convention for regulating Air Navigation and to make further provision for the control and regulation of Aviation" and in the preamble (after reference to the Convention) it is recited that it is expedient to make further provision for controlling and regulating the navigation of aircraft whether British or foreign within the limits of His Majesty's jurisdiction, and in the case of British aircraft, for regulating the navigation thereof both within such jurisdiction and elsewhere, and also that it is expedient that provision should be made by Parliament for enabling effect to be given to the Convention.

11. Section 1 of the Act provides that His Majesty may make such Orders in Council as appear to him necessary for carrying out the Convention and for giving effect thereto or to any of the provisions thereof or to any amendment which may be made under Article 34 thereof.

12. Section 2 provides that His Majesty may by Order in Council direct that the provisions of the Convention for the time being in force or any of them and whether or not those provisions are limited to aircraft of any special description or engaged in any special kind of navigation shall apply to or in relation to any aircraft in or over the British Islands or the territorial waters adjacent thereto, and may make such consequential and supplementary provisions as appear necessary or expedient for the purpose of such application.

13. Section 3 provides that, without prejudice to the generality of the powers thereinbefore conferred, an Order in Council under Part I of the Act may make provision for certain specified matters which are set out in the Section under the letters (a) to (m).

Section 17 of the Act contains provisions as to the making of Orders in Council under the Act.

14. Orders in Council dealing with Air Navigation under the powers conferred by the Air Navigation Act, 1920, have been made from time to time. The Order at present in force in relation to air navigation generally in this country is the Air Navigation (Consolidation) Order, 1923, as amended by further Orders. A copy of such Order in consolidated form is herewith together with copies of three further Orders of 12th February, 1931, 12th February, 1931, and 19th May, 1931, respectively which contain amendments made subsequently to the printing of the consolidated form of Order but which do not materially affect the questions dealt with in this Case.

15. Article 2 of the Order deals with the aircraft to which the Order applies.

Other Articles may be divided generally into the following groups:—

Conditions of flying—Articles 3, 4, 5, 13(A), 14, 14(A), 15 and 18, which contain requirements as to registration, certificates of airworthiness, certificates of competency and licences for personnel, equipment and documents to be carried and articles not to be carried.

Safety—Articles 9, 12 and 13.

Article 6 includes in the Order the provisions of the Schedules to the Order numbered from I to VIII, which deal in detail with the following matters:—

Schedule I. Registration and marking. Schedule II. Certificates of airworthiness. Schedule III. Log Books. Schedule IV. Section 1. Rules as to lights. Section 2. Rules as to signals. Section 3. General rules for air traffic. Section 5. Special rules for air traffic on and in the vicinity of aerodromes open to public use. Schedule V. Licensing of personnel. Schedule VI. Fees. Schedule VII. Prohibited areas. Schedule VIII. Customs.

Enforcement of the Order—Article 27, which prescribes penalties for contraventions of the Order, and Articles 16, 17, 24 and 28, which contain provisions the object of which appears to be to enable the Air Ministry to enforce compliance with the provisions of the Order.



16. The Order also contains a certain number of isolated provisions of an ancillary nature, such as Article 11 as to photography from aircraft, Articles 19 and 20 dealing with aerial lighthouses and the exhibition of false lights, Article 21 as to the method of making and receiving signals, and Article 22 as to points of entrance and departure for aircraft, and route to be followed.

Article 30 provides that the Secretary of State may issue such directions as he thinks fit for the purpose of supplementing or giving full effect to the provisions of the Order including the Schedules thereto and directions dealing with matters expressed in the Order in Council to be subject to such directions have from time to time been issued.

17. It will be observed that while the provisions of the Order in Council may be said to be based generally upon the provisions of the Convention it has been necessary to expand and add to these provisions in some cases in matters of detail and of substance. For instance no provision will be found in the Convention corresponding to the provisions of the Order contained in the provisions to Article 3(1), Articles 4(2), 5(1), 7(1), 8, 9, 10, 12, 19, 20, 21(2), 24, 27 or 28, or in paras. 2 to 6 of Schedule I or Schedule VI; and although Schedule II of the Order is to a certain extent based on paragraphs 1 to 3 of Annex B of the Convention, the provisions of the Convention have been considerably amplified in that Schedule (as is plainly contemplated by paragraph 5 of Annex B of the Convention itself); and moreover there is nothing in the Convention corresponding to paragraphs 8 and 9 of Schedule II of the Order.

18. The Law Officers and Counsel will gather from what is stated above that it has been found necessary in practice and for the purpose of constituting what is in effect a code governing civil aviation in this country to include restrictions and obligations in the Order in Council which, while not inconsistent with the provisions of the Convention are not in fact in terms provided for or in some instances even indicated in the Convention. The Convention suggests the scheme in broad outline but it has been necessary to fill in the details in some parts.

19. The Treasury Solicitor understands that it was considered when the Order in Council was originally framed that the powers conferred by Sections 1, 2 and 3 of the Air Navigation Act, 1920, were sufficiently wide to enable this to be done. Section 1 of the Act was interpreted as conferring power to make such Orders in Council as might appear to be necessary for carrying out and giving effect to the Convention or any provision of the Convention, including the "optional" provisions (*i.e.*, the provisions of Article 3 and other Articles to which attention has been drawn on page 2, paragraph 8). Having regard, however, to the fact that the Convention is an international agreement, Section 1 was regarded as dealing primarily with the international aspect of air navigation; and Section 2 was regarded as dealing primarily with the regulation of air navigation within the territorial jurisdiction of the British Islands. As respects navigation within those territorial limits, Section 2 was regarded as empowering the Orders in Council to make such consequential and supplementary provisions as might appear necessary or expedient for the purpose of the application of the Convention within those limits. Section 3, on the other hand, was regarded as empowering Orders in Council to make provision with respect to thirteen different heads of subject matter, whether the subject matter under any of the thirteen heads was dealt with in the Convention or not: it was thought that the only limit to the power of making provisions as to the matters dealt with in Section 3 was possibly this—that in cases where any of these matters are dealt with by the Convention, the provision made by the Order in Council with respect to that matter must not be in breach of the Convention.

20. In two instances, however, since the original Order in Council was framed a question has arisen as to the power to prohibit by Order in Council under the Act of 1920 the doing of certain things which has involved some consideration of the scope and extent of the powers exercisable by Order in Council under Sections 1, 2 and 3 of the Act of 1920.

The first question arose in 1925 as respects the power to prohibit or restrict photography from aircraft. This question was considered by the Law Officers of the day and the Law Officers and Counsel may be referred to the Case and Opinion of 7th December, 1925, which is sent herewith.

The second question arose in May 1931, as respects the existence of power to declare by Order in Council the precincts of Windsor Castle, a prohibited area

from which all aircraft would be excluded. The Law Officers and Counsel are referred to the Case and Opinion of the Law Officers of the day of 20th May, 1931, herewith.

21. Certain difficulties have arisen with regard to the general application of these opinions and as to the scope and extent within which Orders in Council may be made under Sections 1, 2 and 3 of the Act of 1920 with regard to which it is now desired to obtain the further advice of the Law Officers.

22. In both of the cases above referred to the Law Officers were asked to advise upon a question whether or not specific proposals of a definite nature could be given effect to by Order in Council under the Air Navigation Act, 1920—no general question was in either of these cases raised as to the scope and extent of the powers to be exercised by Orders in Council under the Act in the different circumstances which might arise and it is felt that there may be difficulty in applying as a matter of general application advice given in reference to the particular circumstances of the special case actually under consideration.

23. In the case of the first of the two questions above referred to (power to prohibit photography) Article 27 of the Convention provides that each State may prohibit or regulate the carriage or use of photographic apparatus but whether or not any steps are taken to do so is left entirely optional to the State concerned. The Law Officers advised that an Order in Council could be made under the provisions of Section 3 (e) of the Act of 1920 (which provides that an Order in Council may be made making provision as to the conditions under which aircraft may be used for carrying goods, mails or passengers), but that apart from this special provision there was nothing in the Air Navigation Act to enable an Order in Council to be made prohibiting aerial photography. They added that in their Opinion an Order in Council containing a prohibition which is not found in the Convention cannot to that extent be said to carry out or give effect to or apply the provisions of the Convention.

24. The general propositions implicit in the opinion of 7th December, 1925, appear to be as follows:—that there is no power under Section 1 or 2 of the Act to give effect by Order in Council to the provisions of the Convention which; like Article 27, are optional and not mandatory; under Section 3 of the Act, on the other hand, the Order in Council may make provision for any of the matters specifically enumerated in that section, whether that provision gives effect to a corresponding provision of the Convention or not.

The Air Ministry have experienced some difficulty in applying these general propositions to all cases where a similar question arises, more especially in view of the second opinion referred to above.

25. It is thought that it may be of assistance to indicate by way of illustration the sort of difficulties which have presented themselves on a consideration of the consolidated Order as it at present stands in connexion with the drafting and preparation of the new Order, which is now contemplated.

26. Article 3 of the Convention, which deals with prohibited areas, is a provision of the same type as Article 27, in that it merely *entitles* each Contracting State to take certain action if it chooses. If the propositions set out above correctly represent the effect of the opinion of 1925 and are of general application, there is apparently no power under Sections 1 or 2 of the Act to give effect to Article 3 of the Convention. The only power to prohibit aircraft from flying over certain areas must be found, if it exists at all, in Section 3. The only one of the paragraphs of Section 3 which deals with the matter is paragraph (m). The last words of that paragraph authorise any steps to be taken for preventing aircraft from flying over prohibited areas, which were authorised to be taken under Section 2 of the Aerial Navigation Act, 1913. The steps so authorised are shooting down the defaulting aircraft. It appears to follow that the only provisions which can be inserted in the Order with respect to prohibited areas is that aircraft which fly over them can be shot down; they cannot be fined under the first words of paragraph (m) because, *ex hypothesi*, there can be no provision in the Order in Council prohibiting aircraft from flying over the areas in question except by virtue of the last words of paragraph (m). As a matter of fact, the existing Air Navigation Order, by the combined effect of Articles 4 (i) (iii) and 27 and Schedule VII, provides that the owners and pilots of aircraft which fly over prohibited areas at a lower altitude than 6,000 feet may be penalised by fine and imprisonment. For the foregoing reasons, however, it is doubted, in view of the opinion of 1925, whether this provision is *intra vires*.



27. The second paragraph of Article 13 of the Convention is again a provision of the same type as Article 27. It gives each State a right to refuse to recognise for the purpose of flights within its own territory certificates granted to one of its own nationals by another contracting State. Effect has in fact been given to this Article by Article 4(1) (iv) of the Air Navigation Order. Here again, it may be doubted whether this provision of the Order is *intra vires*, if the propositions implicit in the Law Officers' opinion of 1925 are to be applied generally. For on those propositions there is no power to give effect to the second paragraph of Article 13 under Sections 1 or 2 of the Act, and it is difficult to find any provision of Section 3 of the Act which will meet the case: Section 3(c) seems to be directed entirely to the manner and conditions of the issue of certificates and licences by the Secretary of State, relying apparently on Article 13 of the Convention combined with Sections 1 and 2 of the Act to regulate the recognition of certificates and licences issued by other States.

28. Article 16 of the Convention is another provision of the same type, empowering each State to establish reservations and restrictions in favour of its national aircraft. The Air Navigation Order has not as yet given effect to this provision: but, in view of certain recent amendments of the Convention, it is contemplated that effect may have to be given to it. If so, the same questions arise again. On the basis of the Law Officers' opinion, there is apparently no power to give effect to Article 16 of the Convention under Sections 1 or 2 of the Act; but apparently there is power to give effect to it under Section 3(e) of the Act, since the Air Ministry were advised by the Law Officers' opinion that there was power to give effect to Article 27 of the Convention under Section 3(c) of the Act.

29. Article 21 of the Convention is another provision of the same type: it empowers the proper authorities of each contracting State to demand the production of documents with which an aircraft must be provided. Effect is given to Article 21 of the Convention by Article 17 of the Air Navigation Order. Here, again, on the basis of the Law Officers' opinion, there is apparently no power to give effect to Article 21 of the Convention under Sections 1 or 2 of the Act. Under Section 3(c) of the Act, there is apparently power to make provision as to the production of certificate and licences: but under Article 19 of the Convention (to which effect is given in Article 15 of the Order in Council) aircraft have to be provided not only with certificates and licences but also with log-books and, in the case of aircraft carrying passengers, a list of names, and, in the case of aircraft carrying freight, bills of lading and manifest. Presumably, in the case of aircraft carrying goods or passengers, a provision in the Order in Council requiring the production of log-books, lists of passengers, bills of lading and manifest can be justified as a condition of the use of the aircraft under Section 3(e) of the Act; but it is difficult to find any paragraph of Section 3 which would justify a provision requiring the production of log-books by other aircraft.

30. Article 28 (another "optional" provision) is so similar in form and subject matter to Article 27, on which the Law Officers' opinion of 1925 was written, that it is thought that the opinion must clearly govern both Articles; the result being that there is no power under Sections 1 or 2 of the Act to give effect to Article 28 of the Convention, and effect can only be given to that Article, if at all, under Section 3(e), or possibly Section 3(j) of the Act. No effect has yet been given by Order in Council to Article 28 of the Convention, but it is possible that occasion may arise making it desirable to give effect to it.

31. Annex E, Section 1 of the Convention, contains another "optional" provision, in that it empowers each contracting State to impose conditions for obtaining pilots' licences more stringent than those laid down in the Convention (or in the case of licences only valid for internal traffic less stringent). Here again, it appears to follow from the Law Officers' opinion that there is no power to give effect to these provisions of Annex E of the Convention under Sections 1 or 2 of the Act. It is thought, however, that there is power to give effect to them under Section 3(c) of the Act, which specifically enables the Order in Council to prescribe the conditions of the issue and renewal of any certificate or licence required by the Order or by the Convention. Section 3(c) of the Act, therefore, appears to allow the Order to prescribe whatever conditions appear expedient for the issue of pilots' licences, so long as the conditions are not in breach of the Convention; and in fact conditions more stringent than those laid down in the Convention have in the case of certain licences been prescribed by the Secretary of State under paragraph 4 of Schedule V of the Order in Council.

32. Paragraphs 6 and 8 of Annex H of the Convention are provisions of the same type, but are of such minor importance that it is unnecessary to discuss them.

Paragraph 15, however, of Annex H, is of considerable importance in that it entitles each contracting State to forbid the throwing of articles out of aircraft while in flight. Effect has in fact been given to this provision by Article 13 of the Air Navigation Order. It would appear doubtful, however, on the basis of the Law Officers' opinion of 1925, whether this article of the Air Navigation Order is *intra vires*. The provision, being an "optional" provision, cannot be carried into effect (on the basis of the Law Officers' opinion) under Sections 1 or 2 of the Act. Presumably, under Section 3(e) of the Act, it could be made a condition of carrying goods, mails and passengers that Article 13 of the Air Navigation Order should be observed. That Article, however, is not confined to aircraft carrying goods, mails and passengers, but is of general application, as indeed is obviously desirable. The only provision of Section 3 which could justify the application of Article 13 of the Order to all aircraft is apparently paragraph (j), which allows the Order in Council to supplement the Convention by general safety regulations. The trouble, however, is that the provision in question in the Convention appears not among the provisions dealing with safety, but among the provisions dealing with customs, thus implying that the prohibition of dropping articles from aircraft in flight is to be confined to the purpose of preventing the aircraft from evading Customs duties, and is not to be extended to the purpose of preventing them from endangering persons or property on the ground. It is thought, however, that to draw this inference from the presence of this provision in Annex H is to put too strict a construction on the Convention.

33. The attention of the Law Officers and Counsel should perhaps be drawn in this connexion to Section 68(2) of the Merchant Shipping (Safety and Load Line Conventions) Act 1932. The Treasury Solicitor is informed that this subsection was drafted on the basis of the Law Officers' opinion of 1925 referred to in this case. The shipping Conventions to which this Act gives effect are analogous in many respects to the Aerial Navigation Convention: they deal with load lines and other matters affecting safety of life at sea. The Shipping Conventions contain a very large number of "optional" provisions, *i.e.*, provisions which leave it to the discretion of the contracting Governments whether any and what effect is to be given to them. Many sections of this Act are similar to Section 1 of the Air Navigation Act in empowering the Board of Trade to make such regulations as appear to them "necessary to give effect to the Convention," see *e.g.*, Section 16(2), 24(2) and 42(1). In the circumstances it was considered desirable, in view of the Law Officers' opinion of 1925 given with respect to the Air Navigation Act, to include Section 68(2) in the Act in order to make it clear that the Board had power to give effect to the "optional" provisions of the Convention.

34. In the case of the second of the two Opinions above referred to the question was whether by Order in Council under the Air Navigation Act, 1920, there was power to declare the precincts of Windsor Castle a prohibited area over which aircraft were not to fly. Article 3 of the Convention provides that a contracting State may for military reasons or in the interests of public safety prohibit aircraft from flying over certain areas of its territory. The advice given in this case was that there was not power to declare by Order in Council the required area to be a prohibited area the view being taken that the suggested prohibition could not properly be said to be either "for military reasons" or "in the interest of public safety." The Law Officers added that in their Opinion any Order in Council issued under the Air Navigation Act, 1920, Part I, must be such as to give effect to the Convention. From this it would appear to follow that not only must an Order in Council under Sections 1 and 2 of the Act be such as to give effect to the Convention, but also an Order in Council under Section 3.

35. The Air Ministry find some difficulty in reconciling this proposition with the opinion of 1925. In the opinion of 1925 they were advised that although the prohibition of the carriage of photographic apparatus could not be justified under Section 1 or 2 of the Act, because such a provision was not necessary to give effect to the Convention, it could be justified under Section 3: and they interpreted this opinion as meaning that it was unnecessary, in exercising the powers conferred by Section 3 of the Act, to consider whether or not effect was being given



to the Convention. The later opinion of 1931, however, appears to imply that this interpretation of the former opinion of 1925 was incorrect.

But it is not clear that the statement in the Opinion of 1931 to the effect that any Order in Council made under the Air Navigation Act, 1920, Part I, must be such as "to give effect to the Convention" was intended by the use of that expression in that Opinion to imply that the only cases in which effect is given to the Convention are cases in which the Order in Council imposes a restriction required by the Convention. In the case before the Law Officers in 1931 the Law Officers were expressing the opinion that the prohibition which was proposed was not a prohibition of the nature contemplated by the Convention where the Convention definitely dealt with certain prohibitions.

36. The Air Ministry, therefore, desire to be advised to what extent their former interpretation of the opinion of 1925 was wrong, particularly having regard to the "optional" provisions of the Convention, which have been dealt with earlier in this case. It has been previously suggested in this case that, on the basis of the Law Officers' opinion of 1925, it is possible that certain provisions of the Order giving effect to the "optional" provisions of the Convention can be justified under Section 3 of the Act. On the basis of the second opinion, however, this would appear to be doubtful.

37. If it be the case that a provision made by Order in Council by virtue of Section 3 must be such as to give effect to the Convention, the Air Ministry experience great practical difficulty in the general application of that proposition. Several of the matters specifically dealt with in Section 3 are not dealt with at all in the Convention. For instance, Section 3 (i) enables the Order to prescribe the fees to be paid for certificates or licences, but there is no provision in the Convention whatever as respects fees, presumably for the reason that this was regarded as a matter for the domestic legislation of each Government. Again, there is nothing in the Convention as to the matters dealt with in Section 3 (g) of the Act, and little or nothing as to the matters dealt with in Section 3 (b) or 3 (k).

38. In this connexion attention should be drawn again to the provisions of the Air Navigation Order referred to in paragraph 17 on page 4 above, to which there is no counterpart in the Convention. It is conceived that these provisions were inserted in the Order on the supposition that they were partly justified by Section 3 of the Act and partly by the provisions of Section 2 empowering the making of consequential and supplementary provisions, as shown in the following table:—

Provision of Order.	Provision of Act.
The provisoes to Article 3 (i) ...	Section 3 (g).
Article 4 (2) ...	Section 3 (j).
Articles 5 (i) and 7 (i) ...	Section 3 (b) and (e)
Article 8 ...	Section 3 (b).
Articles 9, 10 and 12 ...	Section 3 (j).
Articles 19 and 20 ...	Section 3 (k).
Article 21 (2) ...	Section 3 (i).
Article 24 ...	Partly Section 3 (c), partly consequential and supplementary provisions under Section 2.
Article 27 ...	Section 3 (m).
Article 28 ...	Section 3 (c).
Schedule I, paras. 2 to 6 ...	Partly Section 3 (d), partly consequential and supplementary provisions under Section 2.
Schedule II, paras. 8 and 9 ...	Section 3 (e) and (j).
Schedule VI ...	Section 3 (i).

39. In the circumstances the Air Ministry wish to be advised how far the proposition that Orders in Council made by virtue of Section 3 of the Act must be such as to give effect to the Convention is to extend.

40. It is desired by the Air Ministry to submit to the Law Officers and Counsel for their consideration the following general observations with regard to provisions of the Air Navigation Act, 1920, as respects Orders in Council made under the Act.

The long title of the Air Navigation Act, 1920, describes the Act as "An Act to enable effect to be given to a Convention for regulating Air Navigation and to make further provision for the control and regulation of Aviation." Similarly in the preamble to the Act, after referring to the Convention, it is recited that it is expedient to make further provision for controlling and regulating the navigation of aircraft whether British or foreign within the limits of His Majesty's jurisdiction (as defined in the preamble), and in the case of British aircraft for regulating the navigation thereof both within such jurisdiction and elsewhere. This recital is followed by a recital that it is also expedient that provision should be made by Parliament for enabling effect to be given to the Convention.

It seems clear therefore that the Act is intended to do more than to give effect to the Convention and the Convention in fact seems to be given rather the second place in the preamble.

It may be said, it is true, that Part II of the Act contains the "further provision" which in accordance with the preamble is to be made for controlling and regulating the navigation of aircraft, and that Part I is limited to giving effect to the Convention. In support of this construction it may further be said that regard must be had to the fact that Part I of the Act (in which Sections 1, 2, and 3 are contained) is headed "Power to apply Convention," and this construction moreover may be thought to derive support from the statement in the Law Officers' opinion of the 20th May, 1931, that "any Order in Council issued under the Air Navigation Act, 1920, Part I, must be such as to give effect to the Convention."

It is not clear however that the existence of the heading "Power to apply Convention" was a ground of the Opinion of the 20th May, 1931, and it is submitted for the consideration of the Law Officers and Counsel that the existence of the heading "Power to apply Convention" in Part I of the Act cannot control the express terms of the enactments which follow in Sections 1, 2 and 3, and particularly Section 3. Moreover Section 4 in Part I (which enables the provisions of the Act to be extended to British Possessions other than self-governing Dominions and India) applies to the whole Act and can hardly be appropriately found in Part I if Part I is intended to be definitely confined to giving effect to the Convention.

41. It is further submitted that the same considerations are material to the due interpretation of the scope of Section 3 of the Act, and that even if it be thought that the provisions of Sections 1 and 2 must be limited to matters necessary for carrying out the Convention and for giving effect thereto or to directing that the provisions of the Convention shall apply to or in relation to aircraft in or over the British Islands, &c., Section 3 is not subject to any such limitation, and an Order in Council under Section 3 may make provision for any matter or thing referred to in sub-para. (a) to (m) of Section 3 without regard to the relevance of such matter or thing to the carrying out or giving effect to the Convention, though it may be that in cases where any of these matters are dealt with by the Convention the provisions made by the Order in Council with respect to that matter must not be in breach of the Convention.

The contention that this is so receives, it is submitted, additional support, if the provisions of Section 3 itself are examined. It is to be observed that sub-para. (b) of Section 3 provides (*inter alia*) for the licensing, &c., of aerodromes. No provision is made in the Convention with regard to this, but the subject is nevertheless one which it seems clear is intended to be dealt with by Order in Council under Section 3. Again sub-para. (c) of Section 3 refers to Certificates or licences "required by the Order or by the Convention," and may therefore be said to extend to certificates and licences not required by the Convention and a similar observation may be made with regard to the provisions of sub-para. (i). Sub-para. (g) of Section 3 provides expressly for exemption from the provisions of the Order or of the Convention being made in certain cases, and sub-para. (j) of Section 3 provides for "supplementing the Convention . . . by general safety regulations" which would appear to contemplate the doing of something which goes further than carrying out or giving effect to the Convention (as in Section 1), or even applying it (as in Section 2), and seems to indicate the provision in the Order in Council of something not included in the Convention, but extraneous and additional to the provisions thereof, viz., general safety regulations.



This sub-paragraph may perhaps be suggested to be of special relevance in this connexion because it seems to indicate, it is suggested, an intention of providing by means of Section 3 (j) for something which is definitely omitted from the Convention.

42. Attention may perhaps also be drawn to the provisions of Section 2 which makes provision for the application of the provisions of the Convention to or in relation to any aircraft in or over the British Islands or the territorial waters adjacent thereto, and provides in particular that such consequential and supplementary provisions may be made as appear necessary or expedient for the purpose of such application. This Section seems clearly therefore to contemplate the application of the Convention not simpliciter as it stands, but with consequential and supplementary provisions (which expression it is submitted is a wide one and might cover a considerable area of variation from the original).

These consequential and supplementary provisions must, it is true, be made for the purpose of the application of the provisions of the Convention, but the provisions of the Convention are nevertheless to that extent clearly intended to be added to or even modified so far as appears "necessary or expedient."

43. In reference to the point referred to above as to the effect to be given to the heading "Power to apply Convention" in the construction of the Sections of the Act which are contained in Part I of the Act and particularly Sections 1, 2 and 3, it is desired to draw the attention of the Law Officers and Counsel to the Cases dealing with the effect to be given to marginal notes and cross-headings in statutes which are collected and commented upon in *Craies on Statutes*, 3rd Ed., pp. 177-8 and pp. 186-190. The decisions in these cases do not appear to be wholly consistent, and the views put forward by Craies appear to be open to question in some respects and at variance with the views advanced in *Roscoe's Nisi Prius* 18th Ed., p. 104.

The following observations with reference to marginal notes and cross-headings which have been furnished to the Treasury Solicitor by the Parliamentary Counsel to the Treasury and which it is thought may be of assistance to the Law Officers and Counsel are submitted for their consideration.

As regards *marginal notes*, there are three early authorities in support of the view that these notes are in some circumstances part of the Act, and that effect should be given to them in construing the Act (see *R. v. Milverton* 5 A. & E. 841 at p. 854; *Sheffield Waterworks v. Bennett* L.R. 7 Ex. 409 at p. 421; *Venour v. Sellon* 2 Ch. D. 522 at p. 525). But the preponderance of opinion in the later cases is in favour of the view that these notes form no part of the Act and cannot be considered for purposes of construction (see *Claydon v. Green* L.R. 3 C.P. 511 per Willes J. at p. 522; *A. G. v. Great Eastern Railway* 11 Ch. D. 449 at pp. 460, 461 and 465; in *Re Woking Urban Council* [1914] 1 Ch. 300 per Phillimore L.J. at p. 322; *Wilkes v. Goodwin* [1923] 2 K.B. 86 per Scrutton L.J. at p. 100). This modern view of the effect of marginal notes seems to be based on the fact that these notes are not considered by Parliament, and no amendment can be moved to them in Parliament (see per Baggallay L.J. in *A.G. v. Great Eastern Railway* supra at p. 461, and per Scrutton L.J. in *Wilkes v. Goodwin* supra): so that they are inserted "not by Parliament nor under the authority of Parliament, but by irresponsible persons" (see per Phillimore L.J. in *Re Woking Urban Council* supra at p. 322).

As regards *cross-headings*, on the other hand, there are several clear decisions that these headings are not on the same footing as marginal notes, but are to be treated as part of the Act (see *Eastern Counties &c. v. Marriage* 9 H.L.C. 32 per Channel B. at p. 41; *R. v. Local Government Board* 10 Q.B.D. 309 per Brett L.J. at p. 321; *Inglis v. Robertson* [1898] A.C. 616 per Lord Herschell at p. 630). Again, in *Hammersmith Railway Co. v. Brand* (L.R. 4 Eng. & Ir. App. 171), both Lord Chelmsford at p. 203 and Lord Colonsay at pp. 209-10 clearly construed a section in the light of the heading to the group of sections in which it was found. On the other hand, Lord Cairns, in a dissenting judgment in the last-mentioned case, at p. 217, was of opinion that headings of groups of sections are "not to be relied on" and that in general they should be treated in much the same way as marginal notes: and again, in *Union Steamship Co. v. Melbourne Harbour Trust*, 9 A.C. 365, the Judicial Committee held, at p. 369, that a cross-heading in an Australian Act was "inserted for the purpose of convenience of reference and was not intended to control the interpretation of the clauses which follow." It may also be noted that in *Lang v. Kerr Anderson & Co.* 3 A.C. 529, Lord Cairns

held, at p. 536, that the cross-headings in a local Glasgow Act were not to be treated as mere marginal notes only because they were referred to in the body of the Act itself; this passage in Lord Cairns' judgment may be related to the observation of Phillimore L.J. in *Re Woking Urban Council* [1914] 1 Ch. 300 at p. 322, that where a marginal note is referred to in the Act itself it may well be that it does form part of the Act.

It may be observed that in none of these cases dealing with cross-headings has it ever been brought to the notice of the Court that for the purposes of Parliamentary procedure cross-headings are on exactly the same footing as marginal notes (see May's Parliamentary Practice 13th Ed., p. 404, note 5): cross-headings are no more regarded as part of a Bill than marginal notes, and no amendment can be moved to them. If, therefore, the reason for not recognising the existence of marginal notes in the construction of a statute is that they are not inserted by the authority of Parliament and cannot be amended by Parliament, the same reasoning should apply to cross-headings.

The reason why no attention has been drawn to this point in the courts is, presumably, that the Parliamentary ruling as to marginal notes was laid down and generally accepted many years ago; whereas the corresponding ruling as to cross-headings became generally accepted only in recent years, after all the cases cited above had been decided. It is true that so early as 1875 the Chairman of Committees ruled that no amendment could be moved to a cross-heading, because it was on the same footing as a marginal note (see Parl. Debs. 3rd Series, vol. 225, p. 1759). This ruling as to cross-headings, however, was not generally observed, until a similar ruling was again given by the Chairman of Committees in 1918 (H.C. Debs. 5th Series, vol. 105, p. 1995), and it is believed that amendments to cross-headings were allowed to be moved as recently as 1911. The ruling of 1918, however, has been regarded as conclusive for the purpose of Parliamentary procedure, and has been invariably observed: with the result that cross-headings are now sometimes altered by the Clerk of the Parliaments after a Bill has been through all its stages and before it receives the Royal Assent, in order to make the cross-headings of the Bill as introduced correspond with the clauses as amended in the course of the proceedings in Parliament.

The attention of the Law Officers and Counsel should, however, be drawn to Section 14 of the Army and Air Force (Annual) Act, 1925, which expressly authorises the Clerk of the Parliaments to alter the cross-headings in the Army Act. That section appears to indicate that, without express statutory authority, the cross-headings could not have been altered. In the light of the Chairman's ruling in 1918, the only explanation which can be offered on this section is that the Army (Annual) Act was originally enacted in 1883 at a time when, not withstanding the ruling in 1875, cross-headings were often regarded as part of an Act and susceptible of amendment in Parliament. It may, therefore, have been felt by the draughtsman that the ratio decidendi of the marginal notes cases was not applicable to cross-headings in statutes passed before the ruling in 1918. The Air Navigation Act, 1920, was, of course, passed after the ruling of 1918.

In any case it is submitted that there is abundant authority for saying that a cross-heading, like a preamble, can only be looked to for purposes of construction in cases of doubt, and cannot be treated as over-riding clear and express words in the sections which follow. On this point, see *Union Steamship Co. v. Melbourne Harbour Trust* 9 A.C. 365; *Latham v. Lafone* L.R. 2 Ex. 115 per Kelly C.B. at p. 119; *Toronto Corporation v. Toronto Railway* [1907] A.C. 315 at p. 324; *Fletcher v. Birkenhead Corporation* [1907] 1 K.B. 205 per Collins M.R. at p. 213-4 and per Farwell L.J. at p. 218; *R. v. Local Government Board* 10 Q.B.D. 309 per Brett L.J. at p. 321. If, therefore (as is submitted above), it is clear from the words of Section 3 of the Air Navigation Act, 1920, that that section enables Orders in Council to provide for matters outside the Convention, the express words of that section should not be over-ridden by the cross-heading of the part of the Act in which it appears.

44. A supplementary memorandum dealing with the general position from the administrative point of view as respects the Air Navigation Act, 1920, and the Air Navigation Order has been prepared by the Air Ministry, and it is desired that such memorandum, consisting of the minutes written by Mr. Ross and the Secretary of the Air Ministry (Document 7 herewith), should be submitted to the Law Officers and Counsel with this case.



It is desired by the Air Ministry that it should be stated that the Air Ministry endorse the case, but desire to add the notes contained in the supplementary memorandum to which the attention of the Law Officers and Counsel is accordingly directed, and in particular to the observations contained in the Secretary's minute of the 29th March, 1932.

The Law Officers and Counsel are requested to advise the Air Ministry—

1. Whether or not there is power by virtue of Section 1 of the Air Navigation Act, 1920, to bring into operation by Order in Council made under the Act the provisions of the Convention which are framed in an "optional" form (that is to say provisions framed in a form which allows to each contracting State discretion as to giving effect and as to the effect to be given thereto, as, *e.g.*, the provisions of Article 3 of the Convention and of the second paragraph of Article 13, Articles 16, 21 and 28, Section 1 of Annex E, and paragraph 15 of Annex H of the Convention), or to bring into operation by Order in Council so made any class or classes of such "optional" provisions, and if so to what extent.
2. Whether or not there is power by virtue of Section 2 of the Air Navigation Act, 1920, to bring into operation by Order in Council made under the Act the provisions of the Convention which are framed in an "optional" form (as referred to in Question 1 above), or to bring into operation by Order in Council so made any class or classes of such "optional" provisions, and if so to what extent.
3. Whether or not and to what extent the power conferred by Section 2 of the Air Navigation Act, 1920, of making such consequential and supplementary provisions as appear necessary or expedient for the purpose of applying the provisions of the Convention to or in relation to any aircraft in or over the British Islands or the territorial waters adjacent thereto, as provided by that Section, enables provisions to be brought into operation by Order in Council made under the Act which, although not included in the provisions of the Convention, can be regarded as being consequential upon or supplementary to such provisions (a) in the case of "mandatory" provisions of the Convention, and (b) in the case of "optional" provisions of the Convention.
4. Whether or not there is power by virtue of Section 3 of the Air Navigation Act, 1920, to bring into operation by Order in Council made under the Act the provisions of the Convention which are framed in an "optional" form (as referred to in Question 1 above), or to bring into operation by Order in Council so made any class or classes of such "optional" provisions, and if so to what extent.
5. To what extent it is necessary that the provisions of any Order in Council made under the Act, with respect to the specific matters enumerated in Section 3, Sub-sections (a) to (m), of the Air Navigation Act, 1920, should be such as to carry out or to give effect to or to apply the Convention, or should otherwise relate to the provisions of the Convention.
6. Generally upon the case.

The Air Ministry have informed the Treasury Solicitor that they would desire a Consultation with the Law Officers and Counsel in this Case, at which Parliamentary Counsel and representatives of the Air Ministry could be present if the Law Officers would kindly accord a Consultation.

Opinion of the Law Officers of the Crown and Counsel.

1. Upon consideration of the full discussion contained in the case submitted for our opinion of the Convention and Air Navigation Act, 1920, we are of opinion that the words of Section 1 of the Air Navigation Act, 1920, are sufficiently wide to permit His Majesty by Order in Council to give effect to the option contained in those provisions of the Convention, which allow each contracting State discretion to do or refrain from doing certain things. Notwithstanding the opinion given on the 7th December, 1925, by the Law Officers with regard to restrictions upon photography, we have come to the conclusion

that to limit the words of the Section merely to the making of Orders in Council giving effect to those provisions of the Convention, which are described in our instructions as the mandatory provisions of the Convention, is to narrow unduly the general language of the Section.

2. We are of opinion that, similarly, His Majesty may by Order in Council under Section 2 of the Act give effect to those options as applied to national air navigation as opposed to international air navigation. The extent to which this power goes must be limited to the express or implied intention of the Convention. Orders in Council cannot be made which violate or contradict such express or implied intention.

3. We are of opinion that so long as the matters dealt with in an Order in Council are consequential upon or supplemental to the provisions of the Convention, whether mandatory or optional, for the purpose of applying these provisions, the Order in Council would be *intra vires* in so far as it applies to national air navigation. It is impossible to lay down any more definite proposition; and each proposed Order in Council must be considered on its merits, having regard to the circumstances of each case.

4 and 5. We are of opinion that under Section 3 Orders in Council may validly be made dealing with the specific matters set out in subsections (a) to (m). Here again such Orders in Council, though dealing with such specific matters, must not violate or contradict the express or implied intention of the Convention.

6. Generally we have nothing to add.

T. W. H. INSKIP.
F. B. MERRIMAN.
WILFRID LEWIS.

*Law Officers' Department,
June 9, 1932.*

[W 9197/192/50]

No. 2^c.

[Dominions Office.]

[July 29, 1932.]

Dominions Office to the Law Officers of the Crown.

December 31, 1931

Gentlemen,

I AM directed by Mr. Secretary Thomas to state that he desires to submit to you certain questions with regard to the steps to be taken to assert His Majesty's sovereignty over, and to provide for the administration of, a part of the Antarctic Continent which it has for some time been contemplated should be placed under the authority of His Majesty's Government in the Commonwealth of Australia, viz., that part of the continent (with the exception of Adélie Land) which lies between the 45th and 160th meridians of east longitude. An explanatory map is annexed to the enclosed memorandum E (30) 20, to which reference is made subsequently.

2. The origin of the present policy in the Antarctic is explained in a secret memorandum Dominions, No. 78 (a copy of which is forwarded herewith) which was enclosed in the letter from the Colonial Office to the Law Officers of the 27th November, 1922. It will be seen that it is suggested in this memorandum that the methods of placing portions of the Antarctic under Australia and New Zealand which would be most in accordance with past procedure would be (a) in the case of Australia to follow the Papua precedent and to issue Letters Patent placing the territory under the Commonwealth in the manner contemplated in section 122 of the Commonwealth of Australia Constitution Act; (b) in the case of New Zealand to follow the precedent of the Kermadec and Cook Islands and to issue an Order in Council under the Colonial Boundaries Act, 1895. It was pointed out, however, that under either of the above two methods resolutions of both Houses of the Dominion Parliaments would be necessary and it was suggested that the object desired might equally well be obtained by the less elaborate method of issuing Letters Patent appointing the Governor-General for the time being of the Dominion concerned to be Governor for the portion of the

Steps to be taken to assert His Majesty's sovereignty over, and to provide for administration of, part of the Antarctic Continent.



Antarctic territory in question and instructing him only to exercise his powers on the advice of his Ministers for the Dominion.

3. It will be seen from the Colonial Office letter above referred to that in the case of the Ross Dependency the New Zealand Government indicated their preference for the latter method, but it appeared from the Law Officers' report of the 3rd January, 1923, that while it was considered possible to confer upon the Governor-General of New Zealand powers of the nature desired, it was thought that this could only be done under the British Settlements Act and not by way of Letters Patent of the nature of those set out in Annexure C to the memorandum, Dominions, No. 78. This opinion was based upon the view that the territory in question must be regarded as a "British Settlement" within the meaning of the definition in the British Settlements Act, 1887. The Law Officers would also appear to have taken the view that, notwithstanding the provisions of section 3, section 2 of the British Settlements Act gave power to delegate by Order in Council to one person (who was to be outside the territory) the powers conferred by the Act on His Majesty in Council. A copy of the Order in Council relating to the Ross Dependency which was accordingly issued on the 30th July, 1923, is enclosed.

4. The further steps which have been taken since that date to establish British control in the Antarctic are described in some detail in the enclosed memorandum E (30) 20 prepared for the use of the last Imperial Conference, but for present purposes it is sufficient to invite your special attention to paragraphs 6-8 and paragraphs 55-64 of the annex to this memorandum. The work of the expedition under Sir Douglas Mawson, which was undertaken to carry out the second stage of the measures recommended at the Imperial Conference of 1926, has now been completed, and a copy of a despatch from the Commonwealth Government forwarding Sir D. Mawson's report on his work is enclosed. As stated in this despatch "the greater portion of the sector" (by which the coastline forming the base of the sector is presumably meant) "between 160°E. and 45°E. has been discovered or revisited. British sovereignty has been formally proclaimed on five occasions extending over the whole area from 160° to 142°E. and 138°E. to 45°E."

5. It appears desirable that steps should now be taken, in pursuance of the policy recommended at the time of the Imperial Conference of 1926 and reaffirmed by the conference of 1930, to provide for the administration of the area in question by placing it under the control of His Majesty's Government in the Commonwealth of Australia. In this connexion the following main questions arise: (1) Whether the action already taken to assert British title to the territory in question may, in the peculiar circumstances appertaining to Antarctic discovery, be regarded as sufficient or whether any formal act of annexation is now desirable; (2) whether in the particular circumstances the territory in question may properly be defined by means of meridians of longitude meeting at the South Pole; (3) whether any reference is required in the instrument to be issued to the ground on which title is based.

6. As to the first question it will be observed from p. 6 of the memorandum E (30) 20 that the Committee of the Imperial Conference of 1926 stated that the third and final stage should be "the issue of Letters Patent annexing the area and making provision for its government." The phrase "annexing the area" was probably not used in a very technical sense and the question whether, from the point of view of establishing a title to the area on as secure a basis as possible, a formal act of annexation is now desirable appears to require careful consideration.

7. The Law Officers' opinion of the 3rd January, 1923, stated that it was no longer the law that the discovery of previously unknown territory conferred an absolute title upon the State by whom the discovery was made, and that such discovery offered only an inchoate title which was perfected by occupation or by acts of ownership exercised over a long period and acquiesced in by other Powers. The opinion proceeded to state "that it would be unwise to proceed by way of annexation in the Antarctic, and that the Government is right to assert existing British sovereignty in the region now in question." Accordingly, the action which was then taken in connexion with the Ross Dependency proceeded on the basis that a British title by occupation to the area in question already existed.

8. The foundations for similar action in the present case have already been laid. As will be seen from paragraph 8 of the memorandum E (30) 20, action

was taken at the Imperial Conference of 1926 to assert British title by discovery to six territories in the area in question. A further advance was made as a result of the Imperial Conference of 1930, when the following passage was inserted in the published summary of proceedings:—

The question of Antarctic exploration was discussed between representatives of the Governments interested. They took note of the fact that, in the exercise of the British title to that part of the Antarctic Continent which lies between Enderby Land and the Ross Dependency, with the exception of the territory of Adélie Land, an expedition organised by His Majesty's Government in the Commonwealth of Australia and led by Sir Douglas Mawson, was despatched to these regions in 1929. The valuable exploratory and scientific work accomplished by this expedition during the season of 1929-30, was reviewed by the representatives of the Governments concerned, who also discussed the arrangements proposed for the continuation of the work during the season of 1930-31.

The whole of that part of the continent (with the exception of the French territory of Adélie Land) which lies between the 45th and 160th meridians of east longitude was thus claimed as British. No protest has been received from any foreign Government, and in these circumstances, and in view also of the additional work since accomplished by the expedition, and the proclamations issued by Sir D. Mawson, it would seem that the action already taken to assert British title to the territory may not unreasonably be regarded as sufficient.

9. With regard to the second question, viz., whether the area claimed may properly be regarded as stretching to the South Pole, it will be observed that in the case of both the Ross Dependency and the Falkland Islands Dependencies, the eastern and western boundaries were defined as lines of longitude which meet at the Pole, and it is contemplated that a similar course should be adopted in the present instance. It is true that some slight distinction can be drawn between the present case and that of the Ross Dependency, in that before the Order in Council in the latter case was issued, the interior had been penetrated, and the Pole itself reached, by British and other explorers; whereas the hinterland of the proposed Commonwealth sector remains wholly unexplored. In this respect, however, the present case is on the same footing as that of the Falkland Islands Dependencies which were extended by Letters Patent in 1917 to the South Pole, although no attempt had ever been made to explore the interior.

10. The policy adopted in the case of the Ross and Falkland Islands Dependencies of claiming sectors of the Antarctic Continent, stretching from the coast line to the Pole itself, seems to have owed its origin to the practice, known as the "sector principle," which has been established during the last century in the Arctic. A note on the "sector principle" in relation to the Arctic is enclosed, from which it will be seen that it is now generally recognised by the interested Powers, with the exception of Norway, that each Power whose mainland territory borders the Arctic circle is entitled to claim any land which may exist, either known or unknown, within the triangle formed by two meridians of longitude, starting from the eastern and western boundaries of its mainland territory and continuing until they meet at the Pole. There is, however, this difference between the Arctic and Antarctic regions. There is no land mass in the Arctic regions, which consist for the most part of numerous islands in frozen seas contiguous to inhabited territory. Surrounding the South Pole, however, there is the vast Antarctic Continent, separated from the nearest inhabited territories by considerable spaces of open and navigable sea. For this reason it was not possible to apply to the Antarctic the "sector principle" as understood in the Arctic, but only a modified form of it, the difference being that whereas in the Arctic the base of each sector is taken to be the eastern and western boundaries of the nearest mainland territory, in the Antarctic the base adopted is that portion of the outlying part of the Antarctic Continent to which title has been established by the Power concerned.

11. It would, however, in any case seem inexpedient to justify the claiming of sectors of the Antarctic Continent by reference to the "sector principle" applied in the Arctic. The only Power which has shown any desire of recent years to acquire territory in the Antarctic is Norway, the very Power which resists the application of the "sector principle" in the Arctic. As is explained in the enclosed note, great pains have been taken to forestall any opposition on



the part of the Norwegian Government to the action now contemplated in connexion with the proposed Australian sector, and a friendly understanding has been reached under which an adjoining sector is regarded as open to Norwegian occupation. A Norwegian expedition has already taken advantage of this understanding to claim for Norway areas in this "free" sector, and, if only on this account, it is considered improbable that they would wish to challenge the southward limit of the proposed Australian sector. It is important, however, that they should be given no provocation which might lead them to depart from the understanding reached, and, from this point of view, it would seem very desirable to avoid any reference to the "sector principle" in the Arctic, which they have hitherto felt bound to contest.

12. A further and perhaps even more cogent argument against any reference to conditions in the Arctic lies in the fact that an opportunity would thereby be given to any Power, which wished to do so, to challenge the modified "sector principle," on which British action in the Antarctic has hitherto proceeded, and to press for the application to the Antarctic of the principle already applied in the Arctic. Any development of this kind would be seriously embarrassing, since if the "sector principle" as applied in the Arctic were to be applied to the Antarctic, considerable portions of the Antarctic Continent and adjacent islands now included in the Falkland Islands Dependencies, would fall within the sphere of sovereignty of Argentina and Chile. It is suggested, in these circumstances, that while the Ross and Falkland Islands Dependencies afford good precedents for defining the proposed Commonwealth sector by means of meridians of longitude meeting at the South Pole (and, indeed, it would be difficult to define the Commonwealth sector in any other manner without casting doubt on the validity of those precedents), no attempt should be made to justify such action by reference to practice in the Arctic.

13. There remains the third question, viz., whether it is necessary to make any reference whatever to the grounds on which title is based. On the assumption that you share the opinion expressed in the Law Officers report of 1923, that it would be unwise to proceed by way of annexation in the Antarctic, and provided that the conclusion reached in paragraph 12 above commends itself to you, it would not appear that any such reference is required, and to specify the grounds on which title is based might provoke criticism from foreign Powers which would not otherwise be forthcoming.

14. There is, however, one minor point to which your attention should perhaps be drawn. Sir Douglas Mawson's commission authorised him to take possession (in addition to any territories which he might discover) of seven specified territories, which were identical with the list contained in the published report of the Imperial Conference of 1926 as being areas "to which a British title already exists by virtue of discovery" (see paragraph 8 of the annex to memorandum E (30) 20). Neither the report nor the commission contained any express reference to the region lying between these discovered territories and the South Pole, but you will observe that in the case of six of the seven territories Sir Douglas Mawson's later proclamations in terms covered that region. (The seventh territory, viz., the outlying part of Coats Land, lies outside the proposed Australian sector, and was not visited by the expedition.) There is, of course, no doubt that it was the intention of those concerned with both the report and the commission to cover the whole sector of which the base was the territories referred to, but inasmuch as Sir Douglas Mawson's commission did not in terms authorise him to take possession of anything beyond the main territories, the question whether his action requires something in the nature of ratification by His Majesty in order to render it fully effective may require consideration. For the reasons given above, however, it is hoped that it may be permissible to proceed on the basis that each of the mentioned territories included the hinterland behind it up to the Pole, which basis the Imperial Conference of 1926 agreed should be accepted in the case of the French territory of Adélie Land.

15. When the above questions have been decided, the question will arise whether the instrument itself should take the form of a Statutory Order in Council on the lines of the Ross Dependency Order in Council of the 30th July, 1923, or whether it would be better to adopt the procedure referred to under (a) in paragraph 2 above, and place the territory under the authority of the Commonwealth of Australia by means of Letters Patent or a Prerogative Order in Council. Precedents for the two latter courses exist in the Letters Patent of

the 18th March, 1902, relating to British New Guinea, the Norfolk Island Order in Council of the 30th March, 1914, and the Order in Council of the 23rd July last, relating to the Ashmore and Cartier Islands. Copies of these instruments are enclosed. If, however, procedure by way of Letters Patent or Prerogative Order in Council were followed, legislation by the Commonwealth Government would be necessary, and from this point of view the Commonwealth Government might possibly prefer the simpler process adopted in the case of the Ross Dependency, under which legislation by the Dominion Government is not required.

16. On the other hand, while it would apparently be in order, on the view expressed by the Law Officers in 1923, to issue an Order in Council following the lines of the Ross Dependency Order, Mr. Thomas is somewhat doubtful whether in the case of the territory now in question it would be entirely appropriate to make use of provisions of the British Settlements Act, if it can be avoided, since it must be admitted that this territory is ice-bound and less habitable even than the Ross Dependency, and that the description of it as a "British Settlement" involves an artificial interpretation of the phrase, particularly having regard to the wording of the preamble of the Act. Further, the view has always been held by the legal advisers to this Department that there is no power to delegate the powers conferred by the British Settlements Act on His Majesty in Council to less than three persons, who must be persons within the settlement, and this was the view taken by the Law Officers in their report of the 29th February, 1912, to the Colonial Office. Reference was made to this report in the letter from the Colonial Office to the Law Officers of the 27th November, 1922, and Mr. Thomas assumes, therefore, that this aspect of the matter had been carefully considered when the Law Officers reported on the 3rd January, 1923, that it was possible, under the British Settlements Act, to confer the desired powers on the Governor-General of New Zealand by Order in Council. Nevertheless, if there is any possible doubt as to the validity of this course, an additional argument would be provided for following a different procedure in the present case.

17. It will be necessary to consult the Commonwealth Government as to the steps to be taken, but it is thought that it would expedite matters if the actual draft of the instrument to be issued could be submitted to them for concurrence. On the assumption that title may be regarded as already existing, and that it will not be considered necessary to specify the grounds on which title is based, the enclosed alternative draft instruments have been prepared, viz., (a) an Order under the British Settlements Act following the precedent of the Ross Dependency Order in Council; (b) (i) a prerogative Order on the lines of the Order in Council relating to the Ashmore and Cartier Islands; (b) (ii) Letters Patent placing the territory under the Commonwealth of Australia in the manner contemplated in Section 122 of the Commonwealth of Australia Constitution Act (on the lines of the Letters Patent dated the 18th March, 1902, relating to British New Guinea).

18. Mr. Thomas would be glad if you could take these papers into consideration at an early date and advise him—

- (1) Whether the action already taken to assert British title to the territory in question may, in the peculiar circumstances appertaining to Antarctic discovery, be regarded as sufficient, or whether any formal act of annexation is now desirable.
- (2) Whether, in the particular circumstances, the territory in question may properly be defined by meridians of longitude meeting at the South Pole.
- (3) Whether any reference is required in the instrument to be issued to the grounds on which title is based.
- (4) If the answers to the first and second questions are in the affirmative, which of the two alternative methods of procedure is considered the more appropriate, viz., the issue of a Statutory Order in Council under the British Settlements Act in the terms of draft (a), or the issue of an instrument invoking the provisions of Section 122 of the Commonwealth Constitution Act, and, if the latter, whether such instrument should take the form of a Prerogative Order in Council in the terms of draft (b) (i) or of Letters Patent in the terms of draft (b) (ii).



1932

42

GENERAL.

- (5) If none of the enclosed drafts is considered suitable, what other form of instrument could properly be issued.
- (6) Whether, before issuing such an Order in Council or similar instrument, any preliminary action is considered necessary with a view to confirming the proclamations already issued asserting His Majesty's sovereignty over the territory in question.
- (7) If the answer to either the first or second question, or both, is in the negative, what procedure should be adopted to meet the object in view.
- (8) Generally.

I am, &c.
H. N. TAIT.

List of Papers.

1. Imperial Conference Paper E (30) 20.
2. Memorandum, Dominions, No. 78.
3. Ross Dependency Order in Council, 1923 [S.P., Vol. 117, p. 91].
4. Commonwealth of Australia despatch, July 13, 1931 (report of Sir D. Mawson's work in Antarctic [W 11079/29/50 (1931)]).
5. Note on Sector Principle [W 399/192/50 (1932)].
6. Letters Patent, British New Guinea, March 18, 1902 [S.P., Vol. 110, p. 66].
7. Order in Council, Norfolk Islands, March 30, 1914 [S.P., Vol. 107, p. 300].
8. Order in Council, Ashmore and Cartier Islands, July 23, 1931 [U 572/517/750 (1931)].
9. Draft Order in Council (a) [W 399/192/50 (1932)].
10. Draft Order in Council (b) (i) [see Annex].
11. Draft Letters Patent (b) (ii) [W 399/192/50 (1932)].

Report.

1. We are of opinion that the action already taken to assert British title to the territory in question is amply sufficient, and no formal act of annexation is now desirable, still less necessary.

2. Yes. The circumstances are peculiar, and the ordinary principles governing the limitation of the territory to which a title to sovereignty extends when such title is acquired by discovery followed by occupation are scarcely applicable. The precedents afforded by the Falkland Islands and the Ross Sea Dependencies should be followed.

3. No. All that is required is an unequivocal assertion of sovereignty.

4. We agree with the Report of our predecessors of the 29th February, 1912, as to the effect of Sections 2 and 3 of the British Settlements Act, 1887, and, having regard to the practical inconvenience of an exercise of the power of delegation to three or more persons under Section 3, we consider the better and appropriate course is to proceed by way of an Order in Council in the terms of draft (b) (i) with a view to the exercise of the powers conferred by Article 122 of the Constitution of the Commonwealth.

5. This does not arise.

6. No further preliminary action is needed. The step proposed will be an assertion of sovereignty and will of necessity confirm and ratify the Proclamation already made.

7. This does not arise.

8. We have nothing to add.

T. W. H. INSKIP.
B. F. MERRIMAN.

*Law Officers' Department,
July 29 1932.*

GENERAL.

43

ANNEX.

Draft Order in Council, (b) (i).

Whereas that part of the territory in the Antarctic Seas which comprises all the islands and territories other than Adélie Land which are situated south of the 60th degree of south latitude and lying between the 160th degree of east longitude and the 45th degree of east longitude is territory over which His Majesty has sovereign rights;

And whereas by the Commonwealth of Australia Constitution Act it is provided that the Parliament of the Commonwealth of Australia may make laws for the government of any territory placed by the King under the authority of and accepted by the Commonwealth;

And whereas it is expedient that the aforesaid territory should be placed under the authority of the Commonwealth of Australia:

Now, therefore, His Majesty, by virtue and in exercise of the power in that behalf in His Majesty vested, is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered as follows:—

- (1) That part of His Majesty's dominions in the Antarctic which comprises all the islands and territories other than Adélie Land which are situated south of the 60th degree of south latitude and lying between the 160th degree of east longitude and the 45th degree of east longitude is hereby placed under the authority of the Commonwealth of Australia.
- (2) This Order shall come into operation on such date, after legislation shall have been passed by the Parliament of the Commonwealth of Australia providing for the acceptance of the said territory and the Government therefor, as may be fixed by proclamation by the Governor-General of the Commonwealth of Australia.

[F 6094/308/10]

No. 2^d.

[Treasury Solicitor.]

[July 29, 1932.]

Case for the Law Officers of the Crown and Counsel.

THE following papers are sent:—

- (1) Copy Judgment of the Full Court at Hong Kong, *Rex v. Chung Tam Kwong and others* [see F 3628/308/10 (1932)].
- (2) Copy Despatches and Departmental correspondence [see F 3628/308/10 (1932)].
- (3) Copy Memorandum by the 3rd Legal Adviser to the Foreign Office [see F 3628/308/10 (1932)].

The opinion of the Law Officers is desired on certain questions arising out of a decision of the Full Court at Hong Kong in the case of *Rex v. Chung Tam Kwong and others*, who had been indicted for the crime of piracy, to the effect that actual robbery is necessary to support a conviction for piracy.

The facts are set out in the transcript of the Judgments of the Court which accompanies this Case, but the salient feature of the case was that the accused had been arrested before they were able to perfect their manifest intention of committing a robbery on the high seas, and it was doubted whether, in these circumstances, the necessary elements of the crime of piracy existed.

As the Law Officers will observe from the correspondence, of which a copy accompanies this Case, the decision of the Court at Hong Kong has given rise to somewhat serious problems, viz., whether there is, under existing legislation, any power in the Courts of this country, and consequently in the Colonial Courts also, to try foreigners committing on the high seas acts of violence which do not include

[8717]

G 2

Whether
Acts of
Violence
committed
on the High
Seas by
Foreigners
are justici-
able in His
Majesty's
Courts
without
Proof of
actual
Robbery on
Board.



actual robbery; if this question should be answered in the negative, the further problem then arises whether it would be competent for the Imperial Parliament to pass legislation conferring the necessary jurisdiction.

The questions raised by these two problems are discussed in the Judgments of the Court and in the correspondence and memorandum to which the Law Officers are respectfully referred. In these circumstances it is not thought that any useful purpose would be served by repeating here the arguments therein set forth. It may, however, be observed that the questions appear to turn to a large extent on whether the definition of piracy given by Sir C. Hedges in *R. v. Dawson* (13 State Trials) is, as the Court at Hong Kong appear to have assumed, to be taken as a comprehensive definition, in the sense that no act which does not fall within its terms can properly be regarded as amounting to the crime of piracy, or whether, as the Treasury Solicitor, in his minute of the 9th March, 1932, suggests, that definition was merely a definition for the purpose of the particular case under consideration, and is in no sense to be taken as exhaustive.⁽¹⁾

A further question also arises whether the presumption that an English Act creating a criminal offence is intended to be limited to matters done within the territory of the United Kingdom, necessarily applies to Acts dealing with the offence of piracy.

The Law Officers will observe that it has been suggested that it may be desirable (should they take a certain view of the law) that there should be a special reference to the Judicial Committee of the Privy Council under Section 3 of the Judicial Committee Act, 1834, for the purpose of eliciting their opinion on the matter. In this connection the Law Officers are referred to the remarks contained in the three concluding paragraphs of the Treasury Solicitor's minute of the 9th March, 1932.

The Law Officers are accordingly requested to advise:—

- (1) Whether the case of *Rex v. Chung Tam Kwong* was, in their opinion, rightly decided; if so
- (2) Whether, assuming that satisfactory proof of intent to commit piracy is forthcoming, a foreigner who on the high seas assaults with intent to murder any person on board a vessel, could be convicted in the Courts of this country under 1 Vic., c. 88, or in the Colonial Courts under 12 & 13 Vic., c. 96.
- (3) Whether the Imperial Parliament could properly be invited to pass legislation conferring jurisdiction to try foreigners in the circumstances indicated in (2).
- (4) Whether it is expedient to refer to the Judicial Committee of the Privy Council any question arising out of the matters discussed in this case, and, if so, to settle the suggested terms of reference.
- (5) Generally on the case.

Opinion of the Law Officers of the Crown and Mr. Wilfrid Lewis.

In our opinion the question whether or not the full court of Hong Kong arrived at a correct decision in quashing the conviction in the above case can only be satisfactorily answered by approaching the matter *de novo*.

It is thus necessary to decide at the outset what jurisdiction the Hong Kong Court had to try the twelve prisoners. They were Chinese subjects in a Chinese vessel upon the high seas. Although it is not expressly so stated, we feel entitled to assume that the acts with which the prisoners were charged were not committed *inter fauces terrae*, and took place more than 3 miles from the coast of Hong Kong so as to be outside the zone provided by the Territorial Waters Jurisdiction Act, 1878. From the above circumstances it results that these prisoners, in the absence of any relevant statute applying to foreigners when outside that zone and in foreign ships, were for no purpose subject to Imperial municipal law. These

⁽¹⁾ Hawkins Pleas of the Crown, Vol. I, Chapter 20, of Piracy: the wider definition in section 1 of this chapter seems to have been accepted in the judgments of Lawrence and Slesser L.L.J. in the recent case of the China Navigation Company against the Attorney-General, but see the subsequent narrower descriptions of the crime in sections 3 and 14.

prisoners, however, were liable to be tried and punished for offences committed outside the 3-mile zone if amounting to piracy *jure gentium*. Reference should be made to the exhaustive judgment of Cockburn C. J. in *Reg. v. Keyn* (1876 2 Exch. D. 63 at pp. 159 to 238), where the history and scope of English criminal jurisdiction over foreigners upon the seas was traced and examined.

It will be convenient to postpone dealing with the questions whether actual robbery is an essential element in the crime of piracy *jure gentium* or whether a frustrated attempt to commit a piratical robbery is not equally piracy and justiciable as such, and to deal first with the question whether Imperial Courts have jurisdiction over foreigners in foreign ships who commit outside the 3-mile zone offences made punishable as piracy by British or Imperial Statutes.

In this connection the propositions of Cockburn C. J. in *Reg. v. Keyn* can be stated broadly as follows: Up to the 16th century the jurisdiction of English criminal courts was confined to crimes committed "within the body of a county," while crimes at sea were subject to the jurisdiction of the Admiral (pp. 162, 167). Thus piracy *jure gentium* was never a felony at common law. Subsequently, in the reign of Richard II the respective jurisdictions were allowed to overlap, to the extent that in murder and mayhem done in great ships in the mouths of great rivers the Admiral was accorded concurrent jurisdiction with the common law (p. 168). And so English criminal law remained until 1878. Cockburn C. J. examined the statute 28 Henry VIII, c. 15, and reached the conclusion (pp. 169 and 209) that it created no new offence and did not render foreigners liable to any English Court when they were not previously so liable: the statute merely transferred the existing jurisdiction of the Admiral to commissioners appointed by the King, and the only jurisdiction over foreigners for crimes committed on the high seas being derived from the civil law the commissioners received no further or greater jurisdiction under the statute of Henry VIII than the Admiral possessed and no power to apply English criminal law to foreigners in circumstances where the Admiral could not apply it (p. 169). And this position was not altered by the statute 4 & 5 William IV, c. 36 (which gave the Central Criminal Court jurisdiction) or 7 & 8 Vict., c. 2, which gave power to ordinary Courts of Assize to try offences committed on the high seas and within the jurisdiction of the Admiral.

Admittedly piracy *jure gentium* was within the jurisdiction of the Admiral, and to this extent the Commissioners (subsequently the Central Criminal Court and Assize Courts) obtained jurisdiction over foreigners committing crimes in foreign ships on the high seas, though Cockburn C. J. admitted that if Parliament had expressly asserted a more extended jurisdiction it would have been the duty of the Courts to recognise and endeavour to enforce such jurisdiction (pp. 160 and 207). At p. 208 he examined the question whether English municipal law either expressly or by implication had been extended to foreigners in foreign ships on the high seas. After approving the doctrine laid down by Turner L. J. in *Cope v. Doherty* (1858 2 De G. & J. 614 at 624 affirming 4 K. & J. 367) that Parliament must not be presumed to have legislated for foreigners and that to warrant such a conclusion the words of an Act ought to be express or its context very clear, Cockburn C. J. reached the conclusion that, up to 1876, no provision had been made by Parliament for trying foreigners for crimes committed generally upon the seas in foreign ships (p. 213), while such legislation as had been applied either expressly or impliedly to foreigners within what may for convenience be termed territorial waters had dealt with the revenue, customs, the protection of fisheries and kindred matters.

We feel satisfied that Cockburn C. J. in his exhaustive analysis of the law would have commented on such acts as the Suppression of Piracy Act, 1698 (Halsbury's Statutes IV, p. 334), the Piracy Act, 1821 (p. 343 *op. cit.*), the Offences at Sea Acts, 1799 and 1806 (pp. 401 and 417), the Murders Abroad Act, 1817 (p. 440), the Piracy Act, 1837 (p. 461), the Admiralty Offences Act, 1844 (p. 476), and the Piracy Act, 1850 (p. 520), had he considered that the provisions of any of those Acts either expressly or impliedly referred to foreigners, for, although the crime charged in *Reg. v. Keyn* was manslaughter, the principle at issue was sufficiently wide to render relevant the various municipal Acts dealing with piracy had the advocates in the case or other members of the Court cited them as conferring statutory criminal jurisdiction over foreigners in foreign ships.



Up to 1878, therefore, we think that, while for the purpose of regulating national defence and such matters as customs and revenue, municipal law had in certain cases been applied to foreigners in foreign ships at sea, there was no statute which had extended the jurisdiction of our criminal courts in respect of crimes committed by foreigners at sea, unless committed on board a British ship or falling under the definition of piracy *jure gentium*. The *ratio decidendi* of Cockburn C. J. and the majority of the Court was responsible for the drafting of the Territorial Waters Jurisdiction Act of 1878. The effect of that Act was to declare and enact (see the preamble and per Coleridge C. J. in *R. v. Dudley and Stephen*, 14 Q.B.D. at 281), that the jurisdiction of our courts extended to all offences committed within 3 miles of the coast; but, subject to that extension, we think that the law of the high seas remains to-day as it was stated by Cockburn C. J. (see *Harris v. steamship "Franconia"*, 1877, 2 C.P.D. 173, and the *Fagernes*, 1927 P. 311).

Thus, in our opinion, Section 2 of the Piracy Act, 1837, does not assist, except in so far as it affects the question of punishment.

We think that the object of this Act was not the definition of the crime of piracy, but the regulation of its punishment. It must be remembered that at this time statutory revisions of punishments, and more particularly capital punishment, was occupying the attention of the Legislature—see, for instance, the Criminal Law Act, 1827, Section 7, the Forgery Act, 1837, and the Punishment of Offences Act, 1837. We think the object of the Piracy Act, 1837, was to retain the death penalty in cases of piracy with violence, but in other cases of statutory or municipal piracy to substitute transportation for death (Section 3). Moreover, if actual robbery is an essential ingredient in piracy, the Section carries the matter no further; if it is not, it is unnecessary to invoke the section.

Accordingly, in our opinion, it would not have been correct to indict these twelve prisoners under the Piracy Act, 1837, Section 2, or any other provision of English municipal law relating to piracy.

On the other hand, we do not agree with what we understand to be the view of the Hong Kong Court, that they were not competent to try a charge of piracy *jure gentium*. We entertain no doubt that the Hong Kong Court possesses jurisdiction over foreigners accused of piracy *jure gentium*. We think such jurisdiction was inherent under international law, upon the doctrine that the pirate is *hostis humani generis*, and his crimes are justiciable anywhere (per Cockburn C. J. in *Reg. v. Keyn* at pp. 163, 168-9; Hawkin's Pleas of the Crown, Volume 1, Chapter 20, Section 1; Halsbury's Laws of England, Volume 9, p. 524; Archbold's Criminal Pleading, Evidence and Practice, 28th edition, pp. 670-1; Hall's International Law, 8th edition, pp. 311, 317). That view was held by the Privy Council in *A.G. for Hong Kong v. Kwok a Sing* (1873 L.R. 5 P.C. 179 at 199, 200), and the jurisdiction specifically recognised in the Courts of that Colony. In this respect, we think the acting Chief Justice was wrong when he expressed the opinion that such jurisdiction in order to exist would probably require to be founded on an express Statute of the Imperial Parliament. But even so, it seems to us that the Admiralty Offences (Colonial) Act, 1849 (12 & 13 Vict. c. 96) coupled if necessary with the earlier Acts—11 William III, c. 7, and 46 Geo. III, c. 54—have effectively invested the Hong Kong Courts with jurisdiction to try foreigners charged with piracy *jure gentium* upon the high seas. But such jurisdiction is confined to acts falling within the conception of piracy *jure gentium* under international law. Any extension—and, conversely, any restriction—in the definition of that crime in English municipal law has not affected that jurisdiction.

Thus it remains to examine whether actual robbery is a necessary ingredient in the commission of piracy *jure gentium*, or whether an unsuccessful attempt to rob upon the high seas fulfils that crime. Up to the present case, this question seems to have been treated academically, for no direct answer has been given judicially, facts apparently not having arisen to require it.

For the purpose of answering such question we think the opinions of the leading writers on International Law are entitled to rank with more authority than was allowed in *Reg. v. Keyn*, when the application of municipal law was involved; or in *Republic of Bolivia v. Indemnity Mutual* (1909 1 K.B. 785), where the question was one of the construction of a policy of insurance (see pp. 790 and 802 *ibid*).

While there is no absolute consensus on the subject, it seems to us that modern opinion supports the contention that attempted or unsuccessful attack or attempt to rob at sea amounts to piracy *jure gentium*. Thus Hall, at p. 314 of his work on International Law, 8th edition, says: "... piracy may be said to consist in acts of violence done upon the ocean ... by a body of men acting independently of any politically organised society," and among "acts which are recognised or alleged to be piratical," the writer includes "robbery or attempt at robbery of a vessel by force or intimidation, either by way of attack from without or by way of revolt of the crew and conversion of the vessel and cargo to their own use." Phillimore's International Law, 2nd edition, Vol. 1, p. 411, contains the passage, "piracy is an assault upon vessels navigated on the high seas, committed *animo furandi*, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury." Oppenheim, 4th edition, Vol. 1, 500, is to a similar effect, while Lord Birkenhead, 5th edition, pp. 139-140, goes further, in stating that an *animus furandi* is not essential, and robbery is not necessarily an ingredient in the offence. On the other hand, in Archbold's Criminal Pleading, robbery is treated as being of the essence of piracy *jure gentium* (p. 670); while in Hawkin's Pleas of the Crown (Ch. XX, 8th edition, p. 251) there appears to be a conflict between Sections 1 and 3 as to whether actual robbery is essential. It is worth noting, however, that statutes such as the Suppression of Piracy Act, 1698, Section 11, and 6 Geo. IV, c. 49 (an Act for encouraging the capture or destruction of piratical ships and vessels) suggest that Parliament recognised that piracy, though frustrated, was nevertheless piracy. See also the judgment of Dr. Lushington on the latter Statute in *Serhassan* (2 W.Rob. 354).

The chief argument to the contrary is founded on the charge to the Grand Jury by Sir Charles Hedges in *R. v. Dawson* (1696 13 State Trials 451 at 454) (approved in *Kwok a Sing's* case), but the conclusiveness and authority of his definition appear to us to be capable of being discounted by two factors (1) he was dealing with charges where robbery of the clearest kind had occurred; (2) he was charging a Grand Jury at the second trial of the same prisoners, and it is tolerably clear from the circumstances that the occasion was not one when Sir Charles Hedges would have deemed it either necessary or expedient to embark on the niceties of technical definition. For such reasons, notwithstanding the Privy Council's adoption of Sir Charles's words in *Kwok a Sing's* case, and the statements which are to be found in such works as Carver's "Carriage of Goods by Sea" (7th Edition, p. 142), or Russell on Crimes (7th Edition, Vol. 1, p. 256), we consider that what Sir Charles Hedges said in *R. v. Dawson* need not be accepted as a precise definition to-day of piracy *jure gentium*. Nevertheless, it must be recognised that, until comparatively recently, piracy was regarded as practically another term for sea robbery (see the trial of *Captain Kidd*, reported in 14 State Trials, p. 123, and of *Bonnet and others*, 15 State Trials, p. 2341, where the several indictments laid are set out in full; see also per Lord Abinger C. J. in *R. v. Macgregor*, 1 Car & Kirwin at 431). But, weighing the various opinions, judicial and otherwise, as well as we can, we are of the view that the old definition expressed by Sir Charles Hedges and approved by the Privy Council in *Kwok a Sing's* case, is not conclusive to the effect that actual robbery is an essential ingredient in piracy *jure gentium*. It is to be observed, also, that Sir Robert Phillimore, in the Chapter already referred to, cites several of these authorities without, apparently, regarding them as being in conflict with his definition of piracy quoted above.

In our opinion, therefore, the full Court of Hong Kong was wrong when it decided to quash the conviction of these twelve prisoners. We think the indictment, verdict, and conviction were proper upon the facts, and if, on a future occasion, a similar case arises of an unsuccessful attack by pirates, the Hong Kong Court is entitled to, and should, convict. But it seems to us that, before convicting in such circumstances, the Court should have clear evidence of the attack being made with intent to rob, or, in other words, made piratically. Under the present law homicide by a foreigner when not in a British ship and outside Hong Kong territorial waters (and a *fortiori* lesser offences, such as assaults) are not cognisable by Imperial Courts. It is of obvious importance that the scope of judicial treatment by any State of piracy *jure gentium* should not be extended so as to trespass unduly upon the municipal jurisdiction which every civilised State is assumed to exercise over its subjects. In the interests of international



1932

amity, any unwarranted extension of Imperial jurisdiction over the high seas is sincerely to be avoided.

Our answers to the questions put to us are as follows:—

- (1) The conviction was correct and should not have been quashed.
- (2) A foreigner, when not in a British ship and outside the 3-mile zone, cannot be proceeded against under 1 Vic. c. 88, or in Colonial Courts by virtue of 12 and 13 Vic. c. 96.
- (3) It is unnecessary, in our opinion, to answer this, but we conceive great objection to legislation extending Imperial Municipal jurisdiction beyond the limits at present laid down.
- (4) Having regard to the importance of the question to the community at Hong Kong, we think that this is a proper case for special reference to the Judicial Committee under Section 4 of the Judicial Committee Act, 1833, if His Majesty should think fit. As the judgment was one quashing the conviction, we do not think that an appeal would have lain under Section 3. We are aware of the decisions in *R. v. Bertrand* (L.R. 1 P.C. 520) and *R. v. Murphy* (L.R. 2 P.C. 535). These, however, were cases in which a new trial had been ordered without jurisdiction. In the present case, in spite of power to order a new trial under Section 78 of the Hong Kong Criminal Procedure Ordinance, the Court quashed the conviction, and we know of no case in which the Privy Council has entertained an appeal against a judgment of acquittal. In our opinion, the Hong Kong Order in Council (1909 S.R.O., p. 805) does not affect the matter.

We think that the reference should be in the following terms:—

“Whether actual robbery is an essential element in the crime of piracy *jure gentium*, or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium* and justiciable as such.”

T. W. H. INSKIP.
F. B. MERRIMAN.
WILFRID LEWIS.

Law Officers' Department,
July 29, 1932.

ITALY.

[C 8961/1027/22/1932]

No. 2^e.

[Colonial Office.]

[October 19, 1932.]

(1)

Colonial Office to the Law Officers of the Crown.

Gentlemen,

October 3, 1932.

Malta:
teaching of
Italian and
other lan-
guages.

I HAVE the honour, by direction of Secretary Sir Philip Cunliffe-Lister, to request the favour of your opinion upon the question whether certain action taken by Maltese Ministers constitutes an infringement of the provisions of the Malta Constitution (Amendment) Letters Patent, 1932. A list of relevant documents is attached, and the Governor reported on the 24th September that there was no other relevant document so far as he was aware.

2. The circumstances under which the present situation has arisen are as follows:—

3. In accordance with the recommendation of the Malta Royal Commission, 1931, the Constitution of Malta, which had been suspended in June 1930 owing to political difficulties arising from the action of the Roman Catholic ecclesiastical authorities, was restored on the 21st June, 1932, with certain modifications. One of these modifications affected the system of language teaching in the elementary schools.

4. Under the system in force at the time of the Royal Commission's investigations, English and Maltese were the only languages taught up to the third standard in the elementary schools, but in the four higher standards of the schools Italian was also taught; the same number of hours' instruction a week being given to Italian as to English. The Commissioners were satisfied that this system was not in the educational interest of the children, and suggested that the teaching of Italian in the elementary schools should be abolished, although they advised that local opinion should be consulted before the change was effected.

5. His Majesty's Government accepted the Commission's suggestion, but decided that, in order to ensure that the suggestion should not be ignored in the event of the return of the next elections of a Maltese Government pledged to the encouragement of the Italian language, and to prevent the question from becoming a contentious party issue in the next Maltese elections, the suggestion should be carried into effect before the restoration of responsible government.

6. Section 57 (2) of the Malta Constitution Letters Patent, 1921 (Paper A), which provided that the English and Italian languages should be recognised as equal languages of culture in Malta at the university, in secondary schools and in the higher classes of the elementary schools as subjects of study, was accordingly repealed by Section 1 of the Malta Constitution (Amendment) Letters Patent, 1932 (Paper F) and replaced by the following new sub-section:—

“(2) (a) The English and Italian languages shall be recognised as equal languages of culture in Malta at the university and in secondary schools.

“(b) The English and Maltese languages shall be the only languages taught as subjects of study in the elementary schools, and the Maltese language shall also be used as a medium for teaching the English language in so far as it may be necessary in the infant schools and the inferior classes of the elementary schools. In the examination for admission to the secondary schools, the students of the elementary schools and other candidates shall have to be approved in the English but not in any other language.

“(c) No alteration, without our consent first had and obtained through the Secretary of State, shall be made either by legislation or by administrative action in the constitution and system of the secondary schools or the elementary schools as at present established, so as in any way to affect the preceding provisions of this sub-section with regard to the languages to be taught or used in the said schools.

“(d) Any provision contained in any Act, Ordinance or other law, statute or regulation now in force or hereafter passed or made in Malta which shall be repugnant to or inconsistent with the provisions of this sub-section shall be read subject thereto, and shall to the extent of such repugnancy or inconsistency, but not otherwise, be and remain absolutely void and inoperative.”

7. At the elections held in connexion with the restoration, on the 21st June, 1932, of the Malta Constitution, the Nationalist party, which has always stood for the maintenance of the position of the Italian language in Malta, obtained a large majority in both Houses of the Legislature over the Constitutional and Labour parties, which had been in power before the suspension of the Constitution. The Nationalist Government at once showed strong opposition to the provisions of the new Letters Patent quoted above, and in July a deputation came to interview the Secretary of State and press for the repeal of these provisions. The deputation was informed that there was no possibility of His Majesty's Government reversing their decision.

8. For a short time nothing was heard of the matter, but on the 6th September a circular, of which a copy is annexed (Paper I), was issued by the Director of Elementary Schools on the instructions of the Maltese Ministry. This circular directs that Italian shall be taught on a voluntary basis in all the classes of the elementary schools outside the normal school hours. Special prizes are to be awarded in connexion with the classes in Italian, and the circular appears to contemplate that the teachers should receive extra remuneration dependent upon the number of students who qualify and the number who attend the classes. It is to be presumed that it is the intention that the expenses should be defrayed out of the Consolidated Revenue Fund.

9. At the same time directions were given (Paper J) for the establishment of a new sub-standard at the Malta Lyceum (a secondary school), in which Italian

[8717]

H

is to be taught, for the benefit of those who fail to pass the ordinary entrance examination into the Lyceum.

10. The Legal Adviser to the Government of Malta, in an opinion, of which a copy is annexed (Paper K), expresses the view that the instructions contained in the circular by the Director of Elementary Schools do not infringe the letter, if they infringe the spirit, of the new Letters Patent (Paper F). Sir Philip Cunliffe-Lister is, however, advised that there is some doubt whether this view should be accepted.

11. It will be observed that the Legal Adviser to the Governor appears to regard the words "subject of study" in section 1 (2) (b) of the Letters Patent (Paper F) as meaning a subject of the ordinary curriculum compulsorily taught in school hours.

While the Secretary of State realises that your opinion will be based upon the proper construction of the section, and not upon the intention of the draftsman, he nevertheless thinks it right to point out—in order that it may be seen that there is another possible construction—that the words were not intended to convey any such meaning as has been placed upon them, but were simply used in contradistinction to the expression "medium of teaching," which almost immediately follows them (Papers K and M).

Reference is also invited to section 57 (2) of the Letters Patent of 1921 (Paper A) where the expression "subject of study" is also used again, it is suggested in contradistinction to the words "medium of instruction," which appear as the last words of the sub-section.

12. The Legal Adviser to the Governor has also expressed the opinion (Paper K) that the proposed new class at the Lyceum, referred to in paragraph 8 above, will not infringe the provisions of the new Letters Patent, since the class will only be for those who have passed through the elementary schools, and will be a Lyceum class and not an elementary school class. The Secretary of State is advised that it would be difficult to contest this view.

13. Sir Philip Cunliffe-Lister would be glad to be favoured with your opinion on the following points:—

- (1) Whether the establishment of voluntary classes in Italian after school hours, but in elementary school buildings, with elementary school teachers and at Government expense upon the lines proposed, would infringe the provisions of section 1, sub-section (2) (b) and (c) of the Malta Constitution (Amendment) Letters Patent, 1932.
- (2) Whether the formation of the new sub-standard at the Lyceum is an infringement of section 1, sub-section (2) (c) of the said Letters Patent.

I have, &c.

J. E. SHUCKBURGH.

LIST OF DOCUMENTS.

- Paper A. The Malta Constitution Letters Patent, 1921. ("State Papers," Vol. 121, p. 1.)
 Paper B. Proclamation of the 15th September, 1921.
 Paper C. The Malta Constitution (Amendment) Letters Patent, 1927. ("State Papers," Vol. 126, p. 116.)
 Paper D. The Malta Constitution (Amendment) Letters Patent, 1928. (S.R. and O., 1928, p. 1399.)
 Paper E. The Malta Constitution (Amendment) Letters Patent, 1930. (S.R. and O., 1930, p. 1983.)
 Paper F. The Malta Constitution (Amendment) Letters Patent, 1932.
 Paper G. The Malta Constitution (Amendment No. 2) Letters Patent, 1932.
 Paper H. The Malta Constitution Act, 1932.
 Paper I. A Circular by the Director of Elementary Schools in Malta dated the 6th September, 1932.
 Paper J. Government Notice No. 321 dated the 3rd September, 1932, regarding the formation of a new Class in the Malta Lyceum.
 Paper K. Opinion by the Legal Adviser to the Governor of Malta on Papers I and J dated the 13th September, 1932.
 Paper L. Letter from the Deputy Leader of the Constitutional Party in Malta commenting on Papers H and I.
 Paper M. Observations by the Legal Adviser to the Governor of Malta on Paper L dated the 17th September, 1932.
 (Papers F to M are contained in C 8960/1027/22/1932.)

(2)

Colonial Office to the Law Officers of the Crown.

Gentlemen,

October 4, 1932.

WITH reference to the letter from this Office of the 3rd October relating to the language question in Malta, I am directed by Secretary Sir Philip Cunliffe-Lister to inform you that he anticipates that a situation may arise in which it would be expedient that the subjects of language and public instruction in the island should be withdrawn from the province of the Legislature of Malta, and should be constituted reserved matters within the meaning of section 41 (1) of the Malta Constitution Letters Patent, 1921.

2. When the withdrawal of certain other subjects, such as police and the appointment of judges, from the province of the Legislature of Malta was contemplated, it was thought best to proceed by means of a Bill in Parliament. Provision for effecting these withdrawals, in one case forthwith and in the other case by Letters Patent if and when occasion arose, was made in Section 1 and the second schedule of the Malta Constitution Act, 1932. It has, however, been suggested that an alternative procedure was available, and that power existed to effect these withdrawals by means of amending Letters Patent.

3. In this connexion, I am to invite your attention to the documents dealing with the Constitution of Malta, copies of which accompanied the letter under reference, and, in particular, to sections 68, 41 and 54 of the Malta Constitution Letters Patent, 1921, and to the amendments of section 41 by the Letters Patent of 1928 and 1930 and the Act of 1932.

4. I am also to invite your attention to section 1 (2) of the Act of 1932, which provided that it should be lawful for His Majesty from time to time by means of Letters Patent to provide that the Legislature of Malta should not have power to pass laws with respect to various police matters. The existence of this sub-section would appear to imply at least that there was a doubt whether the contemplated procedure by means of Letters Patent would have been lawful before the Act was passed.

5. It may be pointed out, however, that power to amend section 57 of Malta Constitution Letters Patent, 1921, relating to language is expressly reserved in section 68 of those Letters Patent.

6. I am to request that you will advise Sir Philip Cunliffe-Lister whether, having regard to the documents under reference, it is competent for His Majesty, by means of further Letters Patent, to provide that the Legislature of Malta shall not have power to pass laws with respect to—

- (1) The use of the Maltese, English, Italian and other languages, and
- (2) The subject of public instruction or any part thereof,

and to provide that either or both of these matters shall become "reserved matters."

7. I am also to request advice as to whether it would be competent to provide in the same manner that the Department of Public Instruction or any part thereof should be taken over and administered by the Maltese Imperial Government and that the necessary funds should be obtained by means of an addition to the Reserved Civil List.

I am, &c.

G. JONES.

Report of the Law Officers of the Crown.

1. The Letters Patent of the 25th April, 1932, provide that the English and Maltese languages shall be the only languages taught as subjects of study in the elementary schools. The Director's circular of the 6th September, 1932, states that Italian is to be taught on a voluntary basis in all the classes of the elementary schools outside the school hours laid down in the Governor's minute. We are of opinion that the establishment in accordance with the terms of the circular of voluntary classes at which Italian is to be taught by elementary school teachers at Government expense is an infringement of the provisions of section 57 (2) (b) and (c) of the Letters Patent, 1921, as amended by the Letters Patent, 1932.

[8717]

H 2



1932

52

PALESTINE.

2. The formation of the new class at the Lyceum is not, in our opinion, an infringement of the said Letters Patent.

3. We are further of opinion that, provided the Secretary of State is satisfied that the course proposed is necessitated by a grave emergency within the meaning of section 41 of the Letters Patent of 1921 as amended by the Malta Constitution (Amendment) Letters Patent, 1930, it is competent for His Majesty by Letters Patent to provide that the Legislature of Malta shall not have power to pass laws with respect to the use of languages and the subject of Public Instruction, and to provide that these matters, or either of them, shall be included in the category of reserved matters, and to provide for the taking over by the Maltese Imperial Government of the Department of Public Instruction and for the provision of the necessary funds out of the Reserved Civil List.

T. W. H. INSKIP.
F. B. MERRIMAN.

Law Officers' Department,
October 19, 1932.

PALESTINE.

[E 744/606/31/1932]

No. 2^e.

[Colonial Office.]

[February 11, 1932.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, February 4, 1932.

I AM directed by Secretary Sir Philip Cunliffe-Lister to refer to the Report⁽¹⁾ of your predecessors in office of the 7th February, 1929, and previous Reports on the question of the extension of Imperial preference to Palestine.

2. In a Report⁽²⁾ of the 7th April, 1925, your predecessors had expressed the opinion that the position of Palestine in relation to His Majesty was the same as that of other Governments established by Order-in-Council under the Foreign Jurisdiction Act; in other words that the Government of Palestine is His Majesty. In the letter,⁽³⁾ which Mr. Amery caused to be addressed to the Law Officers on the 27th May, 1925, the usual wording of the "most-favoured-nation" clauses of commercial treaties was described, and your predecessors were asked whether, in view of the fact that His Majesty's Government had arranged for Palestine to be administered under the Foreign Jurisdiction Act, and in view of the opinions expressed in the Report⁽²⁾ of the 7th April, 1925, they were still of opinion that the extension to Palestine of Imperial preference would infringe the obligations arising from such clauses.

3. In their Report⁽⁴⁾ of the 19th June, 1925, your predecessors stated that they still considered that the extension of Imperial preference to Palestine would be a breach of the "most-favoured-nation" clauses of British commercial treaties, on the ground that, as Palestine falls within the category of States included in the fourth paragraph of article 22 of the Covenant of the League of Nations, it necessarily follows that, internationally, Palestine is an independent nation although the administration of its affairs is mandated to His Britannic Majesty.

4. I am now to transmit to you, for your consideration, a copy of an opinion⁽⁵⁾ on this subject furnished in July 1924 by Sir John Simon and Viscount Erleigh, which has been brought to the notice of the Secretary of State. Sir Philip Cunliffe-Lister will be glad to learn whether, in the light of this opinion, you are able to modify the views expressed in the Reports previously furnished by the Law Officers.

(1) Confidential 13761, p. 8. (2) Confidential 13004, p. 28. (3) Confidential 13004, p. 30.
(4) Confidential 13004, p. 30. (5) See annex.

Extension
of Imperial
Preference
to
Palestine:
whether an
infringe-
ment of
most-
favoured-
nation
clauses of
commercial
treaties.

PALESTINE.

53

5. Should you feel unable to modify the views expressed in previous Reports, Sir Philip Cunliffe-Lister is disposed, as at present advised, to invite his colleagues to consider the desirability of framing the "most-favoured-nation" clause of any future commercial treaty in a form which would not preclude the extension of Imperial preference to Palestine. I am accordingly to request you to be good enough to advise him as to the form of words which you would suggest for that purpose.

6. I am to enclose for convenience of reference copies of the Reports mentioned in this letter, the Palestine Order-in-Council, the Mandate and the Commercial Treaty with Roumania, article 11 of which is a typical example of the "most-favoured-nation" clause.

I am, &c.

O. G. R. WILLIAMS.

List of Papers.

- (1) Law Officers to Colonial Office, January 3, 1923. [Confidential 12470, p. 17.]
- (2) Law Officers to Colonial Office, April 7, 1925. [Confidential 13004, p. 28.]
- (3) Law Officers to Colonial Office, June 19, 1925. [Confidential 13004, p. 30.]
- (4) Law Officers to Colonial Office, February 7, 1929. [Confidential 13761, p. 8.]
- (5) Palestine Order-in-Council, 1922. [Confidential 11940*.]
- (6) Mandate for Palestine. [Cmd. 1785 (Parliamentary 5152).]
- (7) Commercial treaty with Roumania. [Cmd. 3945 (Treaty 2067).]
- (8) Opinion of Sir John Simon and Viscount Erleigh, July 28, 1924. [See Annex.]

ANNEX.

Joint Opinion by Sir John Simon and Viscount Erleigh.

(Private and Confidential.)

IN advising whether, in the event of an Order-in-Council being made applying the provisions of Clause 8 of the Finance Act, 1919, to Palestine as a Mandated Territory, any breach of the most-favoured-nation clause contained in various commercial treaties would be involved, it is important to bear in mind that the issue raised is one to be determined by the proper construction of the most-favoured-nation clauses in question. These clauses differ in language, but they resemble one another in conferring upon the foreign State with which the treaty is made as favourable treatment as is or may be granted to any "other" foreign country, or "any third Power" or "any third nation." These different expressions appear to be used as synonymous and interchangeable phrases, and indeed in some treaties two or more different phrases occur in the same text. The broad question seems to be whether Palestine in existing circumstances should be regarded as enjoying a status, internationally speaking, which is analogous to that of the foreign State with which the particular treaty is made, so that the principle of equally-favoured treatment must apply to one as much as the other.

It seems to us that, if the question is thus defined, there are strong reasons for contending that Palestine is not, *vis-à-vis* this country, in the position of a foreign State. It is quite true that Palestine is not, in the ordinary sense of the term, a British Protectorate, though the conception of a Protectorate in international law varies from time to time and may be said to be in course of development. But, when the Covenant of the League of Nations is considered as a whole, and its application by way of the Mandate given to Britain in respect of Palestine is surveyed, there are a great many respects in which Palestine stands in a relation to this country which is sharply contrasted with the relation between an "other" foreign Power and ourselves. Palestine, indeed, has been treated as in a position analogous to territory of the British Empire and subject to powers of control such as His Majesty exercises in a British Protectorate, in the Palestine Order-in-Council, 1922, and in a wide range of other administrative provisions which will be well known to His Majesty's Government.

This view appears to us to be justified by giving due force to the word "other" in the most-favoured-nation clauses. The word indicates that the



favoured nation is, like the nation with which the treaty is made, enjoying independent Sovereignty and free from British authority. It is obvious that this is not true of Palestine, and it is significant that the affairs of Palestine are dealt with through the Colonial Office, whereas the affairs of every foreign State are dealt with through the Foreign Office. Moreover, preference in the case of Palestine would be established by Executive Order; whereas fiscal adjustments with a foreign Power are effected by international negotiations and bargaining.

It is clear that the British Government which was in office in 1919 took the view which we are now urging, for Section 8 of the Finance Act, 1919, expressly contemplated that a Mandated Territory might be brought within that clause by Order-in-Council. In view of the fact that the treaties which contain the most-favoured-nation clause were entered into before the conception of Mandated Territories had arisen, it is, we think, necessary to construe the most-favoured-nation clause as drawing the contrast between countries which really are foreign countries in the full sense, or at any rate live under the protection and supervision of a foreign Power, and countries which are not in this position. Applying this test, no infringement of the most-favoured-nation clause would be involved if the Executive Government took the step in relation to Palestine which the British Legislature, in the very year when the Treaty of Versailles was ratified, contemplated and provided for.

JOHN SIMON.
ERLEIGH.

Temple, July 28, 1924.

Report of the Law Officers of the Crown.

WE are unable to modify the views expressed in the Reports previously furnished by our predecessors and ourselves. The considerations mentioned by Sir John Simon and Viscount Erleigh in their Opinion dated the 28th July, 1924, were substantially brought to the attention of our predecessors in the Colonial Office letter of the 27th May, 1925. The reliance placed on the reference to mandated territories in Section 8 of the Finance Act, 1919, is not in our opinion well founded. At most, the provisions of the section can only be said to contemplate in a proper case the inclusion of a mandated territory in the definition of the British Empire for the purpose of Imperial Preference. This still leaves open the question as to whether Palestine is a "foreign country" within the meaning of a typical most-favoured-nation clause.

We suggest that the difficulty might be overcome by substituting for "any other foreign country" the words "the territory of any other foreign Sovereign Power."

We have been informed that the Secretary of State desires us to consider what the consequences would be of a failure to comply with the provisions of a most-favoured-nation clause. In our opinion it would not be a matter for the consideration of the municipal courts of either country and it could not be made the subject of a claim for damages by any person prejudiced. It would, however, be open to the injured party to the treaty to pursue the remedies provided by articles 13, 14 and 15 of the Covenant, in addition to making diplomatic representations.

T. W. H. INSKIP.
F. B. MERRIMAN.

Law Officers' Department,
February 11, 1932.

[E 1383/606/31/1932]

No. 2^c.

[Colonial Office.]

[March 16, 1932.]

(1)

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, February 19, 1932.

I AM directed by Secretary Sir Philip Cunliffe-Lister to refer to your Report⁽¹⁾ of the 11th February in which you stated that you were unable to modify the views expressed in the Reports previously furnished by your predecessors and yourselves on the question of the extension of Imperial preference to Palestine. The possibility of the grant of such preference is engaging the earnest consideration of the Secretary of State, and, on grounds of general policy, he considers that it is very desirable that Imperial preference should be extended to Palestine goods, if the risks in so doing are not such as to outweigh the advantages from the point of view of general policy which it is anticipated would result.

In the light of the opinions expressed by yourselves and your predecessors, it is evident that, should it be decided to extend Imperial preference to Palestine goods, His Majesty's Government in the United Kingdom must be prepared for the possibility of a foreign country, whose interests may be affected, regarding such extension as a breach of the most-favoured-nation clause of its Commercial Treaty with this country. In that event, it is presumed that the matter would be referred for arbitration to the Permanent Court of International Justice at The Hague.

It appears that under article 13 of the Covenant of the League of Nations it would be open to the Permanent Court to decide as to the extent and nature of the reparation to be made for any breach of an international obligation of this kind. So far as the Secretary of State is aware, no exact precedent exists to show whether in a case of this nature a claim for damages would, in fact, lie, or, if such a claim could be maintained, what would be the measure of damages likely to be awarded by the Permanent Court. In this connexion your attention is invited to the passages marked on pp. 4, 5, 6, 7 and 8, and 22, 23 and 24 of the enclosed reprint from the "British Year Book of International Law, 1930" (Paper (1)).

On the assumption that His Majesty's Government decide to extend Imperial preference to Palestine goods, and that the Permanent Court of International Justice at The Hague give an adverse judgment, you are requested to furnish the Secretary of State with an estimate of the risk involved of damages being awarded by the court against His Majesty's Government for breach of an international obligation of this kind.

If, in your opinion, there is a risk of damages being awarded, it appears desirable, before His Majesty's Government give effect to a decision to extend Imperial preference to Palestine goods, that steps should be taken to bring a case before the Permanent Court with a view to determining the point at issue. I am accordingly to request your advice also as to the best and most expeditious method of bringing such a case before the court. It has been suggested that one method would be for His Majesty's Government to inform the Government of a foreign country with which there exists a commercial treaty containing a clause providing for most-favoured-nation treatment, and whose trade with this country would be directly affected by the grant of Imperial preference to Palestine, that His Majesty's Government intend to grant such Imperial preference, and to ask that Government whether they have any objection to offer in view of the terms of the commercial treaty existing between the two countries. If an objection were raised, it is further suggested that His Majesty's Government should propose to the Government concerned that the matter should be referred for arbitration to the Permanent Court at The Hague with a view to obtaining an early decision on the following points, viz., whether the extension of Imperial preference to Palestine would be a breach of the most-favoured-nation clause of the treaty in question.

(1) No. 2^c.

Imperial preference to Palestine goods: as to referring question to Permanent Court of International Justice. Measure of damages in event of breach of most-favoured-nation clauses of commercial treaties.

Your advice is further desired on the following point. There is some diversity in the phrases used in the most-favoured-nation clauses of commercial treaties to describe the countries to which most-favoured-nation treatment is, or may be, granted. For example: "any other country" (see article 1 of the Treaty of Commerce and Navigation with the Netherlands of the 27th October, 1837); "any other foreign country" (see article 4 of the Treaty of Amity, Commerce and Navigation with the Argentine Republic of the 2nd February, 1825); "any third nation whatsoever" (see article 1 of the Commercial and Maritime Relations Convention with France of the 28th February, 1882).

In view of the above diversity, it has been suggested that an adverse judgment of the Permanent Court as regards the grant of Imperial preference to Palestine might conceivably be in such a form as to call in question the right of His Majesty's Government, under international law, to accord existing or future preferential treatment to the Dominions and to the Colonies and other Dependencies, without granting similar treatment to countries whose treaties with the United Kingdom contain most-favoured-nation clauses in which certain of the phrases set out above occur, *e.g.*, "any other country" or "any third nation whatsoever."

It is, however, to be observed that, so far as the Secretary of State is aware, no suggestion has ever been made that His Majesty's Government is not free to grant preferences to any part of the British Empire, though such preferences have been accorded throughout the Empire for many years.

I am, &c.

O. G. R. WILLIAMS.

(2)

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, March 2, 1932.

I AM directed by Secretary Sir Philip Cunliffe-Lister to refer to the letter from this Department of the 19th February(?) on the subject of the extension of Imperial preference to Palestine, in the fourth paragraph of which you were asked to furnish an estimate of the risk involved of damages being awarded by the Permanent Court of International Justice against His Majesty's Government if Imperial preference were extended to Palestine goods and the Permanent Court were to give an adverse judgment.

2. Since this question was referred to you, the attention of Sir Philip Cunliffe-Lister has been drawn to the enclosed memorandum from the Foreign Office, dated the 23rd February, 1932 (Paper (2)), which contains examples of the form of compensation which has been awarded in international tribunals in cases where it has been held that duties have been imposed in violation of treaty rights. An extract from a letter on the same subject, dated the 24th February, from the legal adviser to the Secretary of State for Foreign Affairs (Paper (3)) is also enclosed for your consideration. The Secretary of State considers that the information contained in the enclosed memorandum and letter may be of assistance to you in forming an opinion on the question which has been referred to you.

3. In the last paragraph of the letter from this Department of the 19th February(?) it was stated that, so far as the Secretary of State was aware, no suggestion had ever been made that His Majesty's Government was not free to grant preferences to any part of the British Empire. In this connexion the Secretary of State has now been informed that a similar question of treaty interpretation recently arose between the Government of India and the Governments of France and Japan. In this case the Governments of France and Japan claimed from the Government of India the same reduced rate of import duty on cotton goods as had been accorded to cotton goods of United Kingdom origin, both Governments basing their claim on the ground that the word "foreign" in the relevant commercial treaties included, *vis-à-vis* India, the United Kingdom. His Majesty's Government declined to accept this contention.

(2) See (1) above.

4. I am to enclose for your information copies of the notes exchanged on this subject with the French and Japanese Governments, together with copies of the Anglo-French Convention of the 19th February, 1903, the Anglo-Japanese Convention of the 29th August, 1904, and article 2 of the Treaty of Commerce between Great Britain and Austria-Hungary of 1876 (Papers (4) to (17)), to which reference is made in the correspondence.

5. I am to add that in 1897 the Governments of Belgium and Germany protested against the grant by Canada of preferential tariff advantages to the United Kingdom on the ground that such treatment was an infringement of their treaties with the United Kingdom. The contention of Belgium and Germany was unanswerable, since the two treaties in question contained clauses explicitly providing that the produce or manufacture of Belgium (or Germany) should not be subject in British Colonies to any higher or other import duties than the produce of the United Kingdom, and it was decided to denounce both treaties without delay.

6. After the denunciation of the treaty with her, Germany continued to grant most-favoured-nation treatment to the United Kingdom, but refused to accord it to Canada, arguing that if British Colonies were to be in a position to follow out their own customs policy, other countries must be allowed to treat them as separate customs territories. Negotiations between Canada and Germany with regard to commercial relations were not finally concluded until 1910, when the German Government abandoned the contention that German imports into Canada should receive the same treatment as was accorded by the Dominion Government to imports from Great Britain.

I am, &c.

H. F. DOWNIE.

List of Papers.

- (1) British Year Book of International Law, 1930. (Reprint.)
- (2) Foreign Office memorandum, February 23, 1932. [E 1135/606/31.]
- (3) Sir W. Malkin to Mr. Duncan, Colonial Office, February 24, 1932. Extract. [E 923/606/31.]
- (4) French Ambassador to Foreign Office, May 23, 1930. [W 5398/5398/17.]
- (5) Foreign Office to French Ambassador, October 21, 1930. [W 10416/5398/17.]
- (6) Memo. of Japanese Ambassador, August 24, 1927. [F 7108/736/23.]
- (7) Foreign Office to Japanese Ambassador, September 14, 1927. [F 7465/736/23.]
- (8) Japanese Ambassador to Foreign Office, March 7, 1930. [F 1310/650/23.]
- (9) Japanese Ambassador to Foreign Office, March 11, 1930. [F 1410/650/23.]
- (10) Foreign Office to Japanese Ambassador, April 8, 1930. [F 1714/650/23.]
- (11) Japanese Ambassador to Foreign Office, May 14, 1930. [F 5582/650/23.]
- (12) Foreign Office to Japanese Ambassador, October 14, 1930. [F 7071/650/23.]
- (13) Japanese Ambassador to Foreign Office, December 16, 1930. [F 3792/296/23.]
- (14) Foreign Office to Japanese Ambassador, July 9, 1931. [Cd. 2455 (Treaty 1187).]
- (15) Anglo-French Convention, February 19, 1903. [Cd. 2489 (Treaty 1191).]
- (16) Anglo-Japanese Convention, August 29, 1904. [Cd. 2489 (Treaty 1191).]
- (17) Article 2 of Treaty between Great Britain and Austria, December 5, 1876. [Hertslet's Treaties, vol. 14, p. 163.]

Opinion.

THE Permanent Court of International Justice has declared it to be a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. The same principle has been applied in earlier conventional arbitrations to which our attention has been called in a memorandum from the Foreign Office. It follows from the above-mentioned declaration that there is a substantial risk of damages being awarded by the Permanent Court against His Majesty's Government in the event of a claim being made by a Government concerned and of a decision by the Court that the extension of Imperial preference to Palestine goods is a breach of a most-favoured-nation clause contained in a relevant commercial treaty. The measure of such damages would, in our opinion, probably be—

- (a) In the case of goods actually imported into the United Kingdom by nationals of the complainant State, a sum not exceeding the amount of the duty imposed upon such goods to the extent to which the excess of such duty over that, if any, imposed on like goods from Palestine falls upon such nationals by actual payment of the duty or by an equivalent reduction of the price; and

[8717]

- (b) In the case of trade in such goods proved to have been lost directly owing to the imposition of the duty, a sum not exceeding the loss of profit calculated on the usual commercial principles.

The test to be applied in the assessment of damages is the injury done to the individuals whose interests have suffered by reason of the illegal act. These damages, however, would not, in our opinion, extend to more remote consequential loss, such loss being incapable of ascertainment according to the principles laid down by the Permanent Court.

2. In our opinion, the course suggested in the Colonial Office letter of the 19th February, 1932, is the best method of obtaining a decision of the Court upon the point in issue without running any risk of a claim for damages. This method is likely to be more expeditious than procedure under the Optional Clause, and more expeditious also and convenient than the procedure under article 14 with a view to obtaining an advisory opinion. We recommend that, if possible, the Government selected for the proposed communication should be one whose Commercial Treaty contains a clause which raises the substantial issue as clearly as possible, *e.g.*, a clause referring to "any other foreign country." It is to be observed that by article 59 of the Court's Statute "the decision of the Court has no binding force except between the parties and in respect of that particular case," but the Court's decisions are authoritative declarations of international law and are followed by the Court itself as precedents, so that a favourable decision would, in effect, be conclusive in *pari materia* although it would not, as a matter of law, bind third States. A decision under one most-favoured-nation clause obviously would not be conclusive as regards a differently worded clause, but in practice it would probably be an important step in determining the legal position under most-favoured-nation clauses generally.

3. In our opinion, there is no practical danger that an adverse judgment of the Court would be in such a form as to call in question the right of His Majesty's Government, under international law, to accord preferential treatment to the Dominions and to the Colonies and other Dependencies without granting similar treatment to countries whose treaties with the United Kingdom contain most-favoured-nation clauses. The Court has always been careful in giving its decisions to limit itself strictly to the points submitted to it, and even if such a question were mooted we should regard an adverse decision as exceedingly improbable.

T. W. H. INSKIP.
F. B. MERRIMAN.

Law Officers' Department,
March 16, 1932.

PERSIA.

[E 6489/3880/34/1932]

No. 3.

[December 7, 1932.]

Opinion by the Law Officers of the Crown.

THREE questions have been submitted to us:—

1. Whether His Majesty's Government are on safe ground in claiming that the Permanent Court of International Justice has jurisdiction under the optional clause to decide the dispute which has arisen between His Majesty's Government and Persia?
2. Whether a decision by the Permanent Court upholding an objection to the jurisdiction would prejudice the position of His Majesty's Government in relation to their claim to enforce the rights of the Anglo-Persian Company under the concession?
3. Whether His Majesty's Government are right on the merits?

In answer to the first question, we are of opinion that the terms of the Persian acceptance of the optional clause are so limited as to make it very doubtful

Unilateral
cancellation
by Persian
Govern-
ment of
Anglo-
Persian Oil
Company's
concession:
jurisdiction
of Perma-
nent Court
of Inter-
national
Justice.

whether the present dispute is within the jurisdiction of the court, notwithstanding that we are of opinion that article 36 (2) of the statute of the court covers the present dispute. The acceptance by Persia seems to us only to cover disputes as to facts and situations referring directly or indirectly to the application of treaties or conventions. We are unable to regard the concession in question as either a treaty or a convention. There may be some treaty or convention which is indirectly affected by the repudiation of this concession, but we have no information on this point.

We do not, however, regard the question of jurisdiction as unarguable, especially in view of the very restricted operation of the acceptance by Persia of the optional clause which would result from our construction of the acceptance.

In answer to the second question, we are of opinion that a decision upholding an objection to the jurisdiction of the court would not prejudice the rights of His Majesty's Government to pursue their remedies either by submission of the dispute to the Council of the League of Nations or in some other way. Indeed, we think that the readiness of His Majesty's Government to submit the case to the Permanent Court would strengthen their position.

In answer to the third question, on our present information we see no reason apart from the question of jurisdiction to think that His Majesty Government would not succeed in their claim.

T. W. H. INSKIP.
F. B. MERRIMAN.

Law Officers' Department,
December 7, 1932.

SUDAN.

[J 821/355/16]

No. 4.

[July 4, 1932.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, April 12, 1932.

I HAVE the honour, by direction of Secretary Sir John Simon, to request the favour of your advice upon the question of the grant of Imperial Preference to goods the product of the Anglo-Egyptian Sudan in relation to the obligations of His Majesty under the most-favoured-nation clauses of commercial treaties concluded in respect of the United Kingdom. The question is whether it is possible to grant Imperial Preference to the Sudan, while refusing it to the foreign countries with whom such commercial treaties have been concluded, without committing any breach of treaty obligations. Some of the considerations which arise have recently been before you in references from the Colonial Office on the question of the extension of Imperial Preference to Palestine, but, as the international position of the Sudan is quite different from that of Palestine, it is thought that it would be convenient to make the present reference self-contained.

2. Most-favoured-nation obligations in respect of customs or import duties have been entered into with a number of foreign countries. The relevant articles in the treaties correspond generally to one or other of the two following types:—

- (a) "There shall be reciprocal liberty of commerce and navigation. . . .
"No duty of customs or other impost shall be charged upon any goods the produce of one country, upon importation by sea or by land from such country into the other, higher than the duty or impost charged upon goods of the same kind, the produce of, or imported from, any other country."
(Treaty with the Netherlands, the 27th October, 1837, article 1, paragraph 2.)

[8717]

Grant of
Imperial
Preference
to the
Sudan:
effect upon
British
most-
favoured-
nation
obligations.

(b) "Articles produced or manufactured in the territories of one of the high contracting parties, imported into the territories of the other, from whatever place arriving, shall not be subjected to other or higher duties or charges than those paid on the like articles produced or manufactured in any other foreign country" (article 14 of the Commercial Treaty with Turkey of the 1st March, 1930, Paper A).

The question is, therefore, whether the Sudan must for this purpose be regarded as either a "country" other than the United Kingdom within the meaning of article 1 (2) of the above-mentioned treaty with the Netherlands, or "another foreign country" within the meaning of article 14 of the treaty with Turkey quoted above, or similar articles in other treaties. Of these two types of articles (b) is by far the more common.

3. His Majesty's Government have consistently acted upon the assumption that the Dominions, Colonies and Protectorates were not "other (foreign) countries" within the meaning of these commercial treaty articles, and, indeed, the whole of the policy of Imperial Preference depends upon this assumption being successfully maintained for so long as any commercial treaties with foreign Powers containing articles upon these lines remain in force. Up to the present the assumption of His Majesty's Government upon this point has not been seriously challenged, though recently both the French and Japanese Governments have shown a disposition to contest it so far as India is concerned. But up to the present His Majesty's Government have successfully maintained their contention, and no point has so far been raised as to the difference between the phrase "any other country" in the one form of provision and "any other foreign country" in the other. The question is, however, at present under consideration of substituting in future commercial treaties a different formula for the words "any other foreign country," in order to safeguard Imperial Preference by an express provision.

4. Most commercial treaties concluded by this country contain articles providing for the extension of the treaties, at the desire of His Majesty, to British Colonies, Protectorates and mandated territories, and for accession thereto by His Majesty in respect of the Dominions and India (see, for example, article 37 and article 38 of the Commercial Treaty with Turkey of March 1930, Paper A). These articles may be relevant for the purposes of the interpretation of the expression "any other (foreign) country" in other articles of the treaty, as leading to the conclusion that territories to which they applied were not intended to be considered as "other (foreign) countries" in their relations to the United Kingdom. These articles have never been used to extend such treaties to the Sudan, nor, for the reasons given in paragraphs 7 and 8 below, is it thought that it could be contended that these articles could be applied to the Sudan. This fact is one amongst other considerations which serves to distinguish the position of the Sudan from that of the Dominions and Colonies for the purposes of the interpretation of these treaties. On the other hand, it may be pointed out that Palestine is a party to a considerable number of the commercial treaties concluded by His Majesty's Government in the United Kingdom (for example, to the Anglo-German Commercial Treaty of 1924). Although His Majesty's Government have thus recognised that Palestine may for this purpose be regarded as a territory of one of the high contracting parties, they have none the less, acting on the advice of successive Law Officers, continued to regard Palestine as a foreign country for the purpose of Imperial Preference. Further, it does not necessarily follow that the foreign countries which have agreed to recognise Palestine as a territory of His Majesty's Government for the purpose of the application of the treaty in question would be willing so to regard Palestine for the purpose of Imperial Preference. It is possible that even if it were practicable to regard the Anglo-Egyptian Sudan as a territory of His Majesty's Government, similar considerations might apply.

5. If Imperial Preference were granted to the Sudan, and any foreign Government were to claim, by virtue of its most-favoured-nation rights, the extension of Imperial Preference to its own products, in most cases the foreign Government would, if it so desired, be in a position to demand that the question in dispute should be submitted for decision to the Permanent Court of International Justice at The Hague, either by reason of an arbitration article in the commercial treaty concerned or by reason of the acceptance by both parties of the

optional clause of the statute of the Permanent Court of International Justice. Though the position of the Sudan is different from that of the Dominions, Colonies or Protectorates in its relations to this country, the possibility that the Permanent Court, in deciding the question in relation to the Sudan, might base its judgment upon reasoning which might be embarrassing in relation to the contention of His Majesty's Government with regard to the grant of Imperial Preference to the Dominions and Colonies cannot be altogether overlooked. Further, if the Permanent Court were called upon to decide a dispute relating to the grant of Imperial Preference to the Sudan, the question clearly would turn on the nature of the relations between the Sudan and this country, and political disadvantages might attend the pronouncement of the Permanent Court of International Justice on the nature of the relations of the Sudan with this country at the present time, particularly in view of the possibility of the Egyptian Government claiming a right to intervene under article 62 of the statute of the court on the ground that the question was one in which the interests of Egypt were directly involved. Egypt is itself one of the countries with whom most-favoured-nation obligations have been entered into, though in this case they are contained only in a temporary agreement. In virtue of this agreement, His Majesty's Government have undertaken to accord to goods the produce or manufacture of Egypt treatment not less favourable than that granted to goods the produce or manufacture of any other foreign country.

6. The international position of the Sudan and the circumstances which have produced it are described in the historical memorandum of which copies are enclosed (Paper B), and copies of the Anglo-Egyptian Agreement of 1899 and of the British declaration of February 1922, which are referred to therein, are sent herewith (Papers C and D). That position is admittedly anomalous. While Egyptian Nationalist opinion professes still to regard the Sudan as an Egyptian province, the agreement of 1899 has generally been regarded as creating a "condominium" under the joint sovereignty of Great Britain and Egypt (see, for instance, Oppenheimer's "International Law," 4th edition, vol. I, pp. 233 and 362-63). In fact, however, Egyptian sovereignty is represented only by the flying of the Egyptian flag along with the British. In practice, the administration of the country is entirely under the ultimate control of His Majesty's Government in the United Kingdom. The Governor-General is, under article 3 of the 1899 agreement (Paper C), appointed by Egyptian decree on the recommendation of His Majesty's Government, but the holders of the office have always been British subjects, and the Egyptian Government have had no voice in their selection, their function being confined to appointing the nominee of His Majesty's Government. The Governor-General, who has full powers of legislation and administration, acts under the instructions of His Majesty's Government, and in practice the administration of the Sudan is as much under the control of that Government as is that of any colony. It may be added that on more than one occasion the Sudan has raised a loan under the guarantee of the Imperial Parliament. In fact, while the theory of conjoint sovereignty has been preserved by the title of "The Anglo-Egyptian Sudan," by the flying of both flags, by the acceptance of an annual subsidy of £E. 750,000 payable by Egypt to the Sudan and by the fact that, in accordance with article 4 of the 1899 agreement (Paper C), Sudanese legislation is notified both to His Majesty's representative in Cairo and the President of the Egyptian Council of Ministers, the Sudan has in practice been treated as if it were part of the British Empire. Since the Sudan forms one of the "reserved subjects" under the declaration of 1922 (Paper D), the determination of its future status awaits the result of future negotiations with the Egyptian Government.

7. In view, however, of the peculiar status of the Sudan, it was found necessary in 1925 to consider the question as to how the Sudan should participate in international conferences and accept the obligations of international conventions when practical circumstances render such a course desirable. The decision taken on this question was based upon a memorandum by Sir Cecil Hurst (Paper E). It will be seen that it was decided that, in view of the status of the Sudan, it was not possible for international conventions to be extended to the Sudan in the same manner as they are extended to British Colonies and Protectorates, by action taken by His Majesty's Government under the colonial articles of such conventions, on the ground that any such action could only be justified by the view that the Sudan was in the position of a Colony or



Protectorate of His Majesty, and, owing to the existence of the condominium, it was not possible to contend that the Sudan fell into either of these classes. The following is a specimen of the usual form of colonial article in international conventions:—

"Any high contracting party may, at the time of signature, ratification or accession, declare that, in accepting the present convention, he does not assume any obligations in respect of all or any of his colonies, protectorates, overseas territories or territories under suzerainty or mandate; and the present convention shall not apply to any territories named in such declaration.

"Any high contracting party may give notice to the Secretary-General of the League of Nations at any time subsequently that he desires that the convention should apply to all or any of his territories which have been made the subject of a declaration under the preceding paragraph, and the convention shall apply to all the territories named in such notice one year after its receipt by the Secretary-General of the League of Nations.

"Any high contracting party may, at any time after the expiration of the five years' period mentioned in article 16, declare that he desires that the present convention shall cease to apply to all or any of his colonies, protectorates, overseas territories or territories under suzerainty or mandate, and the convention shall cease to apply to the territories named in such declaration six months after its receipt by the Secretary-General of the League of Nations.

"The Secretary-General of the League of Nations shall communicate to all the members of the League of Nations and non-member States mentioned in article 12 all declarations and notices received in virtue of this article."

8. Similar reasoning led also to the conclusion that it was not possible for these conventions to be extended to the Sudan as a Colony or Protectorate of Egypt. Consequently the conclusion was arrived at that, for the purposes of participation in international conventions or conferences, the Sudan must be regarded as a separate entity or State, with the Governor-General as a sort of head of the State, in whom all the treaty-making power was vested. Effect has been given to this conclusion in a number of cases. For instance, the General Sanitary Convention of 1926 was signed by delegates acting under full powers issued by the Governor-General of the Sudan, and was ratified by an instrument signed by the Governor-General. In the list of heads of States in the preamble to the convention, "the Governor-General, representing the sovereign authority of the Sudan," appears alongside of His Majesty, the President of the French Republic, &c. The wording employed is significant of the peculiar status of the Sudan, and it may also be material to observe that the Sultan of Morocco and the Bey of Tunis, which are French Protectorates, figure similarly in the preamble to this instrument. (France none the less accords preference to both Morocco and Tunis, and there is a strong movement for the complete incorporation of Tunis into the French customs area.) The Sudan has also acceded to a number of other international conventions by means of an instrument signed by the Governor-General and under the articles appropriate for the accession of separate independent States, as opposed to the articles providing for accession in respect of Colonies.

9. Section 8 of the Finance Act of 1919 provides for the grant of Imperial Preference to "the British Empire," which was defined as including "any territories under His Majesty's protection"; this definition is reproduced in the Import Duties Act. At that time the protectorate over Egypt, declared in 1914, was still in existence, and it was accordingly decided that Egypt and the Sudan should be regarded as coming within this definition. On the termination, under the declaration of 1922 (Paper D), of the British protectorate over Egypt, Imperial Preference ceased to be granted to Egypt, but it was decided to continue it in relation to the Sudan, and an affirmative answer has been given to enquiries from traders whether the Sudan was included within the definition in section 8 of that Act. The point as to the possible effect under the most-favoured-nation obligations of this country of the grant of Imperial Preference to the Sudan has been raised in the past, but up to now it has in practice been an academic one, since it is probable that no goods imported into this country which were products of the Sudan have hitherto come within any of the classes with respect to which

Imperial Preference has been given. Consequently the Sudan has never enjoyed any substantial measure of preference, and, indeed, has probably enjoyed no preference at all. The commercial treaty question has therefore never arisen in a practical form. There is no reason, therefore, to suppose that the attention of any foreign Government has ever been directed to the matter, nor that the Egyptian Government have been aware of the opinions expressed to the effect that the Sudan would be entitled to Imperial Preference as a territory under His Majesty's protection if any Sudan exports were goods in respect of which preference was granted.

10. The situation has, however, been modified by the passage of the Import Duties Act. In 1930 Sudanese exports to all countries amounted to £E. 4,953,282, of which £E. 3,289,780 came to the United Kingdom. Of the latter figure, £E. 3,031,398 consisted of raw cotton and cotton seed, which are on the free list under the Bill. Of the balance, £E. 199,588 consisted of gum, which is not on the free list, thus leaving a balance of unclassified goods to the value of £E. 58,794, some of which at any rate would presumably not be on the free list. It will be seen, therefore, that for the first time a proportion of Sudanese exports to this country will be in a position to benefit by the grant of Imperial Preference, and the question has thus assumed a practical importance.

11. The question whether, if Imperial Preference were given to the Sudan, the Sudan would be able to reciprocate by granting any preference to exports from this country is still under consideration. It seems probable, however, that by reason of the provisions of article 7 of the 1899 agreement (Paper C) it would not be possible for the Sudan to grant any reciprocity to the goods of this country, unless an agreement to this effect was made with the Egyptian Government. It is extremely doubtful whether it would be possible to come to any agreement with the Egyptian Government on this point, and whether it would be politically desirable to attempt it. It may be added that Egypt gives exceptionally favourable treatment to Sudanese imports, and has expressly reserved the power to do so in some, if not all, of her commercial arrangements.

12. It is also perhaps relevant to consider what might be the results if Imperial Preference were granted to the Sudan and the matter were taken to the Permanent Court of International Justice, and a decision adverse to His Majesty's Government resulted. Clearly as a result, His Majesty's Government would have to cease to grant Imperial Preference to the Sudan. The question must also, however, be considered whether the foreign Government which had obtained a decision in its favour from the Permanent Court could claim damages for the injury which it had suffered by reason of the breach of its treaty rights during the period when rates of duty had been imposed upon its exports to this country while corresponding imports from the Sudan had been admitted free. It might be that, in practice, the foreign Government would not make this claim, but if it would have any legal right to do so, the possibility that it would exercise it can certainly not be altogether discounted.

13. The Permanent Court in decisions given by it has held that the breach of any treaty obligation creates an obligation under international law to make reparation, and has also held that under international law reparation can only be claimed for damage resulting directly from the breach of the treaty obligation, and not for indirect damages. The Permanent Court has further held that where the breach of the treaty obligation which is the subject of the proceedings before the court resulted in injury or loss to the nationals of the plaintiff State, the position before the court is that the State itself is the claimant and is claiming for the injuries done to itself in the person of its nationals, and that consequently it may claim as for damage suffered by itself an indemnity corresponding to the damage which the nationals have suffered as the result of the act which was contrary to international obligations. A summary of the existing decisions of the Permanent Court will be found in a reprint from an article in the "British Year Book of International Law" (Paper F); the decisions of the Permanent Court which appear to have any relevance to this question will be found discussed on pp. 4-8 and 22-24 of this article, together with the necessary references to the reported decisions of the court.

14. It is difficult to estimate what, under international law, would be the appropriate measure of damages in a case of this kind. It might be said that the refund of all the duties which had been wrongly levied could be claimed, and in such precedents as it has been possible to discover this has been the course

adopted. A memorandum on this point is enclosed (Paper G). It might be contended, on the other hand, that the damage suffered by the claimant State and its nationals was the loss of trade which they had suffered by reason of the imposition of higher duties, or alternatively, the lower figure at which they had been obliged to offer their goods for sale. If this is the true criterion for calculating the damages, it is clear that it is one which is almost impossible of precise calculation, and it might be held, therefore, that the claimant would fail on the ground that it was for the claimant State strictly to prove its damages and it had been unable to do so. No precedent has been discovered in which this criterion has been adopted, and it would seem, in the light of the precedents referred to above, that such damages would be regarded as indirect or too remote. In any case, it would appear that since what a State possessing most-favoured-nation rights is entitled to claim for its goods is the treatment accorded to "goods of the same kind," "the like articles" or simply "goods" coming from any other (foreign) country (see provisions quoted in paragraph 2 and at the end of paragraph 5), the measure of damage would be limited to the classes of goods which, in fact, received Imperial Preference when exported from the Sudan; no claim could be made to the benefits of Imperial Preference in general, and consequently no claim could be based on the duties levied on goods other than those which, when exported from the Sudan, were admitted free of duty.

15. I have the honour, therefore, to request you to take these papers into your consideration and to favour Sir John Simon with your advice as to the likelihood of a foreign State, which possesses most-favoured-nation rights in one or other of the typical forms quoted in paragraph 2 above, being able to establish before an international tribunal its right to receive, in respect of goods imported into this country, the same treatment as that accorded to the like goods imported into this country from the Sudan, and generally as to the degree of risk attaching to the grant of Imperial Preference to the Sudan, with particular reference to the question of damages referred to in the preceding paragraph. Sir John Simon will, of course, be grateful to receive any observations of a general character which you may desire to offer.

I have, &c.

M. D. PETERSON.

List of Papers.

- (A).—Commercial Treaty with Turkey, March 1, 1930.
- (B).—Memorandum on the Sudan. [Annex A.]
- (C).—Anglo-Egyptian Agreement of January 19, 1899.
- (D).—Declaration of February 28, 1922.
- (E).—Foreign Office despatch to Lord Allenby of January 22, 1925, enclosing memorandum by Sir Cecil Hurst on the International Relations of the Sudan. [Annex B.]
- (F).—Reprint from the "British Year Book of International Law," 1930, of article by Mr. W. E. Beckett, entitled "Decisions of the Permanent Court of International Justice on Points of Law and Procedure of General Application."
- (G).—Foreign Office Memorandum of February 23, 1932, "Compensation for Imposition of Duties in Violation of Treaty Rights." [Annex C.]

Report.

A foreign State having most-favoured-nation rights in either of the typical forms would, in our opinion, have no difficulty in establishing before an international tribunal its right to receive the same treatment in respect of its goods imported into this country as that accorded to the like goods imported from the Sudan. The contrary view would involve a reversal of conclusions arrived at, not only by the Mixed Courts in Cairo, but by His Majesty's Government, to the effect that the Sudan has been constituted as a new and separate State, although undoubtedly a State *sui generis*. We are of opinion that those conclusions were right. The Sudan is a State existing under a condominium enjoyed by Great Britain and Egypt, but none the less it is, in our opinion, a separate State, and the declaration of Egyptian independence has thrown into clearer relief the impossibility of treating the Sudan as a part of the British Empire. It follows, in our opinion, that it is "another country" or "another foreign country" for the purpose of the most-favoured-nation clauses under our consideration.

If we are right in the opinion we have expressed on the main question submitted to us, the grant of Imperial Preference to the Sudan would be attended with a very serious risk of a liability to pay damages to another Power by way of reparation for the breach of treaty obligations. Such reparation would consist of an indemnity measured by the direct loss or expense suffered or incurred by the nationals of the Power in question in consequence of the duty imposed on their goods over and above the duty, if any, on goods from the Sudan. This would clearly cover a return of duties wrongly levied. Loss of trade directly resulting would, in our opinion, also be taken into consideration. We are of opinion that the damages would be limited to classes of goods exported from the Sudan.

It is impossible to do more than speculate as to the extent to which damages might result directly from the grant of preference and be capable of proof. Indirect loss of trade would not be admitted. Beyond a statement of these general principles based on rulings of the Permanent Court of International Justice, we do not feel able to go.

T. W. N. INSKIP.
F. B. MERRIMAN.

Law Officers' Department,
July 4, 1932.

ANNEX A.

Memorandum on the Sudan.

1. It is a manifest untruth to claim that, ethnologically considered, Egypt and the Sudan are one. There is an entire disparity between the two types of natives, and their only similarities are that Egyptians and the tribes in the Northern Sudan speak Arabic and are nearly all Moslems.

2. Until the 19th century the whole of the tract between Egypt and the Congo had never been subject to one central authority, though the rule of the Fung kings in the 16th, 17th and 18th centuries nominally extended over the central portion of what is now the Anglo-Egyptian Sudan. The coming of the Arabs provided the north and central districts with a common language and religion, but not with unified political control.

3. In 1819 Mohamed Ali Pasha invaded the Sudan, and his armies had little difficulty in taking possession of the power which was already slipping from the impotent hands of native dynasties, whose main strength was expended in internecine bickering. An administrative system of a kind was established for the northern districts, and yearly expeditions were sent southwards in quest of gold and slaves. The Egyptian rule aimed only at the exploitation and not at the development of the whole country, and it is only surprising that the reaction to their amazingly callous maladministration was deferred for sixty years, for it was not until the Dervish rising in 1881 that this policy found its inevitable consummation.

4. The British connexion with the Sudan may be said to date from 1869, when the Khedive Ismail granted to Sir S. Baker powers over all the Nile Basin south of Gondokoro (between Mongalla and Rejaf), with instructions to annex it and effect reforms. On his way south Sir S. Baker was shocked by the poverty and desolation of the Nile Valley. In 1873 the Khedive appointed General Gordon to succeed Sir S. Baker, with the title of Governor-General of the Equatorial Provinces. At the same time Ismail Pasha expanded his domains in Bahr-el-Ghazal, in Eritrea and on the Ethiopian frontier.

5. In 1877 General Gordon was made Governor-General of the whole Sudan. Hampered by the venality and corruption of the Egyptian officials, and forced by sporadic revolts to dash from one end to the other of the vast domain under his control, General Gordon was unable to effect a twentieth part of the reforms necessary, and in 1880, just when he had succeeded in reducing the insurgents to quiescence, the Khedive recalled him.

6. In August 1881 the Mahdi proclaimed his divine mission of regeneration.



7. The attitude of successive Governments in England to Egypt and the Sudan may be summed up in the idea that, while it was held to be essential to the safety of Imperial communications that no other Power establish itself in Egypt, Great Britain would not herself step into that country. From the time of Bonaparte's expedition to Egypt until 1904, when the French recognised the British occupation of Egypt, there was a continual struggle, sometimes open and sometimes latent, between Great Britain and France for supremacy in the Eastern Mediterranean. The overland route to the East and then the Suez Canal only served to accentuate the conflict of interests. In the period between 1875 and 1883 the growing importance of the Canal and the financial collapse of Egypt gradually forced the hand of the British Government, and two new motives came to dominate our policy: the defence of the interests of the bondholders of the Canal Company, and, arising out of this, the reform of the Government of Egypt. French interests were similar, and the French Government, weakened by the Franco-Prussian war and unable to dispense with British goodwill, offered co-operation in Egypt. It was impossible to refuse this offer, and so we see, from 1876 onwards, carefully-selected Englishmen working in Egypt itself on the problem of finance, which, they early discovered, could not be divorced from the general government of the country. A period of vacillation and negative policy followed until in 1882 the course of events forced us to actual intervention and the use of armed force. The events of this year, the bombardment of Alexandria, the defection of the French, the defeat of Arabi Pasha by a British force, and the occupation of Cairo created a new situation. The occupation was declared to be temporary, but one definite move was made: the Anglo-French dual control was terminated and the control of Egyptian finance was vested in one British adviser. As Lord Cromer points out, the British Cabinet wanted two things—the evacuation of British troops and the continuance of reforms; these two things were incompatible, and as time went on, and despite the dislike felt for the situation at home and sundry attempts made to abolish the control, this irregular situation, complicated and embarrassing though it was, became an understood thing.

8. Any suggestion for the immediate withdrawal of troops from Egypt was rendered impossible by the revolt of the Sudan, and the necessity for providing for the defence of Egypt against invasion from the south. By 1882 the whole framework of society in Egypt was on the verge of collapse, and in 1883 the British Government decided that Egypt must evacuate the Sudan and hold only the frontier, Suakin, Massawa, and the Red Sea ports. General Gordon was chosen for the task of evacuation, and proceeded to Khartoum as Governor-General in 1884. The subsequent events of that year, culminating in the fall of Khartoum and the death of General Gordon in January 1885, are too well known to need recapitulation.

9. The next stage was one of retirement, but British public opinion was aroused, and the rise of that "new Imperialism," of which Cecil Rhodes was the father and inspirer, engendered new ideals.

10. The view of every unbiassed historian has been the same: "Le Gouvernement égyptien du Soudan portait en lui-même son germe de destruction." . . . "La cause du soulèvement Mahdiste doit être recherchée dans l'administration intolérable du Gouvernement égyptien" (Dr. Sarkissian).

11. It is worth noting at this point that the cost to the British Treasury of the four years 1882–85 amounted, in addition to normal maintenance charges, to over £13 million; that 1,971 British officers and men had perished and 6,683 been invalided "in consequence of our operations in Egypt"; and that, when the British and Indian troops left in Suakin were withdrawn in 1886, the Egyptian garrison left in charge was paid for by the British Government.

12. There ensued a period between 1885 and 1898 when the Sudan, unoccupied by either Egyptian or British forces, was *res nullius*.

13. The power of the Khalifa in the Sudan was broken once and for all by Sir H. Kitchener in September 1898 at the battle of Omdurman, and on the 19th January, 1899, the status of the Sudan was defined by an agreement between the British and the Khedivial Governments.

14. At the moment when the agreement was signed, the background was briefly as follows:—

Great Britain had accepted responsibility for the guardianship and regeneration of Egypt, and, by 1899, she had been paramount in that country

for seventeen years. She had sacrificed men and money, and had saved Egypt from financial and political ruin. She had preserved her from invasion by the hordes of the Khalifa, and, by her weight in the councils of Europe, she had refuted the claims of others, who held that the Sudan had become *res nullius* to be annexed and developed by the first comer (*cf.* the Fashoda incident). Finally, an Anglo-Egyptian force under British officers had crushed the Dervish power and put Great Britain in a position to effect the regeneration of the Sudan in the interests of its inhabitants.

15. The history of the Sudan and its progress from 1898 to the present day is the record of the fulfilment of this duty.

16. The Condominium Agreement of 1899 was an attempt by Great Britain to obtain freedom of action in the Sudan without undue injury to the susceptibilities of Europe and of Egypt. Lord Cromer described the Constitution of the Anglo-Egyptian Sudan embodied therein as "a hybrid form of government, hitherto unknown to international jurisprudence," and as "the child of opportunism." He added: "Should it eventually die and make place for some more robust, because more real, political creation, its authors need not bewail its fate."

17. The political effect of the Condominium Agreement may be summed up in the following salient points:—

- (i) The joint sovereignty of Great Britain and Egypt is clearly and incontestably established by the flying of the two flags on public buildings.
- (ii) British control of the administrative machinery is provided by articles 3 and 4. Juridically the Governor-General nominated by the British Government, but appointed by the King of Egypt, may be regarded as possessing unlimited powers, for neither party to the Condominium has reserved to itself the power to review or disallow his acts. *De facto* he can be removed from his post, but only if the British Government consents. In practice he is subject to the instructions of His Majesty's Government in the United Kingdom, conveyed to him by the Secretary of State for Foreign Affairs, through the British representative in Cairo, who now holds the title of "High Commissioner for Egypt and the Sudan." The Governor-General does not receive instructions from the Egyptian Government.
- (iii) The appointment of consuls, &c., in the Sudan is specifically made subject to the consent of the British Government, which has, in fact, been withheld.

18. The legal effect of the agreement of 1899 was the subject of argument in an action brought in 1910 before the Mixed Courts in Cairo against the Egyptian and Sudan Governments. The plaintiffs were a firm of contractors who sued upon a contract made by the Sudan Government and joined the Egyptian Government on the ground that the Sudan had never ceased to be an integral part of Egypt.

19. The Egyptian Government pleaded that, by the Agreement of 1899, the Sudan Government was constituted an autonomous Government absolutely separate and distinct from the Egyptian Government, and that the Egyptian Government was consequently in no way responsible for the Sudan Government's contractual obligations. The court upheld this plea and the plaintiffs were nonsuited.

20. The Sudan Government pleaded that the jurisdiction of the Mixed Courts was excluded from the Sudan by the same agreement by virtue of which the Sudan Government was constituted an independent Government. The court upheld this plea and found that by the agreement a new State was established in the Sudan, distinct from and independent of Egypt.

21. The following passages from the Mixed Courts judgment on these questions are of interest:—

"Attendu que c'est un fait historique que . . . le Soudan a dû être abandonné en fait par l'Egypte et qu'ensuite . . . il a été décidé (par le Conseil des Ministres) que la moudirieh de la frontière . . . sera délimitée au sud par le markaz de Wadi Halfa;

"Attendu qu'on est donc amené à en conclure que l'Egypte, en fixant ainsi sa frontière sud, a considéré les provinces du Soudan comme temporairement perdues et séparées de l'Egypte, sans toutefois les abandonner définitivement, mais en attendant le moment propice pour les reconquérir."

"Qu'en effet le Soudan n'est pas revenu à l'Egypte libre de toute charge."

"Qu'il a été établi un véritable condominium au profit des Puissances conquérantes, que pour ainsi dire un Etat nouveau et indépendant de l'Egypte a été créé, qui a droit d'administrer, de légiférer et de juger;

"Attendu qu'il est donc manifeste que la convention dont il s'agit est un acte de souveraineté émanant non seulement du pouvoir souverain de l'Egypte, mais encore de celui de la Grande-Bretagne;

"Attendu qu'il s'ensuit que l'autorité judiciaire doit respecter la convention et s'arrêter, sinon devant une situation en droit, tout au moins devant une situation de fait, ladite convention ayant reçu son exécution;

"... il faut dire en l'état actuel des choses, d'une part, la Juridiction mixte ne peut pas proclamer sa compétence pour juger un procès mixte qui a pris naissance au Soudan et, d'autre part, vu que le Soudan est indépendant de l'Egypte, le Gouvernement égyptien n'a rien à voir dans le présent litige

"Par ces motifs :

Met hors de cause le Gouvernement égyptien;

Et statuant dans les rapports entre les demandeurs et le Gouvernement du Soudan;

"Se déclare incompetent."

22. The claims of the Egyptians that the sovereign rights of Egypt, acquired by conquest in 1820 and the years following remain unimpaired, may derive an appearance of force from the studiously conciliatory language of those who drafted the 1899 agreement, with the intention of avoiding complications in Europe, of excluding Ottoman suzerainty and of satisfying the *amour-propre* of Egypt. But what the old Egypt had won by the sword she had also lost by the sword.

23. In effect, had the words "mandate" and "mandatory power" been coined at that time, the position adopted by Great Britain might have been so described. Great Britain has conscientiously fulfilled her mandate for thirty-two years, albeit under the name of a condominium, and, in deference to the special interests of Egypt, under the ægis of two flags instead of one. Of these special interests the most vital is, of course, the waters of the Nile, and Egypt's absolute rights in this matter have been repeatedly admitted, and notably by Mr. Ramsay MacDonald in the House of Commons on the 10th July, 1924. Effect has been given to Britain's pledges to Egypt in this matter in the exchange of notes between His Majesty's Government and the Egyptian Government, dated the 7th May, 1929.

24. To revert to the course of history since 1899, there was no actual change in the relations between the British Government and the Egyptian Government on the one side, and the Sudan on the other until 1924. But the situation was materially affected by various important events during that period. In 1904 the French definitely recognised the British occupation of Egypt, while the outbreak of war with Turkey in 1914 necessarily involved an alteration in the position of Egypt. This alteration took two forms—the abolition of the Turkish suzerainty and the declaration of the Protectorate. After the war the great pressure of other problems, both internal and international, left little leisure for the consideration of Egyptian affairs, and it did not at first seem that the matter was urgent. But once again extraneous causes, in this case the growth of Egyptian nationalism, symbolised in the figure of Zaghlul Pasha, forced a decision upon the British Government. The grave disorders of 1919 were a trial of strength, and, to quote the words of Sir R. Graham, "the British authorities in Egypt, invested with full discretionary powers, have shown themselves unable or unwilling to stand up to the forces arrayed against them. The principle at issue has been surrendered." Egypt, in fact, held that she was an independent country, while the attitude of Great Britain had been that Egypt had become

part of the British Empire. The Milner Commission exploded this theory and advanced a theory startling in its novelty, viz., that Egypt, though a Protectorate, could not be considered a part of the British Empire. The years 1920 and 1921 were taken up in fruitless attempts to negotiate with the Egyptians a *modus vivendi* which would give to Egypt a status between that of a Protectorate and that of an independent country. By the end of 1921 matters had reached a deadlock, and in November of that year the British advisers to the Egyptian Government stated unanimously that a decision which did not concede the principle of Egyptian independence . . . "must entail serious risk of revolution." As a result, and with obvious reluctance, the British Government agreed to the unilateral declaration of February 1922, which granted, with the reservation of four points, independence to Egypt. Of these reserved points, the Sudan was one. The effect of the declaration was that His Majesty's Government stated that the position of the Sudan was still governed by the 1899 agreement.

25. Since 1899, while Egyptian troops have been stationed in the Sudan, no Egyptian has held a higher grade administrative post. In 1924, following serious disturbances in the Sudan, particularly at Atbara and Khartum, organised by Egyptian influence and the dastardly assassination of the Sirdar, Sir Lee Stack, in Cairo, the Egyptian troops were withdrawn from the Sudan, and the Sudan Defence Force, which owes allegiance to the Governor-General, was formed; there are no Egyptian officers in this force. In January 1924 there had been eighty-four Egyptian mamours and sub-mamours in the Sudan; after the murder of Sir Lee Stack nearly all these were sent back to Egypt and their places taken by Sudanese. Amongst the minor clerical staff, only those Egyptians who had been known to have been indulging in undesirable political activities were sent out of the Sudan, and at the present time there are some 1,400 Egyptian officials occupying minor clerical and technical posts on the establishment of the Sudan Government.

26. It is therefore clear that, in practice, the administration of the Sudan has been British for the last thirty-three years.

27. There are certain points arising out of the above brief survey which are germane to the discussion of the exact political status of the Sudan. The first of these is the attitude adopted by Egypt to the 1910 decisions of the Mixed Courts, to which reference has been made in that survey.

28. Sir Malcolm McIlwraith, who was Judicial Adviser to the Egyptian Government when the 1899 Convention was drafted, stated in a letter to "The Times" on the 20th May, 1930: "Egypt herself admitted, in the Bencini case (*i.e.*, the case above summarised) . . . that she had no rights or liabilities of government in the Sudan, since she demanded her dismissal from that suit expressly on the ground that the Sudan Government was a wholly separate and autonomous one."

29. The "Ministère Public," intervening in the case in 1910, pleaded:—

"Il y a eu donc concours de deux Puissances pour reconquérir le Soudan et l'on ne saurait, sous n'importe quel rapport, pouvoir alléguer ou même suggérer que le Soudan a été repris ou reconquis pour le seul compte de l'Egypte."

"Cette conquête a créé un *Etat Nouveau*, désigné sous le nom de Gouvernement du Soudan": and later: "Le Gouvernement du Soudan est tout à fait indépendant de celui de l'Egypte."

30. In the course of the discussions upon the terms of the Egyptian Constitution promulgated in 1923, it was learned that King Fuad desired his title to be "King of Egypt and the Sudan." The High Commissioner, acting on the instructions of His Majesty's Government, pointed out to His Majesty that this phrase could not be reconciled with the terms of the 1899 Condominium Agreement or of the declaration of the 28th February, 1922. At the beginning of 1923 King Fuad placed his signature to a document acquiescing in the view of His Majesty's Government as expressed above.

31. In August 1925 it was decided to create a special form of passport to be issued to "certain categories of persons permanently established in the Sudan." These passports bear the seal of the Governor-General and holders of them receive the same treatment as British-protected persons and do not require a British visa for the purpose of travelling to British territory. The absence of any requirement as to visas does not, however, confer upon the holder of a

Sudanese passport any right of admission to British territory, or relieve them from the necessity of obtaining permission to land. An expired Sudanese passport can only be renewed by the issuing authority, viz., the Civil Secretary, Khartum, or the Sudan Agent, Cairo. It was at first provided that in cases of emergency the local authority empowered to deal with British passports should be entitled to issue a British emergency certificate, but this proposal was subsequently withdrawn in order to forestall Egyptian objections.

32. It is clear that the intention of these regulations was that neither British nor Egyptian consular officers should perform any function in connexion with Sudanese passports.

33. Lord Lloyd, then His Majesty's High Commissioner, Cairo, wrote to the president of the Egyptian Council of Ministers in May and August, 1926, informing him of the decision to issue Sudanese passports. Adly Pasha replied on the 14th September acknowledging the receipt of the second letter.

34. The protection of Sudanese abroad is undertaken by His Majesty's consular officers, but the instructions to consuls lay down that protection should only be accorded to persons holding Sudanese passports, and that all cases of persons claiming to be Sudanese, but not holding such passports should be referred to the Sudan Government.

G. A. WALLINGER.

Foreign Office, February 28, 1932.

ANNEX B.

Mr. Austen Chamberlain to Field-Marshal Viscount Allenby (Cairo).

(No. 86.)

My Lord,

Foreign Office, January 22, 1925.

I HAVE had under consideration the position of the Sudan Government in regard to international agreements and conferences. It will be remembered that this matter has been examined in some of its aspects in correspondence between your Lordship and my predecessors, but, until the outcome of the negotiations which were then expected to take place between the British and Egyptian Governments was known, it proved impossible to find a comprehensive solution of the problem.

2. Recent events have made it necessary to remove any ambiguity or misconception in regard to the status of the Sudan. His Majesty's Government have made it clear to all concerned that they intend to maintain their position in the Sudan and to remain responsible for the administration and development of the country. At the same time they have expressed their desire to maintain the condominium provided Egypt loyally accepts its obligations and refrains from any attempt, overt or covert, to undermine the British authority. I transmit to your Lordship the accompanying copy of a memorandum by my legal adviser, who defines the principle in accordance with which it seems to me that a solution of the questions arising out of the international relations of the Sudan, referred to in the preceding paragraph, may best be sought.

3. Sir C. Hurst considers that just as in the case of the Sudan Defence Force the Governor-General has been regarded as the embodiment of the condominium, so in the case of representation at international conferences and the signature and subsequent ratification of international agreements, or the accession to such agreements where this is possible, the Governor-General should be regarded as the embodiment of that "new, separate and independent State," which the Egyptian courts have recognised the Sudan to constitute. Acting on this principle it will be for His Majesty's Government to ensure that invitations to attend future international conferences are conveyed to the Sudan Government through this Department, and, if thought desirable, your Lordship may subsequently inform the Egyptian Government of the action taken and of the reply received from the Sudan Government. When an invitation has been accepted, and where the interests of the Sudan in the subject matter of the conference are such as to warrant the appointment of a separate Sudan delegate, the latter will be furnished with the necessary full powers by the Governor-General which might take the form of the accompanying draft. Owing to their

limited interests, the Sudan Government may not in all cases desire to incur the expense of direct representation and may prefer to entrust the protection of their interests to the British delegate, who would then be furnished on behalf of the Sudan with the necessary full powers by the Governor-General.

4. It is necessary to determine the form which the Governor-General's instrument of ratification should adopt in the case of multilateral conventions to which under the procedure described above the Sudan may become a party, and I transmit to you, for communication to the Sudan Government, the accompanying copy of a draft instrument which, I am advised, will meet the purpose.

5. So far as concerns existing conventions or future conventions which are open to the accession of all States and of which the Sudan is not an original signatory, the Governor-General will only have to inform His Majesty's Government directly by means of a letter addressed to me of the desire of the Sudan Government to accede to any such convention. His letter, which should be drafted in such a form as itself to be equivalent to accession, will then be brought by the British diplomatic representative concerned to the notice of the Power responsible for recording accessions to the convention. The instrument of ratification referred to in the preceding paragraph can be conveyed to its destination through a similar channel.

6. It might conceivably be suggested that if the British and Egyptian Governments both were or became parties, without qualification or exclusion in regard to the Sudan, to a convention where there was no question of separate representation of colonies, possessions, protectorates or dependencies, and where the Sudan was not itself represented, that convention ought to be taken to be binding on the Sudan. It was precisely to avoid any question of this nature arising that, in the case of the Commercial Convention and the Convention regarding conditions of Business and Jurisdiction, signed at Lausanne in 1923, notification of the exclusion of the Sudan was made by the British delegation under the colonial exclusion clause. Again in the case of the conventions relating to the Simplification of Customs Formalities (Geneva, the 3rd November, 1923), the International Régime of Railways (Geneva, the 9th December, 1923), and to the International Régime of Maritime Ports (Geneva, the 9th December, 1923), to which His Majesty's Government and other parts of the Empire were parties, it was made clear in the letter conveying the instruments of ratification to the Secretary-General of the League of Nations that the King's ratification did not imply that these conventions would be applied in the Sudan, and this procedure might be followed in similar cases in the future.

7. Subject to any observations which, after consultation with the Sudan Government, your Lordship may wish to offer on the above proposals, I leave to your discretion the manner in which the Egyptian Government should be made aware of the intentions of His Majesty's Government.

I am, &c.

AUSTEN CHAMBERLAIN.

ENCLOSURE IN ANNEX B.

Note by Sir C. Hurst on the International Relations of the Sudan.

THE method by which the Sudan shall in future become a party to treaties and international engagements has recently been under consideration. The Secretary of State has intimated a desire that the method employed should, while preserving the façade of the condominium, be such as to ensure full British control; such full British control constituting the policy which His Majesty's Government are determined to follow in connexion with the Sudan.

The safest and most effective method of meeting the Secretary of State's requirements will, in my opinion, be to take our stand firmly on the Anglo-Egyptian Agreement of 1899. That agreement embodies the arrangements made by Lord Cromer for the future government of the Sudan after the suppression of the Mahdist revolution, and is intended to give effect to the claims which accrued to the British Government by right of participation in the reconquest of the country. Article 3 of the agreement vested supreme military and civil command

in the Sudan in a Governor-General, who was to be appointed by Egypt on the recommendation of the British Government.

The agreement of 1899 was the subject of consideration and interpretation by the mixed tribunals in Egypt in a decision rendered in 1910 in a case which involved the point whether the jurisdiction of the mixed tribunals extended to the Sudan. The tribunal held that the effect of the agreement was to establish what was in fact a condominium on the part of the two conquering Powers, and to constitute the Sudan as a new State, distinct and independent from Egypt and enjoying all administrative, legislative and judicial rights.

This decision is at the present juncture extremely useful. It places an interpretation on the agreement of 1899 which will enable the British control to be complete without in any way running counter to the agreement. The Governor-General, in whom the supreme military and civil command is to be vested, will always be an Englishman, and will always carry out whatever wishes the British Government express to him. Consequently, the convenient way to ensure British control, while preserving the façade of the condominium, will be to magnify the office and the importance of the Governor-General, who, though in form a functionary deriving his authority from both the British and the Egyptian Governments, will, in practice, always obey the instructions of His Majesty's Government. By emphasising the separateness from Egypt of the political entity which the 1899 agreement was held by the mixed tribunals to have brought into being, British control can be assured and Egyptian interference avoided. In the words of the decision of the tribunal, "the Sudan should be treated as having been constituted a new State, distinct and independent from Egypt."

All the difficulties relating to invitations to conferences, signature of treaties or accession to international instruments can then be got over without difficulty. So also can the question of passports for the Sudanese.

Passports drawn up in the name of the Governor-General should be issued to Sudanese, and the British representatives abroad should be notified that if any Sudanese should apply to them for aid he is to be entitled to all the assistance that can be rendered. The powers enjoyed under the condominium would certainly justify this. If a Sudanese chooses to apply to an Egyptian representative for assistance when he is abroad, there is no reason that he should not do so, for the right of Egypt to help him would also be derived from the condominium.

Invitations to attend at a conference should be issued to the Governor-General. Authority to sign an international instrument on behalf of the Sudan should emanate from the Governor-General. In practice it will usually be the case that the person authorised to sign on behalf of the Sudan should be the British representative, but he should receive a separate authorisation from the Governor-General, and the instrument should show on the face of it that it is signed on behalf of the Sudan. An accession to an international convention on behalf of the Sudan should also emanate from the Governor-General. So also would the ratification of a treaty which had been signed on behalf of the Sudan. The ratification must not be made in the name of the King; otherwise the condominium would necessitate the introduction of the King of Egypt as well.

I have just seen a telegram from Egypt which shows that the new Sudan defence force is being recruited on the terms of owing allegiance to the Governor-General. This arrangement is precisely in accordance with what I have suggested above as the best method of meeting the Secretary of State's requirement of ensuring British control while preserving the façade of the condominium. Allegiance to the Governor-General implies that the Governor-General is the head of a political unit of the nature of a separate State.

Foreign Office, January 16, 1925.

ANNEX C.

Memorandum on Compensation for Imposition of Duties in Violation of Treaty Rights.

I.

BY the United States Tariff Act of the 30th August, 1842, the duties on cotton goods imported into the United States were nearly doubled, but it was provided that the Act should not apply to goods shipped in vessels bound to any United States port which actually left their last port of lading "eastward of the Cape of Good Hope, or beyond Cape Horn, prior to the 1st September, 1842."

2. Article 2 of the Commercial Convention of the 3rd July, 1815, between Great Britain and the United States provides that "no higher or other duties shall be imposed on the importation into the United States of any articles the growth, produce or manufacture of His Britannic Majesty's territories in Europe . . . than are or shall be payable on the like articles being the growth, produce or manufacture of any other country."

3. Between August 1842 and the 13th May, 1843, a firm of Glasgow merchants imported at United States ports cotton goods to which were applied duties under the Act of 1842. These duties were paid under protest having regard to the terms of the treaty of 1815.

4. The question was submitted to the claims commission under the convention between Great Britain and the United States of the 8th February, 1853. The commission decided that there had been an infraction of the convention of 1815, and directed that the excess of duties exacted on cotton goods imported before the 13th May, 1843, should be refunded.

5. As regards interest, the commissioners pointed out that at the time the duties were demanded, the claimants formally protested and also claimed protection from the British Minister at Washington, so that the United States Government were, from the first, informed that the payment of the duty would be resisted. Further, the Act of 1842 contained a proviso as regards non-interference with existing treaties. Interest was therefore allowed on the claim from the time of payment.

II.

6. An Act of the United States Congress of the 22nd May, 1824, imposed an increase of duty on cottons with the proviso that it should not take effect on goods coming from beyond the Cape of Good Hope or Cape Horn for six months after it had been in operation as to goods imported from other countries.

7. The commission under the Anglo-United States Convention of the 8th February, 1853, regarded this proviso as a clear discrimination in violation of the Anglo-United States Convention of 1815.

8. The commission, therefore, allowed claims for the return of any excess of duties beyond those paid by those countries favoured by the proviso of the Act of 1824 during the six months' period.

9. As regards interest, the commission pointed out that "the duties were originally paid without complaint, and that the claim has been permitted to slumber, until very recently, without being brought to the notice of the United States; and we are of opinion that no interest should be allowed."

III.

10. The Anglo-United States Commercial Convention of the 3rd July, 1815, provides that no higher or other duties shall be imposed on the exportation of any articles from the one country to the territory of the other than such as are payable on the exportation of the like articles to any other foreign countries. It appears that from the date of the treaty down to the 6th May, 1830, Great Britain imposed an *ad valorem* duty of 10 per cent. on manufactured woollens exported to the United States and certain other countries, while during a large part of the time they were exported free of duty to other countries.



1932

11. As the result of representations by the United States, an order was finally issued in December 1845 by which the duties were refunded back to the 26th January, 1823, at which time the practice began of paying the duties under protest or conditionally. The claim for the refund of duties collected from the 3rd July, 1815, to the 26th January, 1823, remained unadjusted and were referred to the commission under the Anglo-United States convention of the 8th February, 1853.

12. It was conceded that the inequality of duties complained of violated the provisions of the convention of 1815, and it was decided that the duties should be refunded. For certain reasons, however, evidence of the precise amounts of duty paid by the United States importers could not be obtained, and the claimants made an arrangement with the British Government, by which the shippers' accounts, the claimants agreeing to waive interest on them, were accepted as a basis of settlement, and time was allowed for making the requisite apportionment between the several importers. This arrangement having been effected, the commission allowed the claims to be withdrawn.

13. From the above examples it would seem that in the case of the imposition of duties in contravention of treaty rights, the aggrieved party may claim a refund of all excess duties levied contrary to treaty obligations.

14. It is doubtful whether any claim would be upheld by an arbitral tribunal in respect of resultant damage to trade. In the Alabama arbitration before the Geneva tribunal, the arbitrators expressed the opinion that the indirect claims did not constitute good foundation for an award of damages as between nations. The Alabama Commission also held that "prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies." The "Alabama" proceedings in this respect have been regarded as a reliable precedent by other arbitral tribunals which have disallowed indirect claims based upon loss of anticipated profits, loss of credit, and similar consequential elements of loss.

15. Thus, the following statements were made by the Venezuelan commissions in the arbitrations of 1903:—

"Damages to be recoverable must be shown with a reasonable degree of certainty, and cannot be recovered for an uncertain loss."

Again:—

"Governments, like individuals, are responsible only for the proximate and natural consequences of their acts. International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure."

In the Hammaken case, Sir E. Thornton said:—

"The umpire has always been opposed to consequential damages, and thinks they ought never to be taken into consideration. It is impossible to measure them with any approach to justice; they are of an uncertain and imaginative nature"

A. F. ORCHARD.

Foreign Office, February 23, 1932.



1933

THIS DOCUMENT IS THE PROPERTY OF HIS BRITANNIC MAJESTY'S GOVERNMENT

Printed for the use of the Foreign Office

CONFIDENTIAL

(14468)

REPORTS BY THE
LAW OFFICERS OF THE CROWN, &c.

1933



(ii)

LIST OF REPORTS

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 1^A, &c.

GENERAL.

No.		Date	SUBJECT.	Page.
1	Law Officers ..	Mar. 17, 1933	Polygamous marriages and nationality questions arising therefrom	1
2	Law Officers ..	July 28, 1933	Divorces under laws of Soviet Russia, Japan and China	74
2 ^A	Law Officers .. [Colonial Office]	July 28, 1933	Utilisation of Falkland Islands Dependencies Research and Development Fund	94

GERMANY.

3	Law Officers ..	Nov. 3, 1933	Locarno Treaty of Mutual Guarantee: effect of Germany's withdrawal from League of Nations	98
---	-----------------	--------------	---	----

IRAQ (see below).

NETHERLANDS.

4	Law Officers ..	Mar. 31, 1933	Interpretation of "Coast of Guinea" in British-Netherlands Convention, February 25, 1871.. .. .	105
---	-----------------	---------------	---	-----

PERSIA.

5	Law Officers ..	Nov. 9, 1933	Status of Basidu	116
---	-----------------	--------------	--------------------------	-----

TURKEY.

5 ^A	Attorney-General, Mr. G. T. Simonds and Mr. J. H. Stamp [Board of Trade]	Jan. 30, 1933	Claims of British nationals against Turkey entitled to benefit of second charge on proceeds of German property	143
----------------	---	---------------	--	-----

IRAQ.

5 ^B	Law Officers .. [Treasury]	Mar. 29, 1933	Date gardens in Iraq of Sheikh of Koweit and Mohammerah	148
----------------	-------------------------------	---------------	---	-----

(iii)

ALPHABETICAL INDEX

(NAMES AND SUBJECTS)

1933

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

ARB—DIV.

A.

Arbitration: admission by international courts of "travaux préparatoires" in constructing documents, 114.

B.

Basidu: status, 116-142.

C.

Claims: diplomatic, whether change of internal policy can be the subject of, if no international obligation involved, 97.
" of Sheikh of Koweit and Mohammerah to compensation from His Majesty's Government for taxes on date gardens in Iraq, 148-180.
" of British nationals against Turkey in respect of property, rights and interests, 143-147.
" ditto; position under article 297 of Treaty of Versailles and Treaty of Peace Order, 1919, 143-147.
" ditto; as a second charge on proceeds of German property, 143-147.

Coast of Guinea: interpretation of term in British-Netherlands Convention of 1871, 115.

Compensation: by His Majesty's Government for tax on produce of date gardens in Iraq of Sheikh of Koweit and Mohammerah, 180.

" by His Majesty's Government to Sheikh of Koweit for deprivation of portion of his date gardens in Iraq, 148-180.

Convention: *See* Treaty.

D.

Divorce: foreign, recognition by English courts, 78-87.
" history and development of law of, 90-92.
" under Soviet law, 74-87, 94.
" under Japanese law, 74, 77, 78, 87-90, 94.
" under Chinese law, 74, 77, 78, 90, 94.
" Soviet, Japanese, Chinese by mutual consent; recognition by English courts, 74-81, 94.

7492 [10221]

DIV—KOW.

Divorce: Soviet, by unilateral application; recognition by English courts, 74-87, 94.

" Soviet and Japanese, registered at a consulate; recognition by English courts, 87, 94.

" validity of foreign; law of domicile as governing principle, 77, 78, 80, 92, 93, 94.

Domicil: *See* Divorce.

F.

Falkland Islands: Dependencies; ordinance establishing fund for research and development of, 94-97.

" ditto; diversion of fund to other purposes not permissible, 97.

" ditto, ditto; diversion by new ordinance would lead to diplomatic representations, but not to valid legal claim against Crown, 97.

G.

Germany: withdrawal from League of Nations, 98-102, 104.

" ditto; effect on obligations under Locarno Treaty of Mutual Guarantee, 98-102, 104.

Gold Coast: term "Coast of Guinea" in British-Netherlands Convention, 1871, equivalent to, 115.

Guinea: interpretation of term in British-Netherlands Convention, 1871, 115.

I.

Islands: Qishm, sovereignty over, 141.

K.

Koweit, Sheikh of: date gardens in Iraq, 148-180.
" ditto; scope of His Majesty's Government's undertakings in 1914, 148, 151-153, 155.
" ditto; tax on produce of gardens and His Majesty's Government's obligation to compensate, 148-180.

a

(iv)

KOW—OCC.

Koweit, Sheikh of: date gardens in Iraq; deprivation of portion of gardens and His Majesty's Government's obligation to compensate, 148-180.

L.

Law, international: whether change of internal policy can be treated as breach of, 97.

League of Nations: effect of Germany's withdrawal from, on obligations under Locarno Treaty of Mutual Guarantee, 98-102, 104.

Locarno: *See* Treaty.

M.

Marriages: dissolution. *See* Divorce.
" polygamous, recognition of validity for nationality purposes, 1-73.
" ditto; working rules, 14-24.

Mohammerah, Sheikh of: date gardens in Iraq, 148-180.

" " ditto; scope of undertakings of His Majesty's Government in 1914, 148, 151, 156.

" " ditto; tax on produce of gardens and His Majesty's Government's obligation to compensate, 148-180.

Muscat: claim to sovereignty over Qishm and Basidu, 117, 141.

N.

Nachimson v. Nachimson: 74.

Nationality: children, born out of His Majesty's dominions, of polygamous marriages entered into by male British subjects, 1-24.

" foreign women, wives by polygamous marriages of British subjects, 1-24.

" women (British subjects) who entered into polygamous marriages with aliens, 1-24.

O.

Occupation: as title to sovereignty, 117, 141, 142.

PER—WHI.

P.

Permanent Court of International Justice: admission of "travaux préparatoires" as evidence, 114.

Prescription: as title to sovereignty, 141, 142.

Property, rights and interests: *See* Claims.

Q.

Qishm: sovereignty over, 141.

R.

Requisitions: in Turkey; claims of British nationals, 143-147.

S.

Sovereignty: over island of Qishm (and Basidu), 116-142.

" occupation as title to, 141, 142.

" prescription as title to, 141, 142.

T.

Tax: on produce of date gardens in Iraq of Sheikhs of Koweit and Mohammerah, 148-180.

ditto: obligation of His Majesty's Government to compensate Sheikhs, 180.

Treaty: of Mutual Guarantee (Locarno); effect of Germany's withdrawal from League of Nations, 98-102, 104.

" ditto, ditto: effect as regards obligations of His Majesty's Government, 104.

" British-Netherlands Convention, 1871; scope of article 5, 105-115.

" ditto: meaning of term "Coast of Guinea," 115.

" Peace (Germany): article 297, bearing of, in respect of British claims against Turkish Government, 147.

Treaty of Peace Order (1919): claims of British nationals against Turkey entitled to second charge on proceeds of German property under, 143-147.

Treaty of Versailles: *See* Treaty, Peace (Germany).

W.

Whittingham v. Whittingham: 75.

Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.: 1933

GENERAL

[T 3126/695/376/1933]

No. 1.

[March 17, 1933.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, December 2, 1932.

I HAVE the honour, by direction of His Majesty's Principal Secretary of State for Foreign Affairs, to request your advice upon the question whether in any, and if so in what, circumstances:—

- (1) The children born out of His Majesty's dominions, the issue of polygamous marriages entered into by male British subjects, should be regarded as being persons whose fathers were British subjects within the meaning of section 1 (1) (b) of the British Nationality and Status of Aliens Act, 1914 (or, in the case of persons born before the date of the coming into force of that Act, of the corresponding provisions of 4 Geo. II, c. 21, and 13 Geo. III, c. 21), and consequently to be natural-born British subjects, provided that other requirements of the Act are fulfilled.
- (2) Foreign women, who have entered into marriage of a polygamous character with British subjects, must be considered to become themselves British subjects under the provisions of section 10 of the British Nationality and Status of Aliens Act, 1914.
- (3) Women, who, being British subjects, have entered into polygamous marriages with aliens, must be deemed to lose British nationality under the provisions of section 10 of the British Nationality and Status of Aliens Act, 1914.

2. A résumé of a number of cases which have arisen involving one or other of the above questions will be found in Annex I to the memorandum by the Second Legal Adviser of the Foreign Office (Paper A), which is enclosed herewith. Some of these cases await decision when the Secretary of State has been favoured with your opinion. In this memorandum these questions are discussed in the light of all the authority which it has been found possible to discover in the form of decisions of the English and Scottish courts, or of courts in other parts of His Majesty's dominions, or in the United States of America, and also of opinion given by your predecessors.

7492 [10221]

B

3. Sir John Simon has, before requesting your advice on these questions, consulted the Secretary of State for the Home Department, the Secretary of State for the Colonies, the Secretary of State for India, and the Treasury Solicitor, and further observations on, and discussions of, the questions are contained in the memorandum by the Assistant Legal Adviser to the Home Office and the letters from the Colonial Office, India Office and the Treasury Solicitor, copies of which are annexed (Papers B, C, D and E). With reference to paragraph 4 of the letter from the India Office (Paper D), I am to state that the Second Legal Adviser to the Foreign Office agrees that it is intended that the Rule VII (b) proposed in his memorandum should be read as subject to the proposed Rule II. He also agrees with the amendment of the proposed Rule IX as suggested in the second paragraph of the letter from the Colonial Office (Paper C).

4. In the past, the opinion of the Law Officers has been sought upon particular cases in which nationality questions have depended upon the recognition of polygamous marriages, and in response to such requests your predecessors have advised whether, in the circumstances of those particular cases, the individuals concerned should, or should not, be considered to be of British nationality. Some difference of opinion, however, has existed as to the exact grounds on which some of these previous opinions were based, and consequently as to the extent to which the views expressed in these opinions apply to other cases. Sir John Simon feels, therefore, that it would now be preferable, instead of referring specified cases to you for your opinion, to request you, if you see no objection, to advise upon the principles which should be applied when cases involving polygamous marriages in connexion with British nationality arise. This course would, on the one hand, avoid the necessity of referring a large number of individual cases to the Law Officers for their opinion, and, on the other hand, enable the whole question to be considered in all its aspects. With this end in view, the memorandum in Paper A concludes with a series of principles or rules, which the Legal Advisers of this Department suggest are those which should be applied for the purpose of determining the cases, in which polygamous marriages may be recognised as valid marriage, for the purposes of the application of the British Nationality and Status of Aliens Act.

5. I am, consequently, to request you to take these papers into your consideration, and to favour Sir John Simon with your opinion as to whether you consider the principles set out in the memorandum in Paper A are those which should be applied in connexion with the three questions set out in paragraph (1) above, or, if not, what are the principles which should be applied for the purpose of dealing with such cases.

6. I am also to request that Sir John Simon may be favoured with any observations of a general nature which you may be good enough to offer.

I have, &c.

G. R. WARNER.

Report.

It is, in our opinion, undesirable that we should record our assent to, or our dissent from, such a series of abstract propositions as are set out in the papers accompanying the Foreign Office letter of the 2nd December, 1932. It is one thing to advise on concrete cases which appear to the Secretary of State to merit a report by the Law Officers; but we do not conceive it to be our duty to undertake functions which properly belong to text-book writers, or to attempt to reduce into order the whole of an obscure and chaotic part of the law, without reference to any particular set or sets of facts.

These more general reasons are in the present case reinforced by others which appear to us to be no less cogent. Some of the propositions before us (for example, those numbered V and XI) are expressed in very wide and general terms; and, though they may correctly state the law applicable to certain facts, we feel that it would be misleading and possibly embarrassing, both to the Secretary of State

and to the Law Officers in the future, if we were now to signify our assent to them as rules of universal application. If, for instance, some unforeseen case should arise, the correct determination of which appeared to be inconsistent with any of the relevant propositions now submitted for our approval, the Law Officers would find themselves hampered by our attempt at codification of the law. Again, the propositions numbered II and IV appear to us to be inconsistent with each other, and though we concede that judicial authority can probably be found for both, we cannot think that any useful purpose is served by an attempt to elevate each of them into a legal principle. We recognise that in a concrete case we might properly be asked which of two apparently inconsistent decisions ought as a matter of law to be followed by the Secretary of State; but we are not prepared to speculate or pronounce on abstract questions of legal theory. The administrative work of a Department no doubt requires the formulation of rules both of practice and of law for the guidance of those who have to apply the law to particular cases, and it is a proper function of the legal advisers of the Departments to furnish, when necessary, those whom they advise with a statement of the legal rules which seem to them applicable to the work of the Department. But it is not for the Law Officers to draw up or to approve departmental codes of this kind. Their advice is always available to the Departments when particular cases of difficulty arise, and their opinions will, it is hoped, help the legal advisers of the Departments in the formulation or revision of their working principles, but in this respect their functions are those rather of a Court of Appeal than of a Court of First Instance, or a codifier of the law.

For the above reasons, although we have given the most careful consideration to the propositions which have been drawn up with so much care and learning, we do not think that we can usefully return any answer to the questions which have been submitted to us.

T. W. H. INSKIP.

F. B. MERRIMAN.

*Law Officers' Department,
March 17, 1933.*

PAPER A.

[T 827/125/376]

MEMORANDUM BY THE SECOND LEGAL ADVISER OF THE
FOREIGN OFFICE.

General interpretation of British Nationality Acts as Acts of Parliament of the United Kingdom.

THERE is no doubt that the words "whose father was at the time of that person's birth a British subject," in section 1 (1) (b) of the British Nationality and Status of Aliens Act of 1914 (and the corresponding words in the Statutes of 4 Geo. II, c. 21, and 13 Geo. III, c. 21), mean the legitimate child of a British subject, and that the words "wife of a British subject" and "wife of an alien," in section 10, mean the spouse of a marriage which is recognised as valid. Further, these statutes, although they determine the nationality of British subjects belonging to all parts of His Majesty's dominions, are Acts of the Parliament of the United Kingdom, and must everywhere⁽¹⁾ be construed in the manner and according to the rules applicable in this country to the construction of Acts of Parliament; that is to say, they must be interpreted and construed according to the principles of English law. A person born outside His Majesty's dominions must, therefore, in order to be a British subject under section 1 (1) (b) of the Act of 1914, be a person who can be regarded as legitimate under English law, and section 10 only applies to the wives of marriages which English law recognises. The expression "English law," however, must be deemed to include the rules of private international law applied by the English courts.

English rules of P.I.L. with regard to legitimacy.

2. The rule of private international law with regard to legitimacy is stated in Dicey's "Conflict of Laws" (4th edition, p. 530) as follows:—

"A child born anywhere in lawful wedlock is legitimate (but in order to enjoy in England full rights of inheritance of property and titles of honour, he must be born of a marriage which would not have been illegal on account of the relationship of the parents if celebrated in England)."

According to Dicey, therefore, the legitimacy in English law of any person, wherever born or domiciled, always depends on such person being the issue of a marriage which the English courts can recognise. If Dicey is right, then, in considering the question of polygamous marriages, the issue is the same whether it is a matter of the acquisition of British nationality by birth under section 1 (1) (b) of the Act of 1914 or by marriage under section 10. The question will turn in either case on whether the polygamous marriage is one that can be recognised. The Supreme Court of South Africa has, however, held that the children of a polygamous union may be regarded as the legitimate children of their father on the ground that they were legitimate by the law of the country of their domicile of origin, although the court felt obliged to refuse to regard the mother of the children as the wife of their father, on the ground that public policy prevented the recognition of a polygamous marriage as a marriage (*Seedats (exors.) v. The Master*, 1917, App. Div. 302, Annex II, Case No. 1). This case will be referred to later. It shows, however, that it is possible to make a distinction, and that children of polygamous marriages might be regarded as legitimate children of a British subject under section 1 (1) (b), even if the view were taken that no spouses of polygamous marriages could be regarded as "wives" for the purposes of section 10.

⁽¹⁾ I.e., a court in British India would have to decide a British nationality question in the same manner as an English court would decide it.

3. The rule applied by the English courts to determine the question whether a marriage is one which can be recognised as valid, is stated in Dicey (4th edition, p. 686) in the following terms:—

English rules of P.I.L. with regard to validity of marriages.

"Subject to the exceptions hereinafter mentioned, a marriage is valid when—

- (1) each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other; and,
- (2) any one of the following conditions as to the form of celebration is complied with (that is to say):—
 - (i) if the marriage is celebrated in accordance with the local form.

The other conditions and exceptions given in Dicey to the above-mentioned rules are not relevant to the matter under consideration.

4. Subject to the requirement that the state of things existing at the moment of the child's birth is that which determines the question whether he can claim to be a British subject by birth (i.e., he must be the legitimate child of his father at that moment), and that subsequent legitimation does not of itself change the position as so ascertained⁽¹⁾ (*Shedden v. Patrick* (1854), 1 Macq. 535), it is to be presumed that the above-mentioned rules apply for the purposes of the application of the British Nationality Acts.

Application of rules of P.I.L. with regard to legitimacy, &c., under British Nationality Acts.

There appears to be no reason to suppose that the special rules regarding legitimacy which apply when succession to land in England or to titles of honour is in question (see the words in brackets in the rule quoted from Dicey in paragraph 2 above) apply for the purposes of acquisition of British nationality by descent or marriage.⁽²⁾

On the other hand, both the rules quoted in paragraph 2 and in paragraph 3 are subject to the general overriding exception of public policy.

5. It is, of course, clearly established that a polygamous marriage is not one in respect of which the matrimonial jurisdiction of the English courts can be invoked. It is not a "marriage," nor are the spouses a "husband" or "wife" within the meaning of these words in section 21 of the Judicature Act, 1925, or other statutes relating to the matrimonial jurisdiction of the courts. This is clearly laid down in the leading case of *Hyde v. Hyde, L.R., I.P. and D. 130* (Annex II, Case No. 2). The reason for this conclusion given by Lord Penzance in his judgment in that case is, however, not that it is contrary to public policy to accord any sort of recognition to a polygamous marriage, but that the matrimonial law of this country is adapted to marriage as understood in Christendom ("the voluntary union for life of one man and one woman to the exclusion of all others") and is wholly inapplicable to polygamous marriages,⁽³⁾ and it would be impossible to do justice to the parties if the law applicable to one institution (monogamous marriage) were applied to a different institution (polygamous marriage).

Polygamous marriages under English law. *Hyde v. Hyde*.

Lord Penzance ended his judgment by saying: "All that is intended to be here decided is that as between each other (i.e., the spouses of a polygamous marriage) they are not entitled to the remedies, the adjudication or the relief of the matrimonial law of England. . . . This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous union. . . ."

6. The first question is, therefore, whether it is the case that under English law no sort of recognition can be given in any circumstances to a polygamous marriage, and that such a marriage must be regarded as on the same footing as illicit intercourse, and the "wives" and "children" of such marriages as being in the same position as the partners and issue of illicit intercourse.

Can any recognition be given to polygamous marriages under English law for the purposes of succession, legitimacy, &c.?

This is the question so carefully left completely open in *Hyde v. Hyde*.

⁽²⁾ This is the view which has always been taken and previous Law Officers have so advised. An attempt is being made to obtain a decision in the High Courts in a test case on the question whether the Legitimacy Act, 1926, in any way alters the position in this respect.

⁽³⁾ This was the view of the Law Officers in 1906, 1908 and 1897 (see Annex III, Law Officers' opinions Nos. 10, 8 and 7).

⁽⁴⁾ (Following in this respect the judgment of the Privy Council delivered by Dr. Lushington in the case of *Ardaseer v. Cursetjee*, 10, Moore P.C. 375.)



Polygamous marriages are, of course, recognised as lawful and regulated by the law, not only of many foreign countries (such as Persia, Siam, Iraq, &c.), but also of many countries which form part of His Majesty's dominions or are under His Majesty's protection, which are governed under laws depending ultimately upon statutes of the Parliament of the United Kingdom (such as British India, the Straits Settlements, Hong Kong, &c.), and the Privy Council, exercising its appellate jurisdiction over the courts of these countries, has frequently not merely recognised the legal validity of polygamous marriages, but decided questions as to the legal rights which flow from them, including the legitimacy of the issue. (*Cheong Thye Phin*, 1920, A.C. 369, and *Khoo Hooi Leong v. Khoo Hean Kwee*, 1926, A.C. 529, are instances of numerous cases of the same kind.)^(*)

It is obviously going very much further to hold that all polygamous marriages must be regarded as on the same footing as illicit intercourse and that the issue must be regarded as illegitimate, than it is to hold that the matrimonial remedies of the English courts cannot be extended to them because such remedies are unsuitable. Nor does the wider proposition in any way follow logically from the narrower. To hold that the wider principle applies for the purposes of the application of the British Nationality Acts is particularly far-reaching, because these statutes govern the status of British Indians and natives of other British territories whose law recognises polygamous marriage, persons, in other words, who can normally contract no other kind of marriage.^(*) The result, in fact, would be that the children born abroad of such British subjects could never be held to have any right to British nationality, nor could their wives if these were aliens before marriage.

View of Sir E. Davidson and Law Officers in 1869.

7. The view that no recognition could be given by English law to polygamous marriages, and that, for the purposes of the British Nationality Acts (at that time 4 Geo. II, c. 21, and 13 Geo. III, c. 21), the children of such marriages must be regarded as illegitimate, was the view always held strongly by the late Sir Edward Davidson, formerly Legal Adviser to the Foreign Office. He seems to have held that this result followed necessarily from *Hyde v. Hyde*. The earliest of the relevant Law Officers' opinions, though it does not deal directly with questions of nationality, appears, indeed, to support this view. (Opinion of the 10th June, 1869, concerning the jurisdiction of the British Consular Court at Aleppo (Annex III, Law Officers' opinions No. 1: "English law knows marriage or legitimacy only in the sense in which it is understood amongst Christian nations.")

Law Officers' opinions of 1873 and 1883 (jurisdiction of British Consular Court in Siam).

8. The opinion of 1869 was, however, followed in 1873 by a Law Officers' opinion in which it was held that a previous Mahometan marriage between a Moorish subject and an English lady justified a consular officer in performing a consular marriage between the same parties and in regarding the prior marriage as satisfying the consular instructions, which required a prior *lex loci* marriage before a consular marriage was performed if one of the parties was

^(*) See also *Khoo Hoi Leong v. Khoi Chong Yeok*, 1930, A.C. 346, where the following passage occurs in the judgment of the Privy Council. (This case turned on the recognition under the law of the Straits Settlements of Chinese custom in connexion with Chinese British subjects domiciled in the Straits Settlements; the cases cited in this passage were decisions recognising secondary wives and the legitimacy of their offspring):—

(P. 355.) "The modifications of the law of England, which obtain in the Colony in the application of that law to the various alien races established there, arise from the necessity of preventing the injustice or oppression which would ensue if that law applied to alien races unmodified. That was the view expressed by Sir Peter Maxwell, C.J., in *Choa Choon Neo v. Spottiswoode*; and this Board in *Yeap Cheah Neo v. Ong Cheng Neo* stated that 'the rules of English law, and the degree in which, in cases of this kind, regard should be had to the habits and usages of the various people residing in the Colony are correctly stated' in Sir Peter Maxwell's judgment.

"From the above-mentioned necessity arises the recognition by the courts of the Colony of polygamous marriages among the Chinese, and, as a logical consequence the recognition of the legitimacy of the offspring of such marriages."

^(*) Since an Indian court must interpret the B.N. and S.A. Act in the same manner as an English court, it would follow that, if the above were really a correct statement of the position in English law, an Indian court would have to hold that the wives of British Indians were not "wives" for the purposes of section 10 or their children legitimate for the purposes of section 1 (1) (b).

a local subject (Annex III, Law Officers' opinion No. 2: Marriage of Miss Keane and a Moorish sheriff), and in 1883 the Law Officers advised that the offspring of British Indians born in Siam of polygamous marriages were British subjects (Annex III, Law Officers' opinion No. 3).

9. In 1888, in the case of Mr. Grant, an Englishman who had married under Mahometan rites a native Moorish woman in Morocco, the Law Officers advised that neither his wife nor children could be regarded as British subjects, "such marriage being of a polygamous character and, therefore, not recognised by British law" (Annex III, Law Officers' opinion No. 4: Case of Mr. Grant). The opinion of 1888 must have been based on the assumption that Mr. Grant was a domiciled Englishman (at this time the prevalent view, later shown to be erroneous by the decision of the House of Lords in *Casdagli v. Casdagli*, 1919, A.C. 145, was that an Englishman could not acquire a domicile in a foreign country in which His Majesty exercised ex-territorial jurisdiction over British subjects), and, consequently, this opinion is entirely consistent with the opinion of 1883 (No. 3, where the Law Officers expressly said that the issue of polygamous marriages of Englishmen would be illegitimate), and, in fact, the case was covered by the decision of Stirling J. in "*In re Bethell*," 38 Ch. D. 220 (Annex II, Case No. 3), another case of a polygamous marriage of a domiciled Englishman, but Sir Edward Davidson—presumably because he did not think it was correct—never referred to the opinion of 1883 and regarded the opinion in the Grant case as covering all cases of polygamous marriages.^(*)

Law Officers' opinion in 1888. Grant case.

10. In 1897 the Law Officers gave their opinion in the *Abensur* case (Annex III, No. 6). Mr. Abensur, a Moorish Jew, had married in Morocco by Jewish rites a Hebrew lady in 1885, and had by her three children. Under Jewish law a husband may take more than one wife and Jews in Morocco occasionally, but not frequently, did so. Mr. Abensur had, however, only one wife. In 1896 he obtained naturalisation as a British subject by a special Act of Parliament. No special mention was made of his children in the Act, but he had spent most of his fortune in obtaining this naturalisation in the interests of his children, and had been advised that they would become British subjects thereunder. The question was whether these children born before the date of his naturalisation were British subjects. There were two points in the case: (a) Whether the children could be regarded as legitimate in contemplation of English law; (b) whether, if so, they acquired British nationality by virtue of Abensur's naturalisation on the ground that his special Act of Parliament conferred upon him all "the rights, &c., of a natural born subject of Her Majesty the Queen." Of these two points, only (a) is relevant to the subject now under consideration. On this point the Attorney-General did not express any definite opinion ("I desire not to express any opinion against the legitimacy of the children"). The Solicitor-General held that the children must be regarded as legitimate ("It cannot, in my opinion, be broadly laid down that, for all purposes, the offspring of a polygamous marriage is to be treated, in the view of English law, as illegitimate. The Divorce Court and the law of inheritance to real property in this country recognise only monogamous marriage, but, for the purpose of inheriting nationality, I think that a polygamous marriage by a subject of His Majesty in a country where he is domiciled, and where the law allows of such unions, must be treated as lawful, the English law adopting for this purpose the law of the domicile").

1897. The *Abensur* case. Law Officers and Lord Halsbury, L.C.

11. Sir Edward Davidson disagreed so strongly with the Solicitor-General's opinion on the question of the legitimacy of Mr. Abensur's children, that the exceptional course was followed of referring the question to the Lord

^(*) In 1892 the Law Officers advised (with a qualification the exact meaning or reason for which is not quite clear to me) that a polygamous marriage of a British subject in a foreign country should not be registered by a British consul as a *lex loci* marriage under section 4 of the Foreign Marriage Act, 1891 (Annex III, Law Officers' opinion No. 5, registration provisions of the Foreign Marriage Act). This opinion hardly, I think, carries things further than Lord Penzance's judgment in *Hyde v. Hyde*. The view may well be taken that the registration provisions of the Foreign Marriage Act were intended only to cover marriages of a kind similar to those which could be celebrated under the other provisions of the Act (i.e., those which would come within the matrimonial jurisdiction of the English courts) without in any way implying as a necessary consequence that polygamous marriages must in all circumstances be regarded as of no legal effect in English law.

1892. Law Officers' opinion. The registration provisions of the Foreign Marriage Act.

Chancellor. Lord Halsbury, L.C., agreed with the Solicitor-General in holding that the children of Abensur were legitimate in contemplation of English law. He based his view on this point on the ground that the marriage of Abensur was a Jewish marriage, and it was perfectly clear both under the common law and by statute that the English courts recognised Jewish marriages between Jews as valid marriages, and it was immaterial for this purpose whether a Jewish marriage had been celebrated in a country where polygamy was recognised or not.^(*) He called attention to the passage in the judgment in *Hyde v. Hyde*, where it was made clear that that decision did not purport to decide questions of the legitimacy of the issue of a polygamous marriage. Owing to the doubts of Sir Edward Davidson the case was referred to Lord Halsbury a second time, but he maintained his opinion (the opinions of Lord Halsbury in this case are annexed to Law Officers' opinion No. 6 in Annex III).

12. In 1897, shortly after the opinion in the Abensur case, the Law Officers advised that the children born in Siam of Burmese British subjects possessed British nationality (Annex III, Law Officers' opinion No. 7). The Law Officers in this case followed the opinion of the Solicitor-General in the Abensur case, and observed that the opinion of the Law Officers in the *Grant* case (No. 4 (see paragraph 9 above)) did not lay down any general principle apart from the facts of the particular case.

13. In 1903 the Law Officers gave an opinion in which they approved a memorandum by Sir Cecil (then Mr.) Hurst, Assistant Legal Adviser to the Foreign Office (Annex III, Law Officers' opinion No. 8: Registration as British subjects by British consuls in Turkey of the wives and issue of British subjects of marriages celebrated in Turkey otherwise than under the Foreign Marriage Act). Sir Cecil Hurst had advised (*inter alia*) (i) that the marriages of all British subjects in Turkey should be regarded as valid marriages if they were valid according to the law of the country of origin of the British subject, and that the wives and issue of such marriages were British subjects and should be registered as such; (ii) that this principle included the polygamous marriages of British subjects which were valid by the law of the country of origin of such British subjects.

14. In 1905 the Law Officers advised that a polygamous marriage entered into by a woman British subject with an alien and valid by the *lex loci contractus* caused her to lose her British nationality under section 10 of the Naturalisation Act, 1870 (a provision which corresponds to section 10 of the British Nationality and Status of Aliens Act, 1914) (Annex III, Law Officers' opinion No. 9)).

15. In 1906 the Law Officers were asked to advise whether Mr. W. T. Messiah, the son of a Jewish British subject born abroad, and the issue of a Jewish marriage celebrated in Morocco, was a British subject. The reference to the Law Officers states that Sir E. Grey was doubtful whether to accept the decision arrived at in the Abensur case (No. 6) as conclusive of the question of the legitimacy for nationality purposes of the issue of polygamous marriages, in view of the fact that the opinion of the Lord Chancellor and of the Attorney- and Solicitor-General respectively were not precisely the same and the decision was in direct conflict with the Law Officers' opinion in the *Grant* case^(*) (No. 5). The Law Officers advised (Annex III, Law Officers' opinion No. 10) that, on the assumption that the marriage of Mr. Messiah's father was valid by the law of his domicile and the *lex loci contractus*, Mr. Messiah must be regarded as legitimate and as a British subject even if such marriage was polygamous.

16. It will be seen that the view apparently taken by the Law Officers in 1869 (Annex III, No. 1), and so strongly held by the late Sir Edward Davidson, that in no circumstances can a polygamous marriage be recognised in English law, and that in consequence for the purposes of British nationality such marriages are nullities and the issue thereof illegitimate, has been rejected by

^(*) Lord Halsbury therefore clearly disagreed with the Law Officers' opinion of 1869 (Annex III, No. 1) because it was a Jewish marriage which formed the subject of that opinion.

^(*) Neither of these statements is quite correct (see paragraphs 9, 10 and 11 above). The terms of this reference show the pertinacious view taken by Sir E. Davidson on this question. It is remarkable that no reference is made to Law Officers' opinions Nos. 3, 7, 8 or 9.

Law Officers' opinion. Children of Burmese British subjects in Siam.

Law Officers, 1903. Marriages of British subjects in Turkey celebrated otherwise than under Foreign Marriage Act.

Law Officers, 1905. Polygamous marriages entered into by English women.

Law Officers, 1906. The Messiah case.

Results of Law Officers' opinions on the general question of recognition of polygamous marriages.

Lord Chancellor Halsbury and by subsequent Law Officers (including many who later held high judicial office) in six separate opinions (Annex III, Nos. 3, 6, 7, 8, 9 and 10). Before passing on from this fundamental question, it may, however, be useful to consider any relevant judicial decisions, both those of the English courts and of the courts of other parts of His Majesty's dominions and of the United States of America, to see whether or not they tend to support the view taken by these successive series of Law Officers.

17. The leading case of *Hyde v. Hyde* has already been referred to sufficiently (paragraph 5 above). It left the question of the legitimacy of children of polygamous unions completely open. The next case is *In re Bethell*, 38 Ch. D. 220 (Annex II, Case No. 3), the "Baralong marriage case." This was a decision on the question of legitimacy in connexion with succession to property, and the daughter of a domiciled Englishman, the issue of a polygamous union, was held to be illegitimate on the ground that the marriage was one which could not be recognised. The facts on which the decision was given were essentially the same as the *Grant* case (see paragraph 9 above and Annex III, Law Officers' opinion No. 4) in which the Law Officers advised in a similar sense. It is true that the language of the judgment is open to the construction that Stirling, J., thought the issue of polygamous marriages must in all cases be regarded as illegitimate. He does not appear to base his conclusion in any manner on the fact that C. Bethell was a domiciled Englishman. But the reasoning of the judgment is not in all respects very satisfactory. *Inter alia*, the learned judge professed to be bound by the authority of *Hyde v. Hyde* in reaching the conclusion he did, whereas, in fact, he was deciding a question which *Hyde v. Hyde* expressly left open.

It is doubtful if this case should be taken as an authority covering cases other than those in which the facts are similar, *i.e.*, where it is a domiciled Englishman who has entered into the marriages or a person the law of whose domicile does not recognise polygamous marriages. This is clearly the view taken by the Law Officers in 1897 (paragraph 10 and paragraph 12) and in 1906 (paragraph 15).

In the case of *Brinkley v. Attorney-General* 15 P.D. 76 (Annex II, Case No. 4), which was a decision on a legitimacy petition and affirmed the validity of a Japanese marriage, stress was laid on the monogamous character of a Japanese marriage, but, as this was a marriage of a British subject domiciled in Ireland, the fact that this was regarded an essential in this case does not go to show that it is an essential for the validity of a marriage of a person domiciled in a country whose law recognises polygamy.

18. There are indeed many statements in general terms to be found in judgments of the English courts to the effect that English law does not recognise polygamous marriages. But these statements are, I think, to be found exclusively either (1) in judgments in matrimonial cases^(*) or (2) in judgments on a trial for bigamy,^(*) and consequently need not be necessarily considered as having a bearing on the question of the recognition of polygamous marriages otherwise than in connexion with classes of matters with which these judgments were concerned.

19. On the other hand, in *Chetti v. Chetti*, 1909, P. 67 (Annex II, Case No. 10) Sir Gorell Barnes P. expressly stated that his judgment in that case did not affect the question of the recognition outside India of Hindu marriages in India, and in *In re Ullee*, 53 L.T.N.S. 711 (Annex II, Case No. 11), Chitty, J., though he did not base his decision on this ground, stated, with reference to the offspring of a Mahometan marriage celebrated in London between a Mahometan

^(*) Such as (a) *Warrender v. Warrender*, 2 Cl. and F. 488 ("because we clearly never should recognise the plurality of wives and consequent validity of second marriages, standing the first, which second marriages the laws of these countries authorise and validate," Lord Brougham at p. 532 (see Annex II, Case No. 5)); (b) *Harvie v. Fernie*, 6 P.D. 35 (Lush, J., at p. 53: "If one of the numerous wives of a Mahometan was to come to this country and marry in this country, she could not be indicted for bigamy, because our laws do not recognise a marriage solemnised in that country, a union falsely called marriage, as a marriage to be recognised in our Christian country" (Annex II, Case No. 6)); (c) *R. v. The Superintendent-Registrar of Marriages, Hammersmith* (917, 1, K.B. 634 (Annex II, Case No. 7)); (d) *Nachimson v. Nachimson*, 1930, P. 85 and 217 (Annex II, Case No. 8).

^(*) *R. v. Naquib*, 1917, 1, K.B. 359 (Annex II, Case No. 9).



domiciled in India and an Englishwoman, that he was "by no means satisfied that, according to the principles of international law as now understood, he ought to hold the infants now in question to be illegitimate." Further recently, in a case before Lord Merrivale P., the estate of an intestate Mahometan domiciled in Bagdad, who left two wives, both Englishwomen, whom he had married in England by Mahometan rites, and children by both of them, was under the terms of a settlement, which was made an order of the court, to be distributed between all persons on the footing that both marriages were valid and all the children legitimate. It is true that the order was made by consent and therefore the case is not of much authority, but it would seem that it would have been proper, if the President thought that the marriages must be considered nullities and the children illegitimate, for the Treasury Solicitor to have been informed, since in that case the estate was *bona vacantia* and the Crown had a right to claim it. (*In the estate of Abdul Majid Belshah*, "Times" newspaper, the 16th and 18th December, 1926, 14th and 18th January, 1927, Annex II, Case No. 12).

In the Estate of
Abdul Majid
Belshah.

General ques-
tion. Decisions
of other courts.

20. It does not appear, therefore, that the reported decisions of the English courts really afford any support for the view that polygamous marriages must in all cases be regarded as void in contemplation of English law and the issue as illegitimate. Such inferences as can be drawn from them are rather in the contrary sense and in conformity with the view to be found in the more recent Law Officers' opinions. As, however, there is a singular absence of direct authority on the question in the English cases, the decisions of courts in other parts of the British Empire or in the United States of America would presumably in a matter of this kind have a considerable persuasive authority, in so far as they are decisions of courts applying a law which is either based on English law or which, like English law, does not allow of polygamy.

Canadian cases.

21. There is an interesting Canadian decision of 1867 *Connolly v. Woolrich and Johnson*, *Lower Canada Jurist*, Vol. XI, 197 (Annex II, Case No. 13), in which a Red Indian marriage, entered into by a Canadian domiciled in Lower Canada with an Indian woman, was recognised as a valid marriage, and the children as legitimate for the purposes of succession to property. It is clear that the judge did consider that polygamous marriages must be recognised, but it would appear that he regarded the particular marriage as a monogamous one on the ground that the monogamous or polygamous character of a marriage depended not on the *lex loci contractus*, but on the law of the domicile of the husband.⁽¹²⁾

South African
cases.

22. There has been a considerable conflict of opinion on the question in the courts of South Africa.

(a) It has been held that the spouse of a polygamous marriage is not a "wife" within the meaning of an immigration statute which entitles a woman, although otherwise a prohibited immigrant, to enter the country if she is the wife of a person who is not a prohibited immigrant, and (with some conflict of judicial opinion) this ruling has been applied, even in cases where the polygamous marriage was good by the *lex loci contractus* and *lex domicilii* (*Esop v. Union Government*, 1913, 13 C.P.R. 133; *R. v. Sukina*, 1912, T.P.D. 1079. See Annex II, No. 14).

(b) It has been held that the spouse of a polygamous marriage (whether the first or second wife) is not to be regarded as a "wife" within the meaning of the rule which debars a wife from giving evidence against her husband in a criminal trial (*Nalana v. Rex*, 1907, T.P. 407; *Rex v. Mboko*, 1910, T.P. 445. See Annex II, No. 15).

(c) In 1909 it was held that the two wives of a man, domiciled in Pondoland, must be regarded as his legitimate wives and the issue of both wives as legitimate children for the purposes of succession duty on his estate. (*The Estate Canham v. The Master*, 1909, 26, S.C. 166, Annex II, No. 16.) In 1910, on the other hand, it was held that a polygamous native marriage must be regarded as no more than an illicit connexion: the children were illegitimate and the father had no rights of guardianship (*Kaha v. Ntala*, 1910, T.P. 964, Annex II, No. 17). Finally, in *Seedats (Exors) v. The Master* (1917, App. Div. 302—Annex II, Case No. 1—a case

⁽¹²⁾ On this point, see paragraph 27 below.

already referred to in paragraph 2 above), the Appellate Division held in another succession case—

- (1) that the wife of a polygamous union was not a "surviving spouse" for the purposes of succession duty, but that
- (2) the children of such a union in a case where they were legitimate by the law of their domicile of origin must be regarded as legitimate and as "lineal descendants" of the testator for the purposes of succession duty.

If the last-mentioned case represents the final view of the South African courts, it appears that these courts (1) feel obliged on grounds of public policy to refuse to accord any recognition to the spouse of a polygamous union as a wife—a polygamous union being "a legal relation repugnant to the moral principles of its people," but (2) do recognise the issue of such unions as legitimate children when, at the time of their birth, their father was domiciled in a country whose law would have regarded them as legitimate.

23. There are a number of decisions of the United States courts. In an early case in the courts of North Carolina (*Williams v. Oates*, 27, North Carolina, Rep. 375: 5 Iredale 535—Annex II, Case No. 18), Ruffin, C.J., states (a) that if a United States citizen, having already a wife by a marriage contracted in the United States, were to go to Turkey and contract a further (polygamous) marriage there, the second marriage would be void; (b) that if a Turk with two wives were to come to the United States "we would not refuse to administer to them the justice due to the relations contracted by them." The view expressed upon point (b) by Ruffin, C.J., is confirmed by the judgment in *Polybeare v. Prince* (*Beales Cases on the Conflict of Laws*, Vol. III, p. 2, Annex II, Case No. 19) where the following dictum occurs:—

"If a Turkish or Hindoo husband were travelling in this country with his wife or temporarily resident here, we should, without hesitation, acknowledge the relation of husband and wife between them."

These statements are indeed *obiter dicta*, but there are also two decisions in which the wives of potentially polygamous Red Indian marriages have been recognised as acquiring the status of a wife, and as therefore being incapable (as married women) of instituting an action while the marriage subsisted (*Wall v. Williamson*, 8 Alabama 48, confirmed on appeal, 11 Alabama 826—Annex II, Case No. 20, and *Morgan v. McGhee*, 1844, reported in 24 Tennessee Rep. 12, and in 5 Humphrey Rep.—Annex II, Case No. 21), and in each of these cases disapproval was expressed of the view that polygamous marriages could not be recognised at all, so that the issue of such marriages were illegitimate, while in a third case of 1860 (*Johnson v. Johnson's Administrator* 30 Missouri, Rep. 72, Annex II, Case No. 22), the issue of a potentially polygamous Indian marriage were held to be legitimate for the purposes of succession.

24. These five United States cases (and I have been unable to find any decisions in a contrary sense)⁽¹³⁾ therefore strongly support the view of the Law Officers that it is not correct to say that English law can in no case recognise polygamous marriages as valid or the issue thereof as legitimate. The only Canadian case (paragraph 21 above) which I have been able to find points in the same direction, and the South African cases (paragraph 22 above) indicate the view that the children may in some cases be regarded as legitimate although their mothers cannot be recognised as possessing the status of wife.

Two articles in legal periodicals by learned writers, the first by Sir Dennis Fitzpatrick ("Non-Christian Marriage," in the *Journal of the Society of Comparative Legislation*, Vol. II, N.S. p. 367), and the second by C. K. Allen (formerly Professor of Jurisprudence in the University of Oxford) ("Status and Capacity," *Law Quarterly Review*, Vol. CLXXXIII (July 1930), p. 299), indicate a view on the general question similar to that held by previous Law Officers.

⁽¹³⁾ The much quoted statement in Story's *Conflict of Laws*, that marriages affected by polygamy or incest cannot be recognised, although good by the *lex loci contractus*, can hardly be read as intended to have any reference to the polygamous marriages of persons other than those domiciled in a country where polygamy is not recognised.

General effect of
the cases:
Canadian,
South African,
and United
States.

Views of
writers.



Extracts from these articles are, for convenience of reference, reproduced in Annex IV to this memorandum (Nos. 1 and 2).

25. Assuming, therefore, that in some cases English law does recognise polygamous marriages as valid marriages and the wives of such marriages as possessing the status of wives, and the issue of such marriages as legitimate children, at any rate for some purposes, viz., succession to property (other than land in England) and British nationality, the next question that arises is what are the cases in which such marriages are recognised and what are the cases in which they are not. But before this question can be dealt with, it is necessary to clear the ground by dealing with another essential preliminary question, namely, what is the criterion which determines whether a given marriage is a monogamous or a polygamous marriage. The immediately following paragraphs are directed to this point.

The criterion to be applied to determine whether a marriage is polygamous.

26. Two views on this question appear to be found. The first makes the monogamous or polygamous character of the union depend on the "personal law"; this expression is used as meaning that law which is applied to determine questions of status—it is, under Private International Law as applied by the English courts, the law of the person's domicile or, more accurately, that law which is applied by the courts of the country in which he is domiciled, to determine such questions where such person is concerned. (It may be the religious law of the husband.) The second view determines this question by the nature of the contract of marriage into which the parties entered—i.e., the *lex loci contractus* of the marriage.

There is still a subsidiary question, if the second view is adopted, namely, whether the nature of the contract is determined solely by reference to the *lex loci contractus*, or whether the intention of the parties, as evidenced by their conduct and words, can be relied upon to show that their marriage was really a monogamous one, although celebrated by the use of a form of marriage which, under the *lex loci contractus*, was one which allowed of polygamy.

1st theory
Criterion is *lex domicilii* of husband; contrary to weight of authority.

27. The first of these two views proceeds on the assumption that there is one institution "marriage" which includes monogamous and polygamous marriage. The *lex loci contractus* only governs the form of the marriage. It is applied only to determine whether the parties did, in fact, go through a valid form of marriage. The "incidents," or, as it is sometimes termed, the "essentials," of the marriage (viz., the capacity of the parties to contract it, the mutual rights and obligations flowing from it, including the conditions under which it can be dissolved) are governed by the personal law of the parties, and the right or capacity of the husband to take a second wife is one of such incidents or essentials and depends on his personal law. Upon this view, every marriage contracted by a person whose personal law enjoins monogamy is a monogamous marriage, irrespective of whether the form of marriage was by the *lex loci contractus*, a form of monogamous marriage (such as a marriage before a registrar in England), or a form of polygamous marriage, such as a Mahometan or Hindoo marriage. There is a sentence in Lord Brougham's speech in *Warrender v. Warrender* (2 Cl. and Finn. 433 at p. 353, Annex II, Case No. 5) which certainly seems to support this view:—

"An Englishman, marrying in Turkey, contracts a marriage of the English kind, that is, excluding a plurality of wives, because he is an Englishman and only residing in Turkey and under Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England, and for English purposes; consequently, the incidents and effects, nay, the very nature and essence, must be ascertained by the English and not by the Turkish law."⁽¹⁴⁾

This view certainly seems to be the view taken by Monk J. in the Canadian case of *Connolly v. Woolrich* (Annex II, Case No. 13). It has, indeed, a great deal to commend it, both in theory and as a practical rule, but, if it were right, it would mean, not only that a polygamous marriage contracted according to the *lex loci* by a domiciled Englishman would be a valid marriage and the issue

⁽¹⁴⁾ I confess to some difficulty in reconciling this passage with an earlier passage in the same speech at p. 532, where Lord Brougham says that Christian marriage is a wholly different thing from polygamous marriage.

legitimate, but also that it was a monogamous marriage and, as such, subject to the matrimonial jurisdiction of the courts. Consequently, it is contrary to the decision in *In re Bethell* (38 Ch. D. 220, Annex II, Case No. 3), where the issue of such a marriage contracted by a domiciled Englishman was held to be illegitimate, and to the opinion of the Law Officers in 1888 in the *Grant* case (Annex III, No. 4: Mahometan marriage in Morocco of a domiciled Englishman). Further, it is really contrary to *Hyde v. Hyde* (L.R. 1 P. and D. 130, Annex II, Case No. 2), inasmuch as Lord Penzance never considered it material to determine whether the petitioner, who had contracted a Mormon marriage, was domiciled in England or in Utah. (It would seem, however, that he was probably domiciled in Utah.) In the *Nachimson* case (1930, pp. 85 and 217, Annex II, Case No. 8) both Hill, J., and the Court of Appeal acted on the view that the *lex loci contractus* determined the monogamous or polygamous character of the marriage, although this may not have been very material, inasmuch as the *lex loci contractus* and the law of the domicile were at that time the same.

Further, it would seem logically to follow from this view that any marriage, entered into by a man whose personal law sanctioned polygamy, would be a polygamous marriage, even if the form of marriage was by the *lex loci contractus* a monogamous one, such as an English marriage.⁽¹⁵⁾ Such a result is contrary—

- (1) to *R. v. The Sup. Registrar for Marriages*, Hammersmith (1917, 1 K.B. 634, Annex II, Case No. 7), where the refusal of the court to grant a *mandamus* directing the Registrar to issue a licence for the second marriage of Mir Anwarreddin, a Mahometan domiciled in India, proceeded on the basis that his first English marriage was a monogamous one and he could not marry again in England while it subsisted;
- (2) to *R. v. Naquib* (1917, 1 K.B. 359, Annex II, Case No. 9), where Naquib, an Egyptian Mahometan, was convicted of bigamy because he had contracted two marriages in England;
- (3) to *Chetti v. Chetti* (1909, p. 67, Annex II, Case No. 10), where the court granted a decree of judicial separation, in respect of the marriage celebrated in a London registry office, against a Hindoo domiciled in India and overruled (*inter alia*) his contention that the marriage was a polygamous one, and consequently not one within the matrimonial jurisdiction of the court.
- (4) to the Scottish decision in *Lendrum v. Chakravati* (1929, Scots Law Times Rep. 96, Annex II, Case No. 23), where Lord Mackay held that a Church marriage entered into in Scotland by a Hindoo domiciled in India was a monogamous marriage.

It would seem, therefore, that the view that it is the personal law of the husband which determines whether the marriage is monogamous or polygamous must be rejected as being in conflict with the authority of decided cases.

28. The alternative view is that polygamous marriage, though it shares the name marriage and has many results and incidents in common with monogamous marriage, is an essentially different institution, so different that it is necessary to have regard to the actual ceremony and the *lex loci contractus*, to ascertain not merely whether there was a marriage, but also which kind of marriage it was. The essential difference between the two kinds of marriage is illustrated not only (1) by the decisions to the effect that a court, administering a law framed for monogamous marriage, cannot exercise matrimonial jurisdiction in respect of a polygamous marriage (*Hyde v. Hyde*), but also (2) by the decisions, which imply the converse proposition, that methods of divorce, recognised by a law framed for polygamous marriage, cannot be utilised to

Alternative theory.
Criterion is *lex loci contractus*; supported by authority.

⁽¹⁵⁾ It is perhaps possible to argue that this result does not follow from this theory, on the ground that a person whose personal law permits of polygamy is not bound by his personal law to exercise that right, and may by contract, express or implied, with his wife bind himself not to do so, and that such a contract is implied if he marries by the use of a monogamous form (see paragraph 29 below and Lord Mackay's judgment in *Lendrum v. Chakravati*, Annex II, Case No. 23). But if this argument is to be of any force the contract to live monogamously must be enforceable under the husband's personal law, since on this theory it is his personal law which is the determining factor.

dissolve a monogamous marriage, even if such method be the recognised method of dissolving marriages by the law of the matrimonial domicile (this is one of the two alternative grounds for the decision in the *Hammersmith marriage* case (Annex II, Case No. 7); the English marriage of the Mahometan of Indian domicile could not be dissolved by a Mahometan divorce. See the judgments of Darling, J., Swinfen Eady, L.J., and Bankes, L.J.), and (3) by the decisions to the effect that a first and subsisting polygamous marriage is no bar to a monogamous marriage; it does not invalidate it and the husband is not guilty of bigamy (see the judgment of Avery, J., in *R. v. Naquib* (1917, 1 K.B. 359, Annex II, Case No. 9), the dictum of Darling, J., in the *Hammersmith marriage* case, and of Lush, L.J., in *Harvie v. Fernie* (6 P.D. 35, Annex II, Case No. 6)).

This view that the monogamous or polygamous character of the marriage is to be determined by the *lex loci contractus* is not only that taken by the Law Officers in the *Grant* case (Annex III, No. 4), but is the only one which is really consistent with the decision in *In re Bethell* (Annex II, Case No. 3), and the reasoning upon which the judgments in *Hyde v. Hyde*, *Brinkley v. the Attorney-General*, the *Hammersmith marriage* case, *Nachimson v. Nachimson*, *R. v. Naquib*, *Chetti v. Chetti* (Annex II, Cases No. 2, 4, 7, 8, 9 and 10) are based.

Is the intention of parties (otherwise than as evidenced by *lex loci contractus*) relevant?

29. There is still the subsidiary question whether the fact that a marriage is celebrated in a form, which by the *lex loci contractus* is a polygamous form of marriage, is conclusive as showing that the marriage is a polygamous one or whether, if marriage contracted in such a form is shown to have been in fact and in intention from the beginning a monogamous marriage, it must be recognised as a monogamous marriage. The latter is the view for which Mr. S. G. Vesey-Fitzgerald contends in an article in the "Law Quarterly Review" (vol. 47, No. 186, April 1931, p. 252; "Nachimson's and Hyde's Cases," see Annex IV, No. 3). He bases his view upon the dictum of Lord Brougham in *Warrender v. Warrender*, already quoted in paragraph 27 above (but I doubt if this passage really supports this contention), and upon *Grewal v. Grewal* ("Times" newspaper, the 1st August, 1907, Annex II, Case No. 24); a case in which the exact *ratio decidendi* is not clear, but which hardly seems to support Mr. Fitzgerald's view of the law. *Hyde v. Hyde* and the Law Officers' opinion in the *Grant* case appear to be contrary to this view, and its weakness seems to lie in the fact that, if the personal law of the parties is one which recognises polygamy, this common intention of monogamy may be something which is unenforceable in the courts in whose jurisdiction the enforcement of their mutual rights and duties principally lies.

30. Three other points may be noticed with regard to polygamous marriages:—

Other points in connexion with polygamous marriages.

- (1) It is immaterial, as regards the character of the marriage, whether the husband has or has not exercised his right to take a second wife (*In re Bethell* (Case No. 3); the *Grant* case (Law Officers' opinion No. 4); *Hyde v. Hyde* (Case No. 2)).
- (2) If the husband of a polygamous marriage has taken more than one wife, no distinction can be made between them (*Hyde v. Hyde*; in the *Estate of Abdul Majed Belshah* (Case No. 12); *R. v. Fatima* (see Annex II, No. 14); *R. v. Mboko* (Case No. 15); *The Estate Canham v. The Master* (Case No. 16)).
- (3) The character of the marriage is determined once and for all by the *lex loci contractus*; a subsequent change of domicile or religion by the husband cannot cause an originally polygamous marriage to become monogamous or vice versa (see *Sir Denis Fitzpatrick's article*, Annex IV, No. 1).

Rule No. 1.

31. It would now seem to be possible to formulate the first principle or working rule to be applied in dealing with these cases as follows:—

I.

(a) A marriage entered into in a form which under the *lex loci contractus* is a form of monogamous marriage, is a monogamous marriage, whatever the

intentions or the personal law of the parties may be, either at the time when the marriage is contracted or at any subsequent date.⁽¹⁶⁾

(b) A marriage entered into in a form which under the *lex loci contractus* is a form of polygamous marriage, is a polygamous marriage, whatever the intentions or the personal law of the parties may be, either at the time when the marriage is contracted or at any subsequent date.

32. It is now possible to begin the examination of the principles to be applied to determine the cases in which polygamous marriages can and cannot be recognised in English law so as to confer on the "wives" the status of a wife for the purposes of section 10 of the British Nationality and Status of Aliens Act and upon the children the status of legitimacy.

The general principles which emerge from the Law Officers' opinions (1883, No. 3; 1888, No. 4; 1897, No. 6; 1897, No. 7; 1903, No. 8; and 1906, No. 10) is that the marriage must be recognised as valid by the *lex loci contractus* and the personal law (law of the domicile) of the parties.

The general principles of Private International Law applied by the English courts to determine the validity of marriages in general are (as stated in Dicey: Conflict of Laws—passage quoted in paragraph 3 above) that the marriage is valid if, and is not valid unless—

- (I) the parties possessed the capacity to marry each other according to the law of their domicile;
- (II) and the marriage was a valid one under the *lex loci contractus*.

Under (II) the *lex loci contractus* is essentially the governing factor as regards the form or solemnities, but requirement that the marriage should be good by the *lex loci contractus* is not (*semble*) confined to questions of form.

Dicey's rule No. (I) might be formulated without changing the sense, but so as to cover polygamous marriages, if it were made to read "the marriage was one which each of the parties had the capacity to contract under the law of their domicile."

The second principle or working rule to be applied in dealing with these cases might, therefore, be formulated in the following terms:—

II.

"A polygamous marriage will be recognised as a valid marriage if, and will not be recognised as a valid marriage unless—

- (a) the marriage was one which each of the parties had the capacity to contract under his or her personal law (the law of his or her domicile); and
- (b) the marriage was a valid one under the *lex loci contractus*."

Both of these requirements, (a) and (b) of principle No. II, need, however, some special and separate examination, and it is convenient to begin with (a).

33. It follows clearly from *In re Bethell* (Annex II, Case No. 3) and the Law Officers' opinion in the *Grant* case (Annex III, No. 5) that a domiciled English man (the case of a domiciled English woman will be considered later) cannot contract a polygamous marriage.⁽¹⁷⁾ This result seems to follow from the application of the principle laid down by the House of Lords in *Brook v. Brook* (9 H.L.C. 194, affirming the Vice-Chancellor, 3 Sm. and G.H. 481, Annex II, Case No. 25) that the "essentials" for the validity of a marriage depend on the *lex domicilii*, and a marriage which offends the *lex domicilii* in an "essential" is invalid. The monogamous character of the union is no doubt an "essential" under the marriage law of England,⁽¹⁸⁾ and a polygamous marriage contracted

In what circumstances can a polygamous marriage be validly contracted.

A man whose personal law is monogamous cannot contract polygamous marriage.

⁽¹⁶⁾ See the case of *Richard We Cheang Lim* (Annex I, No. 10) for a case which would come under this rule.

⁽¹⁷⁾ The *Bronsdon* case (see Annex I, No. 9) would come under this rule unless there is clear evidence of a domicile in Siam (see also Annex I, No. 11, *Marriages in Abyssinia*).

⁽¹⁸⁾ A more obvious essential than the prohibition of marriages with a deceased wife's sister under 5 and 6 Wm. 4 & 54, the offence against which rendered the marriage of a domiciled Englishman invalid in *Brook v. Brook*.



1933

Special position
of Jewish
marriages.

by a domiciled Englishman is contrary to the law of his domicile in an essential matter and therefore invalid.

Jewish marriages, however, require some special consideration. Though Jews do not practise polygamy in England or any European country, Mosaic law permits it. In Near Eastern countries, or in countries like Morocco where Jews are governed in personal status matters entirely by Jewish law, Jewish husbands would certainly have the right under the local law to take more than one wife, and both marriages would be good marriages. They apparently do so sometimes, though rarely.⁽¹⁹⁾ A Jewish marriage in Morocco or in Syria, for instance, is, therefore, a polygamous marriage under principle No. 1. Nevertheless Lord Halsbury advised in the *Absensur* case (Annex III, No. 6) that a Jewish marriage between two Jews must always be recognised as a valid form of marriage in the English courts, although polygamous by the *lex loci contractus*. The historical reasons for the special position with regard to Jewish marriages are explained in the extracts from *R. v. Millis* annexed to Lord Halsbury's second opinion in the *Absensur* case, namely, that Jews were regarded as a special community governed in marriage matters by their own religious law: and Jewish marriages (although potentially polygamous) have been recognised as marriages even for the purposes of the exercise of the matrimonial jurisdiction of the courts. Amongst recent cases the strong language of Lord Merrivale, P. in *Spivach v. Spivach*⁽²⁰⁾ seems to confirm Lord Halsbury's view. It would seem that a Jewish marriage between two Jews must be recognised as a valid marriage, although the husband is domiciled in England, and although it was performed in Morocco where a Jewish marriage is by the *lex loci* polygamous.

On the other hand, Jews domiciled in England or other European countries have no doubt lost by the law of their domicile the right actually to possess more than one wife.

35. In the light of the above considerations I suggest that a third rule or principle might be promulgated as follows:—

III.

Rule No. III.

A man whose personal law does not permit of polygamy, does not possess the capacity to contract a polygamous marriage;⁽²¹⁾ provided that no marriage celebrated between two persons of the Jewish religion must be held to be a marriage which the husband had no capacity to contract under Rule III, if such husband had, at the time of the marriage, no other wife.

A woman can
contract a
polygamous
marriage
whatever her
personal law
before marriage

36. The next question which is rather a difficult one is whether a woman whose personal law does not admit of polygamy can contract a polygamous marriage. At first sight it might be thought that no logical distinction can be drawn between the position of a man and a woman in this respect.

It will be seen, moreover, that Chitty, J., in *In re Ullee* (53, L.T.N.S., 711; Case No. 11) seemed to think that the Mahometan marriage celebrated in England between the Mahometan of Indian domicile and an Englishwoman

⁽¹⁹⁾ See the case of Mr. Aron Abib, Annex I, No. 14.

⁽²⁰⁾ 46 T.L.R. 243, Annex II, Case No. 26:—

"If there is a fact conspicuous in the developments in the last 200 years of the law of marriage in this country, it is that the Legislature and the courts have known all the time of Jewish marriages. . . . The Legislature has provided in respect of Jewish marriages in a mode which leaves their validity beyond all question and, I should have thought, unimpeachable and unassailable. In the ecclesiastical courts in this jurisdiction the subject has arisen, and nobody until now has ever suggested in my hearing any doubt as to whether a Jewish marriage was a marriage of which the court must take account."

This case concerned a Jewish marriage in Poland.

⁽²¹⁾ It is clearly established (though it may seem illogical) that, under English law, a man whose personal law does permit of polygamy is regarded as possessing the capacity to contract a monogamous marriage, whether or not he possesses under the law of his domicile the capacity to contract such a marriage (*Chetti v. Chetti* (Case No. 10); the *Hammersmith Marriage Case* (Case No. 7); *R. v. Naquib* (Case No. 9); *Lendrum v. Chakravati* (Case No. 23)—this may be justified on the ground that the incapacity is one which it is contrary to public policy to recognise (like the incapacity of a Roman Catholic priest to marry at all): this is the ground suggested in *Chetti v. Chetti*—or on the ground that no person is compelled by the law of his domicile to take more than one wife and may consequently agree not to do so (*Lendrum's case*, No. 23).

"would not be binding on any spouse of English domicile," although he thought the children were legitimate, and Lord Mackay, in the Scottish case (*Lendrum's case*, Case No. 23), said that, if the marriage between the domiciled Scotswoman and the Hindu of Indian domicile were a polygamous marriage, it would "offend the law of capacity of the wife. She could not entertain such a contract." On the other hand, the Law Officers in 1905 (Annex III, No. 9) did not consider that a polygamous marriage entered into by a domiciled Englishwoman, which was good by the *lex loci contractus*, was a nullity. They thought that as a result of such a marriage the woman would acquire the nationality as well as the domicile of her husband.

Two grounds of distinction may possibly be made between the case of a woman whose personal law is monogamous entering into a polygamous marriage and the case of a man doing so:—

- (a) The wife of a polygamous marriage does not possess the right to have more than one husband. She is just as much confined to one husband as in a monogamous marriage;
- (b) A woman who goes through a ceremony of marriage with a man and lives with him on the assumption that she is validly married to him acquires by her residence with him a domicile in the place where his domicile is, even if the validity of the marriage is in issue, and the courts of his domicile are the courts of the domicile for the purpose of deciding the question of validity (see Lord Morison's judgment in *Lendrum's case* Annex II, No. 23).

In other words the woman acquires a polygamous personal law by the act of going through the ceremony of marriage and living with her "husband" and this renders her capable of contracting a polygamous marriage which is one which is recognised by the law of her new domicile.

37. The second of these grounds seems to be a good one and to justify the view of the Law Officers in 1905 and Rule No. IV might therefore be worded as follows:—

IV.

Rule No. IV.

A woman who enters into a polygamous marriage and resides with the spouse of such marriage, is deemed to acquire his domicile and his personal law and to possess the capacity to contract such a marriage (whatever her personal law before the marriage) provided that her husband possesses such capacity under his personal law.⁽²²⁾

38. Since the decision of the House of Lords in *Casdagli v. Casdagli* (1919, A.C. 145) it is no longer possible to contend that a person whose domicile of origin is English cannot acquire a domicile in a country like Persia, where the laws and customs of the people differ widely from those of this country and where the local law recognises polygamy. In many countries (like India or Iraq) matters of personal status and marriage are governed by the religious law of the persons concerned. It cannot be contended that it is legally impossible for a Christian of English race to become a convert to a religion like Mahometanism or Hinduism, whose religious law recognises polygamy.

The presumption is against it, unless evidence of a genuine acquisition of domicile and a genuine and not merely counterfeited conversion is forthcoming, but, if there is, there seems no reason to doubt that the personal law of a person who was a Christian and domiciled in England originally, may become Mahometan or Hindu law and therefore render him capable of contracting polygamous marriage.⁽²³⁾ The Law Officers' opinion in the *Grant* case is not contrary to this view, for, at the time it was given, the prevailing view was that an Englishman could not become legally domiciled in a foreign country where the Crown exercised extraterritorial jurisdiction.

⁽²²⁾ For a case which would be covered by this rule, see the case of *Miss Ray*, Annex I, No. 8 (see also Annex I, No. 11, *Marriages in Abyssinia*).

⁽²³⁾ See the *Ellis* case, Annex I, No. 4 (Annex III, No. 4), the *Parrett* case, Annex I, No. 13, and the *Gales* case, Annex I, No. 15. The evidence of the acquisition of a domicile in Persia in these cases has not, however, been fully investigated.

The law of the domicile of British subjects in extraterritorial countries. Egypt, Morocco, Abyssinia.

Conversely, though the presumption may be against it, there is no reason to doubt that a person whose personal law was originally Mahometan or Hindu can become domiciled in a country like England, so that his personal law becomes English and he ceases to be capable of contracting a polygamous marriage.

39. The *Casdagli* case decided (overruling the view commonly held to the contrary up to that date, based on *In re Tootal's Trust* and *Abd-ul-Messih v. Farra*) that a person whose domicile of origin is English can acquire a domicile in a foreign country where His Majesty exercises extraterritorial jurisdiction over British subjects, and the judgment of the Privy Council in *Bartlett v. Bartlett* (1925 A.C. 377) decided that the personal law (law of the domicile) of a British subject domiciled in Egypt is that law which the Crown has by Order in Council prescribed to be applied in His Majesty's consular courts in Egypt, namely, in the particular case the law applicable under article 90 of the Ottoman Order in Council, 1910, which reads as follows:—

"Subject to the provisions of this Order, the civil jurisdiction of every court acting under this Order shall, as far as circumstances admit, be exercised on the principles of, and in conformity with, English law for the time being in force:

"Provided that in all matters relating to marriage inheritance or other questions involving religious law or custom the court shall, in the case of persons belonging to non-Christian communities, recognise and apply the religious law or custom of the person concerned."

The person concerned in the *Bartlett* case was a British subject who was a Mahometan domiciled in Egypt, and the Privy Council said his personal law (the law of his domicile) was Mahometan law.

Article 91 of the Egypt Order in Council, 1930, reproduces (with amendments not material for the present purpose) article 90 of the old Ottoman Order. A corresponding provision is to be found in article 80 of the Abyssinia Order in Council, 1913, and in article 45 of the Morocco Orders in Council (1889-1929) Consolidated.

The consequence is that it becomes quite clear that the personal law of non-Christian British subjects⁽²⁴⁾ domiciled in any of these three countries is their religious law, and if that law permits of polygamy they are capable of contracting polygamous marriages.

If they are Christians their personal law is English law.⁽²⁵⁾ An English British subject domiciled in one of these countries, who became genuinely a convert to Islam would, however, acquire Mahometan law as his personal law.⁽²⁶⁾

China.

40. The only other important foreign country in which His Majesty now exercises extraterritorial jurisdiction over British subjects is China, and in this case the position is not so clear. Article 104 of the China Order in Council, 1925, contains no provision corresponding to the proviso to article 90 of the old Ottoman Order, and only provides that the civil jurisdiction of the court shall be exercised "as far as circumstances admit on the principles of, and in conformity with, English law for the time being in force."

At first sight the result would appear to be that the personal law of all British subjects domiciled in China, of whatever race or religion, is English law.

There are in China numbers of British subjects of Indian or Chinese race who practise polygamy; but the view has never been taken that these marriages were void and the children illegitimate.

The reason is to be found, I think, in the fact that, until the *Casdagli* decision in 1919, it was supposed to be impossible for a British subject to be domiciled in China, and that, in consequence, all British subjects in China retained a domicile in the part of His Majesty's dominions from which they originated, i.e., the Indians were domiciled in India, &c., and their personal law was the law which applied to them in India.

This view has the authority of three Law Officers' opinions given before the *Casdagli* or *Bartlett* decisions (1883, No. 3; 1897, No. 7; and 1903, No. 8).

⁽²⁴⁾ In the new Egypt Order Jewish law is no longer applied to Jews.

⁽²⁵⁾ See Annex I, No. 11, *Marriages in Abyssinia*.

⁽²⁶⁾ See, for instance, the *Tully* case, Annex I, No. 1, and the *Palmer* case, Annex I, No. 2; the *Williams* case, Annex I, No. 6.

The last of these opinions approved a memorandum by Sir C. Hurst, in which this view is very clearly stated. The effect of the *Casdagli* case on this particular point was probably overlooked. If it had not been, it would seem probable that, when the China Order of 1925 was drafted, a proviso corresponding to the proviso in the Ottoman Order would have been introduced. It may be advisable that this should be done at the first opportunity, as otherwise the legitimacy and British nationality of the issue born in China of Indian and other British subjects may be open to doubt.

Perhaps, however, while article 104 of the China Order remains as it is, reliance may be placed on the words "so far as circumstances admit" to avoid the conclusion that the personal law of Indian and other British subjects of polygamous religion and race, domiciled in China, is English law and to justify the view that their personal law may still be regarded as the law of their country of origin.⁽²⁷⁾

41. In the light of the considerations set out in the preceding paragraph I suggest two further rules formulated as follows:—

V.

A person whose personal law of origin does not admit of polygamy may by a change of domicile and/or of religion⁽²⁸⁾ acquire a personal law which does admit of polygamy, and a person whose personal law of origin does admit of polygamy may by a change of domicile or of religion acquire a personal law which does not admit of polygamy, but in both cases the presumption is against the change of domicile or religion.

Rules Nos. V and VI.

VI.

The personal law of a British subject domiciled in a foreign country in which His Majesty exercises extraterritorial jurisdiction over British subjects is that law which His Majesty, by Order in Council, has prescribed as the law applicable to such British subjects in His Majesty's Consular Courts in that country; nevertheless in China, under article 104 of the China Order in Council, the circumstances should be regarded as not admitting the application of English law as the personal law of British subjects of polygamous religion or race domiciled in China, but as admitting only the application of the law of their country of origin.

42. I also suggest for the reasons explained below the two following rules:—

VII.

(a) A prior polygamous marriage, although still subsisting, does not invalidate a subsequent monogamous marriage.

Rules Nos. VII and VIII.

(b) An existing monogamous marriage would not invalidate a subsequent polygamous marriage.

VIII.

(a) A monogamous marriage cannot be dissolved by any proceeding under a law applicable to polygamy, even if it be the law of the matrimonial domicile.⁽²⁹⁾

Relations of monogamous and polygamous marriages to each other.

(b) A polygamous marriage may be dissolved by any proceeding which is recognised as lawful by the law of the matrimonial domicile, even if such proceeding should not involve the interposition of any court of justice or State authority.⁽³⁰⁾

Rule VII (a) follows directly from the decision of Avory, J., in *R. v. Naquib* (Annex II, Case No. 9), and the dicta of Lush, L.J., in *Harvie v. Fernie* (Case No. 6), and Darling, J., in the *Hammersmith marriage* case (Case No. 7).

Rule VII (b) seems at first rather doubtful. It must, however, be remembered that only a man whose personal law is polygamous could contract a polygamous

⁽²⁷⁾ See the case of Mahomet Shah, Annex I, No. 3.

⁽²⁸⁾ According to the circumstances a change of domicile only may be necessary (viz., a Mahometan domiciled in England becomes domiciled in Persia) or a change of religion only (viz., a British subject domiciled in Egypt changes his religion and becomes a Mahometan) or a change of religion and a change of domicile (viz., a Christian British subject domiciled in England becomes domiciled in Egypt and becomes a Mahometan).

⁽²⁹⁾ See Annex I, No. 12, application for naturalisation by the Misses G. and H. Kuo Sing.

marriage after contracting a first monogamous marriage. It follows that such a man would not be domiciled in England or in any country where marriage is monogamous. His second polygamous marriage would, indeed, in the words of Lord Mackay⁽³⁰⁾ "be an infringement of the contract of monogamy into which he had entered and of the marital rights of the wife under that contract," but it does not follow that it would be regarded as invalid on that ground if good by the *lex loci contractus* and the law of his domicile.

Rule VIII (a) follows directly from the *Hammersmith Marriage Case* (Case No. 7).

Rule VIII (b).—There seems to be no reason to doubt that English law will recognise a dissolution of a polygamous marriage by any proceeding (even if it be only the unilateral act of the husband which he may do at any time he wills), provided that such proceeding is recognised as a valid divorce by the law of the matrimonial domicile. Even if it be the case that the English courts will not recognise that monogamous marriage can be dissolved in accordance with the law of the domicile without the interposition of the courts, there seems to be no reason to suppose that they would take the same view as regards the dissolution of a polygamous marriage (see the two decisions of the United States courts *Wall v. Williamson* and *Johnson's case* (Annex II, Cases Nos. 20 and 22), where the dissolution of the two Indian marriages by unilateral act of the husband were recognised). *Connolly's case* (Case No. 13) points to the same conclusion. The Law Officers' opinion of 1903 (Annex III, No. 8) approved Sir Cecil Hurst's memorandum, which contained a passage to this effect.

The *lex loci contractus*.

43. There are one or two points to be considered in connexion with the second requirement under Rule II, *i.e.*, that the marriage should be valid by the *lex loci contractus* (paragraph 32 above). Where the polygamous marriage is celebrated in India or Persia or another country where the local law recognises polygamy and the forms or ceremonies necessary for a polygamous marriage are sanctioned by that law, the application of this requirement creates no difficulty and requires no comment.⁽³¹⁾

In extraterritorial countries.

In a foreign country where His Majesty exercises extraterritorial jurisdiction, the operation of the ordinary *lex loci* is practically excluded so far as British subjects are concerned. The *lex loci contractus* is (under the principle laid down in *Bartlett v. Bartlett*) the law prescribed for the British consular courts by Order in Council. In Egypt, Morocco, and Abyssinia, the proviso to the relevant article of the Order in Council makes it clear that in the case of non-Christian British subjects the *lex loci contractus* is the religious law of the person concerned.

Polygamous marriages celebrated in England, &c.

What, however, is the position as regards polygamous marriages (such as Mahometan marriages) celebrated in England (or in China, since English law applies under the Order in Council), or in any other country where the local law only provides for a monogamous marriage? Are these marriages void as not possessing the sanction of the *lex loci contractus*?

It will be noticed that (1) in *In re Ullee* (Annex II, Case No. 11) there was a Mahometan marriage celebrated in London between a Mahometan domiciled in India and an Englishwoman, and in that case Chitty, J., inclined to the view that the children were legitimate; (2) that in "*In the Estate of Abdul Majid Belshah*" (Annex II, Case No. 12) there were two Mahometan marriages celebrated in England, the husband being a Mahometan domiciled in Iraq and the two wives Englishwomen, and the course taken by the President was hardly consistent with the view that he regarded the two wives as strangers to the deceased intestate or their children as illegitimate.

It is, moreover, well known that Mahometan marriages are from time to time performed at the Mosque in Woking.⁽³²⁾

There is the rule of English common law that domiciled Englishmen [or *quære* all British subjects] carry with them English common law into a foreign country and continue to be subject to it except to the extent that the foreign

⁽³⁰⁾ Lendrum's case, No. 23, Annex II.

⁽³¹⁾ See the case of the British Indians in Iraq, Annex I, No. 7.

⁽³²⁾ In cases where a registrar of marriages attends it would seem that the marriage is an ordinary English monogamous marriage (see the decision of the South African courts in *Mashia Ebrahim v. Mohamed Esop*, 1905, Tr L.R. 59 in this sense in the case of a Mahometan marriage celebrated in that country in the presence of a marriage officer appointed by the Governor under a statute (Annex II, Case No. 27)).

country has subjected them to another code which supersedes their common law, and it is under this rule that marriages, celebrated between British subjects in the English common law form in a foreign country where there is no local form of marriage which they can use, are held to be valid marriages (see Dicey: *Conflict of Laws*, 4th ed., p. 686, Rule 182 (2) (111)). This rule finds its most frequent application in the case of Christian British subjects who find themselves in a country, like Persia, where the local forms of marriage are polygamous marriages and available only to persons of certain religions.

Is there not another principle analogous to this rule of common law to the effect that, conversely, persons domiciled abroad whose personal law envisages polygamous marriage, for which the local English law provides no forms, are deemed when in England to carry with them sufficient of their own personal law to enable them to contract marriages in the manner recognised by their personal law? *In re Ullee* and *In the Estate of Abdul Majid Belshah* rather suggest it. Further, this view is rather supported by the Law Officers' opinion of 1903 (Annex III, No. 8), which dealt with the religious marriages in Turkey of British subjects (Indian Mahometans; Hindoos; and also of Maltese (Roman Catholic marriages)). The Law Officers approved the proposition that each different class of British subject carried with him in Turkey for marriage purposes his own personal law (*i.e.*, that of his domicile of origin). In Turkey, at that date, His Majesty possessed extraterritorial jurisdiction over British subjects, and under the Order in Council then in force, the Consular Courts had to apply English law. Finally, there is the position with regard to Jewish marriages in England in early days, when the Jews lived in a separate community, applied their own religious law and custom in marriage and family matters—celebrated Jewish marriages—marriages which the courts recognised like foreign *lex loci* marriages. (See the extracts from *R. v. Millis* annexed to Lord Halsbury's second opinion in the *Abensur* case—Annex III, No. 6). The manner in which Mahometans marry at the Mosque in Woking seems very similar to the position of Jewish marriages in earlier times. Sir Denis Fitzpatrick in his learned article (see Annex IV, No. 1) quotes the following passage from a judgment of Sir Erskine Perry in a case in a court of British India, putting forward this view which he (*Sir Erskine Perry*) considered to be supported by judgments of Lord Stowell. "By the comity of nations, therefore, as existing between princes of Christian and non-Christian faith, the *lex loci* to its whole extent is held not to apply to Europeans placing themselves under the government of the latter. But if this is the case as regards Christian aliens in a foreign State, there can be no doubt that a similar comity requires a similar rule to be observed when a Mussulman or a Hindoo seeks a domicile in a Christian country. How far the peculiar laws of such non-Christians aliens would be recognised, it may not be very easy, nor is it necessary, to define beforehand. . . . But on very many questions such as marriage, divorce, succession and possibly adoption, there seems no reason to doubt that the proper law to be referred to for the decision of any controversy would not be the law of the Christian community, but the law or usage of the peculiar non-Christian class. That this was the opinion of the great jurist whom I last cited (Lord Stowell) is not left a matter of doubt, for he has stated it expressly in many of his judgments with respect both to Jews and that other singular oriental race, the gypsies. See 3 Ral. 32: *Ruding v. Smith*, 2, Hagg Cons. 384. *Lindo v. Belisario*, 1 Hagg 216."

Such authority as there is upon this point (and there appears certainly to be very little) points to the conclusion that persons whose personal law is Mahometan law or some other law which sanctions polygamy, should be deemed, when temporarily in a country whose marriage law is based upon the Christian conception of marriage, to carry with them sufficient of their personal law to regulate and govern their marriages and family relations, subject always, of course, to the limitation that their matrimonial rights and duties cannot be enforced in the local courts, even though their existence may be recognised.⁽³³⁾ If this view is accepted, the following further rules might be formulated.

IX.

When a polygamous marriage is celebrated in a country where the *lex loci* provides no form of polygamous marriage which it is possible for the parties to Rules Nos. IX and X.

⁽³³⁾ See the case of the British Indians in Madagascar, Annex I, No. 5.



1933

use, such a marriage should be deemed to be valid under the *lex loci contractus* provided that it is valid by the personal law of the husband.

X.

The *lex loci contractus* in the case of a marriage of a British subject celebrated in a foreign country in which His Majesty exercises extraterritorial jurisdiction over British subjects is the law prescribed by Order in Council for application by His Majesty's consular courts in that country.

Presumption in favour of validity and legitimacy.

44. Lastly, there is the general principle of law that, where there is evidence of a ceremony of marriage having been gone through followed by cohabitation of the parties, then the presumption, in case of doubt or in the absence of evidence to the contrary, is always in favour of validity and legitimacy.^(*) Presumably this principle applies to polygamous marriages and children born of them as well as to other marriages and their issue. The series of rules already suggested might be completed by the following:—

XI.

Rules Nos. XI and XII.

Where there is evidence of a ceremony of marriage, whether polygamous or otherwise, having been celebrated and followed by cohabitation between the parties, then, in case of doubt and in the absence of evidence to the contrary, the presumption is in favour of the validity of the marriage and the legitimacy of the issue.

XII.

In all cases, where under the preceding rules a polygamous marriage is to be held to be valid, any wife of such a marriage must be deemed to be a "wife" within the meaning of section 10 of the B.N. and S.A. Act 1914 (and the corresponding provisions of the Naturalisation Act 1870) and any child born the issue of such a marriage must be deemed to be legitimate and the husband to be the "father" of such child within the meaning of sect. 1 (1) (b) of the B.N. and S.A. Act 1914 and the corresponding provisions of 4 Geo. II, c. 21, and 13 Geo. III, c. 21

(Signed) W. E. BECKETT.

January 11, 1932.

Suggested Rules or Principles for Application in Cases where Questions Relating to Polygamous Marriages arise in connexion with British Nationality Law.

I.

(a) A marriage entered into in a form which under the *lex loci contractus* is a form of monogamous marriage, is a monogamous marriage, whatever the intentions or the personal law of the parties may be, either at the time when the marriage is contracted or at any subsequent date.

(b) A marriage entered into in a form which under the *lex loci contractus* is a form of polygamous marriage, is a polygamous marriage, whatever the intentions or the personal law of the parties may be, either at the time when the marriage is contracted or at any subsequent date.

II.

"A polygamous marriage will be recognised as a valid marriage if, and will not be recognised as a valid marriage unless:—

"(a) The marriage was one which each of the parties had the capacity to contract under his or her personal law (the law of his or her domicile); and

"(b) The marriage was a valid one under the *lex loci contractus*."

^(*) See, for example, Halsbury Laws of England, vol. 16, p. 309, sections 603-4, and *Spivack v. Spivack* (Annex II, Case No. 26).

III.

A man whose personal law does not permit of polygamy, does not possess the capacity to contract a polygamous marriage; *provided* that no marriage celebrated between two persons of the Jewish religion must be held to be a marriage which the husband had no capacity to contract under Rule IV, if such husband had at the time of the marriage no other wife.

IV.

A woman who enters into a polygamous marriage and resides with the spouse of such marriage, is deemed to acquire his domicile and his personal law and to possess the capacity to contract such a marriage (whatever her personal law before the marriage) provided that her husband possesses such capacity under his personal law.

V.

A person whose personal law of origin does not admit of polygamy, may by a change of domicile and/or of religion acquire a personal law which does admit of polygamy, and a person whose personal law of origin does admit of polygamy, may by a change of domicile or of religion acquire a personal law which does not admit of polygamy, but in both cases the presumption is against the change of domicile or religion.

VI.

The personal law of a British subject domiciled in a foreign country in which His Majesty exercises extraterritorial jurisdiction over British subjects, is that law which His Majesty, by Order in Council, has prescribed as the law applicable to such British subjects in His Majesty's consular courts in that country; nevertheless, in China, under article 104 of the China Order in Council, circumstances should be regarded as not admitting the application of English law as the personal law of British subjects of polygamous religion or race domiciled in China, but as admitting only the application of the law of their country of origin.

VII.

(a) A prior polygamous marriage, although still subsisting, does not invalidate a subsequent monogamous marriage.

(b) An existing monogamous marriage would not invalidate a subsequent polygamous marriage.

VIII.

(a) A monogamous marriage cannot be dissolved by any proceeding under a law applicable to polygamy, even if it be the law of the matrimonial domicile.

(b) A polygamous marriage may be dissolved by any proceeding, which is recognised as lawful by the law of the matrimonial domicile, even if such proceeding should not involve the interposition of any court of justice or state authority.

IX.

When a polygamous marriage is celebrated in a country where the *lex loci* provides no form of polygamous marriage which it is possible for the parties to use, such a marriage should be deemed to be valid under the *lex loci contractus*, provided that it is valid by the personal law of the husband.

X.

The *lex loci contractus* in the case of a marriage of a British subject celebrated in a foreign country in which His Majesty exercises extraterritorial jurisdiction over British subjects, is the law prescribed by Order in Council for application by His Majesty's Consular Courts in that country.

XI.

Where there is evidence of a ceremony of marriage, whether polygamous or otherwise, having been celebrated, followed by cohabitation between the parties, then, in case of doubt and in the absence of evidence to the contrary, the presumption is in favour of the validity of the marriage and the legitimacy of the issue.

XII.

In all cases, where under the preceding rules a polygamous marriage is to be held to be valid, any wife of such a marriage must be deemed to be a "wife" within the meaning of section 10 of the British Nationality and Status of Aliens Act, 1914 (and the corresponding provisions of the Naturalisation Act, 1870), and any child born the issue of such a marriage must be deemed to be legitimate, and the husband to be the "father" of such child within the meaning of section 1 (1) (b) of the British Nationality and Status of Aliens Act, 1914, and the corresponding provisions of 4 Geo. II, c. 21, and 13 Geo. III, c. 21.

ANNEX I.

RÉSUMÉ OF CASES ON FOREIGN OFFICE FILES

No. 1.—Tully Case.

A. P. T. TULLY, a British subject born in Putney in 1883, resided in Turkey during the war, assumed a Turkish name and became, or purported to become, a Mussulman, and in 1916 married according to Moslem religious rites a Turkish woman, Emineh Sofuet Khanum. The Moslem law permits of polygamy, and Turkish law at that time allowed polygamy. Two children were born of the union, and both were recognised as British subjects because they were both born in London. The question arose, however, as to the nationality of the wife. The latter stated that in the contract of marriage the right had been given to her (as well as to the husband) to divorce by repudiation, and having been deserted by Tully she had exercised this right and executed the necessary formalities before a notary in Constantinople. Tully disputed the validity of the divorce and, when the wife had recourse to a Turkish tribunal, disputed the jurisdiction of the tribunal on the ground that both parties were British subjects. The situation of the wife was that it was in her material interests at that time to establish that she was not a British subject.

No reply was ever given to the repeated questions of the wife whether she was a British subject. The Foreign Office view was never expressed officially. The minutes indicate a view that, following the Law Officers opinion in the Messiah case (1906) the principle to be applied to the case was that a male British subject who enters into a polygamous union with an alien will not confer British nationality upon his wife, unless by the law of his domicile he is capable of contracting a polygamous marriage, in which case the wife would become a British subject. Consequently the question turned first of all on whether Tully was domiciled in Turkey. If he was, then as His Majesty possessed extraterritorial rights in Turkey, the law of Tully's domicile was that which, under the Ottoman Order in Council, the Consular Court in Turkey would have had to apply to the case.

Article 90 of that Order provided that in all matters relating to marriage, inheritance and other questions involving religious law and customs, the Court shall in the case of persons belonging to non-Christian communities recognise and apply the religious law of custom of the person concerned. Assuming, therefore, that Mr. Tully was domiciled in Turkey the next question was whether he could be recognised as belonging to a non-Christian community within the meaning of the article. Assuming this question to be answered in the affirmative, the conclusion would be reached that the law of the domicile was Mahometan law and consequently, in accordance with the principle stated above, Tully's wife would become a British subject. On the other hand, the Home Office view appears to have been that this marriage could not be recognised as conferring British nationality on the wife whatever the domicile of Tully.

No. 2.—Palmer Case.

J. A. B. Palmer was born in Kent in 1899 and went to Constantinople in 1924 where he became engaged to a Turkish Mahometan lady, Sheriff Nafa'a. He embraced the Moslem faith, declared his intention of residing permanently in Turkey, and in October 1924 married this lady according to the rites of the Moslem religion. Soon after this he desired to come to England with his wife on business and wanted a passport issued to his wife as a British subject. The question was referred to the Home Office by the Foreign Office and the Home Office expressed their views upon the legal principles involved in a memorandum in which their conclusions were stated in the following terms:—

1. "English law will not recognise as valid in any circumstances or for any purpose (including the acquisition of British nationality) a polygamous marriage celebrated in a foreign country by a British subject domiciled in England and will not regard the woman (or women) with whom he forms the polygamous union as having any claim to the status and rights of a wife.
2. "Where the husband is domiciled in a foreign country which allows polygamy and while so domiciled he contracts a polygamous marriage in accordance with the local law it is by no means clear that the marriage is void for all purposes in contemplation of English law. Such a marriage will not be recognised in the Divorce Court or for purposes of succession (at any rate succession to real property in England), but there is no clear authority for holding that it will not be recognised for any other purpose including the nationality of the wife and the claim of the foreign-born children of the marriage to be British subjects if their father is a British subject.
3. "The case of polygamous marriages in those parts of the British Empire where polygamy is allowed by the local law and contracted between persons domiciled in those parts does not appear to be distinguishable on any logical or legal ground from the case dealt with in 2 above. There are, however, administrative considerations which tend strongly to support the policy of recognising and giving extra-territorial validity to such marriages, but it is doubtful how far our Courts are prepared to go in this direction."

The Home Office, taking the view (1) that if Palmer was not domiciled in Turkey it was clear that the marriage could not confer British nationality on the wife and it was uncertain whether he was so domiciled, and (2) that it was not absolutely certain even if he were domiciled in Turkey that the wife would acquire British nationality under the marriage, considered that she should not be regarded as a British subject.

When this communication was received in the Foreign Office Sir Cecil Hurst expressed the view very strongly that it was not either correct or prudent in cases of doubt for Government Departments to act upon the presumption of the invalidity of a marriage and to refuse to recognise its effect as conferring British nationality, but that on the contrary where there was no preponderance of authority in favour of the view of invalidity the proper course for the Government Department to follow was to presume validity until the contrary was established by the decision of a Court. In the end, however, the matter was settled by the issue of an emergency certificate to the lady in which her nationality was not stated, and on their arrival in England the parties settled all possible doubts by remarriage at a Registry Office in this country.

No. 3.—Mohomet Shah.

T 7712/7712/376
of 1929.

His Majesty's consul-general at Yunnan-fu in China reported in April 1929 that Mohomet Shah, a British Indian subject born in Gujrat, married in January 1928 a Chinese woman under a form of contract in use by the local Mahometan Chinese; a child was born of the marriage in 1928 in China, and Mohomet Shah desired that the child should be registered as a British subject. The Chinese authorities expressed the opinion that the contract would be accepted in a Chinese court of law as good evidence of a legal marriage. The marriage laws of the Moslem religion allow polygamy.

Mohomet Shah is domiciled either in Yunnan-fu or in British India. On the supposition that he is domiciled in India, the law of his domicile would be Mahometan law. On the supposition that he is domiciled in China, he is a person under the extra-territorial jurisdiction of His Majesty, and the China Order in Council must presumably be looked at to ascertain the law which applies to him in China (see *Bartlett v. Bartlett*, 1925, A.C. 377).

Article 104 of that Order provides that—

"Subject to the provisions of the Order, the civil jurisdiction of every court acting under this Order shall, as far as circumstances admit, be exercised on the principles of, and in conformity with, English law for the time being in force."

Article 113 provides—

"The Supreme Court shall, as far as circumstances admit, have for and within China, with respect to British subjects, all such jurisdiction in matrimonial causes as for the time being belongs to the High Court in England in like matters."

His Majesty's consul-general asked whether the child of Mohomet Shah should be registered as a British subject, but no reply has as yet been returned to him.

No. 4.—Ellis Case.

T 2835 of 1929.

Mr. Robert Ellis, born in the United Kingdom, served for twenty-two years in the Indo-European Telegraph Department of the Indian Government in Persia. In 1921 in Persia he married, according to Mahometan law, a Persian lady named Ozra Khanom—a form of marriage recognised in that country.

In 1928 he came with her to England on leave, and the question arose whether this lady must in England be treated as a British subject or as an alien. The Home Office, in March 1929, informed Mr. Ellis that the lady could not be regarded as a British subject. The Foreign Office suggested unofficially that Mr. Ellis should solve his difficulties by remarrying the lady in this country.

No. 5.—British Indians in Madagascar.

T 10707 of 1927-
T 11314 of 1927.

His Majesty's consul at Antananarivo, Madagascar, asked for guidance as to the recognition as British subjects of the wives of British Indians resident in Madagascar and their children born there. Such Indians often possessed more than one wife.

With the concurrence of the India Office instructions were sent to His Majesty's consul to the effect that, pending the result of full consideration of the whole question, no definitive ruling could be given, but in the meantime he might, when occasion arose, issue emergency certificates to such wives or children for the purposes of travel.

No. 6.—Williams Case.

R. A. Williams, a British subject born in Beirut, Syria, in 1883 and resident in Egypt since 1898, adopted the Mahometan religion and a Moslem name in 1912, and in that year contracted a marriage with an Egyptian lady of the Moslem faith according to the formalities of Mahometan law by notarial contract—a form of marriage which is recognised as a valid marriage in Egypt for Mahometans. Of the marriage, between 1912-19, four children were born in Egypt, and in 1927 Mr. Williams applied to His Majesty's consul at Cairo to have these children registered as British subjects.

The evidence in this case is strongly in favour of a domicile in Egypt, but there is some ground for thinking that Mr. Williams only adopted the Moslem faith in order that he might marry this lady.

Assuming a domicile in Egypt, it appears that the law of Williams's domicile is that which is laid down in the Ottoman Order in Council, 1910 (see *Bartlett v. Bartlett*, 1925, A.C. 377), article 90 of which provides that "In all matters relating to marriage, inheritance, or other questions involving religious law and custom, the court shall, in the case of persons belonging to non-Christian communities, recognise and apply the religious law or custom of the person concerned."

His Majesty's consul at Cairo asked for instructions from the Foreign Office with regard to the registration of these children, but no instructions have yet been sent to him.

No. 7.—British Indians in Iraq.

A number of British Indians of the Moslem faith reside in Iraq and have married there according to Moslem rites one or more wives by whom they have had children born in that country. In other cases they have gone to Iraq with wives whom they have married in India according to Moslem law. His Majesty's High Commissioner in Iraq, in a despatch to the Government of India, reported that such Indians had applied for passports for themselves and their wives and children, and asked for guidance as to the issue of passports, as British subjects, to second and subsequent wives of such Indians, where they were not British subjects before marriage, and their children born in Iraq.

The Government of India replied to the High Commissioner stating that the "practice of the Government of India was to include all the wives of a British Indian Moslem on the husband's passport and treat them as British subjects."

The High Commissioner consulted the Colonial Office on this reply, expressing doubt whether it was correct, since, for nationality purposes, it was necessary to show that these marriages were recognised as valid in English law, and they were polygamous marriages.

No reply has been returned to the High Commissioner on this point.

No. 8.—Marriage of Miss E. B. Ray to a Siamese

Mr. Bailey, acting consul-general at Bangkok, reported that Miss Ray, a British subject, was living in Siam with a Siamese as his wife, and a marriage between these parties had been registered with the Siamese authorities.

Under Siamese customary law a valid marriage is contracted if a man and woman, not under any incapacity or disability, freely consent to take each other as husband and wife and live together openly as such.

Under Siamese law a man may have more than one wife.

Mr. Bailey desired to be informed whether, by reason of this marriage, Miss Ray must be regarded as having lost her British nationality under section 10 of the British Nationality and Status of Aliens Act, 1914. In reply to Mr. Bailey, the Foreign Office stated that if, as appeared to be the case, there was in Siamese law (the *lex loci contractus*) a valid marriage between the parties, Miss Ray must be regarded as having become the wife of an alien and to have lost her British nationality, the "provisions of British law regarding the national status of married women being of general application extending even to the case of polygamous marriages in countries where such marriages are lawful and that no exception could be made in the case of a Christian woman who contracted a polygamous marriage with a foreigner."

No. 9.—Marriage of Mr. H. J. Bronsdon to a Siamese woman.

His Majesty's consul-general at Bangkok, in a despatch of the 15th October, 1930, reported that a European British subject, named H. J. Bronsdon, born in England, stated that since November 1923 he had cohabited with a Siamese woman, named Khien, and that they regarded each other as man and wife and he applied for the issue of a British passport to Khien as a



1933

The Home Office, taking the view (1) that if Palmer was not domiciled in Turkey it was clear that the marriage could not confer British nationality on the wife and it was uncertain whether he was so domiciled, and (2) that it was not absolutely certain even if he were domiciled in Turkey that the wife would acquire British nationality under the marriage, considered that she should not be regarded as a British subject.

When this communication was received in the Foreign Office Sir Cecil Hurst expressed the view very strongly that it was not either correct or prudent in cases of doubt for Government Departments to act upon the presumption of the invalidity of a marriage and to refuse to recognise its effect as conferring British nationality, but that on the contrary where there was no preponderance of authority in favour of the view of invalidity the proper course for the Government Department to follow was to presume validity until the contrary was established by the decision of a Court. In the end, however, the matter was settled by the issue of an emergency certificate to the lady in which her nationality was not stated, and on their arrival in England the parties settled all possible doubts by remarriage at a Registry Office in this country.

No. 3.—*Mohomet Shah.*T 7712/7712/376
of 1929.

His Majesty's consul-general at Yunnan-fu in China reported in April 1929 that Mohomet Shah, a British Indian subject born in Gujrat, married in January 1928 a Chinese woman under a form of contract in use by the local Mahometan Chinese; a child was born of the marriage in 1928 in China, and Mohomet Shah desired that the child should be registered as a British subject. The Chinese authorities expressed the opinion that the contract would be accepted in a Chinese court of law as good evidence of a legal marriage. The marriage laws of the Moslem religion allow polygamy.

Mohomet Shah is domiciled either in Yunnan-fu or in British India. On the supposition that he is domiciled in India, the law of his domicile would be Mahometan law. On the supposition that he is domiciled in China, he is a person under the extra-territorial jurisdiction of His Majesty, and the China Order in Council must presumably be looked at to ascertain the law which applies to him in China (see *Bartlett v. Bartlett*, 1925, A.C. 377).

Article 104 of that Order provides that—

"Subject to the provisions of the Order, the civil jurisdiction of every court acting under this Order shall, as far as circumstances admit, be exercised on the principles of, and in conformity with, English law for the time being in force."

Article 113 provides—

"The Supreme Court shall, as far as circumstances admit, have for and within China, with respect to British subjects, all such jurisdiction in matrimonial causes as for the time being belongs to the High Court in England in like matters."

His Majesty's consul-general asked whether the child of Mohomet Shah should be registered as a British subject, but no reply has as yet been returned to him.

No. 4.—*Ellis Case.*

T 2835 of 1929.

Mr. Robert Ellis, born in the United Kingdom, served for twenty-two years in the Indo-European Telegraph Department of the Indian Government in Persia. In 1921 in Persia he married, according to Mahometan law, a Persian lady named Ozra Khanom—a form of marriage recognised in that country.

In 1928 he came with her to England on leave, and the question arose whether this lady must in England be treated as a British subject or as an alien. The Home Office, in March 1929, informed Mr. Ellis that the lady could not be regarded as a British subject. The Foreign Office suggested unofficially that Mr. Ellis should solve his difficulties by remarrying the lady in this country.

No. 5.—*British Indians in Madagascar.*T 10707 of 1927-
T 11314 of 1927.

His Majesty's consul at Antananarivo, Madagascar, asked for guidance as to the recognition as British subjects of the wives of British Indians resident in Madagascar and their children born there. Such Indians often possessed more than one wife.

With the concurrence of the India Office instructions were sent to His Majesty's consul to the effect that, pending the result of full consideration of the whole question, no definitive ruling could be given, but in the meantime he might, when occasion arose, issue emergency certificates to such wives or children for the purposes of travel.

No. 6.—*Williams Case.*

R. A. Williams, a British subject born in Beirut, Syria, in 1883 and resident in Egypt since 1898, adopted the Mahometan religion and a Moslem name in 1912, and in that year contracted a marriage with an Egyptian lady of the Moslem faith according to the formalities of Mahometan law by notarial contract—a form of marriage which is recognised as a valid marriage in Egypt for Mahometans. Of the marriage, between 1912-19, four children were born in Egypt, and in 1927 Mr. Williams applied to His Majesty's consul at Cairo to have these children registered as British subjects. T 7472/7472/376
of 1927 to
T 11116/1411/376
of 1929.

The evidence in this case is strongly in favour of a domicile in Egypt, but there is some ground for thinking that Mr. Williams only adopted the Moslem faith in order that he might marry this lady.

Assuming a domicile in Egypt, it appears that the law of Williams's domicile is that which is laid down in the Ottoman Order in Council, 1910 (see *Bartlett v. Bartlett*, 1925, A.C. 377), article 90 of which provides that "In all matters relating to marriage, inheritance, or other questions involving religious law and custom, the court shall, in the case of persons belonging to non-Christian communities, recognise and apply the religious law or custom of the person concerned."

His Majesty's consul at Cairo asked for instructions from the Foreign Office with regard to the registration of these children, but no instructions have yet been sent to him.

No. 7.—*British Indians in Iraq.*

A number of British Indians of the Moslem faith reside in Iraq and have married there according to Moslem rites one or more wives by whom they have had children born in that country. In other cases they have gone to Iraq with wives whom they have married in India according to Moslem law. His Majesty's High Commissioner in Iraq, in a despatch to the Government of India, reported that such Indians had applied for passports for themselves and their wives and children, and asked for guidance as to the issue of passports, as British subjects, to second and subsequent wives of such Indians, where they were not British subjects before marriage, and their children born in Iraq. T 3132/3132/378
of 1930 to
T 6640/3132/378.

The Government of India replied to the High Commissioner stating that the "practice of the Government of India was to include all the wives of a British Indian Moslem on the husband's passport and treat them as British subjects."

The High Commissioner consulted the Colonial Office on this reply, expressing doubt whether it was correct, since, for nationality purposes, it was necessary to show that these marriages were recognised as valid in English law, and they were polygamous marriages.

No reply has been returned to the High Commissioner on this point.

No. 8.—*Marriage of Miss E. B. Ray to a Siamese*

Mr. Bailey, acting consul-general at Bangkok, reported that Miss Ray, a British subject, was living in Siam with a Siamese as his wife, and a marriage between these parties had been registered with the Siamese authorities. T 8034 of 1929.

Under Siamese customary law a valid marriage is contracted if a man and woman, not under any incapacity or disability, freely consent to take each other as husband and wife and live together openly as such.

Under Siamese law a man may have more than one wife.

Mr. Bailey desired to be informed whether, by reason of this marriage, Miss Ray must be regarded as having lost her British nationality under section 10 of the British Nationality and Status of Aliens Act, 1914. In reply to Mr. Bailey, the Foreign Office stated that if, as appeared to be the case, there was in Siamese law (the *lex loci contractus*) a valid marriage between the parties, Miss Ray must be regarded as having become the wife of an alien and to have lost her British nationality, the "provisions of British law regarding the national status of married women being of general application extending even to the case of polygamous marriages in countries where such marriages are lawful and that no exception could be made in the case of a Christian woman who contracted a polygamous marriage with a foreigner."

No. 9.—*Marriage of Mr. H. J. Bronsdon to a Siamese woman.*

His Majesty's consul-general at Bangkok, in a despatch of the 15th October, 1930, reported that a European British subject, named H. J. Bronsdon, born in England, stated that since November 1923 he had cohabited with a Siamese woman, named Khien, and that they regarded each other as man and wife and he applied for the issue of a British passport to Khien as a T 13155 of 1930.

[10221]

E 2



British subject. Mr. Bronsdon accompanied his application by a statutory declaration to this effect, and also by a declaration by a solicitor practising in Bangkok to the effect that under the Siamese law, the *lex loci*, these two persons would be regarded as man and wife. In this latter declaration the Siamese law with regard to marriage was described in a manner similar to that set up in the note with regard to the marriage of Miss E. B. Ray to a Siamese (see T 8034 of 1929).

Mr. Consul-General Johns asked for instructions as to whether a passport should be given to this lady as a British subject.

In the minutes on this paper the Legal Advisers of the Foreign Office recommended that a reply should be returned to Mr. Johns to the effect that this whole subject of polygamous marriages in connexion with British nationality was at present under consideration and until the advice of the Law Officers had been obtained it was impossible to give a final answer to his question.

In 1905 the Law Officers had advised that sections 10 (1) and (2) of the Nationalisation Act of 1870 referred not merely to marriage such as is contemplated by English law for the purposes of the construction of an English settlement or of the jurisdiction of the divorce court, but were of general application and that they applied in the case even of polygamous marriages in countries where such marriages were lawful. It was clear that this opinion would cover such marriages where both the parties were of polygamous religion or race. It was also clear that the opinion covered the case where the husband was of such religion or race and the wife was an Englishwoman, since these were the circumstances of the case in respect of which this advice was given; and it was on the basis of this opinion that the Foreign Office (in case No. 8) had advised Mr. Bailey, acting consul-general at Bangkok, that Miss Ray, a British subject, must be deemed to have lost her status as such by reason of her marriage to a Siamese man. The Law Officers had, however, not dealt specifically with the case of a polygamous marriage where the husband was a British subject of non-polygamous religion and race and the wife was a native woman, and though it might not be clear whether any distinction in principle could be drawn upon this difference, it would be advisable to await the further consultation of the Law Officers before any decision was given. The question seemed to be whether the man, a British subject, possibly still domiciled in England, should be deemed to be capable of contracting marriage in this way. In corresponding circumstances the Law Officers seem to have been of the opinion that an English woman could so contract a marriage.

Mr. Johns had, it was thought, therefore better inform Mr. Bronsdon in reply to his application that he could only grant this lady a temporary passport of short duration and this grant must not be taken by Mr. Bronsdon to imply that any final decision had been taken upon the question whether this lady had become a British subject by reason of this marriage, as the question was still the subject of further consideration. At the same time he should discover and report to the Foreign Office in case the point was a material one, whether Mr. Bronsdon should now be regarded as domiciled in Siam (*i.e.*, whether he had now made Siam his permanent home).

No. 10.—Case of Richard Ewe Cheang Lim.

T 8547/7472/376
of 1927.

Dr. Lim Eng Hae, a British subject of Chinese race, born at Penang, a graduate of London University and a medical practitioner at Penang, and presumably domiciled there, married in Java a Chinese lady born in Java. The marriage was performed in accordance with the provisions of Dutch Indian law by a Dutch official. A child was born to them in Java, named Richard Ewe Cheang Lim, and Dr. Lim applied to His Majesty's consulate-general for the registration of the child as a British subject. The birth was, in fact, registered, but Consul-General Crosby subsequently raised the question whether the registration had been correct. Dr. Lim is not a Christian.

Under Dutch Indian law in Java, Chinese are subject to the same system of civil law as is applicable to Europeans, and only one wife is allowed by law to Chinese as well as Europeans, offspring of another wife not being recognised as legitimate unless in the case of Chinese the second wife was married before the husband entered Dutch territory or before the application in the territory of the European system of civil law to Chinese.

In the Straits Settlements, however, where Dr. Lim was domiciled, the law recognises polygamy for Chinese and the children of secondary marriages as legitimate.

Mr. Consul-General Crosby asked for a ruling—

- (a) With reference to the registration as a British subject of the son of Dr. Lim.
- (b) With reference to the general question as to whether entries should be made in the consular registers of the births of offspring of fathers who are not obliged to follow a monogamous rule of life.

Mr. Crosby stated that hitherto all the entries in his registers were confined to the children of parents professing a religion or following a customary law which did not permit of polygamy, but he emphasised certain political difficulties which might arise in the future if the registration of the children of the large number of Chinese British subjects in his district was to be refused.

In reply to Mr. Consul-General Crosby's despatch the Foreign Office approved the registration of the son of Dr. Lim on the ground that Dr. Lim's marriage in Java was, under the *lex loci celebrationis*, a monogamous one, and his son would be recognised as legitimate by the law of the Straits Settlements, where Dr. Lim was domiciled, and the case could, therefore, be dealt with independently of the general question of the issue of polygamous marriages.

Mr. Crosby was informed that instructions on this general question would be sent to him at a later date. No such instructions have, however, yet been given to him.

No. 11.—Abyssinian Lex Loci Marriages.

In 1926 a despatch from His Majesty's Minister at Addis Ababa raised various questions relating to the effect of marriages contracted in Abyssinia according to the local forms on the nationality of the parties, and a reply to these questions was furnished in a Foreign Office despatch of January 1927. As it is not possible to summarise the latter, these two despatches are quoted in full:—

(No. 237.)
Sir,

Addis Ababa, December 7, 1926.

I have the honour to transmit to you herewith a copy of a letter from Mr. A. L. Gardiner, barrister-at-law at Addis Ababa, regarding the question of change of nationality on marriage and of my reply thereto.

2. In illustration of what I have said to Mr. Gardiner regarding the difference in attitude towards marriage of the Abyssinians and of other countries, I may say that three degrees of marriage are recognised by Abyssinian law:—

- (i) Where a woman is hired, in the same manner as a domestic servant, at about 40 dollars a month. In this case she can be dismissed like a domestic servant, but while she cohabits she is regarded as a wife, and the children resulting from the union have no slur of illegitimacy.
- (ii) Where the marriage is arranged by mutual contract. In this case the woman cannot be dismissed, but can be divorced without much ceremony. She has the right, on divorce, to a division of household goods proportionate to the share therein of each party on entering into the original contract.
- (iii) Where an ecclesiastical marriage takes place. In this case divorce would appear not to be recognised or at least most difficult to obtain. Ecclesiastical marriage between British subjects and Abyssinians is probably extremely rare.

3. From the nature of Abyssinian marriage as described above the point arises whether marriages between British subjects and Abyssinians are valid according to British law.

4. It seems to me that we cannot possibly recognise a *lex loci* marriage in Abyssinia of the first and second category any more than we could in Japan, and that only a marriage before a British consular officer can entitle an Abyssinian woman to claim the nationality of her British husband.

When the parties are Moslems the case is simpler, since the marriage, in order to be legal, has to be performed by the Cadi, but even here the ground would not appear to be secure. For instance, if an Arab of Aden marries an Abyssinian woman (Moslem) before the Cadi and divorces her after a month, can she claim to be a full British subject?

5. I should be grateful if I might be given a ruling on this complicated question, and specially on the question of Moslem marriages, which is continually arising.

I have, &c.
C. H. BENTINCK.

[T 16331/16331/376]

(No. 6.)

Foreign Office, January 18, 1927.

Sir,
I received your despatch No. 237 of the 7th ultimo relative to marriages contracted under Abyssinian law and questions of national status consequent thereon.

2. Of the three degrees of marriage described in your despatch, it is clear that the kind of marriage referred to in paragraph 2 (i) could not be considered as a marriage for any purpose in English law and would be incapable of producing any effect on the nationality of the persons who had contracted it. On the other hand it would appear that the methods of marriage referred to in paragraph 2 (ii) and (iii) must be considered as marriages. It is a material factor in the consideration of the questions raised in your despatch whether under Abyssinian law and custom marriages celebrated by these methods can or cannot be polygamous. The effect of this factor will be explained in the following paragraphs.

3. English law does not recognise any polygamous union as a "marriage" for the purposes of the matrimonial jurisdiction of the English courts. On the other hand in certain cases a polygamous union which possesses the characteristics of a marriage will be recognised in English law as a marriage for other purposes, including that of the acquisition or loss of British nationality. If these marriages must under Abyssinian law be monogamous, then it would appear probable that they would be recognised as marriages by the English courts for all purposes.

4. The effect of these marriages on the nationality of the parties is hereafter considered with reference to cases where (a) the wives are British subjects and the husbands aliens, and (b) the husbands are British subjects and the wives aliens.

(a) I am advised that British women married to foreigners under a *lex loci* form of marriage which permits polygamy lose their British nationality by such marriage. It appears to follow that, even if Abyssinian law recognises polygamy in the case of unions of the kinds described in paragraph 2 (ii) and (iii) of your despatch, marriages of women who are British subjects with Abyssinians according to these forms in Abyssinia will cause such women to lose their British nationality. It would also cause them to lose their British nationality if they married aliens other than Abyssinians the law of whose domicile admitted of polygamy. If, however, they were to marry in such circumstances aliens the law of whose domicile did not admit of



1933

polygamy, it does not appear that the marriage would cause them to lose their British nationality, since presumably it would not be recognised as a marriage by the law of their husband's domicile. But, if, on the other hand, unions of classes (ii) and (iii) must be monogamous under Abyssinian law, then such women would lose their British nationality in every case, provided the validity of the marriage were not upset on some other ground.

(b) In the case of marriages of men who are British subjects with women who are aliens, celebrated in Abyssinia according to the *lex loci*, essentially the same reasoning would apply. If the marriages are monogamous under the law of Abyssinia, and are not invalid on any other ground, the wives would appear to acquire British nationality in every case. If such marriages are by Abyssinian law polygamous, then British nationality will be acquired by the wives in cases where the law of the domicile of the British husband allows of polygamy. In other cases it would appear that British nationality would not be acquired by the wife, since no marriage had taken place according to the law of the British husband's domicile.

5. The only remaining question is as to the cases in which the law of a British subject's domicile can be said to recognise polygamy. In the case of British subjects, who are not domiciled in Abyssinia, the question naturally depends on the law of the place where they are domiciled. On the other hand the law of the domicile of British subjects who are domiciled in Abyssinia itself is not Abyssinian law, since His Majesty possesses extra-territorial rights in Abyssinia. It was decided by the Judicial Committee of the Privy Council in *Bartlett v. Bartlett* (1925 A.C. 377) that the law of the domicile of a British subject domiciled in Egypt is the law which the Crown has by Order in Council prescribed for His Majesty's courts in Egypt. The same principle appears to apply to Abyssinia. The law of the domicile of British subjects domiciled in Abyssinia is therefore that which is prescribed in the Abyssinia Order in Council. Article 80 of that Order provides that "the civil jurisdiction of every court acting under this Order shall, as far as circumstances admit, be exercised on the principles of, and in conformity with, the law for the time being in force in British India: provided that in all matters relating to marriage, inheritance, or other questions involving religious law and custom the court shall, in the case of persons belonging to non-Christian communities, recognise and apply the religious law or custom of the person concerned." The law of the domicile therefore of all Christian British subjects is the law which would be applied to Christian British subjects were they in British India, i.e., a law which would not recognise a polygamous marriage. No polygamous marriage of a Christian British subject domiciled in Abyssinia would therefore confer British nationality on the wife. In the case of other British subjects domiciled in Abyssinia, it depends on their own religious law and custom whether they must be deemed to be capable in law of contracting polygamous marriages. In the case of those who are so capable, a marriage in the Abyssinian form would confer British nationality on the wife, although it may be a polygamous marriage.

I am, &c.
(For the Secretary of State),
G. R. WARNER.

No. 12.—Application for British Naturalisation by the Misses G. and H. Kuo Sing.

T 14645 of 1930.

A despatch of the 20th November, 1930, from His Majesty's Minister at Peking enclosed two applications for British naturalisation by the Misses G. and H. Kuo Sing, who were still minors, under section 4, or alternatively section 5 (2), of the British Nationality and Status of Aliens Act, 1914.

These girls are the daughters of W. K. Sing, a Chinese national, and Katharine K. Sing (*née* Reid), an English woman and British subject by birth.

The parents were married in Tientsin in 1911 in accordance with Chinese custom.

By an agreement in a deed, dated the 1st August, 1925, the parties dissolved their marriage by mutual consent, under which it would appear that the mother was left the sole guardian of the children.

This agreement apparently, under Chinese law, constitutes a valid divorce.

Mrs. Sing's principal object in securing this divorce was to facilitate her reacquisition of British nationality by naturalisation under section 2 (5) of the British Nationality and Status of Aliens Act, 1914, together with naturalisation of her children under section 5 (1), but, having been advised that (a) she had ceased to be a British subject by her marriage in 1911, (b) that her divorce in 1925 would not be recognised as valid in English law and therefore that this course would not be open to her, the applications of the children for naturalisation were submitted. These applications were forwarded to the Home Office.

In the minute on this paper a legal adviser of the Foreign Office wrote:—

"I agree that this matter should be referred to the Home Office, but I suggest, as it raises a number of rather interesting points, that, in so referring it, we should make some observations on the following points:—

"First of all, if the Home Office have not had the Crown Advocate's opinion, referred to in paragraph 3 of this despatch, I think that it would be well that they should have it, and, in sending it, I think that the following observations might be made with regard to the case of Mrs. Alice Woodhead, to which that opinion refers, in order to show the differences between that case and this.

"In the case of Mrs. Alice Woodhead there has been a Scottish marriage in Scotland between an Englishwoman and a Chinese. After this the parties went to China and apparently became domiciled there, and, in accordance with the Chinese law, divorced one

another by mutual consent and by deed. The Crown Advocate held, and there is no doubt on this point that he was right, that, by reason of this marriage, the lady ceases to be a British subject. He held, further, that this divorce by deed would not be recognised by the English courts as a valid dissolution of the marriage contracted in Scotland. He based his opinion on the decision of the English courts in *R. v. The Superintendent Registrar of Marriages for Hammersmith*, reported in 1917, L. K.B. 634. Whatever view is taken of the real *ratio decidendi* in that case, I think it is clear that the decision does cover it, and therefore, for so long as that case stands as good law, his opinion on this point was right.

"In this case there was a marriage between a Chinese man and an English woman in China, in accordance with Chinese custom. The Crown Advocate is of the opinion that this marriage was one under which the Englishwoman would lose her British nationality. I think that on this point his opinion is one which is in accordance with the opinion of the Law Officer in 1905 and therefore accords with the view which we also must at present adopt. Of this marriage there were born in China two daughters. Subsequent to their birth the parties to the marriage divorced one another by mutual consent and by deed in accordance with Chinese law. Sir Miles Lampson apparently thinks that the Crown Advocate's opinion in the Woodhead case covers this case, and that accordingly this Chinese divorce would not be recognised as dissolving the marriage. But this is not quite so certain, because there is a distinction between the two cases; in the Woodhead case there was a marriage contracted in the United Kingdom and therefore a monogamous marriage contracted in accordance with the principles attending the conception of that institution in European countries, and it was this marriage which the Crown Advocate was of opinion could not be dissolved by a Chinese divorce by mutual consent, China being a country whose law, I think, permits of polygamy; whereas now the question is whether a Chinese divorce can be regarded as dissolving a Chinese marriage. Whether or not the decision of the English courts in 1917 (referred to above) would cover this case depends largely on one's view as to what was the real ground of that decision, which it is not very easy to determine. A view which is commonly taken as the real ground of the decision in the case is that a monogamous marriage which is one institution cannot be dissolved by a divorce under a law whose conception of marriage allows of polygamy, a polygamous marriage being regarded as a different institution; or, to put it shortly, a monogamous marriage cannot be dissolved by a polygamous divorce. If this is the true ground of the decision, then it does not really cover this case, because here we are dealing with a Chinese marriage and a Chinese divorce, both of them equally covered by a law which permits of polygamy.

"One might, however, deduce from the language of parts of the judgments of some members of the court, and in particular the passages quoted in the Crown Advocate's opinion, that the ground of the decision was a different one, namely, whether the English courts will recognise any divorce which does not consist in the decree of a court. If so, of course, that case does cover this point. It does not, however, seem quite certain whether this view would now be upheld in view of the recent decision of the Court of Appeal in the *Nachimson* case; not that the point decided in the *Nachimson* case was this point, but indirectly it has some bearing upon it. Indeed, if the proceedings of the *Nachimson* case are continued it would seem that the courts will, in fact, have to pronounce on this very point, because it was the contention of the husband in that case, in replying to the wife's petition for judicial separation, that the marriage had already been dissolved by registration at a consulate. In the first part of the proceedings this question was not decided, since the issue was only whether there was a marriage at all of a kind coming within the matrimonial jurisdiction of the English courts, and the decision was that the means by which, under Soviet law, a Soviet marriage could be dissolved did not take away from the marriage the characteristics essential to give the English courts matrimonial jurisdiction.

"For these reasons I do not think that it is by any means certain that this lady's divorce under Chinese law would not be recognised as a valid divorce of her Chinese marriage by the English courts. The point is one which, of course, could be fully considered if the lady were to submit an application under section 2 (5) of the Act of 1914. If the Home Office were not prepared to consider her application under section 2 (5) on the ground that they were not sufficiently certain of the validity of her divorce she could presumably, if she has the means to do so, take proceedings to obtain a declaration in the English courts, and the decision of the courts on this point would throw some light on a point of English law where light is badly required. This course has this advantage for her that she might at the same time apply to have her children included under section 5 (1). She is the sole guardian of the children apparently. It might be well worth while facilitating proceedings for the purposes of obtaining a decision.

"Her two daughters are clearly not British subjects in any event. There is no doubt on this point, and it is clear that their applications for naturalisation under section 4 could not be considered. In so far as the application is made under section 5 (2) the matter seems to be one of discretion purely, and therefore one entirely for the Home Office to decide.

"Foreign Office, January 2, 1931."

No. 13.—*The Case of Mr. Ronald Cedric Parrett.*

T 7743/7743/378
of 1929, and
T 6792/6792/378
of 1931.

His Majesty's Minister at Tehran reported in June 1929 that Mr. R. C. Parrett, a British subject, accountant of the Anglo-Persian Oil Company (Limited), Tehran, had applied for a passport in the name of himself and his wife, Rafa'at I. Sufi, of Persian origin, and of the Mussulman religion. In support of his application Mr. Parrett produced the following documents duly legalised by the Shari Court of the Persian Ministry of Justice: (1) a certificate, dated the 4th October, 1928, of his adoption of the religion of Islam; (2) a marriage certificate, dated the 14th October, 1928, between himself and the said Rafa'at I. Sufi. The passport was then granted.

In May 1931 His Majesty's Minister at Tehran reported that Mr. R. C. Parrett had divorced his wife, Rafa'at I. Sufi, according to Moslem law, and contracted another Moslem marriage with another Persian lady, and now requested for another joint passport in the name of himself and his second wife. Mr. Parrett produced a copy of the act of divorce and the marriage certificate of the new union, both documents being registered and recognised as valid by the competent Persian authority. Sir R. Clive requested instructions, and he was informed that a temporary passport only should be issued, and that all definitive recognition of the wife as a British subject should be delayed pending the advice from the Law Officers on the general question of polygamous marriages.

No. 14.—*The Children of Mr. Aron Abib.*

T 2836 of 1931.

His Majesty's consul at Tripoli reported that Mr. Aron Abib, a British subject, born in Tripoli, of the Jewish religion, and apparently domiciled there, married in Tripoli, in accordance with the local Jewish law, L.L., his first wife being still alive, and the son of the second wife, Mr. Darco Abib, had applied for registration as a British subject. His Majesty's consul stated that under the Italian law in force in Italy polygamy was recognised in the case of Jews domiciled there, but not in the case of Jews domiciled in Italy.

(It would also appear that in the case of Jews domiciled in Tripoli, Jewish religious marriages were recognised under the Italian law in force in Tripoli.)

As the case appeared to be covered by the opinion of Lord Halsbury (L.C.) in the *Abensur* case, the Foreign Office instructed His Majesty's consul to register Mr. Darco Abib provisionally as a British subject pending the receipt of an opinion from the Law Officers on the whole subject of polygamous marriages in connexion with nationality questions.

No. 15.—*Ralph Edward Gales.*

T 3051 of 1931.

Mr. Parr, Chargé d'Affaires at His Majesty's Legation, Tehran, reported that Mr. R. E. Gales, a British subject, applied for a passport for his wife, a Persian lady, and produced a Persian marriage certificate which stated that R. E. Gales, a convert to Islam, had married this lady. (The certificate was evidence of a marriage recognised by Persian law, which, however, admits of polygamy for Mahometans.)

Mr. Parr reported that he had granted a passport to the lady limited for travel to the United Kingdom.

The Foreign Office suggested to the Home Office that until an opinion of the Law Officers had been received, it was desired to avoid as far as possible raising the question whether the lady was a British subject.

ANNEX II.

JUDICIAL DECISIONS.

Case No. 1.—*Seedats (Exors.) v. The Master.* S.A., 1917, Appellate Div. 302.

S, a Mahometan and domiciled in India, married X according to Mahometan rites and had four children by her born in India. He removed to Natal and became domiciled there, and, while so domiciled, but during a visit to India, he married in India according to Mahometan rites a second wife Y, and had by her six children, two born in India and four born in Natal.

Both marriages were good in form under the law of India, and under the law of India, so far as it applied to the case, both marriages were valid marriages and the children legitimate. S died and left a will bequeathing his estate to executors to be realised and distributed according to the Mahometan law of succession between X and Y and his children by both of them. Under the law of Natal, where estate was situated, a succession duty of 1 per cent. is charged where the successor is a lineal descendant of the testator and 5 per cent. if he is a stranger, while if a successor is a surviving spouse no duty is charged.

A dispute arose between the Master and the executors as to the duty payable on the estate.

Held:

(1) The expression "surviving spouse" in the Natal Act meant the survivor of a marriage recognised by South African law as valid, and the expression "lineal descendants" as applied to children meant children regarded by that law as legitimate.

(2) That, in view of the fact that S was domiciled in Natal at the time of his second marriage to Y, and the law of Natal did not permit of polygamy, the marriage with Y could not be recognised, and her children must be regarded as illegitimate and the duty levied at 5 per cent. as regards their share. ["Polygamous union is one the nature of which is consistent with the husband marrying another wife during its continuance; whether he exercise his privilege or not is beside the question."]

(3) That the marriage with X was a polygamous union, and, though good as a marriage by the *lex loci contractus* and by the *lex domicilii*, could not be recognised as a marriage by the law of South Africa on grounds of public policy, since it was a "legal relation repugnant to the moral principles of its people," and therefore X could not be held to be the "surviving spouse" of S.

(4) The children of S and X being legitimate according to the law of their domicile of origin must be regarded as legitimate in South Africa, and the grounds of public policy against the recognition of X as a wife did not apply to the recognition of her children as legitimate.

(The decision on this last point is partly based on *Hyde v. Hyde* (Case No. 2 below).)

Case No. 2.—*Hyde v. Hyde.* L.R. 1 P. and D. 130.

The petitioner, born in and originally domiciled in England, married the respondent in 1853 at Salt Lake City. The respondent was born in and originally domiciled in England. Both parties were at the time of the marriage of the Mormon faith, and the marriage was celebrated according to Mormon rites. At the time of the marriage both parties were resident (and *quære* domiciled) in Utah. They lived and cohabited in Utah and children were born there.

In 1856, however, the petitioner, while out of Utah, renounced the Mormon faith, and in 1857 he resumed his domicile in England.

In December 1856 a sentence of excommunication was pronounced against the petitioner in Utah, and the respondent was declared free to marry again. The respondent refused to change her faith or to leave Utah and rejoin the petitioner, and in 1859 contracted another Mormon marriage at Salt Lake City with another person, by whom she had children. The petitioner sought a decree of dissolution of his marriage with the respondent on the ground of adultery.

The evidence was that the Mormon marriage of the petitioner would be recognised as a valid marriage by the Supreme Court of the United States, and that under Mormon law polygamy was lawful and commonly practised. The petitioner had, however, never taken a second wife.

Held by Lord Penzance:

(1) Marriage, as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others.

It is an institution and confers the status of husband and wife, which, apart from minor incidents, is the same in all Christian countries.

(2) Polygamous marriages exist in many countries which have laws adapted to define and regulate the rights and obligations of the parties to them, but polygamous marriage is a different institution from Christian marriage, and the status of husband and wife under it is a different one (*Warrender v. Warrender*).

(3) The matrimonial law of this country is adapted to a Christian marriage and is wholly inapplicable to polygamy. There is no law in England adapted for the institution of polygamous marriage.

(4) The nature of the institution is determined by the contract entered into by the parties when they married, and it would be impossible for the court to treat the first marriage of a person, contracted under a law permitting polygamy, as a Christian marriage and apply English law to it as defining the rights and duties of the parties. The result would be to render the marriage something entirely different from that which the parties contracted.

(5) The petition cannot be granted, but "this decision is confined to that object. This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous union, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication or the relief of the matrimonial law of England."

Case No. 3.—*In re Bethell.* 38 Ch. D. 220.

W.F.B., the testator, devised certain real estate in England to trustees (the defendants in these proceedings) upon trust (*inter alia*) for the use of his son, C.B. for life; and after the death of C.B., if he died leaving any child or children him surviving, upon trust for sale, the trustees to hold the proceeds for such child or children; and in the event of C.B. dying and leaving no surviving child the testator devised the said estate to his son W.B. (the plaintiff) for his life.

[10221]

F

There was evidence that C.B. had refused to be married to Teepoo in church, although there were facilities for this purpose, and never spoke of himself as married or of Teepoo as his wife. C.B. made testamentary provision for Teepoo and any child of his by her if they survived him, and directed that his relatives in England should be informed of these provisions in his will.

(1) The nature of the union into which C.B. and Teepoo entered was a Baralong marriage which is polygamous and not a marriage in the sense that that institution is understood under the law of England.

(2) A Baralong marriage is not a marriage according to the law of England, and, therefore, Sc., the child of Teepoo, cannot be considered to be a child of C.B. within the meaning of the will of W.F.B.

Stirling, J., professed in his conclusion No. 2 simply to be following *Hyde v. Hyde*, by which he was bound, but in *Hyde v. Hyde* the question of the legitimacy of children of polygamous marriages was stated clearly *not* to be decided.

Finally he refers to the U.S. case of *Johnson v. Johnson's Administrator* (Case No. 22), and the Canadian case of *Connolly v. Woolrich* (Case No. 13), and suggests that the marriages in those cases might have been held valid according to the law of England consistently with *Hyde v. Hyde*. In *Johnson v. Johnson's Administrator* the question was one of legitimacy. It is true therefore that the decision in favour of legitimacy in that case might be consistent with *Hyde v. Hyde* because in *Hyde v. Hyde* legitimacy questions were left open. Johnson's case is, however, only consistent with Stirling's, J., judgment in this case, another legitimacy case, if the latter judgment must be regarded as being based on the domicile of C.B. being English.

B, a British subject born and apparently domiciled in Ireland, married in 1886 in Japan, when temporarily resident in that country, a Japanese lady. As evidence of the marriage a certificate was produced from the office of the Governor of Tokyo stating that the parties had duly married in accordance with Japanese law, and there was evidence by experts in Japanese law to the effect that this certificate showed a marriage valid under Japanese law, and that under that law B was by his marriage precluded from marrying any other woman during its subsistence.

Held by Sir James Hannen, P.:

- (1) That a marriage valid by the law of Japan (*lex loci*) had been proved.
- (2) That a Japanese marriage being a monogamous one was a marriage which could be recognised as such in the English courts, although Japan was not a Christian country.

This was an appeal to the House of Lords from the Scottish Court of Session, and the question at issue was whether the Scottish courts could dissolve the marriage contracted in England of parties whose matrimonial domicile was in Scotland.

“ But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. If, indeed, there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each—there may be some room [532] for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different *status*, from Turkish or other marriages among infidel nations, because we clearly never should recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate. This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere. Therefore all that the courts of one country have to determine is whether or not the thing called marriage, that known relation of persons, that relation which those courts are acquainted with, and know how to deal with, has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer.⁽¹⁾

constituted; and those who administer the law must administer it according to the principles of the municipal law which they administer.⁽¹⁾

"But it is said that what is called the *essence* of the contract must also be judged of according to the *lex loci*; and as this is a somewhat vague, and for its vagueness a somewhat suspicious proposition, it is rendered more certain by adding that dissolubility or indissolubility is of the essence of the contract. Now I take this to be really *petitio principii*. It is [533] putting the very question under discussion into another form of words and giving the answer in one way. There are many other things which may just as well be reckoned of the essence as this. If it is said that the parties marrying in England must be taken all the world over as this. If it is said that the parties marrying in England must be taken all the world over to have bound themselves to live until death or an Act of Parliament 'them do part,' why shall it not also be said that they have bound themselves to live together on such terms, and with such mutual personal rights and duties, as the English law recognises and enforces? Those rights and duties are just as much of the essence as dissolubility or indissolubility; and yet all admit, all must admit, that persons married in England and settled in Scotland will be entitled only to the personal rights which the Scottish law sanctions, and will only be liable to perform the duties which the Scotch law imposes. Indeed, if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by and subsisting with another, polygamy being there of the essence of the contract.

That indissolubility is of the essence,' appears plainly

"The fallacy of the argument, 'that indissolubility is of the essence,' appears plainly to be this: it confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the courts of the [534] country where the parties reside, and where the contract is to be carried into execution."

On p. 535 the following further passage occurs:—

p. 535 the following further passage occurs:—

“ Hitherto we have been considering the contract as to its nature and solemnities, and examining how far, being English, and entered into with reference only to England, it could be dissolved by a Scotch sentence of divorce. But the circumstance of parties belonging to one country marrying in another (which is the case before us) presents the question in another light. In personal contracts much depends upon the parties having regard to the country where it is to be acted under, and to receive its execution; upon their making the contract, with a view to its execution in that country. The marriage contract is emphatically one with a view to an immediate view to the usual place of their residence. An Englishman, marrying in Turkey, contracts a marriage of an English kind, that is, excluding plurality of wives, because he is an Englishman, and only residing in Turkey and under the Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England, and for English purposes; consequently the incidents and effects, nay, the very nature and essence (to use the language of the Appellant's argument) must be ascertained by the English, and not by the Turkish law. So of an Englishman marrying in Prussia, where incompatible temper, that is, disagreement, may dissolve the contract; as he marries with a view to English domicile, his contract will be

(1) See as to this passage an article on "Non-Christian Marriage" by Sir Dennis Fitzpatrick in Jour. Soc. Comp. Leg., N.S., No. V, p. 374.



judged by English law, and he cannot apply for a divorce here upon the ground of incompatible tempers. In [536] like manner a domiciled Scotchman may be said to contract not an English but a Scotch marriage, though the consent wherein it consists may be testified by English solemnities."

Case No. 6.—*Harvey v. Fernie*. 6 P.D. 35 (C.A.).

The question in this case was whether a divorce granted by a Scottish court when the parties were domiciled in Scotland in respect of a marriage celebrated in England on a ground not recognised as a valid ground for divorce by an English court would be recognised in England.

Counsel for the appellant (arguing that the divorce would not be recognised in England) was contending that the status created by the marriage contract is governed by the *lex loci contractus* not the *lex domicilii* and (on p. 40) supports this contention by the argument that if this were not so a marriage entered into in England by a domiciled Turk must be regarded as a polygamous marriage.

James, L.J. (p. 46): "All the rights and consequences arising from the marriage are to be determined by the law of that which by the actual contract of marriage becomes the domicile of both parties, exactly to the same extent as if they had both been originally of the foreign country."

Cotton, L.J. (p. 47): "The word 'marriage' is used in two senses. It may mean the solemnity by which two persons are joined together in wedlock, or it may mean their status when they have been so joined. The solemnity . . . must depend upon the law of the country where that solemnity takes place. When the marriage takes place in a country which is not the country of the domicile, the country of the domicile will hold the persons as duly married if they have followed the forms required by the country where it is solemnised. Of course I am speaking only of Christian countries and that gets rid of what was put to us by (Counsel for the appellant) that we have to consider what would be the consequence of dealing with the law of the domicile supposing it to be Turkish" (and he goes on to say), that the status is governed by the law of the domicile, that divorce is not an incident of the contract governed by the *lex loci contractus*; divorce is an incident of the status.

Lush, L.J. (p. 53): "There is no analogy whatever between the union of a man and a woman in a country where polygamy is allowed, and the union of a man and a woman in a Christian country. Marriage in the contemplation of every Christian community is the union of one man and one woman to the exclusion of all others. No such provision is made, no such relation is created in a country where polygamy is allowed, and if one of the numerous wives of a Mahometan was to come to this country and marry in the country, she could not be indicted for bigamy, because our laws do not recognise a marriage solemnised in that country, a union falsely called marriage, as a marriage to be recognised in our Christian country."

This decision was affirmed by the House of Lords on appeal, 8 A.C. 43.

Case No. 7.—*R. v. The Superintendent Registrar of Marriages, Hammersmith; ex parte Ma-Anwaruddin*. 1917, 1 K.B. 634.

M-A was a native of and domiciled in the province of Madras in India. He was a Mahometan and under the law of India was subject in matters of personal status to Mahometan law. In March 1913 he contracted in England a civil marriage with R.P.H. She deserted him and in December 1913 M-A obtained in the City Civil Court at Madras a decree of restitution of conjugal rights against R.P.H., which was served on her, but she refused to obey the decree.

In August 1915 M-A made a declaration of divorce against R.P.H. This declaration was drawn up and signed in England. It was based on the desertion of R.P.H. and her failure to obey the decree of the Madras Civil Court. This declaration was a valid dissolution of the marriage under Mahometan law, which applied to M-A under the law of India. Under Mahometan law a husband can divorce his wife by a declaration of divorce by a mere declaration of his will and pleasure. M-A could not obtain a divorce from R.P.H. from the courts of India because the courts only had jurisdiction to dissolve the marriages of Christians. Under Mahometan law a man may have four wives.

M-A presented a petition to the Divorce Division of the High Court in England praying (1) for a declaration that his marriage had been dissolved, or alternatively (2) for a decree of dissolution of his marriage with R.P.H.

His petition was dismissed by Bargrave Deane, J., on the ground that the Court had no jurisdiction to entertain it because M-A was not domiciled in England.

Bargrave Deane, J., stated in his judgment that he thought that the marriage with R.P.H. had in fact been dissolved and that there was no marriage subsisting.

In August 1916 M-A applied to the Superintendent Registrar of Hammersmith for a licence to marry V.L.L. and upon his application being refused, he obtained from the Divisional Court a *rule nisi* directed to the Superintendent Registrar, to show cause why a writ of mandamus should not issue commanding him to issue a certificate and licence for the marriage with V.L.L.

The Solicitor-General appeared to show cause against the issue of the writ, and argued (*inter alia*):—

- (I) That an English marriage could not be dissolved by a "declaration of divorce" under Mahometan law; only a Mahometan marriage could be so dissolved.
- (II) An English marriage could only be dissolved by a decree of an English court or a court of the husband's domicile.
- (III) A Mahometan marriage being polygamous was not a marriage recognised by English law.

M-A (appearing in person) argued *inter alia* that the decision in *Ganer v. Lady Lanesborough*, 1790, 1 Peake 25, showed that a decree of a court was not essential for the dissolution of a marriage.

Held by Lord Reading, C.J.:

(I) The marriage with R.P.H. was a valid marriage. M-A could not set up the law of his domicile (Mahometan law), which permitted him to have four wives as rendering invalid a monogamous marriage contracted by him in England (*Chetti v. Chetti*).

(II) The status of marriage is conferred by entering into a contract of marriage; M-A by entering into the marriage in England celebrated in accordance with the law of England had acquired the status of a party to a marriage as understood in English law (*viz.* a monogamous marriage).

(III) R.P.H. acquired by the marriage the domicile of M-A, and consequently became subject to the law of his domicile in respect of the consequence of the marriage relation (*Harvey v. Fernie*) and the marriage could (*prima facie*) be dissolved in accordance with the law of M-A's domicile and for a cause which would not support a petition for divorce in England.

(IV) Mahometan law was the personal law of M-A, but it was a religious law and not the general law applicable to all who are domiciled in India, but only to Mahometans. R.P.H. acquired by the marriage the domicile of M-A in India, but she did not acquire his religion or become subject to Mahometan law, except in so far as it was the law of his domicile, and then to that extent only.

(V) There was no dissolution of this marriage by the courts of India, but only a dissolution by the mere operation of the laws of the religion of the husband and without a decree of a court of law.

There was no authority for the view that an English marriage could be dissolved in this way.

(N.B.—It is difficult to see whether Lord Reading based his view upon (1) the absence of a decree of a court, or (2) the fact that the dissolution was one according to the law of M-A's religion only, which did not apply in India to all persons domiciled there. The manner, however, in which he carefully reserved his view as to whether the marriage would have been dissolved even if a court in India had made a decree if such a decree had been based upon the husband's right to pronounce a declaration of divorce rather indicates that he considered (2) and not (1) the more important.)

Darling, J.:

(1) A Mahometan polygamous marriage is an institution differing widely in character from an English monogamous marriage. They are not the same institutions (*Hyde v. Hyde*).

(2) A person who was already a party to a polygamous marriage and then came to England and contracted a monogamous marriage could not be indicted for bigamy. The first union would not be regarded as a marriage (*Harvey v. Fernie*). The nature of the marriage into which M-A and R.P.H. entered is determined by the *lex loci contractus* (English law). It was a monogamous marriage.

(3) M-A's marriage with R.P.H. was one to which a declaration of divorce under Mahometan law had no application.

Bray, J.:

The authorities (*Harvey v. Fernie*) show that the English courts will recognise the decree of a court of the domicile even if given on grounds which would not support a decree in England. They do not decide that the courts will act upon the law of the domicile in the absence of a decree. There has been no decree here.

On appeal to the Court of Appeal, it was held by Swinfen Gady, L.J.:

- (1) M-A contracted a monogamous (Christian) marriage with R.P.H.
- (2) A Mahometan polygamous marriage is something quite different—a different status (*Warrender v. Warrender, Harvey v. Fernie*).
- (3) The marriage with R.P.H. has not been dissolved by a court of competent jurisdiction, and it was not a marriage in the Mahometan sense which can be dissolved in the Mahometan manner.

(N.B.—He also quotes Lord Brougham in *Warrender v. Warrender*:—

"Indeed, another consequence would follow from this doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the courts and their power of dealing with the rights and duties of the parties to it: if there were a country in which marriage could be dissolved without any judicial proceedings at all merely by the parties agreeing in *pais* to separate, every other country ought to sanction a separation

in *pais* there and uphold a second marriage contracted after such separation. It may be safely asserted that so absurd a proposition never could for a moment be entertained," which indicates that he thought that a divorce by "agreement in *pais* to separate" would not be recognised in this country.)

Banks, L.J.:

- (1) A Christian marriage is a different institution from a Mahometan marriage.
- (2) A Christian marriage cannot be dissolved by a Mahometan divorce.
- (3) A Christian marriage cannot be dissolved by an "agreement in *pais* to separate," even if that is recognised by law of domicile.

Case No. 8.—*Nachimson v. Nachimson*. 1930, P. 85 (Hill, J.) and 217 (C.A.), 46 T.L.R. 166 and 444.

This was a petition for judicial separation, on the ground of cruelty, brought by the female petitioner, I.N., against the male respondent, G.M.N. The parties had, on the 19th March, 1924, been through the formalities required by the laws of the U.S.S.R. for a marriage at the Moscow Provincial Registration Office, Krasno Presna Section, Moscow—their domicile at that time being Russian. The parties subsequently cohabited in Sweden and in England, where a child was born to them. The present petition was filed on the 9th March, 1929. The respondent alleged that the marriage had been dissolved on the 29th January, 1929, according to the laws of the U.S.S.R. by an *ex parte* registration of dissolution, at the instance of the respondent, at the consulate-general of the U.S.S.R. in Paris (there being at that time no Soviet consulate in London), and appeared under protest.

On the 11th November, 1929, an order was made for the trial of the following questions before the hearing of the petition:—

- (1) Have the respondent and petitioner ever been man and wife?
- (2) If yea: (a) Were the parties domiciled in the U.S.S.R. on the 29th January, 1929?
- (b) Was their marriage dissolved on that day?

The evidence of several experts in Russian law was given on the points of Russian law arising out of these questions. These experts were unanimous on the question of the nature of the union between the parties created by the marriage in Moscow, namely, that it was a union presumably for life, between a man and a woman, and continued until dissolved, and that neither party could marry another person during the subsistence of the marriage; and in holding that, under the law of the U.S.S.R., such a marriage could be terminated at any time by mutual consent or the unilateral desire of one party, if the appropriate proceedings were gone through—which consisted merely in registration at the appropriate office. Their evidence was conflicting on the question whether, in this case, the registration of dissolution at the consulate-general in Paris was effective under that law to dissolve the marriage—the difference relating to the jurisdiction of the consulate-general in respect of these parties.

Both parties contended that the nature of the union between them created such a relationship of husband and wife as to give the court jurisdiction. The respondent contended—

- (a) That the matrimonial domicile was Russian.
- (b) That the dissolution by registration in Paris was a valid dissolution under the laws of the U.S.S.R., and the English courts recognised any dissolution of a marriage of parties domiciled abroad which was recognised by the *lex domicilii*.
- (c) Alternatively, if the parties were not domiciled in the U.S.S.R., the provision of the *lex loci contractus* that the marriage could be terminated unilaterally or by common consent was one attached to the contract of marriage, and a dissolution in accordance with it must be recognised by the law of the domicile.

The petitioner contended—

- (a) That the parties were now domiciled in England, and that the marriage could only be dissolved by the English courts in the manner and on the grounds recognised in English law;
- (b) That the question whether and in what manner a marriage could be dissolved was an incident to the marriage, and was not one which affected the nature of the contract; the provisions of the *lex loci contractus* on this point were immaterial.

And, alternatively, assuming a Russian domicile—

- (c) The English courts would not recognise a dissolution (i) which was not the judgment of a court, or (ii) pronounced elsewhere than the country of domicile; and
- (d) In any case, the registration in Paris was not a valid dissolution of the marriage according to the laws of the U.S.S.R.

Held by Hill, J.:

- (1) That, though neither party desired it, it was necessary for the court *ex officio* to decide the first question first of all—as, if there was no marriage, the court had no jurisdiction over the matter alleged in the petition. The question was whether the parties were "husband" and

"wife" and there was a "marriage" within the meaning of these terms in section 21 of the Judicature Act, 1925, from which the jurisdiction of the High Court in matrimonial causes and matters was derived.

(2) That it was therefore necessary to determine what was the nature of the union by the *lex loci contractus* (U.S.S.R.), and ascertain whether such union was of such a kind that it was a "marriage" in respect of which the court had jurisdiction to grant relief in a matrimonial cause.

(3) That, in order to give the court jurisdiction, the marriage must be the (a) voluntary (b) union for life (c) of one man and one woman to the exclusion of all others (*Hyde v. Hyde*, L.R. 1 P. and M. 130).

(4) That a marriage contracted in the U.S.S.R. was a union which the parties or one party could dissolve at will by complying with the forms prescribed by law.

Though the requirement of English law that the marriage must be "for life," does not exclude unions dissoluble by Act of State, but only means indissoluble by the acts of the parties during life, that requirement was not fulfilled by a marriage under which the parties were bound to one another until death or until one (or both) desired a dissolution and procured a ministerial Act of State, which gives legal force to the desire; and, in consequence, a marriage contracted under the laws of the U.S.S.R. was not a "marriage" within the meaning attached to that word in the Statute from which the court derived its jurisdiction, and there was no jurisdiction to give the relief prayed for in this case.

Note on p. 96.—The learned Judge said: "There can be no question but that a marriage which permits polygamy is not a 'marriage' at all within the meaning of English law even as regards the first wife."

On appeal by the petitioner against the judgment of Hill, J., the Court of Appeal (Lord Hanworth, M.R., Lawrence, L.J. and Romer, L.J.), unanimously reversed his decision.

The C.A. agreed with the judgment of Hill, J., on the points summarised above under the numbers (1), (2) and (3), but differed from him with regard to (4), and held that:—

(1) The dissolubility or indissolubility of the marriage and the conditions under which it could be dissolved is a question relating to the rights of the parties under, or flowing from, the marriage and is a matter which was an incident of and not part of the essence of the contract of marriage; these conditions are not conditions incorporated in and forming part of the marriage contract under the *lex loci contractus* of the marriage, but are conditions of defeasance governed by the law of the domicile of the spouses and not dependent on any agreement between them or capable of being altered by the parties (following on this point the dicta of Lord Brougham in *Warrender v. Warrender*).⁽²⁾

(2) Consequently in determining whether there was a marriage within the meaning of section 21 of the Judicature Act, 1925, so as to give the Court jurisdiction to entertain a petition for judicial separation and in ascertaining the essential nature of the union under the *lex loci contractus* for this purpose, the conditions under which marriages could be dissolved under the *lex loci contractus* of this marriage were immaterial, since they did not form part of the essence of the matter and it is the law of the matrimonial domicile of the parties and not the *lex loci contractus* which governs all questions relating to the dissolution of the marriage.

(3) That in considering, by reference to the *lex loci contractus*, whether the essential nature of the union so contracted fulfilled the conditions necessary to give the Court jurisdiction and applying for this purpose the requirements of the definition of Lord Penzance in *Hyde v. Hyde* (see point No. 3 above) and in dealing with the requirement (b) that it should be a "union for life," the test was whether the union was or was not one of limited duration and, if it was of unlimited duration, and continued for life, unless dissolved in accordance with the law of the domicile of the spouses, it satisfied the condition of this requirement and was a "union for life."

(4) Upon the evidence of the experts, it was not possible under the law of the U.S.S.R. for parties by agreement to make provisions relating to the duration of the marriage or relating to the conditions under which it could be dissolved, and marriage in Russia were of unlimited duration and continued for life unless dissolved.

(5) Consequently a marriage celebrated in the territory of the U.S.S.R. in accordance with the law in force in that territory in 1924 was a marriage within the meaning of that term in section 21 of the Judicature Act, 1925, and fulfilled the requirements necessary for the matrimonial jurisdiction of the English courts to be invoked by the parties to it.

Case No. 9.—*R. v. Naquib*. 1917, 1 K.B. 359 (C.C.A.).

N, who was an Egyptian by birth and Mahometan by religion, went through a Mahometan form of marriage in Egypt with X in 1898. In January 1903 N went through a form of marriage in England with A.W., his marriage with X still subsisting.

In 1913 N divorced X by a Mahometan divorce. In 1914 N married T.J.S. in England, A.W. being still alive and his marriage with her not having been annulled or dissolved.

N was indicted for bigamy. It was contended on behalf of N that the marriage with A.W. in 1903 was void by reason of the prior marriage with X, and in 1914 when he married T.J.S. he was not married to any person.

⁽²⁾ 2 Cl. and F. 488 at p. 532.

No evidence of the validity of the marriage with X under the laws of Egypt was given, but Avory, J., held: (1) That it was incumbent upon the defence to produce such evidence if they relied upon a foreign marriage, and that, as the defence had failed to do so, the court could take no account of it, and (2) even if the marriage in Egypt with X was valid by Egyptian law, it was a polygamous marriage; a polygamous marriage was a different thing from a monogamous marriage and will not be regarded in England as a marriage, and therefore it was no bar to the marriage with A.W., which was a valid marriage. N was convicted.

On appeal to the C.C.A. the conviction was affirmed; the C.C.A. expressed no opinion on second ground on which conviction was based, but held the first ground to be a good one and dismissed the appeal.

Case No. 10.—*Chetti v. Chetti*. 1909, p. 67.

The petitioner, an Englishwoman, married the respondent, a Hindu domiciled in India, at a London registry office in 1890. The respondent returned to India shortly after the marriage and petitioner sought a decree of judicial separation on the ground of desertion.

The respondent contended (1) that the marriage was null and void on the ground that by his personal law (the law applicable to him in India, the country of his domicile) he was incapable of marrying anyone outside his own caste or who was not a Hindu. (2) That under his personal law he might take more than one wife; consequently his marriage with the petitioner was not a monogamous marriage and not within the matrimonial jurisdiction of the court, or, alternatively, that by his personal law he was incapable of contracting anything except a polygamous marriage.

Held by Sir G. Barnes, P.:

(1) That the incapacity under the law of his domicile alleged by respondent to marry the petitioner was not a general incapacity resting on all persons domiciled in India, but a religious incapacity, which did not differ in principle from the incapacity of a priest under the law of some Catholic countries. It was an incapacity he could get rid of by changing his religion.

(2) That even if (a point on which the president declared he was not satisfied on the evidence) the marriage would be regarded as invalid in the courts of India, on ground of incapacity on the part of the respondent, the English courts could not recognise such incapacity as invalidating the marriage celebrated in England.

N.B.—The president stated in his judgment that the present case did not affect the question of the recognition outside India of Hindu marriages entered into in India.

Case No. 11.—*In re Ullee*. 53 L.T.N.S., 711 Chitty, J., and 54 L.T.N.S. 286 C.A.

Ullee, the Nawab Nazim of Bengal, went through a ceremony of marriage with an Englishwoman (the applicant in this case) in London according to the rights of the Mahometan religion, which Ullee professed, in May 1870. Of this marriage four children were born. In 1875 Ullee made a declaration before the Lord Mayor of London avowing the marriage, recognising the children as his and making them his heirs according to Mahometan law, and at the same time a deed was entered into between the applicant and Ullee providing that Ullee should have sole control over these children in the matter of their education. In 1880 he went through a similar ceremony in England with another Englishwoman, and the applicant left him. He had also in India, prior to 1870, at least one other wife, with children. After the applicant left him he retained her four children and sent them to India, and a little later returned himself to India, where he died in 1884. He left a will appointing two persons as guardians of these children.

At the time of the application two of the children had been brought by their guardians to England for the purposes of their education. The applicant claimed the custody of these children from the guardians on the ground that there had been no valid marriage between the parties and they were illegitimate, and that consequently the right of custody was vested in her as their mother. On behalf of the respondents it was argued that the children were legitimate since their father was of Indian domicile and the law of his domicile was Moslem law, and consequently the rights of custody were vested in the father, and he could appoint guardians by will. Alternatively, they relied upon the terms of the deed and pleaded that the court, in the exercise of its discretion, should confirm their guardianship in the interests of the children. As regards the deed, the applicant pleaded that a mother was unable to dispose of the rights of custody over her children by deed, since it was contrary to public policy.

Chitty, J., found for the respondents, but he did so on the ground that, even if the children were to be assumed to be illegitimate, the court could have regard to the rights of the putative father, and could exercise its discretion in accordance with the interests of the children, and he held that the guardianship of the respondents was in the interests of the children, and this decision on the ground of discretion was upheld by the Court of Appeal.

Chitty, J., did not decide the question whether the children must or must not be regarded as illegitimate, but he made certain observations upon this question. He referred to the fact that at the time of the marriage Ullee was already married and the marriage was polygamous and intended to be so, and he referred to the case of *Hyde v. Hyde*, and said that such a polygamous marriage could not be regarded as a marriage in the sense that the term is used in English law, and, even if binding on the husband in Mahometan law, it could not be binding

on any spouse of English domicile. But he then quoted the passage in the judgment of Lord Penzance in *Hyde v. Hyde*, in which Lord Penzance said that, in refusing to treat a polygamous marriage as a marriage for the purposes of the matrimonial jurisdiction of the English courts, he was in no way to be taken as deciding in any question with regard to the rights of succession or legitimacy of the wives and children of such marriages; the question of their status according to English law was left open. Chitty, J., said, with reference to the applicant and her children: "I am by no means satisfied that, according to the principles of international law as now understood, I ought to hold the infants now in question to be illegitimate," but, for the reasons given above, he found it unnecessary to decide the question.

Case No. 12.—*In the Estate of Abdul Majid Belshah, Deceased*.

(The "Times" newspaper, December 16 and 18, 1926, January 14 and 18, 1927.)

NOTE.—(In the report of the "Times," the deceased is described as being domiciled in England. It has been ascertained that this is an error and that the deceased was admitted on the pleadings to be domiciled in Bagdad.)

The deceased, Abdul Majid Belshah, was a person of Mahometan religion domiciled in Bagdad. According to the law of his domicile (*i.e.*, Mahometan law) he was capable of marrying more than one wife. For some fifteen or more years before his death he had been resident in England and engaged as a teacher of Eastern languages. In 1905 in England he went through a ceremony of marriage according to Mahometan law with an English woman, described in the proceedings as Violet Annie Majid, and by her he had two children. Later, in 1920 (or alternatively in 1922) he went through a ceremony of marriage in England according to Mahometan law with another English woman, described in the action as Kate Elizabeth Belshah, by whom he had also two children. In 1923 he died intestate. Claims to his estate were made in the Probate Division of the High Court by these two women and their respective children, in which each of them denied the right of the other to succeed to any of the estate. However, during the hearing the two parties came to an agreement, and the proceedings were terminated on the terms of an agreed settlement, which was made an Order of the Court. Under this settlement both parties recognise the validity of both the marriages according to Mahometan law and the legitimacy of the four children, and the solicitors to the two parties were appointed administrators *ad colligenda bona*.

Case No. 13.—*Connolly v. Woolrich and Johnson*.

The report of this case is extremely long (sixty-eight closely printed pages). In the summary which I give here only those points which appear to be most relevant to the matters now under consideration are given, and for the purposes of a short summary it has been necessary to take the various points relied upon in the judgment in somewhat different order from that in which they appear in the report.

Connolly v. Woolrich and Johnson.

"Lower Canada Jurist," Vol. XI, 197 (1867).

(Decision of Monk, J., in Superior Court of Lower Canada.)

W. Connolly, a R.C. born in Lower Canada, which was his original domicile, in 1786, went to the North-West Territories when 16 years of age and resided there for thirty years at different posts of the North-West Company.

In 1803, in the Athabasca country in the North-West Territories, at the age of 17 years, he took to live with him as his squaw or Indian wife, an Indian girl called "Suzanne Pas de Nom," the daughter of an Indian Chief, with the consent of her father, and lived with her as his wife, according to the usages and customs of the Cree tribe to which she belonged. They were faithful to one another for twenty-eight years and had six children. They both came to Lower Canada in 1831 and remained there, living as husband and wife, for a short period, Suzanne being called Mrs. Connolly and introduced as his wife to the principal people of the locality.

In 1832 Connolly left Suzanne and married according to the rites of the Roman Catholic Church Julia Woolrich, his second cousin (under a dispensation from the Bishop), and lived in Lower Canada with Julia as his wife till 1849 when he died. He had two children by her.

In 1848 he made a will, bequeathing all his property to Julia and her two children. The validity of the disposition of the whole of the property by will was disputed by the Plaintiff, one of Connolly's children by Suzanne, on the ground—

- (1) That Connolly and Suzanne were validly married and Suzanne was his lawful wife at the time of his death.
- (2) That the law of the domicile of Connolly was the law of Lower Canada, and under that law (in the absence of contract) the régime of community of goods was created between Connolly and his wife Suzanne Connolly, and under this régime Suzanne Connolly at the time of Connolly's death was entitled to one half of his property and Connolly could only dispose by will of one half.



1933

- (3) That the Plaintiff (Suzanne Connolly being now dead) was entitled to one-sixth of of his mother's half share and the Plaintiff claimed an account for that purpose from the Defendant who was then in possession of the whole property.

The Defendant (Julia being dead at the time of the institution of the action) was the Executor under Julia's will, and he contended *inter alia* (1) that the alleged marriage of Connolly to Suzanne was a nullity and that Julia was the only lawful wife of Connolly on the grounds that the union of Connolly and Suzanne was not one which could be recognised as a valid marriage; since it was a union which was only concubinage, or alternatively was one which, if governed by any law or custom at all, was governed by the customs of the Cree Indians which permitted polygamy and divorce at will by repudiation.^(*) (2) Alternatively to (1), that the union was one governed by the law of the Cree Indians (a) which permitted divorce at will, and Connolly had in this way divorced Suzanne before he married Julia; (b) which did not recognise the system of community of goods.

In considering the law applicable to this case Monk, J., said that there were two principles to be applied: (1) that the law to be applied to determine whether a marriage had taken place was the law of the place where the marriage was contracted, and (2) that assuming that by the application of (1) it was found that a valid marriage had been contracted the law which must be applied to determine the rights, powers and capacities of the parties to the marriage was not the law of the country in which the marriage was celebrated, but the law of the husband's domicile, and that there was a distinction to be drawn between these two matters. In support of his views with regard to the principles to be applied, he cited the passage which is quoted below from Burge's Colonial and Foreign Laws (p. 261):—

"It ought always to be remembered that the question, whether the status has been constituted by means of a legal marriage, is perfectly distinct from the consideration of the rights, powers and capacities which the status confers.

"The enquiry whether the status has been constituted is answered by the law of the country in which the marriage was contracted.

"If by marriage, which, according to that law, is valid, the status is constituted, the connexion of the parties with the law of that country ceases, unless that place be the domicile of the husband; and then its law governs, not because the marriage was celebrated there, but because it is the country of the husband's domicile. The parties, if they do not, by any express agreement on their marriage, stipulate as to their future rights and capacities, are presumed to submit to them as they have been defined by some municipal law; and the law which, it is presumed, they contemplate is not that of a country in which they have no intention to reside, and to which, therefore, their status cannot be subject, but that of the country in which, as it is the place of their domicile, their rights and capacities are to be exercised.

"Jurists, therefore, concur in selecting the law of the domicile of the husband and wife as that which determines the personal powers and capacities incident to their status, and not the law of the place in which the marriage was celebrated." Burge, Colonial and Foreign Laws, vol. I, p. 245; 5, 14.

Monk, J., held that the law of the domicile of Connolly was the law of Lower Canada. Connolly had acquired a domicile of origin in Lower Canada, and had never lost it during his long residence in the North-West Territories because he had always had the *animus revertendi*. (Alternatively, if Connolly had lost his domicile of origin and acquired a domicile in the North-West Territories, he had again acquired his domicile in Lower Canada on his return in 1831).

In regard to the *lex loci actus*, the alleged marriage took place on the Rat River in the Athabasca country, in what was then called the North-West Territories. The Athabasca country was at that time an undeveloped country inhabited mostly by Indians, with settlements and trading posts scattered here and there, and the learned judge held that the principles which he had to apply to determine what was the law of that country were the following:—

- (1) In the case of a colony, plantation or settlement of a European country in savage territories the law of the parent (or settler) State then in being became immediately and *ipso facto* in force in these new settlements, and the discoverers and first inhabitants of these places carried with them as their inalienable birthright the laws of their own country, but only took with them so much of these laws as were applicable to the conditions of an infant colony.
- (2) The laws and usages of the native tribes were not abrogated, but left in full force in regard to the civil rights of the natives.

Applying these principles to the Athabasca country, Monk, J., found the facts to be as follows:—

The Athabasca country was situated in a part of Canada which was discovered and developed both by French and British, the British working from Hudson Bay and through the Hudson Bay Company and the French from Lower Canada. The Athabasca country was originally in the French area and belonged to the Crown of France, in the same way as the Hudson Bay Company's area belonged to the British Crown. In 1770 the Hudson Bay Company were granted a charter by Charles II, and this charter made English law applicable within the territory of the company

(*) The evidence was that polygamy was in fact rarely practised by the Northern American Indians and was practically confined to powerful Chiefs, and that it was not practised by the white men who frequently married Indian women according to the local Indian customs and treated their Indian squaws as wives whom they had married for life.

to all persons belonging to the company or living under it, but Monk, J., held on various grounds that the Athabasca was not covered by this charter (*inter alia* on the ground that it was then belonging to the French Crown and the charter excluded territory possessed by any other Christian Power or State). In the alternative, if he was wrong on this point and it was the Hudson Bay Company's area, English law was only made applicable to the persons under the company, and the Indians remained subject to their own law and customs. The position, therefore, was that the two systems of law existed side by side in the Athabasca territory, that is to say, (a) French (or, in the alternative, English) law applicable to the white settlers and (b) the Indian customs applicable to the Indians. In 1763, on the cession of the French possessions on the continent of North America, the North-West Territories came under the British Crown, but English law was not introduced into the territories ceded by France, and the laws of the Indians and the French settlers remained as they were. The possible *lex loci actus*, therefore, in this case were French law applicable to the settlers, and therefore to Connolly, and the native Indian law applicable to the Indians.⁽⁴⁾

The marriage in question, therefore, was one which was contracted by Connolly, a white settler (subject to French law), and an Indian woman, Suzanne, subject to Indian law and custom, according to the customs of the Indians, and the question was whether this marriage, celebrated according to Indian law and custom, could in these circumstances be recognised as valid by the application of the general rule that a marriage celebrated in any country in accordance with the forms and laws of that country must be recognised elsewhere as a ceremony capable of creating the status of marriage. The objections raised to the recognition of this marriage were:—

- (1) The difference in race and religion of the parties.
- (2) That the Cree Indian law and custom could not be recognised as a law at all.
- (3) That a union under the Cree law and custom could not be recognised as creating the status of marriage owing to the fact that under it divorce by repudiation at will, and polygamy were permitted.

Monk, J., overruled No. (1) on the ground that the differences of religion and race and the fact of one party being a Christian and the other a pagan could not materially, if at all, affect the question. He overruled No. (2) on the ground that the Crown, as the supreme authority in the Empire, had by not abolishing or altering the Indian law and custom and by allowing it to exist for 100 years, impliedly sanctioned it, and that the sovereign power in these matters having by proclamation acknowledged the law and usages of the Indians to be in force the Court must, so long as they were in force in any part of the British Empire or elsewhere, acknowledge and enforce them, and consequently the Indian custom or usage was, as regards the jurisdiction of the Court, a foreign law of marriage which must be recognised as such. With regard to (3) (the objection based on the right of repudiation and on polygamy) Monk, J., said that there seemed to be two questions: (a) whether a union under the Cree Indian law could be considered to be a marriage at all, and (b) whether, if so, the existence of the right of repudiation and polygamy afforded any ground for making an exception to the general rule that all marriages celebrated in a foreign country under the law of that country must be recognised. As to what must be regarded as a marriage, he cited the early Canon Law which recognised as marriages all unions where consent existed followed by co-habitation (*per verba de presenti*). This law prevailed generally over Europe until the Council of Trent. The Council of Trent introduced a new requirement, the presence of a priest, but this requirement did not apply until the declaration had been published in the parish, and did not apply in places where circumstances rendered its fulfilment impossible. Turning then to the Common Law of England, Monk, J., held that a marriage *per verba de presenti* was a good marriage by English Common Law, and said with regard to the decision of the House of Lords in *Rex v. Millis*, which laid down that the presence of a minister episcopally ordained was necessary, that even if this decision was correct (which he thought it was not) and even if it were binding on him (which he thought it was not on the ground that the Law Lords were equally divided) still that decision did not lay down a rule of English Common law which was applicable outside the United Kingdom or in places where it was virtually impossible to fulfil this requirement. There were no ministers or priests or magistrates in the Athabasca country and the intention of Connolly to make Suzanne his wife was held to be clearly proved. On these grounds he held that the marriage according to the Cree Indian law did constitute a status which must be recognised as a marriage and could not be disregarded and treated as a nullity.

He then turned to the second question, (b), and said that this question was whether there was any authority for treating marriages celebrated in countries and under laws where the right of repudiation and polygamy were permitted as exceptions to the general rule. He said that he was unable to find any authority of sufficient weight in support of such an exception, and cited large numbers of authorities, but only one of them, and that a French author, Merlin, deals specifically with polygamous marriages:—

"I do not find in any of these authorities the distinction here contended for, and what the law does not distinguish I will not. And here it may be proper that I should refer more particularly than I have heretofore done to one noticeable incident in these Indian marriages, and that is polygamy. It was contended that this imports to this connexion in an especial manner its invalid character and renders it unworthy of recognition as a legal marriage by this Court, excluding it from the operation of the general rule so clearly

(4) See footnote at the end of the case. Monk, J., also considered the position in the alternative on the footing that he was wrong in his findings above, and that the laws applicable were either English law and Indian custom or English Common Law alone to the exclusion of all Indian custom.



enunciated and laid down in authorities which I have just cited. But it is obvious and must be conceded at once that this is an incidental and not an essential element in the law or custom of marriage known among those aboriginal tribes. It is an abuse but not a condition of or an essential ingredient in these barbarian obligations of matrimony. If proved at all in this case it is manifestly established as the exception and not the rule; and in regard to marriages between Christians and natives it is not proved to be the custom."

On these grounds the judge held that the marriage must be recognised.

Dealing next with the second contention of the Defendant, that if this was a marriage according to the law and custom of the Cree Indians that law and custom permitted divorce by repudiation, and Connolly had exercised this right, Monk, J., held (referring here again to this distinction between the law which decides whether the status of marriage has been constituted and the law which decides the rights and powers and capacities which the status of marriage confers) that the right of repudiation or divorce came within the latter category and was governed by the law of the domicile of the husband. The law of the domicile of Connolly being the law of Lower Canada, and that law not recognising divorce by repudiation, Connolly was unable to terminate his marriage in this way.

On these grounds, therefore, Connolly's marriage with Suzanne was held to be good and the second marriage with Julia Woolrich a nullity.

Dealing finally with the third contention of the Defendant, that the marriage being governed by Cree Indian law that law did not recognise any system of community of goods between husband and wife, Monk, J., held that the system of the proprietary rights between husband and wife was a matter which was governed by the law of the domicile as being one of the rights, powers and capacities conferred by the status of marriage, and on this ground the proprietary rights of Connolly and Suzanne under their marriage were governed by the law of Lower Canada, which did recognise the system of community of goods, and on this ground he gave judgment for the Plaintiff.

Note 1.—The case was decided on the footing that in the Athabasca country at the relevant time the two possible laws applicable as the *lex loci* were French law and Indian law, but the view which Monk, J., took that this marriage would have been a good marriage at English Common Law if that law alone applied would have rendered the decision the same on this hypothesis.

Note 2.—It will be seen from the above summary that the decision is partly based upon the distinction between the ceremony which is governed by the *lex loci actus*, the law to be applied to see whether the status of marriage is created, and the rights, powers and capacities of the parties, assuming the status to be created under (1) above, which are governed by the law of the domicile. In determining the question whether the status was created, Monk, J., rejected the contention that the fact that under the *lex loci actus* polygamy was permitted prevented the court from recognising the ceremony in accordance with the *lex loci* as creating the status of marriage, and then went on to hold that the question of divorce fell into the second category and was one which was decided by the law of the matrimonial domicile and not by the *lex loci actus*. So far as the point raised by the right of divorce by repudiation at will is concerned the decision of the judge upon this point is in agreement with the recent decision of the Court of Appeal in the Russian case of *Natchimson v. Natchimson*.

It will be seen also that Monk, J., held that the fact that under the *lex loci actus* polygamy was permitted did not prevent the court from recognising that the ceremony of marriage had created the status of marriage. There is no decision of the English courts to the same effect on this point. But it is interesting to observe that Monk, J., also treats the question of polygamy (*i.e.*, the right of the husband to take more wives) as a matter which is an incident to the status (being a question of the rights, powers and capacities of the parties to the marriage) which should, therefore, be governed by the law of the matrimonial domicile, and that the application of this principle results in the following conclusion: That if an Englishman governed by English law enters into a Mahometan or other polygamous marriage in a foreign country where such marriages are recognised, he must be regarded as having contracted a marriage, but since by his personal law, the law of the domicile, he is not permitted to be polygamous, the result is that a monogamous marriage has been contracted, but (*scilicet*) in the contrary case, if an Englishwoman marries in this country a Moslem domiciled in a country where polygamy is permitted, a marriage is created, but it is one which will be governed by the law of the domicile of the husband, namely, Mahometan law.

The first of these propositions seems to be in conflict with the decision of the English courts in the Baralong case, and the second is contrary to the decision of the English courts in the cases of *Ex-parte Anwarudin Khan* and *R. v. Naquib*.

Group of Cases No. 14.—*Esop v. Union Government*. 1913, C.P.R. 133.

E, an Indian Mahometan resident in Cape Colony since 1902, visited India in 1912 and married B.M. there by Mahometan rites, and brought her back to South Africa in 1913. The question was whether B.M. had the right to admission under section 4 (e) of Act No. 30 of 1903 as the "wife" of the applicant.

Held that the marriage between B.M. and E being a polygamous one, B.M. could not be regarded as the "wife" of E within the meaning of the Act, the word "wife" meaning the spouse of a marriage recognised in South Africa and polygamous marriages not being so recognised.

(N.B.—Report does not make it clear where E was domiciled, but presumably in South Africa.)

R. v. Sukina. 1912, T.P.D. 1079.

S was indicted with a contravention of Act No. 15 of 1907, namely, being a prohibited immigrant and entering the Province. It was admitted that she was *prima facie* a "prohibited immigrant," but it was claimed she was entitled to the benefit of the exception in the Act in favour of "the wife or minor child" of a person who is not a prohibited immigrant as being the wife of H.M., who was not a prohibited immigrant.

H.M. had married S in India in 1895 according to Mahometan rites. This marriage was by the *lex loci contractus* a polygamous marriage. H.M. had in 1905 at Johannesburg contracted a second Mahometan marriage with one I, whom it was alleged he had since divorced.

Held by Wessels, J. (who was in a minority)—

- (1) The marriage with I in 1905 contracted according to Mahometan rites in the Transvaal was not a valid marriage (if the marriage had been valid the divorce would not be valid).
- (2) The marriage with S being good by the *lex loci celebrationis* and the domicile of parties at that time was a good marriage, and S came within the exception in the Act.

Held by Bristow and Carlewis, JJ., that the marriage between H.M. and S being a polygamous one, it could not be recognised in South Africa.

See also *R. v. Fatima*, 1912, T.P.D. 59, another case on the Immigration Act in which Wessels, J. (who took same view as in his dissenting judgment in *R. v. Sukina*), says he does not distinguish between first and subsequent wives of a polygamous marriage.

Group of Cases No. 15.

In South Africa a wife is (or was at the relevant time) not competent to give evidence in a criminal trial against her husband.

Held in *Nalana v. Rex*, 1907, T.S. 407, that the second wife of a native, married according to native custom was not his "wife" so as to be debarred from giving evidence against him.

And in *Rex v. Mbobo*, 1910, T.P. 445, that the first wife (and only wife) of a native, married according to native custom was not debarred as his wife from giving evidence against him.

These cases are based on the view that polygamous marriages cannot be recognised as marriages and there is no distinction to be drawn between first and later wives and it is immaterial whether in fact there is more than one wife.

Case No. 16.—*The Estate Canham v. The Master*.

In the Supreme Court of South Africa, 1909, 26 S.c. 166.

C, an Englishman, went to Pondoland in 1850. He lived there under Pondo rule (Pondoland being then an independent native State) and married a native woman according to Pondo custom. F.C., son of C, was born of this marriage in 1862 and lived in Pondoland as a Pondo subject till its annexation. While so living there, and prior to the annexation, F.C. married two wives according to the native customs of Pondoland. These two wives and their fourteen children survived him, and the matter came before the court with regard to the rates at which the estate of F.C., which had been left by will to these wives and children, should be taxed for estate duty. If they were to be regarded as wives and children, they were subject to only a very small rate of duty. If they must be regarded as strangers, a high rate of duty was chargeable.

Held: That these marriages were contracted in Pondoland before the annexation, according to the law and custom of that country; both wives and all their children must be recognised as legitimate wives and children, and the lower rates of taxation only were payable.

Case No. 17.—*In Kaha v. Ntala*. 1910, T.P. 964.

In this case the court, following *Nalana v. Rex* and *Rex v. Mboko*, held that a polygamous native marriage must be regarded by the court as no more than an illicit connexion. The children were illegitimate and the father had no rights of guardianship over them; and no action could be entertained for the recovery of a dowry by a husband because it must be regarded as something given in earnest of illicit connexion.



1933

46

GENERAL

Case No. 18.—*Williams v. Oates*. 27 North Carolina Reports 375. (5 Iredale 535.)

The question was whether the marriage of a divorced woman domiciled in North Carolina, under the law of which she was not free to marry again, celebrated in South Carolina, was valid. Ruffin, C.J., delivering judgment against the validity of the marriage, says that the act of the parties in going to South Carolina to get married was in fraudem legis:—

"Now, if the law of South Carolina allows of such a marriage, and although it is true that generally marriages are to be judged by the *lex loci contractus*, yet every country must so far respect its own laws and their operation on its own citizens as not to allow them to be evaded by acts in another country purposely committed to defraud them. . . . If a person contracts a marriage here, and, leaving the other party, he goes to Turkey and marries half a dozen wives contrary to the laws of this State, it would be impossible that we could give up our whole policy regulating marriages and inheritances, and allow all those women and children to come in here as wives and heirs, with the only true wife and heirs according to our laws. And it would be yet more clear if two persons were to go from this country to Turkey, merely for the sake of getting married at a place in which polygamy is lawful and then coming back to the place where it is not lawful."

(Then he refers to an English case, dealing with a person domiciled in England who got divorced in Scotland and then married again—the marriage being held void in England though good in Scotland.)

"It was declared invalid on the personal incapacity of one of the parties to contract, when his first wife was living, by the law of England. . . .

"Certainly every country should be disposed to respect the law of another country, but not more than its own. That ought not to be expected. If a Turk with two wives were to come here, we would not refuse to administer to them the justice due to the relations contracted by them at home. But if an American marries at home, where plurality of wives is excluded, and then, contrary to his engagement with that wife, takes another, where a plurality of wives is tolerated, and the first wife claims the benefit of the law of her own country from the courts of her own country, while the second wife claims from the same courts the immunities and rights conceded to her in the law of her original country; these claims are incompatible and one only be granted, and it is easy to see that the obligations arising out of the first contract are to be sustained by the country in which they are assumed and that our courts must hold the second marriage void in our law, which denied the capacity to contract it."

Case No. 19.—*Polybere v. Prince*. "Beale's Cases on Conflict of Laws," Vol. III, p. 2.

Case deals with status of slavery.

P. 3. "The general doctrine of foreign jurists seems to be that the state of the person, that is, his legal capacity to do or not to do certain acts, is to be determined by the law of his domicile. . . . (Then deals with qualifications to this rule.)

P. 4. "Besides those personal laws determining the state and condition of individuals which are founded on natural relations and qualities and such as are universally recognised among civilised communities, as those of parent and child, those resulting from marriage, from intellectual imbecility and the like, they may [the laws of foreign countries], and in point of fact do, establish distinctions which are not founded in nature, but relate only to the peculiarities of their own social organisation, to their own municipal law, and to the artificial forms of society which are established amongst themselves. Now it is usually admitted that other nations are bound by the *jus gentium* to admit the validity of all those personal statutes of other communities establishing such distinctions among their members, whether natural or artificial, to a certain extent. Their validity will be admitted, and they will be enforced by the tribunals of other countries, as to acts which are done and rights which are acquired, within the territorial limits of the community where those laws are established.

"If a Turkish or Hindoo husband were travelling in this country with his wife, or temporarily resident here, we should, without hesitation, acknowledge the relation of husband and wife between them, but the legal pre-eminence of the husband as to acts done here would be admitted only to the extent that marital rights are recognised by our laws and not as they are recognised by the law of the domicile."

Case No. 20.—*Wall v. Williamson*. 8 Alabama 48.

Action on a promissory note given by the defendant to the plaintiff—defence, that the defendant was the wife of the plaintiff and could not be sued by him.

The case turned *inter alia* on (1) the validity of a marriage between the parties in the year 1831 in the territory of the Choctaw Indians and according to the customs of that tribe, followed by cohabitation till 1839, and (2) the question whether it had been validly terminated. In the interval the territory of the Choctaw Indians had been annexed to the territory of the State of

GENERAL

47

Alabama. Both parties were of Indian extraction from the Choctaw tribe. It was in evidence that by the laws and customs of the Choctaw tribe (a) the husband could dissolve the marriage at will; (b) the husband could take plurality of wives; (c) that the husband had purported to dissolve the marriage.

Goldthwaite, J., quoting the general rule from Story that a marriage valid at the place where it is contracted is valid everywhere, and mentions Story's qualification that marriages involving polygamy or incest are an exception, as Christianity is understood to prohibit them, and therefore no Christian country would recognise polygamous or incestuous marriages. (He also quotes Lord Brougham in *Warrender v. Warrender*.—

"It is important to observe that we regard it (marriage) as a wholly different thing, a different status, from Turkish or other marriages among infidel nations, because we clearly never would recognise the plurality of wives and consequent validity of second marriages, notwithstanding the first, which second marriages the laws of these countries authorise and validate.")

He then says:—

"If this doctrine is to be understood as leading to the conclusion that a court can collaterally enquire into the existence of such a relationship as would, in a direct proceeding, annul a marriage, it is questionable whether it is sustainable. . . .

"A parallel case to a Turkish or other marriage in an infidel country will probably be found among all our savage tribes, but can it be possible that the children must be illegitimate if born of the second or succeeding wife? However the true rule may be, it is immaterial to this case unless it can be shown that when the law tolerates polygamy there can be neither lawful wife nor legitimate children, for here the evidence does not disclose any previous marriage."

He then goes on to find that in 1831 the Choctaw tribal law was in force at the place where the parties lived, and says:—

"The consequence is that, if valid by those customs, it is also recognised by our law."

He further says that:—

"The marriage was dissolved according to Choctaw usages by the abandonment of the husband.

"Whatever may have been the capacity of the husband to abandon his wife and thereby dissolve the marriage if both had become residents of Alabama after the tribe had departed from its limits, it is clear that the same effect must be given to a dissolution of the marriage by the Choctaw law as is given to a marriage by the same law. . . . We conceive that the same effect must be given to this Act as would be given to a lawful decree in a civilised country dissolving the marriage."

On appeal from the decision quoted above the court took the same view on all points relevant to the question under consideration.

Wall v.
Williamson.
11 Alabama 826.

Case No. 21.—*Morgan v. McGhee*. 24 "Tennessee Reports" 12 and 13. (1884, 5 Humphrey.) (Action of Detinue for Slaves.)

The question was whether the plaintiff was or was not a married woman and thereby possessed no right to sue.

G. Morgan and M. McGhee were married in 1813 according to the usages of the Cherokee tribe of Indians in that part of the territory of the Cherokees which was within the limits of the State of Tennessee. By these usages only a public agreement to live together as husband and wife was necessary, and they so lived as husband and wife.

Held, the marriage should be recognised, as a marriage made and consummated in an Indian nation should be recognised in the same manner as a marriage celebrated in a foreign country.

Case No. 22.—*Johnson v. Johnson's Administrator*. 30 "Missouri State Reports" 72 (Year 1860).

One of the questions in this case was whether the issue of the deceased Johnson and an Indian woman were to be regarded as the legitimate children of Johnson.

Napton, J., delivered the opinion of the court. The facts were that Col. Johnson was a Government factor at Prairie du Chien in 1812 (at that time a military post in Indian country outside the limits of any State). Whilst there he formed a connexion with an Indian woman, a chief's daughter, with whom he lived several years and had by her three children, whom he brought up and educated as his daughters and introduced into society as such, and they lived in his house till they married, and when he died he left them by will the bulk of his fortune.



1933

In 1822 Col. Johnson moved to the City of St. Louis, and he then left the Indian woman with her tribe and shortly afterwards married the plaintiff in this action. There was no evidence whether the Indian woman was or was not living at the time of this marriage.

P. 85. "There is no doubt that permanency enters into the idea of marriage as understood among all civilised and Christian people, and the proposition stated in the instruction of the land court is undoubtedly well sustained by writers who have discussed the subject of marriage. It may be further conceded that, even by the law of nature, a mere casual commerce between the sexes does not constitute a marriage. But when there is a cohabitation by consent for an indefinite period of time, for the procreation and bringing up of children, that, in a state of nature, would be a marriage, and, in the absence of all civil and religious institutions, may safely be presumed to be, as it is termed by some writers 'a marriage in the sight of God.'" (Selford on Marriage.)

"If permanency is to be regarded as an essential element of marriage by the law of nature, it is clear that all such connexions which have taken place among the various tribes of North American Indians, either between persons of pure Indian blood or between half-breeds or between the white and Indian races, must be regarded as mere illicit intercourse, and the offspring as illegitimate: for it is well established . . . that in most of the tribes, perhaps in all, the understanding of the parties is that the husband may dissolve the contract at his pleasure. . . .

"It is plain that among the savage tribes of this continent marriage is merely a natural contract, and that neither law, custom nor religion has affixed to it any conditions or limitations or forms other than what nature has itself prescribed. It can hardly be said that the power of divorce in one or both of the parties to the contract, at his or her pleasure, is inconsistent with the law of nature.

"It is well settled, as a general proposition, that a marriage valid according to the law or custom of the place where it is contracted is valid everywhere. (Story, 'Conflict of Law,' § 113.) It is equally clear, both upon authority and upon the general principles of public policy and natural equity, that where the legitimacy of children is called in question, especially after their death and a great lapse of time, every reasonable presumption is indulged in favour of legitimacy. . . ."

(Dealing with the separation of Colonel Johnson from the Indian woman), the court said: "It seems to be a right conceded to the husband by the terms of the contract, and its exercise cannot therefore be regarded as inconsistent with it."

Case No. 23.—*Lendrum v. Chakravarti*. 1929, Scot's "Law Times" Reports, 96.

The pursuer, F.H.L., a girl of 18 years of age and daughter of a Scottish minister of Glasgow, married in a church in Glasgow in 1918 the defender, C, a Hindu domiciled in British India. It was the common intention of the parties that at the end of the war the pursuer should go to India with the defender as his wife where they would reside. In 1919 the defender left for India and settled there. Later in the same year the pursuer followed him and lived with him in India. In 1922 she returned to Scotland in disgust at the conditions of her life in India and remained there till 1924. In 1924 she returned again to the defender, but left him again in 1925 and came back to the United Kingdom. In 1928 she commenced in the Scottish courts the suit for a declarator of the nullity of her marriage with C.

The issue of jurisdiction was decided first and it was held by Lord Morison (Lord Ordinary):

(1) That, although the nullity of the marriage was in issue, a woman, who has gone through a ceremony of marriage with a man and then lives with him on the assumption that she is validly married to him, acquires by her residence with him *de facto* a domicile in the place where his domicile is.

(2) That C was domiciled in British India and F.H.L. had acquired a domicile in India.

(3) That nevertheless in a suit for a declarator of nullity of marriage the courts of the country in which the marriage was celebrated had jurisdiction as well as the courts of the country of the domicile and consequently the suit was one which the Scottish courts could entertain. (The decision of the House of Lords in the *Salvesen* case was not cited to the Lord Ordinary, and Lord Mackay, in his judgment on the merits, refers to this case, but thought (a) it was not for him to interfere with the decision of Lord Morison on this point except on very cogent grounds, (b) that the speech of Lord Haldane in *Salvesen's* case "left open a somewhat narrow platform for the *forum loci celebrationis*."

On the merits of the case it was contended on behalf of the pursuer (the defender was not represented)—

(1) That the marriage was void because the pursuer had been induced to enter into the marriage by the fraud of C in that he had represented falsely and fraudulently "that he was a Brahmo; that a Brahmo was not a Hindu; that a Brahmo was not allowed by his law to take more than one wife; that a Brahmo, in matters of marriage, was substantially in the position of a Christian, being (a) monogamous, and (b) unitarian; that by a certain Act described as the *Brahmo Marriage Act* he was entitled to marry the pursuer; and that she would be his proper wedded wife," which representations were false in that (a) C was able to have more than one wife in India if (which it was open to him to do) he reverted to Hinduism, (b) his marriage with the pursuer was not recognised in India.

(2) (a) That C was a person, whose personal law permitted polygamy and in consequence the marriage of 1918 (and any marriage with him wherever and however celebrated) was a

polygamous marriage, and (b) that the pursuer was incapable of entering into a polygamous marriage by her personal law and consequently the marriage was void.

(3) That the marriage was void because C was incapable by the law of domicile from contracting a marriage with the pursuer of conferring on her the status of a lawful wife, and/or of contracting, a marriage in the manner, in which this marriage was celebrated, and in order that a marriage should be valid, it must be one which both parties are capable of contracting by their personal law.

(4) That there was no *consensus ad idem* as the pursuer intended and thought that in entering into this marriage with C she would acquire the legal status of the wife of C in India, but under his personal law C was incapable of contracting a valid marriage with the pursuer and conferring upon her the status of a lawful wife in India.

Held by Lord Mackay:

(1) That the pursuer's first contention must be rejected on the grounds (a) that fraudulent misrepresentation on the part of C was not established, (b) that even if it had been established the misrepresentations would not avoid the marriage since misrepresentations with regard to the social condition, legal condition or means of a party do not constitute a ground for nullity of marriage.

(2) That the pursuer's second contention (i.e., that the marriage celebrated in 1918 was a polygamous marriage and void) must be rejected. He said that this contention would mean "as I understand it, that any person to whom, according to his system of personal law, it may be open, without crime and without religious offence, to take a second wife, is *eo facto* precluded from entering into any married union, not merely with all Christian persons, but with all persons who live under a system of law where monogamy is enforced. So put, I should think that hundreds and thousands of unions at present regarded as binding would be shaken. It would, I think, be directly in the teeth of the decision in the English Court of Appeal of *Rex v. Superintendent Registrar of Marriages, Hammersmith* ([1917], 1 K.B. 634)," and he went on: "The true way of looking at the matter appears to me to be this: Although by the law affecting one of the parties to a contract of monogamous marriage he may, without offence to his own system of general law, be entitled to take a second wife, yet if the contracted marriage is his first and if he uses words and so contracts as to leave no doubt that he binds himself towards his spouse to live monogamously, then his taking any second woman to wife, while not rendering him amenable to penal laws in his domicile, is undoubtedly an infringement of the contract of monogamy into which he has entered and of the marital rights of his wife under that contract, and accordingly would afford her a remedy in any competent court where such a breach was recognised as inferring dissolution. There arises at once a dilemma, but a very simple dilemma, to solve. If the contract between these two parties was one which recognised the defender's right to enter into subsequent and co-incident marriages, then it was not a Christian marriage or a monogamous one, and it would offend the law of capacity of the wife. She could not entertain such a contract. If, on the other hand, it clearly limited the parties, by vows of fidelity on each side, to the one and only wife and one and only husband, then it was a monogamous and valid Christian marriage, for there is no juridical difficulty in the concept that a person by such a contract debars himself from some part of the liberties legally allowed to him by his own system of law. Although this was not fully argued out in the *Hammersmith* case, it appears perfectly certain that it is involved because the court unanimously held that in the case of the marriage of a Mahometan man his first marriage to an English and Christian woman was a valid impediment which justified the Registrar in not issuing the document entitling him to marry a second person; that is to say, they affirmed positively the validity of his first marriage, their eyes being perfectly open to the fact that his personal law permitted him four wives."

(3) The pursuer's third contention must be rejected on the grounds—

That though (a) the Law of Scotland was that the capacity of each party to enter into a marriage was governed by the law of his domicile and, in order that the marriage should be valid, the parties must be capable both by the law of their respective domiciles and by the *lex loci celebrationis*;^(*)

And though (b) the evidence of the law of India was to the effect that no marriage between a Hindu and any person not a Hindu would be recognised as valid in India whether celebrated in India or elsewhere and C was a Hindu domiciled in India;

Nevertheless (c) this provision of the (Hindu) law of India was not a provision relating to the capacity of a Hindu domiciled in India, but in the nature of a prohibition against mixed marriages of Hindus and was not one whose extra-territorial operation was recognised under private international law.^(*)

^(*) On this point Lord Mackay said the rule (Exception No. 1) in Dicey's *Conflict of Laws*, 4th edition, p. 708, "The validity of a marriage celebrated in England between persons of whom one has an English and the other a foreign domicile is not affected by any incapacity which though existing under the law of such foreign domicile, does not exist in English law," is not a rule of Scottish law if it is a rule of English law. But *quære* whether, in view of the fact that it is based upon the cases of *Simonia v. Mallac*, *Sottomayer v. de Barros*, No. 2, and *Ogden v. Ogden*, and that these cases have been adversely commented upon by the Privy Council and the House of Lords in *Attorney-General of Alberta v. Cook* and the *Salvesen* case, this rule is any longer a rule of English law.

^(*) Lord Mackay thus reaches by a slightly different process of reasoning, the same results as the English courts in *Chetti v. Chetti*, a result which is stated in Dicey Exception No. 2, *Conflict of Laws*, 4th edition, p. 709, as follows: "A marriage celebrated in England is not invalid on account of any incapacity which, though imposed by the law of the domicile of either or both of the parties, is of a kind to which our courts refuse recognition."



1933

(4) That the pursuer's fourth contention was a valid one as the error of the pursuer was one induced by C and was one in *substantialibus* and on this ground a decree of nullity should be pronounced.

Case No. 24.—*Grewal, otherwise Buck, v. Grewal.*

(The "Times News," August 1, 1907. Bargrave Deane, J.)

Petition for Decree of Nullity.

M.C.B. went through a ceremony of marriage in 1903 at a London registry office with K.S.G., an Indian, formally baptised as a Sikh, who had never professed Christianity. K.S.G. had in 1888 gone through a ceremony of child marriage according to Hindu ceremonies, which was valid according to Hindu law, with M.D.K. According to Sikh law—

- (1) Marriage with a Christian was invalid.
- (2) No man might have more than one wife, though he might have concubines.

K.S.G. had returned to India after the marriage (and was presumably domiciled there at all relevant times) and was living with his wife, M.D.K.

M.C.B. alleged that she did not know K.S.G. had a wife living in 1903, and he had described himself as a widower, and prayed for a decree of nullity on the ground that K.S.G. had already a wife alive at the time the marriage with her was celebrated.

Bargrave Deane, J., granted a decree, but report is not clear whether the decree was based (a) on the ground that K.S.G. had already a wife and the 1903 marriage was bigamous, or (b) on the ground of fraud and mistake, i.e., that M.C.B. thought he had no wife in India, whereas, in fact, he had one.

Case No. 25.—*Brook v. Brook.* 9 H.L.C. 194 (H. of L.).

(Also 3 Smo. and Giff. 481. Vice-Chancellor's Court.)

A and C, both British subjects domiciled in England, married in Denmark. C was the sister of A's deceased wife. Such a marriage was lawful in Denmark.

Under 5 & 6 Wm. 4, c. 54, the marriage of a man with his deceased wife's sister is made void.

Held:

(1) That this statute affected all persons domiciled in England, wherever they might be transiently resident.

(2) That the forms of entering into the contract of marriage were governed by the *lex loci contractus*, but the essentials depend on the *lex domicilii*.

(3) That the provisions of 5 & 6 Wm. 4, c. 54, constituted an essential thing, and the marriage was one which A could not, under law of domicile, contract. It was therefore void and the children of the union must be regarded as illegitimate.

A passage from Story is quoted in the judgments, regarding marriages involving polygamy or incest, and referred to in a manner which indicates the view (a) that the monogamous or polygamous character of a marriage is an essential; (b) that a polygamous marriage entered into by a domiciled Englishman would not be recognised.

Case No. 26.—*Spivack v. Spivack.* 46 T.L.R. 243. 1930, W.N. 46. Divisional Court.

(Lord Merrivale, P., and Bateson, J.)

This was an appeal brought before a Divisional Court by the appellant, George Spivack, against an Order of the Stipendiary Magistrate of Leeds, whereby he was found to have deserted the respondent, his wife, and ordered to pay a weekly sum towards her maintenance. The appellant appealed on the grounds that there had never been a valid legal marriage between him and the respondent.

The facts were that in 1890, in what was then Russian Poland, a Jewish ceremony of marriage took place between the parties, who were then both under 21 years of age, and they lived together in the house of the respondent's father, and three children were born. The appellant came to England in 1895, leaving the respondent in Poland, but for a number of years he sent her sums of money. Communication between them then ceased, and in 1913, in England, the appellant went through a ceremony of marriage with another woman. In 1929 the respondent traced the appellant's whereabouts, came to England and took proceedings against him and obtained the Order against which the appellant now appealed.

The appellant contended *inter alia*(*) that there was no evidence of a lawful marriage in 1890, or that the ceremony alleged by the respondent was a valid celebration of marriage, either by Jewish law or the law in force in Russian Poland. Before the Divisional Court evidence was given by a person who was Russian consul in London under the Imperial régime, to the effect that a document produced by the respondent was a certificate of marriage duly registered in accordance with the local law, and would have been recognised as a certificate of a valid marriage by the authorities of the former régime in Russia.

Lord Merrivale, P. (in whose judgment Bateson, J., concurred), in dismissing the appeal, held (a) that the certificate produced was evidence of a marriage valid by the *lex loci*; (b) that, even in the absence of such a certificate and of the evidence of the former Russian consul, the court would have presumed that a marriage existed, on the evidence of the respondent that a Jewish religious ceremony had taken place, followed by cohabitation, on the principle set out in "Halsbury's Laws of England, Husband and Wife," Part 2, Marriages, paragraph 604: "Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary. This was," he said, "the lifelong practice in this division," and quoted the contentions of Mr. Bethell, afterwards Lord Westbury, before the House of Lords in *Piers v. Leigh*, 5 Clark Finelly 381, and the maxim *semper præsumitur pro matrimonio*.

He distinguished the practice of the Probate and Divorce Division in this matter from that of the criminal courts in bigamy trials, as evidenced in cases such as *R. v. Naquib*, 1917, 1 K.B.D. 362, where strict affirmative proof of the validity according to the law of the *lex loci* is required of every foreign marriage.

In cases such as the present before the Probate and Divorce Division the burden of impeaching the marriage lay on the party impeaching it.

Case No. 27. *Mashia Ebrahim v. Mohomed Esop.* 1905 Tr. L.R. 59.

The appellant brought an action against the respondent. The respondent contended that the appellant was a married woman and could not bring an action without the joinder of her husband.

The appellant, who was a Malay woman, had gone through a Mahometan ceremony of marriage, performed according to Malay rites in a mosque by a Malay priest, with E in Capetown.

The appellant contended that Malay Mahometan marriages were polygamous, and as such not recognised by the South African courts, and therefore she was in the same position as a single woman.

Held:

That if the marriage were polygamous, the courts would not recognise it.

But, though Mahometan marriages were in general polygamous, the Governor had power under an Act of 1860 to appoint marriage officers for the purpose of celebrating Mahometan marriages. There was no evidence that this marriage of the appellant was not celebrated by such a marriage officer. A marriage celebrated by such an officer was a valid marriage, and, though celebrated according to Mahometan rites, must be deemed to be a monogamous marriage. The presumption in case of doubt must be in favour of the validity of the marriage.

(*) The respondent also argued that the Jewish marriage was dissoluble at any time at the will of one of the parties by the delivery of a letter of divorce, and that therefore, on the authority of the judgment of Hill, J., in the case of *Nachimson v. Nachimson*, the marriage was not of the kind which came within the matrimonial jurisdiction of the English courts. The judgment has now been reversed (see 1930, p. 217), but Lord Merrivale (speaking before the delivery of the judgment of the Court of Appeal) said:—

"... if there is a fact conspicuous in the developments in the last 200 years of the law of marriage in this country, it is that the Legislature and the courts have known all the time of Jewish marriage; that the Legislature has put Jewish marriages outside of the ambit of its enactments providing for the legality of the ceremony of marriage in this country, and has left them where they stood before the various marriage Acts, and has merely required by an enactment in the course of the last century that there shall be a representative of a registry present, who shall see that the marriage is registered. The Legislature has provided in respect of Jewish marriages in a mode which leaves their validity beyond all question and, I should have thought, unimpeachable and unassailable. In the ecclesiastical courts in this jurisdiction the subject has arisen, and nobody until now has ever suggested in my hearing any doubt as to whether a Jewish marriage was a marriage of which the court must take account."



1933

ANNEX III.

PREVIOUS LAW OFFICERS' OPINIONS.

Law Officers' Opinion No. 1.—*Jurisdiction of British Consular Court in Aleppo.*

Law Officers' opinion of June 10, 1869: Sir R. P. Collier, Sir J. D. Coleridge and Mr. Travers Twiss.

The following passage occurs:—

"That if the suit before the Consul at Aleppo be, strictly speaking, a matrimonial cause the Consular Court has no jurisdiction to entertain such a suit between British Indian Jews living there under British protection. It may be, however, that it is a suit as to property, in which case it will be necessary for the Consular Court to decide the point as to the validity of the marriage in question before it. The English Court of Divorce does not recognise polygamic contracts, even when they are sanctioned by the *lex loci*. Neither do the Courts of Common Law. The English law knows marriage or legitimacy only in the sense in which it is understood amongst Christian nations; the state of the husband of one wife, and the status of children, the issue of such a union. By the 7th section of the Order in Council of the 31st December, 1864, the civil jurisdiction of the Consular Court is, 'as far as circumstances admit, to be exercised upon the principles of and in conformity with the Common Law of England,' and the English law recognises no such marriage as that which has here been contracted. The fact that such a marriage is tolerated by Turkish law does not affect the question. Nor does the fact, that the Jewish law enjoins or sanctions such a marriage, make any difference. Such a marriage does not become good in English law, because it does not offend a Jewish conscience."

Law Officers' Opinion No. 2.—*Marriage of Miss Keane and Moorish Sheriff.*

Law Officers' opinion of April 7, 1873: Sir J. D. Coleridge, Sir G. Jessel and Dr. J. Parker Deane.

Under the instructions existing at that date with regard to the performance of consular marriages, it was laid down that a consular marriage might be celebrated, although one of the parties only was a British subject provided that the party, who is not a British subject, is a subject of the country in which the marriage is proposed to take place, and had previously complied with the requirements of the Marriage Law of that country. Sir J. Drummond Hay, His Majesty's Consul-General in Morocco celebrated a marriage between a Moorish Sheriff of high rank in Morocco and an English lady, Miss Keane. Before the consular marriage took place a marriage was celebrated according to Moorish law between this lady and the Sheriff, Moorish law in fact allowing a husband more than one wife, although the Sheriff had not at the time any other wife. The Law Officers advised that His Majesty's Consul-General was in fact acting correctly and in accordance with his instruction in performing this marriage.

Law Officers' Opinion No. 3.—*Jurisdiction of the British Consular Court in Siam.*

Law Officers' opinion of July 31, 1883: Sir Henry James, Sir Farrer Herschell and Dr. J. Parker Deane.

My Lord,

"We are honoured with your Lordship's commands signified in Sir Julian Pauncefote's letter of the 2nd instant, stating that, with reference to the concluding paragraph of our report of the 7th February last, in the case of Ai Baa, of which report a printed copy was enclosed, he had the honour to transmit to us the papers relating to the exercise of jurisdiction by the British Consular Court in Siam over protected persons, and its recognition by the Siamese Government. That our opinion was now requested as to whether, under the circumstances stated by the Acting Consul-General at Bangkok, he should be instructed to obtain a Declaration (by an exchange of notes or otherwise) from the Siamese Government, recognising British jurisdiction over protected British subjects, and whether such Declaration would be sufficient to support such an Order in Council as was suggested in the reference to us from the Foreign Office of the 27th January last, and which was embodied in our report of the 7th February.

"In obedience to your Lordship's commands we have the honour to report:—

"That the letter of Mr. Newman presents the question in a new aspect. It would appear that very many of the children of British subjects who receive British protection, though illegitimate according to our law, if they were the children of Englishmen, are the offspring of the marriage of the subjects of British India and other parts of Her Majesty's dominions.

"And such offspring would, as we understand, be regarded as legitimate in those dominions, and also legitimate according to the law of Siam. If this be so, we think they may properly be regarded as British subjects.

"There may, of course, be children of British subjects who do not come within this category, and are not, strictly speaking, entitled to the privilege of British subjects. But we quite recognise the difficulty pointed out by Mr. Newman, of ascertaining decisively in all cases the status of the children of British male subjects. Under the circumstances, therefore, the practically convenient course would probably be to treat them as British subjects, unless the fact of illegitimacy should be brought to the knowledge of the consulate.

"As it is not likely that there will be many such cases, it might be more expedient to avoid raising the question with the Siamese Government until some practical necessity for so doing arises."

We have, &c.

(Signed) HENRY JAMES.
FARRER HERSCHELL.
J. PARKER DEANE.

NOTE.—It would appear that this opinion relates to the offspring of unions of a polygamous character contracted by British subjects in Siam. The Law Officers appear to have held (1) that if the fathers were Englishmen the children would be illegitimate, and therefore not British subjects; (2) that if they were the offspring of the marriages of British Indian subjects and would be regarded as legitimate by the laws of British India, then the children should be regarded as British subjects.

Law Officers' Opinion No. 4.—*Case of Mr. Grant.*

Law Officers' opinion of June 14, 1888: Sir Richard Webster, Sir Edward Clarke.

My Lord,

"We were honoured with your Lordship's commands signified in Sir Julian Pauncefote's letter of the 29th ultimo, stating that he was directed by your Lordship to transmit to us the papers noted in the accompanying list, with reference to an application which had lately been made to Mr. Frost, the British vice-consul at Rabat, in Morocco, to enrol in the register of his vice-consulate as British subjects two children born at that place under the following circumstances:—

"That the father of the children (who were aged 4 and 2 years respectively) was a British subject named Grant, who, while retaining his British nationality, had formally embraced the Mahometan faith, and, in compliance with the rites of that religion, and with all the requirements of the Moorish law, had contracted a marriage, of which those children were the offspring, with a native Mussulman woman.

"That Mr. Grant had, as yet, only contracted the marriage above alluded to, and that, although that union might doubtless from one aspect be properly described as partaking of a polygamous nature, he was not at present living in a state of polygamy.

"That it was, however, competent for him, at any moment during the duration of the union of which those children were born, to contract other marriages with one or more Mussulman women which would, according both to the Mahometan religion and the Moorish *lex loci*, be of equal validity with his first marriage.

"That Her Majesty's consular officers abroad having been instructed (see circular instruction of the 29th May, 1876) that the illegitimate children of British parents born abroad were not British subjects, and therefore should not be registered as such, Mr. Frost, who entertained some doubt as to whether those children were to be considered as illegitimate or not, had applied for further instructions with respect to the case.

"That, with reference to the legal status of the children in question, Sir Julian Pauncefote was to refer us to the judgment delivered on the 15th February last by Mr. Justice Stirling in the Baralong marriage case, and reported at length in the 'Times' newspaper of the following day. (See also L.R., Chancery Division, vol. XXXVIII, p. 220.)

"That it was understood, on the authority of counsel engaged in the case, that no appeal was pending, or would be brought, against the decision of Mr. Justice Stirling.

"That Sir Julian Pauncefote was also to call our attention as bearing, though less directly, upon the subject to the cases of *Warrender v. Warrender* (2 Clarke and Finelly's House of Lords Reports, p. 488) and *Hyde v. Hyde and Woodmansee* (L.R. 2 Probate and Divorce Division, p. 130), and also to the enclosed report of the then Law Officers, dated the 10th June, 1869.

"That Sir Julian Pauncefote was to request that we would take the papers into our consideration, and that we would favour your Lordship with our opinion as to the instructions which should be sent to Sir William Kirby Green with reference to the application addressed by Mr. Grant to Vice-Consul Frost to register as British subjects the children in question, and with any general observations which we might have to offer on the case.

"In obedience to your Lordship's commands, we have the honour to report:—

"That, in our opinion, Sir William Kirby Green should be directed [Qy. 'to instruct Mr. Frost'] to refuse to register as British subjects the children of Mr. Grant by his marriage according to the Mahometan faith with a Moorish Mussulman woman, such marriage being of a polygamous character, and therefore not recognised by British law."

We have, &c.

(Signed) RICHARD E. WEBSTER.
EDWARD CLARKE.



1933

NOTES.—(1) Mr. Grant was an Englishman.

(2) At the time this opinion was given the view prevailed that an Englishman could not become domiciled in a foreign country in which His Majesty exercises ex-territorial jurisdiction.

(3) At the time this opinion was given there was in the relevant Morocco Order in Council, no provision corresponding to article 45 of the Morocco Orders in Council, 1889-1929 consolidated, providing that in all matters relating to marriage, inheritance and other questions involving religious law and custom the court shall, in the case of persons belonging to non-Christian communities, recognise and apply the religious law and custom of the person concerned.

(4) Though the attention of the Law Officers was called to the opinion of their predecessors given in 1869 (Law Officers' Opinion No. 1, Jurisdiction of the British Consular Court at Aleppo), their attention was not drawn to the opinion in the opposite sense of 1883 (Law Officers' Opinion No. 3, Jurisdiction of the British Consular Court in Siam), nor to the opinion of 1873 (Law Officers' Opinion No. 2, Marriage of Miss Keane and a Moorish sheriff), which also indicates a view contrary to that of the opinion of 1869.

Law Officers' Opinion No. 5.—*The Registration Provisions of the Foreign Marriage Acts.*

Law Officers' opinion of June 27, 1892: Sir Richard E. Webster, Sir Edward Clarke.

My Lord,

"We were honoured with your Lordship's commands signified in Sir Philip Currie's letter of the 13th instant, stating that he was directed by your Lordship to bring to our attention two points with regard to the registration, under the Foreign Marriage Acts, of marriages solemnised in accordance with the local law of a foreign country, respecting which some doubt had been expressed, and with reference to which, therefore, your Lordship desired to be favoured with our opinion for his guidance.

"That the other point was whether any marriage, by whatever form, rite, or ceremony solemnised in a Mahometan or other polygamous country, could be registered under the Foreign Marriage Acts, unless it had been solemnised in pursuance of those Acts.

"That the question upon which the determination of that point appeared to rest was whether, in a Mahometan or uncivilised country where the marriage law was repugnant to the fundamental principles of English jurisprudence and of religion and morality as understood in this country, any marriage which was solemnised in accordance with the local law, and which derived such validity as it possessed wholly and merely therefrom could be recognised as a marriage within the meaning of that term as employed in Christian countries, and systems of jurisprudence, even for the limited purpose of registration under an English Statute relating to foreign marriages.

"That it appeared to be clear that if a British subject attempted to avail himself of the forms of the *lex loci* in a Mahometan or heathen country, or of the ceremony of marriage observed amongst the Mormons, even though the parties were competent to contract, the marriage was not regarded as valid in English law, and that, consequently, the essential principle underlying the recognition of *lex loci* marriages generally, viz., the fact that it was valid by the law of the place of its celebration, was in that case quite inapplicable.

"That your Lordship was disposed to think that the expression '*lex loci* marriages' should be confined, in its interpretation, to such marriages alone as did not violate the essential requirement of Christian wedlock, viz., the union of one man with one woman to the exclusion of all others, and that polygamous marriages being in no sense and for no purpose marriages in contemplation of English law were not such '*lex loci* marriages' as were contemplated by the wording of section 4 of 'The Foreign Marriage Act, 1891,' and could not be registered thereunder.

"That Sir Philip Currie was, at the same time, to transmit copy of a despatch from Mr. Payton, Her Majesty's Consul at Mogador, asking for guidance with regard to his duties under the Foreign Marriage Acts, together with the draft of the reply which your Lordship proposed to send him, if we concurred in its terms.

"That it would be found that the correctness and expediency or otherwise, of the answers suggested in the draft depended on the principles to be decided in connexion with the latter of the two points specially raised in Sir Philip Currie's letter to us.

"That Sir Philip Currie was to request that we would be so good as to take the papers into our consideration and favour your Lordship with our opinion on the points raised therein, and also with any general observations upon the subject which we might be good enough to offer.

"In obedience to your Lordship's commands, we have the honour to report—

"1. That there is a distinction between solemnisation and registration of marriages under the Foreign Marriage Acts.

"As to solemnisation at the marriage office under section 8 of 'The Foreign Marriage Act, 1892,' no marriage can be solemnised at the official house of the marriage officer if by English law the parties cannot lawfully inter-marry, but if *lege loci contractus* the parties can marry, notwithstanding the impediment preventing a valid English marriage, the marriage may still be registered under section 18 of the above Act.

"2. Except in the case, which we do not imagine to exist, of the law of the foreign country expressly providing that valid marriages may be contracted in the way and according to the forms actually adopted, we are of opinion that no form, rite, or ceremony of marriage in a Mahometan or polygamous country can be registered under the Foreign Marriage Acts.

"3. The registration of '*lex loci* marriages' should be confined to marriages which do not violate the essential conditions of Christian wedlock.

"4. We approve of the draft reply to Consul Payton as altered and initialled by us."

We have, &c.
(Signed) RICHARD E. WEBSTER
EDWARD CLARKE.

Law Officers' Opinion No. 6.—*The Abensur Case.*

Law Officers' opinion of June 30, 1897: Sir Richard Webster, Sir Robert Finlay.

Gentlemen,

I am directed by the Marquess of Salisbury to transmit to you the Papers which are noted in the accompanying list, relative to an application which has been made to Her Majesty's Consul at Tangier for the enrolment, in the Consular Register of British subjects, of certain infant children of a naturalised British subject, named Mr. Isaac A. Abensur, aged respectively 9 years, 5 years and 6 months.

Mr. Abensur, who was theretofore a subject of the Sultan of Morocco, having divested himself of his Moorish nationality in contemplation of Moorish law, was naturalised as a British subject by a special Act of Parliament, the short title of which is '*Abensur's Naturalisation Act, 1896*,' on the 7th August last.

This Act (Paper B) confers upon him (section 1) "All the rights, privileges, and capacities whatsoever of a natural-born subject of Her Majesty the Queen," and the question which now arises for decision is, whether the infant children who are the offspring of a marriage contracted between Mr. Abensur and a Hebrew lady at Tangier on the 10th June, 1885, according to the Hebrew religious law prevailing in Morocco are (1) according to English law legitimate; and (2) if according to English law legitimate, whether they are entitled to be registered as British subjects, notwithstanding that they were born before the date of their father's naturalisation, under the special Act already quoted.

I am to draw your attention to the instructions upon this subject which was addressed to Her Majesty's Consul at Tangier on the 17th March last (Paper E), to the report by the Law Officers of the Crown respecting the case of Mr. Grant's children (the 14th June, 1888), to which reference is therein made (Paper F), and to Mr. Consul White's despatch of the 9th ultimo (Paper H), in which he gives particulars as to the local law and usage of Morocco in regard to Jewish marriages in that country.

You will observe that in this last-named paper Mr. White reports that Mr. Abensur obtained his private Act of Parliament largely in the interests of his children, and was assured by his legal adviser (for whose opinion, however, neither Her Majesty's Government nor this Department are in any way responsible) that under that Act those children would obtain British nationality equally with himself.

Mr. White also draws attention to a despatch which was addressed to Sir J. D. Hay by Lord Rosebery on the 6th March, 1886, and in which it was stated that marriages performed by Jewish Rabbis between British subjects in Mahometan countries would be admitted as valid in England.

The despatch in question is enclosed (Paper J).

I am to request that you will take the enclosed papers into your consideration, and favour his Lordship with your opinion as to the question set forth in the third paragraph of this letter, and generally as to the instructions which should be sent to Her Majesty's representatives in Morocco for their guidance in dealing with applications for the registration of children of marriages between British subjects performed by Jewish Rabbis in that country.

I have, &c.
(Signed) F. H. VILLIERS.

Report.

We agree in thinking that the doctrine of English law that for the validity of a marriage in England the presence of an episcopally ordained clergyman is necessary, has no bearing upon the present case. It never applied to the marriage of Jews in England, and cannot apply to the marriage of a Jew in Morocco.

With regard to the other points raised, we are not quite agreed as to reasons, though agreeing in the result. The opinion of the Attorney-General upon these points is as follows:—

"The question whether Abensur's marriage was monogamous raises points of difficulty, but, for the purposes of the question submitted to us, it is not necessary to express any opinion thereon, or to consider whether Mr. Abensur's children are legitimate according to English law. A good deal may depend upon the place where, and the circumstances under which, the questions arise, and I desire not to express any opinion against the legitimacy of the children.

"In my judgment, however, assuming them to be legitimate, they yet cannot be registered as British subjects. '*Abensur's Naturalisation Act*' is not, I think, retrospective, and cannot be held to naturalise children born before the Act was passed.

"To attain Mr. Abensur's object I think he must obtain an Act of Parliament making his children born before the passing of the Act British subjects, and it would be well to provide, at the same time, that any children born after the passing of the Act should also be British subjects."

The opinion of the Solicitor-General upon these points is as follows:—

"For the present purpose I think it is immaterial whether the marriage of Abensur was monogamous or polygamous. This question would be material if he desired the assistance of the English Divorce Court (*Hyde v. Hyde*, L.R. 1 P. and D. 130) or of his children claimed to inherit real property in England (see *Birtchistle v. Vardill*, 7 C. and F. 1895). But it cannot, in my opinion, be broadly laid down that for all purposes the offspring of a polygamous marriage is to be treated, in the view of English law, as illegitimate. The Divorce Court and the law of inheritance to real property in this country recognise only monogamous marriages, but for the purpose of inheriting nationality I think that a polygamous marriage by a subject of Her Majesty in a country where he is domiciled, and where the law allows of such unions, must be treated as lawful, the English law adopting for this purpose the law of the domicile.

This second objection, therefore, to the registration, in my opinion, fails like the first. A difficulty, however, is presented by the fact that the children were born before Abensur was naturalised. If they had been born after the Act of Naturalisation they would, though born abroad, in my opinion, be British subjects by virtue of the statutes 7 Anne, cap. 5, sec. 3, and 4 Geo. II, cap. 21, sec. 1.

"The children born before the Act of Naturalisation stand, however, on a different footing.

"It is no doubt eminently reasonable that infant children living with their father should follow his nationality.

"The Law Officers, in their report of the 4th November, 1861, advised that, in their opinion, minors who were born in Her Majesty's Dominions, but whose fathers had become naturalised American citizens, ought, during their minority, to be considered and treated as between the two Governments, not as British subjects, but as American citizens, minors in this position being by the Statute Law of the United States regarded as American citizens.

No difficulty would exist with regard to children born abroad of a person afterwards naturalised, who might not desire to assume the character of British subjects, as the statute 4 Geo. II, cap. 21, merely confers upon children born abroad the privilege of being British subjects, but does not fasten upon them without their own concurrence any burdens whatever (see Sir Roundell Palmer's speech in the House of Commons on the 20th March, 1868, as quoted in 'Forsyth on Constitutional Law,' p. 339). But, in the present case, as they were born abroad, the title of these children to be, in view of English law, British subjects must depend upon 7 Anne, cap. 5, sec. 3, as explained by 4 Geo. II, cap. 21, which confers this privilege only on children whose fathers were at the time of their birth natural-born subjects.

Although for some purposes naturalisation by special Act has undoubtedly a retrospective effect ('Blackstone's Commentaries,' Book II, Chapter 15, p. 250, of 11th edition citing Co. Lib. 129a), it appears to me to be impossible to say that Abensur was at the time of the birth of these children, before the passing of his special Act, a natural-born subject as required by 4 Geo. II, cap. 21."

The Attorney-General and the Solicitor-General are therefore agreed in thinking that the claim to have these children recognised as British subjects fails.

We may further observe that the Morocco Order in Council does not appear to make any provision for the registration of infants, and that, before advising generally as to applications for the registration of children of marriages between British subjects performed by Jewish Rabbis in Morocco, we should desire further instructions as to the law or practice under which such registration has been carried out.

(Signed) RICHARD E. WEBSTER.
ROBERT B. FINLAY.

The Legal Adviser to the Foreign Office, Sir Edward Davidson, disagreed so strongly with the Law Officers' opinion in this case that Lord Salisbury caused the question to be referred to Lord Chancellor Halsbury. Lord Halsbury gave an opinion in which he disagreed both with the Law Officers and with Sir Edward Davidson. He agreed with the Law Officers in holding that the children of Mr. Abensur must be regarded as being legitimate in contemplation of English law, but on this point he based his opinion on the fact that they were the offspring of a Jewish marriage, and Jewish marriages (apparently whether monogamous or polygamous) were recognised by the English courts. He thought that Lord Penzance in *Hyde v. Hyde* deliberately used the expression "Christian marriage" in order that nothing which he said might be deemed applicable to Jewish marriages, though he went on to quote, with regard to polygamous marriages, the passage in the judgment in that case in which Lord Penzance said that his decision had no bearing upon the question of the legitimacy of the children of a polygamous marriage.

The Lord Chancellor disagreed with the Law Officers on the question as to whether these children born before Abensur's naturalisation had become British subjects by virtue of it (i.e., on a point which is irrelevant to the present question).

Sir Edward Davidson still being strongly opposed to the view which was now taken by both the Lord Chancellor and the Law Officers, the question was referred to the Lord Chancellor again, but the Lord Chancellor adhered to his previous opinion. In this connexion he added certain observations with regard to Jewish marriages.

The relevant portions of these two opinions of Lord Halsbury are set out below marked (A) and (B).

(A.)

(First Opinion of Lord Halsbury, L.C., in the *Abensur Case*.)

"I am unable to agree with the Attorney- and Solicitor-General, or with Mr. Davidson.

"It seems to me a very strange misapprehension of what is really involved in this case has run through all the papers on the subject. It seems to have been forgotten that if the objection made to the registration of Mr. Abensur's children is founded upon the view that they are not the offspring of marriage at all, the result must be of so far-reaching and extraordinary a character that I think that result cannot have been before the minds of the Law Officers.

"Mr. Abensur was married to the person, who lived with him as his wife, by the Chief Rabbi, and according to the rites and ceremonies of the Jewish Church.

"So far as I understand the argument, no question is raised on the validity of the form, or that the form does not comply properly with the rites and ceremonies of the Jewish Church. But the objection is raised that the relation between the man and the woman was not a marriage at all; that, in short, the status of married people was never created between them. The fact that what I will call the marriage was celebrated in a polygamous country does not affect the argument. Apart from the objection which I have stated, and with which I will deal, it is immaterial where the marriage was celebrated.

"I do not understand that in Morocco more than elsewhere any peculiar ceremonies are essential other than those that existed in this case; but, if I understand the objection aright, it is, as I have said, to the nature of the contract entered into between the parties by reason of the Jewish religion permitting the marrying of more than one wife.

"I will deal with the cases in the English Divorce Court presently, but, putting the broad proposition as I have stated, it comes to this: that no Jewish marriage by persons professing the Jewish faith can be recognised as a marriage in England; there can be no lawful issue of the connexion between a Jew and a Jewess, although sanctioned by the ordinary rites and ceremonies which Jews recognise as appropriate to marriage.

"I should have thought the fact that inasmuch as Jewish marriages, so called, have been repeatedly recognised by the Legislature of this country, and by the ecclesiastical courts of this country, would have rendered such a contention impossible, and for my own part I am unable to understand what construction is to be placed upon section 2 of 6 and 7 William IV, cap. 85, which is in these words:—

"And be it enacted that the Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, may continue to contract and solemnise marriages according to the usages of the said society and of the said persons respectively; and every such marriage is hereby declared and confirmed good in law, provided that the parties to such marriage be both of the said society, or both persons professing the Jewish religion, respectively."

"It will be observed that every such marriage is by that statute declared and confirmed good in law, provided that both parties to such marriage be both professing the Jewish religion.

"It is obviously nothing to the purpose to say that the English law prohibits more than one wife, and punishes with the penalties attaching to bigamy the person who enters into a second marriage during the lifetime of the person whom he has first married, because, if the objection be a good one, there has never been a marriage at all.

"The Jewish religion in all countries recognises the right, as part of their belief, to take a second wife during the lifetime of the first, and, if the reasoning be accurate in the papers put before me, there is no first wife or second wife—there is no marriage at all, because a connexion between two persons by the rites and ceremonies of the Jewish religion, which in all other respects is binding, is of no avail to establish the status or religion of marriage by reason of the theoretic belief that a person may have more wives than one at the same time. If any such principle exists, it is a very extraordinary thing that no trace of it is to be found; but, on the contrary, we find Lord Stowell trying and deciding a case of jactitation of marriage between a Jew and a Jewess.

"It can hardly be suggested that Lord Stowell did not know what were the tenets of Jews in this respect, and, indeed, in one of the cases referred to in the papers, *Lindo v. Belisario*, he took counsel with the learned Hebrews and declared the nullity of the marriage by reason of the neglect of the proper forms which he held to be an essential part of the necessary preliminaries to marriage established in that case.

"Undoubtedly Lord Penzance, in the case of the Mormon marriages, *Hyde v. Hyde* and *Woodmansee*, 1 Probate and Divorce, 130, decided that what was there called a marriage did not correspond to what in all Christian countries is recognised as a marriage, and I note that in that case he uses the terms 'Christendom' and 'Christian belief' throughout his judgment with a very marked emphasis.

"It is also true that Sir James Hannen in *Brinkley v. The Attorney-General*, 15 Probate and Divorce, p. 78, applies Lord Penzance's decision to the case of a Japanese.

"Whether Lord Penzance had in his mind the Jewish marriages I cannot say, and certainly the emphasis with which he repeats that phrase 'Christian and Christendom' as an important element of what he is saying in every part of his judgment suggests that he must have had Jewish marriages in mind.

"No such point appears to have occurred to Sir James Hannen—and he extends the observations of Lord Penzance as if they were of universal application and applies them to a Japanese. Whether that reasoning be good or bad I will not now discuss, though I think it was open to very considerable question, because, to my mind, it is impossible for an English court to overlook as matter of law the continued and long-established recognition of Jewish marriages.



1933

58

GENERAL

"And even in respect of Lord Penzance's judgment it is to be observed that, apart from the continued use of the word 'Christian,' he is very cautious to add that—

"This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law in England."

"Under these circumstances, I think, Mr. Abensur's children ought to be registered. To refuse to register them upon such grounds as have been set forth would shake the validity of every Jewish marriage in this country, since, as I have said (and, indeed, as is stated in the papers submitted to me), the Jewish view of the marriage and its obligations in respect of monogamous or polygamous marriages are the same in England as in Morocco—and, indeed, all over the world—though the practice, which for this purpose is immaterial, is said to be very rarely adopted in Spain."

(Signed) HALSBURY.

House of Lords, December 16, 1897.

(B.)

(Second Opinion of Lord Halsbury, L.C., in the Abensur Case.)

"I have already advised that Mr. Abensur's children should be registered.

"I am represented as relying upon the *lex loci* of the marriage being one which allows of polygamy. So far from doing so, I expressly said it was in my view immaterial where the marriage was celebrated.

"This is the view held by all Her Majesty's Judges given by the mouth of Lord Chief Justice Tindal in *Millis v. The Queen in Error*, as will be seen below in the passages quoted.

"Of course Lord Campbell, Lord Brougham, and Lord Denham thought the question could be decided by a mere agreement to take each other as husband and wife, but they urged the case of the Jews against those who contended for the proposition that a person in holy orders must be a party to the celebration.

"Lord Lyndhurst and Lord Cottenham treated of this matter in the passages quoted below. Against such a weight of authority I at least would not feel myself justified in laying down an opposite view, and I observe no opinion of the Attorney or Solicitor-General countenancing the view that a Jew to be married must be married by a person in holy orders.

"The other misrepresentation is, that my opinion rested on the enactment of the Act of William IV. What I said was, and what I should have thought no lawyer could have misunderstood was, that that Act confirmed and declared to be lawful the Jews' marriages which had been excepted in terms from the exigency of Lord Hardwicke's Act (*see* section 18, 26 Geo. II).

"Further, I observe, Mr. Davidson has entered into an enquiry whether the views of the Jews are as stated in the papers submitted originally to me, and controverts the statement thus made to me.

"As to this, I have no means of entering into this question; but I should very much doubt whether a Jewish authority could be found to say that what their whole national traditions approved was unlawful, however much they might deprecate the practice, but be that as it may, I have advised upon the hypothesis of fact submitted to me."

(Signed) HALSBURY.

ANNEXES TO LORD HALSBURY'S SECOND OPINION IN THE ABENSUR CASE.

The Queen v. Millis, 10 Cl. and Find. 672.

(Lord Chief Justice Tindal.)

"And as to the case of the Jews, it is well known that in early times they stood in a very peculiar and excepted condition. For many centuries they were treated, not as natural-born subjects, but as foreigners, and scarcely recognised as participating in the civil rights of other subjects of the Crown. The ceremony of marriage by their own peculiar forms might therefore be regarded as constituting a legal marriage, without affording any argument as to the nature of a contract of marriage *per verba de presenti* between other subjects. But even in the case of a Jewish marriage, it was more than a mere contract; it was a religious ceremony of marriage; and the case of *Lindo v. Belisario* is so far from being an authority that a mere contract was a good marriage, that the marriage was held void precisely because part of the religious ceremony, held necessary by the Jewish law, was found to have been omitted."

(The Lord Chancellor, p. 864.)

"I must not pass over the observations that have been made upon the marriages of Jews and Quakers. It is said they can only be supported on the ground of their being contracts *per verba de presenti de futuro* followed by cohabitation.

"No such argument can, I think, be justly raised from the decisions respecting marriages amongst the Jews. They are treated in those decisions as a distinct people, governed, as to this

GENERAL

59

subject, by their own religious observances and institutions, among which marriage is included. Speaking upon this subject Lord Stowell, in the case of *Ruding v. Smith* (2 Haggard's, Consistory Reports 371) observes that 'the matrimonial law of England for the Jews is their own matrimonial law; and an English Court Christian, examining the validity of an English Jew marriage, would examine it by that law, and that law only, as has been done in the cases that were determined in this court on those very principles.' Such are the admitted grounds of decision in the case of Jewish marriages.

(Lord Cottenham, p. 900.)

"In *Goldsmid v. Bromer* (1 Hagg., Consistory Reports 314), Lord Stowell says: 'The parties are both Jews, and both appeal to the Jewish law, by which this question must be decided. The Jews, though British subjects, have the enjoyment of their own laws in religious ceremonies, and the Marriage Act acknowledges this privilege, by excepting them out of its provisions. To deny them the benefit of their own law upon such subjects would be to deny to a distinct body of people the full benefit of the toleration to which they have long been held to be entitled.'"

Law Officers' Opinion No. 7.—Children of Burmese British Subjects Born in Siam.

Law Officers' opinion of July 31, 1897.

Gentlemen,

I have the honour, by direction of the Marquess of Salisbury, to transmit to you herewith, the papers noted in the accompanying list, which relate to a question which has arisen in connexion with the registration of British subjects at Her Majesty's consulate-general in Siam.

It is, his Lordship conceives, unnecessary to invite your perusal of the voluminous earlier correspondence which has passed on this subject. It may suffice to state that various circumstances have of late years led to a large increase in the number of persons who apply to be registered at the Bangkok consulate-general, and that in consequence many disputes have arisen with the Siamese authorities as to who are, and who are not, entitled to British protection. These and other considerations render it desirable that the practice of registration should not be unduly extended.

I am to invite your particular attention to the considerations set out in the Memorandum by Mr. Davidson, Q.C., the legal adviser to the Foreign Office, which forms the enclosure to the letter from this Department to the India Office of the 9th April, and to the reply received from that Office of the 27th instant.

I am to request that you will be good enough to take these papers into your consideration, and to favour Lord Salisbury with your opinion as to whether Her Majesty's Government are entitled, in law, to claim as British subjects—in the sense in which that expression is employed in the treaties between Great Britain and Siam—the children and grandchildren of persons born on British soil, or on soil which has subsequently become British, and, if so, whether it is competent for Her Majesty's Government to exercise any discretion with reference to asserting or declining to assert as against the Siamese Government, and in admitting or declining to admit with reference to the claimants themselves claims of this nature in the circumstances mentioned.

Lord Salisbury will at the same time be glad to be favoured with any observations of a more general nature which you may desire to offer on the papers.

I have, &c.
(Signed) FRANCIS BERTIE.

Report.

We assume from the terms of the despatch from the India Office and of Sir Charles Turner's Memorandum that there is nothing in the local law of British Burmah which specially affects this question.

Upon the conquest of Burmah, Burmese subjects became British subjects, and we think that their children and grandchildren, born subsequently to the conquest, are also, by British law, British subjects, though born out of Burmah.

The fact that these children and grandchildren are the issue of polygamous marriages is not, in our opinion, decisive of the question of nationality.

The rules relating to the jurisdiction of the English Divorce Court, and to succession to land in England, have not necessarily any application to questions of nationality, and the opinion of the Law Officers, dated the 14th June, 1888, in the case of *Abdul Kerim Grant*, did not lay down any general principle apart from the facts of the particular case.

There are many parts of the British Dominions in which polygamous marriages are lawful, and for the purposes of nationality it seems to us impossible to treat the issue of such marriages, who are legitimate by the law of the domicile of their parents, as illegitimate.

(Signed) RICHARD E. WEBSTER.
ROBERT B. FINLAY.

[10221]

I 2



1933

60

GENERAL

Law Officers' Opinion No. 8.—Registration as British Subjects by British Consuls in Turkey of the Wives and Issue of British Subjects of Marriages celebrated in Turkey otherwise than under the Foreign Marriages Act.

[April 28, 1903.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

I have the honour, by direction of the Marquess of Lansdowne, to transmit to you a despatch from His Majesty's Ambassador at Constantinople, forwarding a despatch from His Majesty's consul-general at Beirut, in which the latter enquires: (1) whether, in view of a circular addressed by the Marquess of Salisbury to His Majesty's consular officers on the 4th November, 1899, which forbids the registration of *lex loci* marriages in Mahometan or polygamous countries without fulfilment of the provisions of "The Foreign Marriages Act, 1892," the issue of such marriages are to be registered at His Majesty's consulate-general as British subjects; and (2) whether, after such marriage has been dissolved in the Mahometan or polygamous country, and the divorce is valid according to the personal law of the parties, the husband can claim to register a second wife and her children as British subjects.

A copy of the circular above referred to is enclosed for convenience of reference. I am also to transmit to you a memorandum which has been drawn up by the Assistant Legal Adviser to this Office on the subject; and I am to request that, in taking these papers into your consideration, you will inform his Lordship whether you concur in the conclusions arrived at in this memorandum, and, if so, whether instructions may properly be sent to Mr. Drummond-Hay to the effect suggested.

I have, &c.
(Signed) CHARLES HARDINGE.

Report.

We agree with the view of the Assistant Legal Adviser that the answers to both the questions asked by Mr. Drummond-Hay should be in the affirmative, and we think instructions may be sent accordingly.

(Signed) R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice, April 28, 1903.

ANNEX.

Memorandum by Mr. Hurst.

Both the questions asked by the consul should, in my opinion, be answered in the affirmative. I think he enunciates the correct principle when he writes:—

"The validity of these marriages would, I conclude, be decided by the laws of their country of origin."

The doctrine is recognised that a man carries his common law with him wherever he goes; if he is in a foreign country he continues to be subject to that law except in so far as entrance into that foreign country has subjected him to another code which supersedes his common law.

For a British subject of Indian origin polygamy is lawful if he is a Mahometan or a Hindu, or, I think, if he is a Jew; marriage is one of the questions which is decided in the British courts in India by the personal law of the litigant, and the bigamy clause of the Indian Penal Code is carefully worded so as to preserve this right.

When a British Indian settles in the Ottoman Empire, where he will still be subject to the King's jurisdiction, he will continue subject to his personal law of marriage, except in so far as His Majesty enacts otherwise for him; no such legislation has, in fact, been provided with regard to him, and, consequently, a British Indian marrying according to his personal law contracts a marriage which is valid and of which the offspring will be legitimate; if his personal law permits polygamy, the marriage in the Ottoman Dominions will not be invalid because it is polygamous.

The same reasoning applies to the British subject of Maltese origin: if he contracts in the Ottoman Dominions a marriage which is valid by Canon Law, which is the Common Law of Malta, that marriage is valid.

The Law Officers recently advised that the marriage of an Englishman in a Greek island, celebrated by an ordained clergyman, was valid because it was good by the Common Law of England; as Greece had made no other provision for the marriage of Christians of other communions, the Englishman was governed in this particular matter by his common law.

This opinion of the Law Officers really covers the questions asked by the consul.

If the marriage is valid the issue are legitimate and, consequently, entitled to be registered at the consulate both in the register of British subjects and in the register of births.

Similar considerations apply to the divorce question, where, under the religious law of his community, a man's marriage can be severed, a divorce in accordance therewith in the Ottoman Empire is permissible and valid for a British Indian, as being in accordance with his personal law, and because no machinery for divorce, that he could make use of, has been provided under the Ottoman Order in Council.

For Christians this question as to divorce cannot arise, because the Canon does not, any more than the English Common Law, allow divorce.

GENERAL

61

If the divorce is recognised, then the subsequent marriage is lawful and its issue legitimate. Cases that were decided on the rights of Englishmen to inherit real estate in this country, and cases on the jurisdiction of the English Divorce Court, do not appear to me to have any bearing on this question.

I have also read all the Abensur print, but nothing in the decisions arrived at in that case appears to me to conflict with what I have written above.

As to the practical working out of the proposition, there might, with Hindus or Mahometans, be difficulty in finding out whether the marriages (and divorces for Mahometans) were, in fact, valid by the religious law of the community; but the consul's despatch appears to refer chiefly to Jews and Maltese, and I do not see why there should be trouble as to these: the care with which Jewish records are kept is proverbial.

(Signed) C. J. B. HURST.

February 2, 1903.

Law Officers' Opinion No. 9.—Loss of British Nationality by Women British Subjects contracting Polygamous Marriages with Aliens.

[April 25, 1905.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 16, 1905.

I have the honour, by direction of the Marquess of Lansdowne, to transmit to you the papers noted in the accompanying list, which relate to applications made by Fatma Hanem, widow of the late Menshawi Pasha, an Ottoman subject, and Rakel, daughter of Helal Sassoon, and widow of the late Elyak Rivan, an Ottoman subject, for readmission to British nationality.

I am to invite your attention to the correspondence and minutes (Paper G) which passed in 1899 with reference to an application made by Mrs Abigail Maimaran, widow of Isaac Maimaran, a Moorish subject, for readmission to British nationality. These papers were amongst those submitted to, and discussed by, the inter-Departmental Committee appointed in 1899 to consider difficulties which have arisen with regard to the interpretation of the Naturalisation Acts; the committee, however, considered that the point involved was one relating rather to the law of marriage than to that of nationality, and did not make any recommendation with regard to it.

I am also to draw attention to the report of the Judicial Adviser to the Egyptian Government for the year 1901 (Paper H), at p. 43 of which reference is made to the case of Fatma Hanem, and at p. 48 of which appear comments by Mr. McIlwraith on the general question of the nationality of a European woman marrying an Ottoman subject.

In the present case it will be observed that, owing to the non-fulfilment of the conditions of residence prescribed by section 8 of "The Naturalisation Act, 1870," by the applicants, no steps can be taken by His Majesty's Secretary of State for the Home Department for the grant of a certificate. The question, however, arises as to whether the marriages contracted by these ladies with Ottoman subjects were of a kind which would be recognised as valid by the English courts on the ground that they were valid by the *lex loci*; and on the answer to this question depends whether Fatma Hanem and Rakel Rivan can, in accordance with section 10 (1) of "The Naturalisation Act, 1870," be deemed to be subjects of the State of which their late husbands were subjects, and consequently to have lost their status as British subjects.

I am to request that you will take these papers into your consideration, and that you will be so good as to favour Lord Lansdowne with your opinion as to whether, for the purposes of section 10 (1) of "The Naturalisation Act, 1870," the marriage of an Englishwoman must be understood to mean such a marriage alone as is recognised as valid in contemplation of English law, or whether a marriage which, though not *per se* valid in contemplation of English law, is binding according to the *lex loci celebrationis* and the personal law of the husband will satisfy the requirements of the Statute.

I have, &c.
(Signed) F. A. CAMPBELL.

Report.

In our opinion section 10 (1) and (2) of the Naturalisation Act refers not merely to marriage such as is contemplated by English law for the purposes of the construction of an English settlement or of jurisdiction of the Divorce Court. These provisions are of general application, and we think that they apply in the case even of polygamous marriages in countries where such marriages are lawful. This would clearly be so if the woman, being a Mahometan subject of His Majesty or of any Mahometan Power, contracted a polygamous marriage with a subject of another country in which polygamy is lawful. We do not think that an exception can be made from its provisions in the case of a Christian woman who contracts a polygamous marriage with a foreigner. When the marriage is valid according to the law of the country where it is contracted, we think the woman acquires the nationality as well as the domicile of her husband.

(Signed) R. B. FINLAY.
EDWARD CARSON.

Royal Courts of Justice, April 25, 1905.



1933

62

GENERAL

Law Officers' Opinion No. 10.—*The Messiah Case*.

[October 19, 1906.]

Foreign Office to the Law Officers of the Crown.

Foreign Office, July 30, 1906.

Gentlemen,

I have the honour, by direction of the Secretary of State, to transmit to you the enclosed papers relating to an application for a certificate of British nationality made by Mr. Wilfred Judah Messiah, of Oran, in order to enable him to claim exemption from military service in France.

The application was forwarded by His Majesty's Consul-General at Algiers on the 23rd April last (Paper 1), and is supported by the accompanying documents, viz.:—

- (a) Contract of marriage at Mogador (the 27th August, 1862), in accordance with Hebrew religious law, between the father and mother of the applicant, Moses Messiah and Esther Youli (or July).
- (b) Certificate of the birth of the applicant, Wilfred Judah Messiah (the 20th April, 1885), at Oran.
- (c) Certificate of the birth of the father of the applicant, the aforesaid Moses Messiah, at Gibraltar, the 13th March, 1828.

The documents were forwarded to the Home Office in order that the necessary steps might be taken in the matter, and I am to enclose a letter from that department in reply (Paper 2), stating that the marriage of the father of the applicant, on the validity of which the claim of the latter for a certificate of British nationality depends, appears to have been of a polygamous character (see passages underlined in the Marriage Contract); but that, having regard to the case of Isaac Aaron Abensur in 1897, Mr. Gladstone proposes, subject to the concurrence of Sir E. Grey, to issue the desired certificate.

With regard to the case of Isaac Aaron Abensur referred to, I am to enclose a copy (in print) of the correspondence, &c., which passed in the matter (Paper 3), and I am especially to call attention to the memorandum on p. 9, in which the facts of the case and the opinions expressed thereon are fully set forth, and also to the subsequent opinion of the then Lord Chancellor (Lord Halsbury). The decision arrived at in the matter will be found on p. 38 in a minute of the late Lord Salisbury, as follows:—

"This opinion" (that of the Lord Chancellor) "must be accepted as the best exposition of the existing law that we can obtain in the absence of any decided case."

"Therefore Mr. Abensur's children must be registered."

Sir E. Grey feels, however, some hesitation in accepting the decision arrived at in the Abensur case as conclusive of the question whether the offspring of a polygamous marriage, contracted according to the Hebrew religious law prevailing in Morocco, are, according to English law, legitimate, inasmuch as the views of the late Lord Chancellor differed in some material respects from those of the then Attorney-General (now Lord Chief Justice of England) and the then Solicitor-General (Sir Robert Finlay), besides being directly in conflict with the opinion of previous Law Officers given in the case of Abdul Kerim Grant (see p. 25 of print).

Moreover, so far as Sir E. Grey is aware, none of the other legal authorities, before whom the case indirectly or directly came, took quite the same view as the then Lord Chancellor; and in these circumstances he is disposed to think that it would be dangerous to accept as finally conclusive of the question what was not a judicial decision, but merely an opinion of the ex-Lord Chancellor, without at any rate giving the matter fuller consideration.

I am therefore, in forwarding these papers, to request that you will be good enough to favour Sir E. Grey with your opinion, whether in the present case the applicant for a certificate of British nationality, Mr. Wilfred Judah Messiah, being the offspring of a marriage of a polygamous character, is to be regarded as legitimate in contemplation of English law, and, if so, on what ground?

Sir E. Grey would also be glad to receive any observations of a general nature which you may be good enough to offer on the papers now submitted to you.

I have, &c.
(Signed) ERIC BARRINGTON.

Report.

We understand the facts to be that Moses Messiah, the father of the applicant, is a natural-born British subject, who, at the time of his marriage with Esther Youli, was domiciled in Algeria, and that such marriage is valid according to the Jewish law and to the law of the domicile of the parties and of the place where the marriage was contracted, namely, Algeria.

We think that such marriage, in spite of its polygamous character, is valid by English law for the purpose of conferring British nationality upon the offspring on the ground that it is a good marriage according to the law of the domicile of the parties and of the place where the marriage was contracted, and also of their religion, if that be material, although such marriage would be considered in England as invalid for the purpose of succession to land in England, or of claiming the assistance of the matrimonial courts there.

We think, therefore, that the applicant is entitled to British nationality on the ground that he is the legitimate (for this purpose) son—born out of His Majesty's Dominions of a natural-born British father.

We offer no opinion on the question whether the possession of a certificate of British nationality will enable the applicant to escape military service in France.

(Signed) JOHN L. WALTON.
W. S. ROBSON.

Law Officers' Department, October 19, 1906.

GENERAL

63

ANNEX IV.

ARTICLES IN LEGAL PERIODICALS.

No. 1.—*Society of Comparative Legislation Journal*, Vol. II, N.S.

Sir Dennis Fitzpatrick, writing on non-Christian marriage, says (on p. 367 of the "*Society of Comparative Legislation Journal*," Vol. II, N.S.):—

"As regards non-Christian marriage generally, there is a further point which seems worth mentioning, namely, that the character of a marriage as Christian or non-Christian must be determined by looking at it as it stood at the time it was contracted, according to the law under which it was contracted. In other words, once a non-Christian marriage, always and everywhere a non-Christian marriage. Thus, if the parties to a potentially polygamous marriage were to come into England, the courts there would not say: 'The husband has only one wife, and if we recognise his union with her as a marriage, he cannot, during the continuance of such marriage with her, take a second wife in England. Hence we may treat this union as monogamous and Christian.' They would, on the contrary, hold the marriage to be still polygamous and non-Christian. Similarly, where persons who are not Christians contract a non-Christian marriage, and during the continuance of that marriage are converted to Christianity, the character of their marriage is unaffected by the conversion, and remains non-Christian. This was held by a full bench of the Madras High Court,⁽¹⁾ and a similar view was taken by the Allahabad High Court.⁽²⁾ The Calcutta High Court⁽³⁾ in a case before it acted as if it took an opposite view, but the parties in that case did not appear by counsel, and the point was not raised."

A Marriage once Non-Christian always Non-Christian.

On p. 368, he says, with regard to the recognition of non-Christian marriages:—

"What we have to deal with here, as stated above, is the treatment of the non-Christian marriage, and the legal relations, rights, and duties springing directly or indirectly from it, in cases where such marriage has been contracted in some foreign country or in some part of Her Majesty's dominions abroad where such marriages are legal, and comes in some way in question before the courts in England or in some part of Her Majesty's dominions similarly situated. The question is one of private international law, using the phrase in its widest sense.⁽⁴⁾

Recognition of Non-Christian Marriages.

(P. 369.) "It may be said at once that it seems almost hopeless to think of the courts of a country like England dealing with the personal relations of the parties to a non-Christian marriage, except, perhaps, in regard to some particular points; and one thing above all might be easily anticipated, namely, that a piece of machinery like the English Matrimonial Court, constructed specially for the purpose of dealing with the personal relations of the parties to a Christian marriage, would be found altogether unsuitable for handling non-Christian marriages. It must, however, be remembered that a marriage gives rise directly or indirectly to many other legal consequences besides the personal relations between the parties, and to them different considerations may apply.

Its Difficulties.

(P. 370, footnote.) "Sir Erskine Perry, in his judgment in the case of *The Khojas and Memons (Oriental Cases*, p. 127), actually formulated a very far-reaching claim of certain non-Christian people to have their personal law administered to them, and he considered that he had for it the support of Lord Stowell, but in this he perhaps went too far. Lord Stowell never put the dots on the 'i's' and the crosses on the 't's,' as Sir E. Perry does. The passage (which seems worth quoting), after referring to the well-known remarks of Lord Stowell in *The Indian Chief*, proceeds as follows: 'by the comity of nations, therefore, as existing between princes of Christian and non-Christian faith, the *lex loci*, to its whole extent is held not to apply to Europeans placing themselves under the government of the latter. But if this is the case as regards Christian aliens in a foreign State, there can be no doubt that a similar comity requires a similar rule to be observed when a Mussulman or Hindu seeks a domicile in a Christian country. How far the peculiar laws of such non-Christian aliens would be recognised, it may not be very easy, nor is it necessary, to define beforehand. But on very many questions, such as marriage, divorce, succession, and possibly adoption, there seems no reason to doubt that the proper law to be referred to for the decision of any controversy would not be the law of the Christian community, but the law or usage of the peculiar non-Christian class. That this was the opinion of the great jurist whom I last cited is not left a matter of doubt, for he has stated it expressly in many of his judgments with respect both to Jews and that other singular Oriental race, the gypsies.' See 3 Rol. 32; *Ruding v. Smith*, 2 Hagg. Consist. 384; *Lindo v. Belisario*, 1 Hagg. 216."

Jewish Marriages before Lord Stowell.

(P. 371.) "The next case was that of *Lindo v. Belisario*, which was a jactitation suit brought by a Jewess against a Jew, charging him with having boasted of a marriage with her which was not good or valid in law."

(P. 372.) "It [marriage] is a contract according to the law of nature, antecedent to civil institution, and which may take place, to all intents and purposes, whenever two persons of different sexes engage by mutual contracts to live together. Our first parents lived not in

⁽¹⁾ I.L.R. 17 Mad. 235 [1893].

⁽²⁾ 2 N.W.P.H.C. Rep. 370.

⁽³⁾ I.L.R. 18 Cal. 252 [1891].

⁽⁴⁾ As distinguished from the narrower, and, for certain purposes, more proper sense of a body of definite rules already recognised between the courts of civilised States. It is to private international law in this latter sense Professor Dicey confines himself in his *Conflict of Laws*, and thus non-Christian marriage falls outside the scope of that truly admirable work.



political society, but as individuals without the regulation of any institutions of that kind. It is hardly necessary to enter something of a protest against the opinion, if any such opinion exists, that a mere commerce between the sexes is itself marriage. A marriage is not every casual commerce, nor would it be so even in the law of nature. A mere casual commerce without the intention of cohabitation and bringing up of children would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children and for such lasting cohabitation, that in a state of nature would be a marriage, and, in the absence of all civil and religious institutions, might safely be presumed to be, as it is popularly called, a marriage in the sight of God. It has been made a question how long the cohabitation must continue by the law of nature—whether to the end of life. Without pursuing that discussion, it is enough to say that it cannot be a mere casual and temporary commerce; but must be a contract at least extending to such purposes of a more permanent nature in the intention of the parties. The contract thus formed in the state of nature is adopted as a contract of the greatest importance in civil institutions. Rights of property, he goes on to observe, spring from it, and so on."

Dicta of Lord Brougham on Non-Christian Marriage in "Warrender v. Warrender."

(P. 375.) "As to what really these utterances of his regarding the non-Christian marriage are to be taken to mean there is room for considerable doubt. They have sometimes been referred to in support of the view that no court in a civilised Christian country can recognise any marriage except a Christian marriage, and that such a court must treat every other marriage as a mere nullity, under whatever circumstances and for whatever purposes it may present itself for consideration; but it is perfectly clear from the first of the two passages we have italicised above that Lord Brougham did not mean to assert that. It may with more plausibility be suggested that, though he did not mean to lay this down in respect to non-Christian marriages generally, he did mean to lay it down in the second passage italicised, in regard to such non-Christian marriages as might be deemed to be polygamous, including those only potentially polygamous. But it is very hard to say what opinion exactly Lord Brougham meant to express in this latter passage, or, indeed, whether he had formed in his own mind any opinion definite enough to help us. It may be that all he meant to say was that we could not treat a second polygamous marriage as good, standing the first, and that he would have been prepared, like the Christian Church, to treat the first polygamous marriage as good, but as binding the man to monogamy. There is a passage a little lower down which goes to support, to some extent, this view of his meaning; but if that was his view, it is clearly one which we could not accept."

"Further, whether his observations are to be taken as applying to a first polygamous marriage or only subsequent one standing the first, the question arises—What exactly did he mean by saying that 'We never should recognise the plurality of wives,' or, to put it in the more usual form, that we should never recognise a polygamous marriage?"

"Recognising" a polygamous marriage.

"Now what is ordinarily meant when it is said that a particular court cannot 'recognise' a certain marriage which it is admitted has, as a matter of fact, been contracted is simply this, that that court cannot give effect to, or do away with, or otherwise deal with, some or all of the legal relations, rights and duties springing directly or indirectly from that marriage, by virtue of the law under which it has been contracted; and if Lord Brougham merely meant that he could not in this sense 'recognise' a polygamous marriage for the purposes of a case like that before him, and on which his attention would be naturally fixed—a case dealing with the personal relations between the parties to the marriage—that would be no more than was subsequently decided, so far as the English Divorce Court was concerned, in the *Hyde* case. But it must be remembered that one of our courts might be asked to 'recognise' such a marriage for any one of a number of other purposes, as, e.g., if a man of a polygamous race, domiciled and married in his own country, were to die there leaving two wives, and children by both, and these children were to institute proceedings here to recover the share legally due to them of some money left by their father in the hands of an agent here. Now had Lord Brougham thought out all this, and did he mean deliberately to say that, for the purpose of the case just put, and of all other cases that could be put, our courts should refuse to 'recognise' a polygamous marriage? I must say that, having regard to the circumstances, this seems extremely unlikely; and it may be added that, if he had thought the whole position out in such detail, he would probably, *more suo*, have given us the benefit of his reflections on it at length. It is a relief to turn from such matters of speculation to the case of *Hyde v. Hyde*, where we shall find ourselves on firmer ground."

Jurisdiction of Matrimonial Court over mutual personal rights of parties—whether exclusive.

(P. 378.) "It does not, of course, follow because there exists in a country a special court, like the English Divorce Court, established for the purpose of affording certain sorts of relief to the parties to a Christian marriage, and to them only, that somewhat similar relief will not be granted by some other court in that country to the parties to a non-Christian marriage."

Enforcement of other rights arising under non-Christian marriage.

(P. 379.) "But this is very far from exhausting the question before us. It does not necessarily follow, because the judicial system of a country like England must abandon the idea of dealing adequately with the purely personal relations between the parties to a non-Christian marriage, that it should treat such a marriage as for all purposes a mere nullity, incapable of giving rise to any legal consequences whatsoever. It does not necessarily follow that it should refuse to recognise and enforce any proprietary or pecuniary claims to which the marriage may give rise between the parties to it—that it should refuse, for example, to entertain a claim by a Mahometan wife to a sum due to her on account of her 'dower,' or a claim by a Mahometan or Hindu widow to succeed to the whole or a portion (say) of some funds left by her husband in England. Still less does it follow that, if there were children of the marriage, and they, on the death of their parents, claimed to succeed (say) to funds left by the parents in England, they should be held to be illegitimate, and as such not entitled to succeed. In short, it does not

(*) Westlake's Private International Law, 1st ed., s. 347.

follow, as some have suggested, that our courts in England should absolutely ignore all family relations among the great majority of the human race, treating all wives among them as mere concubines, all children as bastards and all property left by an intestate among them as escheating or becoming ownerless.

"Lord Penzance was most careful in his judgment in the *Hyde* case to guard against any such startling conclusions being drawn from his decision."

(P. 380.) "Besides the questions which Lord Penzance here expressly states that he meant to leave untouched, it is obvious from what he says that he means to leave similarly untouched other important questions, which may depend on the validity or invalidity of a non-Christian marriage. You may, for example, have a question of national character or domicile depending on the validity of such a marriage; or, again, the question of the validity of a subsequent marriage may depend on whether a previous marriage of a non-Christian type is to be deemed a valid marriage or not."

(P. 382.) "The results to which we have now got are:—

"(1) That a non-Christian marriage is not a marriage in respect of which the English Matrimonial Court, or any like court in Her Majesty's Dominions, can exercise its peculiar jurisdiction.

"(2) That a non-Christian marriage is not a marriage through the medium of which a claim can be made out, in the United Kingdom and some other parts of Her Majesty's Dominions, to succeed to real property *ab intestato*, or, it may probably be added, otherwise by mere operation of law.

"As to the rest, the general question of the treatment to be accorded by the courts of a country like England to a non-Christian marriage entered into in a foreign country in accordance with the law of that country, and of the extent to which those courts can give effect to the legal relations, rights and duties springing directly or indirectly from such a marriage, is, so far as we have hitherto carried our enquiry, completely open. We now come to a case decided by one of our most eminent judges (Mr. Justice Stirling) in 1888, which, according to the way in which it is to be understood, may or may not have an important bearing on that general question.

"The *Baralong* Case. The case referred to is "*Re Bethell*," commonly spoken of as the *Baralong* Case."

(P. 384.) "No case has yet come before a court which would call for a detailed consideration of the judgment, but it has been found necessary to consider it for certain purposes out of court, and the result has been that a difference of opinion has arisen between persons eminently deserving of respect as to what should be understood to be the real grounds on which the learned judge based his decision. Two views have been taken of those grounds, which may be called the narrower and the broader view. The former view is that the judge decided as he did only because Christopher Bethell was, at the time of his marriage with Teepoo, an Englishman domiciled in England; and that consequently if Teepoo's husband had been a real *Baralong* pure and simple, domiciled and married in his own country, and had died leaving (say) money in the hands of an agent in England, as he might conceivably have done, and the daughter of the marriage had come to claim it as his next of kin, it is at least possible that she would have been held to be legitimate. It seems quite clear from paragraphs 605-7 of his *Commentary on the Indian Penal Code* that that eminent lawyer, Mr. J. D. Mayne, would agree with those who take this view.

"The broader view is that the judge decided as he did on the wider ground that every polygamous marriage must be held by a court in England to be, for all purposes whatsoever, a mere nullity, and that he would accordingly in the case just put have held the daughter to be illegitimate.

"Now, first, as to the narrower view. If it is right, Mr. Justice Stirling's decision is just what we should all have expected it to be.

"If the English law of marriage adheres to a domiciled Englishman to such an extent and so persistently that he cannot even contract a valid Christian marriage with his deceased wife's sister in a foreign country, where by the local law such a marriage is permissible, it may well be argued that, *a fortiori*, he cannot, by going into a country where a system of non-Christian marriage prevails, contract a valid non-Christian marriage. It may be added that the language of Lords Campbell and Cranworth in the *Brook* case(*) is sufficiently general to support the view that he cannot."

(P. 386.) "To turn now to the broader view of the grounds of the judge's decision, it must be admitted that there is something to be said in favour of it. It seems certainly strange that if the learned judge meant to decide as he did simply on the ground that Bethell was a domiciled Englishman at the time of his marriage he did not expressly say so. Further, there is a passage in his judgment which at first sight reads as if he meant to put his decision on the wider ground. After referring to Lord Brougham's dicta in the *Warrender* case, which we have already (p. 374) discussed, and to Lord Penzance's decision in the *Hyde* case, he says: 'I conceive that, having regard to these authorities, I am bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it is formed on the same basis as marriages throughout Christendom, and be in its essence the voluntary union of one man and one woman to the exclusion of all others.'

"I confess that when I first read the judgment I agreed with those who take the broader view of the ground on which the decision rests; but on further reflection I have come to agree with those who take the narrower view and think that the learned judge decided as he did merely

Results of cases so far examined.

The *Baralong* Case.

Views as to the "Ratio Decidendi."

The element of domicile.

The broader ground—a polygamous union.

Conclusion as to grounds of decision.

(*) Law Rep. 38 Ch. D. 220: 57 L.J. Chanc. 487.

(*) 2 House of Lords 193 [1861]. See also Mr. J. D. Mayne's *Commentary on the Indian Penal Code*, s. 628.



1933

because Bethell was domiciled in England at the time of his marriage. The circumstance that this ground is not expressly stated in the judgment may be explained by the course the argument had taken. The counsel for the infant referred to Bethell's English domicile, and admitted⁽⁹⁾ that, if the marriage was a polygamous one, it was invalid. All their efforts were directed to showing that the marriage was not meant to be polygamous, and thus the real issue in the case was whether it was polygamous or not. On this, which was substantially an issue of fact, the judge's attention would naturally be concentrated, and he had no occasion to trouble himself much about the law. As to the passage above extracted from his judgment, we are in no way driven to put upon it the construction put upon it by those who take the broader view, and which would make it deal with a variety of matters which the judge was in no way called upon to consider.

"It is submitted that when he said in effect that no non-Christian marriage was, as he expressed it, a valid marriage according to the law of England," he was using the phrase "law of England"⁽⁹⁾ in the narrower sense of the law of England governing English marriages, the essential portions of which an Englishman, like Bethell, domiciled in England, would carry with him abroad, and not in the broader sense of the law of England as including all principles of private international law which would be followed by our courts. It seems impossible to suppose that the learned judge could have considered that he was bound, by Lord Brougham's *dicta* and Lord Penzance's decision in the *Hyde* case, to hold that the law of England in the latter and broader sense must always and for all purposes treat non-Christian marriage as invalid, and in particular that he would be bound by these authorities to hold that the child of a marriage contracted in their own country between members of a polygamous community there domiciled is illegitimate. Lord Penzance, as we have seen (pp. 379-80), most carefully guarded himself against being supposed to decide anything like that; and as for Lord Brougham's *dicta*, it will be seen, from what has already been said (pp. 374-6), that they could not bind any judge to hold anything.

"Assuming the narrower view of the grounds of Mr. Justice Stirling's decision to be right, our general question is still a completely open one, and we must accordingly look beyond our English law reports to see whether we can find anything to throw light on it."

No. 2.—"Law Quarterly Review," CLXXXIII, July 1930: "Status and Capacity."—
By Carleton Kemp Allen.

P. 299.

If an Oriental has by the law of his own country the right to kill his wife for adultery, or his son for disobedience, his *lex domicilii* will not avail him as a defence if he exercises those rights in this country. Our courts would not, as will be submitted presently, in any way deny the status of the husband and wife in such a case; but they would not allow that status to produce practical results which would shock English ideas and disturb public order.

P. 302.

(Reversed in the
C.A. 1930/W.N.
145.)

It is even doubtful whether the children of polygamous marriages, perfectly valid in the countries where they have been contracted, would be permitted to exercise rights of inheritance in England.⁽¹⁰⁾ It has recently been held that Soviet marriages are not marriages at all in the view of English law; would the offspring of these unions be entitled to succeed to personal property in England? There is no certain answer to these questions at present; but it is difficult to doubt that foreign rules of legitimacy and legitimation might be regarded by English courts as *contra bonos mores*, and that in such circumstances the capacities which usually accompany the status of legitimacy would not be permitted by our law.

P. 308.

To take another example of a status "not recognised" by English law: It is said that English law does not recognise or "will not give effect to" any form of marriage other than the monogamous. The group of cases of which *Hyde v. H.* (1866) L.R. 1 P. and M. 130 is the chief and *Nachimson v. N.* (1930), p. 85, is the most recent, seems to lay down this principle: A person of foreign domicile cannot employ the machinery of English courts in order to dissolve a marriage of a kind which is unknown to English law.⁽¹¹⁾ A Mormon spouse polygamously married in Utah cannot dissolve the marriage in England by means of a procedure which was devised for monogamous marriage. The effect of the rule is purely negative; it says nothing positive as to the status of the parties. It is never denied that the parties may be irreproachably wedded spouses within their own community, at the risk of redundancy, it must be repeated that the court cannot affect that question, even if it would; what is denied is that they are spouses in the sense in which English law, and indeed all Christendom, understands the term. That being so, they can hardly expect to put in motion legal machinery which is clearly intended for spouses in the Christian sense. Lord Penzance in *Hyde v. H.* points out the absurdities which would result from any attempt to adapt the unadaptable; the parties would come before the court asking for English matrimonial remedies, in a state of inextricably-tangled bigamy and

⁽⁹⁾ P. 226 of report in Law Reports and p. 490 of that in Law Journal Reports.

⁽¹⁰⁾ See Dicey's Conflict, p. 6.

⁽¹¹⁾ The question is left open by *Hyde v. H.* (1866) L.R. 1 P. and M. 130 (see Dicey, p. 290, and *post*, p. 308), and by the curious case of *Re Ullee* (1885), 54 L.T. (N.S.) 286, though in the latter case Chitty, J., at first instance, seemed to incline to the view that the children of a Mahometan marriage would be considered legitimate for all purposes in England.

⁽¹²⁾ See *per* Lord Brougham, *Warrender v. W.* (1835), 2 Cl. and F. at p. 351. The rule does not appear to apply to Jewish marriages, which in some countries may be dissolved by the mere repudium of one party: *Spivack v. Spivack* (1930), 46 T.L.R. 243 (though this was a case of maintenance, not of divorce).

adultery." The chief ground of his decision is the impossibility—apart from the undesirability—of attempting to bring one kind of marriage within the territory of a totally different kind. "We have in England no law framed on the scale of polygamy, or adjusted to its requirements" (p. 136). "All that is intended to be here decided is that as between each other (the spouses) are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England" (p. 138).⁽¹²⁾

It is, indeed, a little misleading to say that a polygamous marriage is not recognised in England—at all events for purposes other than the application of the matrimonial law. It is difficult to believe that a Mahometan wife ceased to be a wife merely because she happens to be temporarily in England. American courts have expressed strong opinions to the contrary.⁽¹³⁾ The wife cannot, it is true, go to an English court for the enforcement of matrimonial duties or for relief from matrimonial obligations; but it is apprehended—though with diffidence, in the absence of authority—that if, while she was in England, any person wrote or said that because she was not married in the Christian sense she was no true wife, but an immoral woman living in fornication with a man not her husband, she would have a good cause of action for libel or slander in an English court. Or, again, is it conceivable that a Mahometan married to a wife of, say, 14 years, would be liable in this country for carnally knowing his wife, under the Criminal Law Amendment Act, 1885? Yet this result would seem to follow if his married status is in no way recognised by our law.

No. 3.—Article in the "Law Quarterly Review," vol. 47, No. 186, April 1931, p. 252, by
S. G. Vesey Fitzgerald, entitled "Nachimson's and Hyde's Cases."

In this article the author contends that where a marriage is celebrated which is a valid form of marriage by the *lex loci celebrationis*, and is in intention and in fact a monogamous marriage, it should be recognised and treated as a monogamous marriage, although the form of marriage was one under which polygamous marriages are contracted (viz., a Mahometan marriage, &c.).

The author supports his contentions by a reference to the language of Lord Brougham in *Warrender v. Warrender*, 2 C.L. and F. 488 at p. 530; the Sikh marriage case, "Times," the 1st August, 1907; a decision of the Indian courts reported *Sonaluzmi v. Vishnaprasad* (1903) 28 B. 597, in which it was held that a marriage celebrated according to polygamous form between Hindus barred the subsequent marriage by the husband according to the rights of the monogamous Brahmo Samaj, to which meantime he had become affiliated, and that his existing marriage was clothed by his new tenets with the legal vesture of monogamy; and the decision of the Supreme Court of the State of Iowa, *Royal v. The Cudahy Packing Company*, 195 Iowa, 757.

The author recognises that the decision in *Hyde v. Hyde* is against his contention in the sense that Lord Penzance in that case never considered the possibility that a marriage contracted in a polygamous form might be nevertheless considered to be a monogamous marriage, though the author's contention in no way affects the famous definition of marriage in that case which the English courts have always applied with regard to cases in which their matrimonial jurisdiction was invoked.

The author does not consider, and does not appear to be aware of, the possibility carefully safeguarded by Lord Penzance, that a polygamous marriage, although one not coming within the scope of the court's matrimonial jurisdiction, might nevertheless be a marriage for the purposes of legitimacy and succession to property.

⁽¹²⁾ In parts of the Empire where domiciled subjects (Chinese) may lawfully have secondary wives, the issue of these wives or concubines are recognised by the Privy Council as legitimate for purposes of succession: *Cheang Thye Phin v. Tan Ah Loy* [1920], A.C. 369; *Kho Hooi Leong v. Kho Hean Kwee* [1926], A.C. 529.

⁽¹³⁾ "If," said Ware, J., in *Polydore v. Prince* (Beale's Cases, at p. 1, 741), "a Turkish or Hindu husband were travelling in this country with his wife, or temporarily resident here, we should, without hesitation, acknowledge the relation of husband and wife between them; but the legal pre-eminence of the husband as to acts done here would be admitted only to the extent that the marital rights are recognised by our laws, and not as they are recognised by the law of his domicile." (The latter part of the dictum is undoubted (see Dicey, Rule 141, and *ante*, p. 299). Dicey is therefore scarcely accurate in saying (p. 290, note (c)) that the dictum of Ruffin, C.J., in *Williams v. Oates* (5 Iredell 535) is "isolated." Ruffin, C.J., said: "If a Turk with two wives were to come here, we would administer to them the justice due to the relations contracted by them at home": cited and doubted by Wharton, s. 130. It is certain that jurisdiction in separation and restitution of conjugal rights will be exercised independently of the *lex domicilii*: *Armstrong v. A.* [1898], p. 178; *Graham v. G.* [1923], p. 31; but whether it would be exercised by English courts in relation to a polygamous marriage does not appear to be settled.



1933

PAPER B.

[T 13620/125/376]

OBSERVATIONS BY THE ASSISTANT LEGAL ADVISER TO THE HOME OFFICE.

IN commenting briefly on Mr. Beckett's memorandum it is not desired to question the desirability of establishing the conclusion (as suggested in Rule XII) that, where a polygamous marriage is to be held valid under the preceding rules, the wife of any such marriage is to be deemed to be a "wife" for the purposes of British nationality law and any child of such a marriage is to be deemed legitimate and the husband to be deemed the "father" for the same purpose. The memorandum makes out a strong case in favour of the view that for some purposes (other than the matrimonial jurisdiction of the English courts and succession to land in England or to titles of honour) a polygamous union is in English law a valid marriage, if each of the parties had the capacity to contract the marriage under his or her personal law, and if the marriage was a valid one under the *lex loci contractus*. If such union can be held to be valid for any purpose, there are good reasons (stated in paragraph 6 of the memorandum) why it should be regarded as valid for the purposes of the application of certain provisions of the British Nationality Acts and the Naturalization Act, 1870.

2. As regards the rules or principles set out in Mr. Beckett's memorandum, there appears to be some inconsistency between Rules II and IV. Rule II states that a polygamous marriage is valid if, and not valid unless, the marriage is a valid one under the *lex loci contractus* and each of the parties to the marriage had the capacity to contract that kind of marriage under his or her personal law (the law of his or her domicile). This implies that the capacity of a woman to enter into a valid polygamous marriage must always depend upon her own personal law as distinct from that of her intended husband; and that for this purpose the same test (*i.e.*, domicile immediately before marriage) is to be applied to each party separately. Rule IV says, in effect, that, so far as the woman is concerned, her capacity to contract such a marriage is governed, in cases where she resides with her husband, not by her own personal law before the marriage, but by that of her husband; she is deemed on marriage to have acquired his domicile and personal law.

3. Rule IV appears to be based upon the authority of Lord Mackay's judgment in *Lendrum v. Chakravarti* (1929), *Sc. L.T. Rep.* 96. It is not altogether clear how its application in any particular case is to be determined. It is obvious that the fact that the wife resides with her husband cannot, in the nature of things, be established on the actual date of the marriage. The test must either be (a) that on that date she *intends* to reside with him, or (b) that she has lived with him for some period after the marriage. If (b) is the right test to apply, the question whether she acquired her husband's domicile and personal law at the moment of marriage cannot be determined until some time afterwards. It follows that a polygamous union which, by reason of the "wife's" incapacity under her own personal law, is an invalid marriage in English law at the time it was celebrated may become a valid marriage *ex post facto* by the process contemplated in Rule IV.

4. Assuming, however, that Rule IV be accepted and the capacity of the woman to enter into a valid polygamous marriage is (in those cases where she "resides with the spouse of such marriage") to be determined by reference to the law of the domicile which she acquires by reason of the marriage, it would appear to follow that in the great majority of cases the wife cannot be regarded as possessing for this purpose any independent personal law of her own; her own personal law is, in such circumstances, ousted by the mere act of going through the ceremony of marriage.

5. If Rule IV is accepted, it is suggested that Rule II should be expressed to be subject, so far as concerns the wife's personal law, to the qualification in Rule IV.

6. If Rules I-XI in Mr. Beckett's memorandum are to be applied to British nationality law with the consequences suggested in Rule XII, this would, as Mr. Beckett points out, mean that the expressions "wife" and "father" would be interpreted as including respectively the wife of a polygamous marriage and the husband of such a marriage. If this interpretation of these expressions is established by a decision of the High Court, the same meaning would have to be given to them in the courts of all parts of His Majesty's dominions in which the British Nationality and Status of Aliens Act, 1914, or the relevant previous Act is in force as an Act of the Parliament of the United Kingdom, and in which that Act is the law to be applied in the courts of those parts for the purpose of determining whether any person is a British subject or not. As regards the *Dominions*, each of whom (other than the Irish Free State) has passed an enactment substantially in the same terms as the Imperial Act of 1914, it would, to say the least of it, be inconvenient if the courts of a Dominion were to take, as regards the meaning of the word "wife" in the corresponding enactment of the Legislature of that Dominion on the subject of British nationality, a view different from that taken by the English courts. Such a difference of interpretation would mean that a person who is a British subject in the United Kingdom would be regarded as an alien in the Dominion concerned; and, conversely, a person might be regarded as an alien in the United Kingdom and yet be a British subject in the Dominion in question. Similar differences might arise as regards the nationality of the children born abroad of a British subject whose marriage was polygamous. If, as a result of the recognition in an English court of the validity of the marriage, the children were held to be legitimate, it would follow, as Mr. Beckett points out, that they would fulfil the conditions required by s. 1 (1) (b) of the Act of 1914 and would be British subjects and should be so recognised in all those parts of His Majesty's dominions whose courts are bound to interpret and construe the Act of 1914 according to the principles of English law. But Dominion courts might hold that they were not bound by those principles in the interpretation and construction of their own Acts relating to British nationality and might decline to recognise as British subjects the children born abroad of such a polygamous marriage. The result of the application of a different principle would be that the law of British nationality, though in substantially uniform terms in the various enactments in force throughout the Commonwealth, would not be uniform in its application. It is, of course, obvious that differences of this kind cannot be avoided so far as concerns the decisions of courts. But in the absence of judicial decisions producing such a result it seems desirable to ensure that, so far as possible, the various enactments relating to British nationality throughout the Commonwealth should be construed for administrative purposes according to uniform principles and this result might perhaps be achieved by consultation with the Dominions.

November 19, 1932.

PAPER C.

[T 3748/125/376]

Colonial Office to Foreign Office.—(Received March 31, 1932.)

Sir,

Downing Street, March 30, 1932.

I AM directed by Secretary Sir Philip Cunliffe-Lister to acknowledge the receipt of Foreign Office letter No. T 827/125/376 of the 18th February, regarding the proposed reference to the Law Officers of the Crown on the question of the nationality of women who have entered into polygamous marriages and of children born out of His Majesty's Dominions the issue of polygamous

marriages entered into by male British subjects, and to request you to lay before Secretary Sir John Simon the following observations on the subject:—

2. Sir Philip Cunliffe-Lister is advised that the authorities cited in connection with the proposed Rule IX in paragraph 43 of the memorandum by the Second Legal Adviser to the Foreign Office, go to show, only that where the husband's personal law recognises polygamy, English law regards as valid a polygamous marriage celebrated in England or in a country where English law governs British subjects. Even if this proposition is established, there may well be countries in respect of which it could not be. It would appear, therefore, that the proposed rule is too wide and should be qualified by the words "unless the *lex loci contractus* otherwise provides."

3. It is also suggested that, apart from the fact that the order in the case of *In the Estate of Abdul Majid Belshah* was made by consent, that case can, for the following reason, hardly be regarded as good authority for the proposed rule. The question at issue in that case concerned the devolution of movables on intestacy, which depends upon the law of the domicile of the deceased. The only question to be decided, therefore, would be, who were in fact the *individuals* who, by the law of the domicile, should succeed to the property, and if the answer to that question was that the persons to inherit was one who had taken part in England in a certain ceremony, it does not follow that, in giving effect to the law of the domicile, the English court recognised that ceremony as a marriage or the person concerned as a wife.

4. I am to take this opportunity to enclose a note, by one of the Assistant Legal Advisers to the Colonial Office, on the subject of the case of Mr. J. S. Lee (otherwise known as Li Jow Son) who was granted a certificate of naturalisation as a British subject in 1924. It will be observed that the view acted upon in that case was not in conformity with the effect of the proposed Rules II and XII.

I am, &c.

GERARD L. M. CLAUSON.

Case of J. S. Lee (otherwise known as Li Jow Son).

J. S. Lee, a Chinese national, applied to the Governor of Hong Kong in November 1923 for a certificate of naturalisation under the British Nationality and Status of Aliens Act, 1914. Lee stated that he was married in 1900 to Li Wan Shi, but there was no children of the marriage; that he subsequently took unto himself a concubine named Ng Shi, and a son was born to him of this concubine on the 25th July, 1915; and that he also took unto himself another concubine named Helen Lee, and a son was born to him of this concubine on the 6th October, 1922.

In his application for naturalisation Lee asked that his two children, who were born not of his wife, but of his two concubines, should be included in the certificate.

The Crown Solicitor of Hong Kong, in an opinion from which it appears that under Chinese law Ng Shi and Helen Lee would be regarded as wives and not as mere concubines, expressed the view that the British Nationality and Status of Aliens Act, 1914, contemplated one wife to the exclusion of others, and only children born of such wife, and that Lee's concubines and sons by concubines or adoption should not be mentioned in and would not be affected by any certificate of naturalisation granted to him.

The Legal Adviser to the Colonial Office concurred in the view expressed by the Crown Solicitor, and the certificate of naturalisation granted to Lee contained no mention of his children.

PAPER D.

[T 9466/125/376]

India Office to Foreign Office.—(Received August 10.)

Sir,

India Office, August 9, 1932.

WITH reference to your letter of the 18th February, 1932, T 827/125/376, and connected correspondence, on the subject of the proposed reference to the Law Officers of the Crown on certain nationality questions arising out of polygamous marriages, I am directed by Secretary Sir Samuel Hoare to state for the information of Secretary Sir John Simon that the suggested rules at the end of the Foreign Office memorandum dated the 11th January, 1932, are acceptable to the Government of India.

The Government of India observe, however, that if the Law Officers conclude that the suggested rules do not embody a correct statement of the existing law, and more particularly if their opinion lends any support to the view attributed in paragraph 7 of the memorandum to the late Sir Edward Davidson, they may find it necessary to suggest that steps should be taken to amend the British Nationality and Status of Aliens Act in such a manner as to introduce the substance of the rules proposed by the Second Legal Adviser to the Foreign Office.

2. The point had been raised whether any ambiguity exists in connection with the sense in which the expression "personal law" is used in the proposed Rules II-VI and Rule IX; reference may also be made to the statements bearing on the question of the interpretation of the expression in paragraphs 26, 38 and the last sub-paragraph of paragraph 43 of the memorandum. In the view of the Government of India the expression "personal law" is always intended to denote the law which the Courts of the country of a particular person's domicile would apply to that person in matters of status. Hence, since by virtue of provisions such as those contained in, *e.g.*, Section 16 of the Madras Civil Courts Act, 1873, and Section 5 of the Central Provinces Laws Act, 1875, the Courts in British India would apply the Muhammadan religious law of marriage to a Muhammadan domiciled in British India, the Muhammadan religious law is the personal law for the purpose of the memorandum and rules of a Muhammadan domiciled in British India (*cf.* paragraph 26 of the memorandum).

3. The question had also been raised whether some addition should be made to meet the case of the Indian States in the proposed Rules VI and X, dealing with the case of British subjects in foreign countries in which His Majesty exercises extra-territorial jurisdiction. The position appears to the Government of India to be that the subjects of British India take their personal law with them and enjoy it without any reference to any extra-territorial jurisdiction which may be enjoyed by His Majesty in those States. The Government of India doubt, therefore, whether there is any real occasion to refer to the Indian States in the proposed rules, as it may be assumed that all the States follow British India in applying what may be termed the personal law to questions of marriage. Consequently a marriage contracted, *e.g.*, by a British Indian Muhammadan in a State, is covered in terms of Rule II.

4. As regards the proposed Rule VII, the Government of India assume that the latter part of Rule VII (b) is intended to be read subject to Rule II. In other words, Rule VII (b) is designed to protect a subsequent polygamous marriage from being invalidated (for the purpose of legitimacy *vis-à-vis* the British Nationality and Status of Aliens Act, 1914) by reason only of an existing monogamous marriage, but not to oust the necessity of the subsequent polygamous marriage satisfying the conditions necessary to the recognition of the marriage for that purpose under Rule II.

I am, &c.

A. DIBDIN.

PAPER E.

[T 13619/125/376]

Treasury Solicitor to Foreign Office.—(Received November 22.)

Sir,

WITH reference to Mr. Warner's letter, T 827/125/376, of the 18th February last, enclosing a memorandum by the second legal adviser to the Foreign Office on the subject of polygamous marriages, and subsequent correspondence relating to the same matter, I concur generally with the conclusions set out in Mr. Beckett's memorandum, which appear to be in agreement with the present state of the authorities, but I venture nevertheless to submit the following observations.

I find it difficult to reconcile the second and fourth propositions stated by Mr. Beckett. If a polygamous marriage is recognised as a valid marriage if, and will not be recognised as a valid marriage unless, the marriage was one which each of the parties had the capacity to contract under his or her personal law, I do not understand how a woman who enters into a polygamous marriage and resides with the spouse of such marriage can be deemed to acquire his domicile and his personal law and to possess the capacity to contract such a marriage, whatever her personal law before the marriage, provided that her husband possesses such capacity under his personal law. There is, I agree, authority for both propositions, but they appear to me nevertheless to be inconsistent with one another. I hesitate to say on which side the greater weight of authority lies; but I am inclined to think that it is in favour of Mr. Beckett's fourth proposition, although principle and reason are in favour of his second.

I appreciate that Mr. Beckett's propositions generally are stated in reference to questions arising in connection with British nationality law, but it would be desirable, I suggest, for the sake of avoiding misunderstanding hereafter, that attention should be drawn to certain qualifications which might otherwise be overlooked. There is, for example, so far as I know, nothing to prevent the Sovereign from conferring a hereditary peerage upon a person who is not a British subject, but a person on whom a peerage is conferred is only entitled to a Writ of Summons if he is a British subject. On the other hand, it seems clear that a person who is the lawfully begotten offspring of a polygamous or potentially polygamous marriage has no claim to a Writ of Summons, even if he is a British subject, on the ground that a peerage was conferred upon his father. The point has arisen in connection with the Sinha peerage, and I believe is still the subject of discussion.

It can scarcely be denied that the law on the subject of polygamous marriages and their incidents is in a sad state of confusion, arising mainly, if not wholly, from the failure of the Courts to adhere to the well recognised principles of the Common Law which ordinarily govern questions of personal status. The abandonment of these principles seems to be due in part to the difficulty experienced by the Courts in fitting into the Common Law system juristic conceptions which are alien to and inconsistent with English legal ideas, and in part to a very natural desire to protect Englishwomen against the consequences of their own folly. The results have proved very unfortunate, and it is difficult to discern in Mr. Beckett's twelve propositions a body of coherent and consistent law.

The English Courts at the outset declined to admit that the jurisdiction of the Divorce Court could be invoked for the purpose of dissolving a polygamous marriage. That this refusal was based upon sound legal doctrine cannot be doubted; but it is singular that they have failed to see that to make English ceremonies of marriage available to those whose personal law permitted polygamy was an equal if not a greater impropriety. Certainly it is strange doctrine that a polygamist may enter into a valid marriage in England, but has no right to have a polygamous marriage dissolved by an English Court. The Courts have, it is true, endeavoured to evade the dilemma by holding that the contract created in England by the marriage of a polygamist according to the law of England

brings into existence a monogamous marriage only; but they so hold by abandoning *in toto* the fundamental principle that matters of status, and especially the essential validity of a marriage, are regulated by the law of the domicile and not by the *lex loci contractus*.

It is submitted that if this topic had been the subject of a well-considered decision by one of the higher tribunals when it first arose, the conclusion must necessarily have been that the ceremonial of marriage prescribed by English law was only available for those whose personal law recognised no other form of marriage than monogamous marriage, the whole basis of the Common Law, so far as questions relating to marriage are concerned, being essentially based on the idea of monogamy and on nothing else. There is in truth no place for polygamy in the Common Law system, although such legal incidents as flow from it under the personal law of those who practise polygamy are entitled to recognition in an English Court in the same way as rights lawfully acquired under any foreign system of law are entitled to recognition on the principles of international law and comity which have been adopted in England. Nor need a conclusion such as is suggested above have caused any practical inconvenience, as Mr. Beckett's ninth proposition clearly shows. But to hold that one who is a polygamist by his personal law and who marries in England according to English law thereby becomes a monogamist is to destroy the unity of the personal law and to set the *lex loci contractus* up in competition with the law of the domicile as the determining factor in the status created by marriage.

The mischief is, however, already done, and only the Legislature can now remedy it. An opportunity might have occurred a few years ago of having the whole subject reviewed with the assistance of such arguments as the Law Officers might have thought fit to present, if the case of *In re Belshah, Belshah v. Majig*, of which an account is given on p. 38 of Mr. Beckett's Memorandum, had not been settled on terms which were made an Order of the Court. In that case, if the polygamous marriages of the deceased were not entitled to any recognition by an English Court, it would seem that the deceased's property vested in the Crown as *bona vacantia* and that the Treasury Solicitor, as the Crown's Nominee, ought therefore to have been made a party to the proceedings for the purpose of representing the Crown's interest. This aspect of the matter appears, however, to have escaped the notice of the learned President, and the attention of the Treasury Solicitor was never drawn to the case until the proceedings were over and the property had been divided among the various claimants. Possibly another opportunity of the same kind may occur; and it is a matter for consideration whether, when fundamental questions affecting the English law of marriage arise in proceedings between private individuals (such as recently occurred in connection with the case in which the question of Soviet marriages was discussed), the assistance of the King's Proctor ought not to be invoked by the Court in order that he may lay the facts before the Attorney-General and the latter may appear before the Court and bring to its notice all relevant arguments and authorities, if he is of opinion that over and above the issues between the parties to the suit questions of general public interest and importance are involved. It is, perhaps, significant that Parliament has enacted that in the case of all petitions for a declaration of legitimacy or of British nationality the Attorney-General must be cited as a respondent, presumably on the ground that these are matters of status in which the public interest requires to be represented by a public officer.

I am, &c.

M. L. GWYER.



1933

74

GENERAL

[T 8615/1326/376/1933]

No. 2.

July 28, 1933.]

Foreign Office to the Law Officers of the Crown.

Recognition by
English
courts of
divorces by
declaration
and
registration
under laws
of Soviet
Russia,
Japan and
China.

Gentlemen,

Foreign Office, June 26, 1933.

I HAVE the honour to state, by direction of the Secretary of State for Foreign Affairs, that he and the Secretary of State for the Home Department desire to obtain your opinion on the question whether a dissolution of marriage by declaration and registration in accordance with (a) the law of Soviet Russia, (b) the law of Japan, and (c) the law of China, should be recognised as a valid dissolution of the marriage if the parties were, at the material time, domiciled in Soviet Russia, Japan or China, as the case may be. The laws of these three countries possess in regard to divorce certain features in common.

2. The question is of practical importance in the administration of both the Foreign Office and the Home Office. On the one hand, the nationality of a woman—and her eligibility for a British passport—may depend upon whether or not a divorce obtained by her or her husband under Soviet (Japanese or Chinese) law is valid in English law, *e.g.*, where having been married to a British subject and subsequently divorced under Soviet (Japanese or Chinese) law, she thereupon marries an alien. In such a case, if her first marriage still subsists, her second marriage is invalid, with the consequences that she remains a British subject. On the other hand, cases arise in which a British-born woman has married a Soviet (Japanese or Chinese) national or an alien of some other nationality and the marriage has subsequently been dissolved by registration under Soviet (Japanese or Chinese) law at a time when the parties were domiciled in Soviet Russia (or Japan or China, as the case may be). In such a case her eligibility for the grant of a certificate of naturalisation to enable her to recover her British nationality depends upon whether, by virtue of the Soviet (Japanese or Chinese) divorce, her marriage has been dissolved within the meaning of section 2, sub-section (5) of the British Nationality and Status of Aliens Act, 1914.

(a) *Soviet Divorces.*

3. I am to refer you to the text of the Soviet Civil Code relating to marriage and divorce, in the pamphlet published by the Soviet Government, copy of which is enclosed (Paper No. 1).⁽¹⁾ This code, which came into force on the 1st January, 1927, and the earlier code promulgated in 1918, came under consideration on a petition for judicial separation in the recent case *Nachimson v. Nachimson* (1930), P. 85, 217; and their effect, in the light of the evidence of Russian lawyers, is summarised in the judgment of Hill J. at pp. 92, 93, and in the judgments of the Master of the Rolls and Lawrence L. J., at pp. 222, 229–230. The divorce in that case, however, was one obtained under the earlier law of 1918.

4. Under the law of 1918 provision was made for the dissolution of marriage by mutual consent, subject to the requirement that the parties must appear before the official in charge of the register in which the marriage had been recorded, and, on their declaring their desire to be divorced, the registrar was bound to register the divorce and, when so registered, the marriage was dissolved. In the absence of mutual consent, application had to be made to a court of law by the party desiring the dissolution, the court being that of the residence of the other party; and it was necessary in such a case that notice by summons should be given to the other party or that proof should be given showing it was impossible to give such notice. Upon fulfilment of these requirements, and upon the mere declaration, by the spouse instituting the proceedings, of his

⁽¹⁾ Not reproduced.

GENERAL

75

or her desire to be divorced, the court had no discretion and was bound to make a decree dissolving the marriage.

5. A decree of divorce given under the law of 1918 in respect of a marriage where the parties appear to have been domiciled in Russia was considered in the unreported case of *Whittingham v. Whittingham* (a transcript of the shorthand notes is attached, Paper No. 2).⁽²⁾ In that case the husband obtained the divorce in Russia when the wife was living in England, and no notice of the proceedings was served on the wife, although the husband knew of her address, and the law of 1918 required that notice should be served if the address of the respondent was known. The President appears to have taken the view that the Soviet divorce was invalid on this ground in Soviet law and, therefore, invalid everywhere. The case was one where, in the interests of both parties to the suit, it was desirable that the Soviet divorce should be held invalid, but (apart from the question of notice) no suggestion was made either by the President or counsel for the petitioner (the respondent was not represented) that, if the Soviet divorce had been valid in Soviet law, and notice had been given to the respondent, it would not have been valid in this country (see paragraph 24 below; this was one of the cases described in class (e) in that paragraph).

6. By the decree of the 19th November, 1926, a new code of laws (Paper No. 1) on marriage, the family, and guardianship, was adopted and brought into force as from the 1st January, 1927. Articles 18–20 of this code are as follows:—

18. During the lifetime of both parties to a marriage, the marriage may be dissolved either by the mutual consent of both parties to it or upon the *ex parte* application of either of them.

19. During the lifetime of both parties, the dissolution of a marriage (divorce) may be registered at the civil registry office, whether the marriage was registered or unregistered, provided that in the latter case it had been established as a fact by the court in accordance with section 12 of the present code.

20. The fact that a marriage has been dissolved may also be established by a court, if the divorce was not registered.

Provision is made in articles 22–24 for the custody and maintenance of children and for alimony. The registration is performed by a responsible public official and takes place at the Civil Registry Office (see article 111 of the code). The relevant articles relating to the registration of declarations of dissolution of marriages are as follows:—

138. A declaration of dissolution of marriage is filed with the Civil Registry Office either in writing or orally at [*sic*: ? of] the place of residence of either the husband or the wife.

139. In case the declarant possesses no documents attesting the registration of the marriage that is being dissolved, he signs a statement indicating the time and place where the marriage was registered and assumes the responsibility for the correctness of the information given.

140. In case the declaration of the dissolution of marriage is made by one of the conjugal partners, the other partner receives a copy of the record of the dissolution of marriage addressed as indicated by the declarant.

141. Documents issued to foreigners attesting a divorce granted according to the laws of their respective countries are regarded as equivalent to extracts from the registers of divorce.

There is also a “Note 2” to article 111, to the following effect:—

The registrations mentioned in the present section are entered outside the territory of the U.S.S.R. by the plenipotentiary representatives and consulates of the U.S.S.R. (the 26th September, 1927: Compiled Statutes of the R.S.F.S.R., 1927, No. 105, section 705).

7. It is to be observed that article 20 of this code provides that the fact that a marriage has been dissolved may be established by a court if the divorce was not registered. From this provision and from the terms of article 19, “may

⁽²⁾ Not printed.

[10221]

L 2



1933

be registered," it would appear to follow that, in the case of divorce by mutual consent at any rate, the dissolution is complete as soon as the parties have made their declaration (orally or in writing—see article 138) and that registration merely affords evidence of the fact of dissolution. In the case, however, of a dissolution "upon the *ex parte* application" of one of the parties only (see article 18) it seems that registration may be essential since the dissolution can only take place upon such application, *i.e.*, application to register the declaration made by the party concerned.

8. The facilities for divorce provided by the code are available to all persons in Soviet Russia, including British subjects or other foreigners who may be domiciled there. Indeed it would appear that spouses of foreign nationality temporarily resident there could take advantage of these facilities and obtain a divorce which would be valid in Soviet Russia; but, in any such case, the divorce would not of course in any event have extra-territorial validity.

9. The characteristics of the Soviet law of divorce which are relevant for present purposes are thus: (1) *in matters of substance* an unqualified right to divorce by mutual consent or at the unilateral desire of one party; (2) *in matters of procedure*: (i) the procedure is either by way of purely administrative registration or, in so far as it requires (under the law of 1918) recourse to a court of law, does not allow the exercise of any judicial discretion; and (ii) (in the case of divorces under the law of 1926) the procedure by way of declaration and registration may be carried out by one of the parties only without any prior notice to the other party, though it is provided (article 140) that the other party is to receive a copy of the record of the registration of the divorce "addressed as indicated by the declarant." Seeing, however, that there is an unqualified right to divorce by mutual consent or unilateral application, the absence of *prior* notice to the other party does not seem to be a material matter, since such notice would not enable the other party in any way to affect the result. It would be a meaningless formality as the legislators of 1926 apparently realised when in the new code they dropped this requirement which had previously existed under the law of 1918 (see the evidence in the *Whittingham* case, p. 15, Paper No. 2). The procedure is only a logical result of the substantive principles of the law. The notice of the completed registration which is required to be given to the other party under article 140 is no doubt to enable the latter to take proceedings under article 24 for alimony, and with reference to the guardianship and maintenance of children.

10. The decision in *Nachimson's* case was confined to the issue whether a marriage under Soviet law is a valid marriage according to English law, notwithstanding that under Soviet law the marriage can be dissolved by mutual consent or at the will of either party upon fulfilment of merely formal conditions of official registration. Hill J. held that such a marriage did not comply with the essential of marriage in English law and will not be recognised by an English court; but his decision was reversed by the Court of Appeal, who held that the conditions under which marriages can be dissolved in the country where they take place cannot be regarded as conditions incorporated in the contract of marriage by the *lex loci contractus*. Such conditions, the Court of Appeal held, were not part of the essence of the contract of marriage, but conditions of defeasance incidental thereto and are governed, not by the *lex loci contractus*, but by the *lex domicilii*.

11. The validity of a Soviet divorce in English law was a second issue raised in the petition in *Nachimson's* case, but Hill J., in view of his decision on the first issue, held that he had no jurisdiction to deal with it. It is, however, relevant to observe at this stage that the judge referred to this second issue as raising the question "whether the rule that this court regards as binding a decree of divorce pronounced by a court of the husband's domicile, is to be extended so as to include a divorce effected by registration according to the law of the husband's domicile, and effected without notice to the wife." The Court of Appeal also refrained from dealing with this second point (see per Lord Hanworth, p. 222). It has already been pointed out in paragraph 5 above that in *Whittingham v. Whittingham*, where the validity of a Soviet divorce by judicial decree under the law of 1918 was in issue, the President decided the case on the ground that, owing to the absence of notice, the divorce was invalid under Soviet law.

(b) *Japanese Divorces.*

12. For information relating to the law of Japan relating to divorce, I am to refer you to a memorandum, dated the 18th June, 1932, prepared by the legal adviser to His Majesty's Embassy at Tokyo (Paper No. 3). It will be seen that under Japanese law divorce can be obtained in two ways:—

- (a) By mutual consent.
- (b) By decree of a court.

No particular question appears to arise with regard to Japanese divorces obtained by means of a decree of a court. But in the case of divorce by mutual consent, it seems that the procedure is analogous to that in force in Soviet Russia. A divorce by mutual consent can be obtained as of right upon the notification in proper form of such consent to a registrar. It will be seen, however, that Mr. Gadsby is uncertain whether this procedure is really available under Japanese law to persons not of Japanese nationality, but United States citizens have from time to time availed themselves of it. It is desired that you should consider the matter of the Japanese divorces by consent upon the hypothesis that the divorce in question is valid under Japanese law.

(c) *Chinese Divorces.*

13. In Paper No. 4, a copy of a despatch from His Majesty's consul-general at Shanghai is enclosed,^(*) which shows that, under Chinese law (Civil Code, articles 1049–1050), it is possible for two spouses to enter into an agreement in writing to dissolve their marriage; that such an agreement, provided it is in proper form, operates *ipso facto* as a divorce; that if the parties choose to apply to a Chinese court the agreement can be registered for record purposes. Full information with regard to the marriage law of China is not at present available, but articles 971, 1049 and 1050 of the Chinese Civil Code are quoted in translation in Paper No. 5. The Law Officers are asked to advise whether an English Court would recognise a Chinese decree of divorce based upon the agreement of the spouses to dissolve their marriage.

Questions of principle which arise in connexion with the recognition by the English courts of Soviet, Japanese, and Chinese divorces.

14. It may be desirable in the first place to consider whether, in connexion with the recognition by the English courts of Soviet, Japanese, and Chinese divorces, there is any distinction to be drawn between cases where the spouses are of Soviet, Japanese, or Chinese nationality as the case may be, and cases where they are British subjects or nationals of a third State. It would appear that no distinction is to be made based upon considerations of nationality. The English courts have consistently adopted the law of the domicile as the law applicable to matters of divorce and questions of personal status generally, and have paid no attention to the nationality of the parties except in so far as it has been necessary to consider the law of their nationality where questions of *renvoi* arise because the country of the domicile is one which applies the law of the parties' nationality. Unless, therefore, it can be said that there are considerations of public policy which would arise in connexion with the recognition of such divorces by the English courts in the case of British subjects or nationals of third States (although such persons are domiciled in Soviet Russia, Japan, or China, as the case may be), which would not arise in the case of Soviet, Japanese, or Chinese nationals, it would appear that any distinction on these grounds must be rejected.

15. A second question arises as to whether it is material, in connexion with the recognition of these divorces, whether the marriage which is dissolved was one celebrated in one of the countries concerned or was one celebrated in England or in a third State. It would appear that the decision of the Court of Appeal in the *Nachimson* case, and the earlier cases upon which this decision is based, show that no such distinction can be made. The basis of the decision of the Court of Appeal in the *Nachimson* case was that (a) the validity of a marriage must be determined in accordance with the *lex loci contractus*, and (b) the manner in

(*) Not printed.



which a marriage can be terminated is not one of the essentials of the contract of marriage, but is incidental thereto and, depends not upon the *lex loci contractus*, but upon the law of the domicile of the parties at the time of the dissolution, a law which may be different from that of their domicile at the time when the marriage was celebrated. The English courts have already, in *Bater v. Bater* (1906), p. 209, recognised that a marriage celebrated in England between parties domiciled there at that time can be terminated by a divorce obtained in another country in which the parties had become subsequently domiciled, and upon grounds which would not have supported a petition for divorce in England. In this connexion it is desired to draw your attention to the observations of Romer L.J. in the *Nachimson* case (1930) P. at pp. 242-244.

16. Before passing on to a discussion of some of the particular points which arise in connexion with these divorces, it may be desirable to call attention to the fact that if the English courts do not recognise Soviet, Japanese, or Chinese divorces in cases where the spouses are domiciled in the country where the divorce was given, the result is that the parties are considered to be man and wife in England, although under the law of their domicile, which is presumably the country with which they are most closely connected and in which they will in the main be resident, they are divorced. Thus, in numerous instances, the situation might be created where persons are held to be married in one country and to be divorced in another. In recent cases the English courts have alluded to the undesirability of such a situation, and this consideration appears to have influenced a recent rather remarkable development towards the general recognition of the supremacy of the law of the domicile in matters of marriage and personal status. The principle, indeed, is by no means a new one, and was stated in a most categorical form by Lord Westbury as long ago as 1868 in *Shaw v. Gould* L.R. 3 H.L. 55, at pp. 82-83; but there was for a time a tendency to narrow its application and introduce exceptions. Recently, however, beginning with the decisions of the House of Lords and the Privy Council, there would appear to have been a considerable development in the last ten years in the direction of rejecting the supposed exceptions and towards a broad application of the principle. This development can be seen in the following cases: *Lord Advocate v. Jaffrey* (1921) 1 A.C. 146 (see in particular p. 152, per Lord Haldane); *Eustace v. Eustace* (1924) P. 45 (see pp. 49-50, per Sir Henry Duke, P.); *Attorney-General for Alberta v. Cook* (1926) A.C. 444 (see pp. 452-458); *Salvesen v. Administrator of Austrian Property* (1927) A.C. 641 (see pp. 653-4 per Lord Haldane; p. 670 per Lord Phillimore); *H. v. H.* (1928), P. 206; *Inverclyde v. Inverclyde* (1931), P. 29; *De Massa v. De Massa* (the *Times* newspaper, the 31st March, 1931). It would appear, therefore, that certain dicta in older cases, indicating circumstances in which the English courts might refuse to recognise divorces good by the *lex domicilii*, having been pronounced at a time when the pre-eminent position of the law of the domicile was less well established, may have to be reconsidered in the light of this recent development.

17. In the case of Soviet divorces, on the assumption that the parties to a marriage (whether the marriage was contracted according to Soviet law or otherwise) were domiciled in Soviet Russia at the material time, three main questions would appear to arise for consideration:—

- (1) Whether in the existing state of English law (including the rules of private international law as applied by the English courts) it is (for reasons of public policy or otherwise) impossible to recognise a foreign divorce, if such divorce were obtained under a law which permits of divorce (a) by mutual consent, (b) on the unilateral desire of either spouse?
- (2) Whether in the existing state of English law (including the rules of private international law as applied in the English courts) it is essential for the recognition of a foreign divorce, not only that the parties should be domiciled in the foreign country at the material time and that the divorce should be valid in the country where it was given, but also that the divorce should be judicially determined by a decree or sentence of a competent court of law. In other words, is the rule of private international law that a foreign divorce obtained in accordance with the law of the country of domicile is entitled to extra-territorial recognition, limited, so far as concerns the application

of the rule by an English court, to cases where the law of the country of domicile provides for divorce by the decree or sentence of a court of competent jurisdiction, obtained in accordance with that law?

- (3) Assuming that recognition of a Soviet divorce would not be refused by the English courts merely on either of the grounds indicated in the two preceding questions, could the validity of such a divorce, in cases where there was no mutual consent and the registration was effected on the application of one only of the spouses without notice to the other, be successfully challenged in an English court, on the ground that by reason of the absence of notice the proceedings were contrary to natural justice?

These three questions will be separately considered in the order indicated above. The first question applies also to Japanese and Chinese divorces obtained by mutual consent.

First Question: Can the English courts recognise a divorce based upon a right of the spouses to a dissolution of their marriage (a) by mutual consent; (b) at the unilateral desire of one party?

18. With regard to the first question, it is clearly established that the English courts do not refuse to recognise a foreign divorce granted by a court of the domicile merely because the divorce is given upon a ground or in conditions which would not support a petition for a divorce in England, even if the marriage which is dissolved was an English marriage and celebrated between persons who at that time were domiciled in England (see *Bater v. Bater* (1906), P. 209). Reference on this point may also be made to *Dicey's Conflict of Laws*, fifth edition, pp. 424 and 426, where the author cites "incompatibility of temper" as being a ground recognised in the laws of certain foreign countries for divorce. It has, it is thought, never been suggested that a foreign divorce by a court of the domicile on the ground of incompatibility of temper is one which the English courts would not recognise, and Lawrence L.J. in the *Nachimson* case (p. 232) says "No substantial distinction can be drawn between such a ground and the mutual agreement of the parties to separate." The distinction, therefore, if there is a distinction which would justify a refusal to recognise a Soviet divorce by mutual consent or unilateral application, appears to be one of degree, i.e., as to the extent to which the principles of the foreign law under which the divorce was obtained differs from the principles of English law.

19. In this connexion it may be noted that Jewish Rabbinical law permits a husband to divorce his wife by means of a proceeding before a Rabbi, known as "Gett," which appears to be a unilateral act dependent only upon the husband's will and the fulfilment of certain formalities. Under the law of some foreign countries Jews are governed in matters of personal status, including marriage and divorce, by their own religious law. This was formerly the position in Russia in the days of the Empire, and is still the case in Egypt and some other countries in the Levant. No case has been found where the English courts have been called upon to decide whether they can recognise a Jewish Rabbinical divorce pronounced in a country where the parties were domiciled, and where, by the law of the country, Jews were left to be governed by their own religious law. The point arose, and evidence was given upon it, in the case of *Spivack v. Spivack* 46 T.L.R. 242; but in that case the allegation that the Jewish marriage had actually been dissolved by this means, if made, was not pressed, and the only point made in argument and dealt with in the judgment was that the fact that a Jewish marriage could be dissolved in this way led to the conclusion (following the reasoning of Hill J. in the *Nachimson* case) that a Jewish marriage was not one which the English courts could recognise at all. In the case of *Preger v. Preger* 42 T.L.R. 281 a Jewish divorce by "Gett" was also raised, but there the parties were domiciled in England, and it was not even contended that in those circumstances the marriage could be regarded in English law as having been dissolved by that means. In the case of *Sasson v. Sasson* (1924) A.C. 1007, two Jewish British subjects domiciled in Egypt had been divorced by the Grand Rabbinate at Alexandria, and the husband had applied to the British consular court in Egypt for a declaration that this Jewish divorce had dissolved the marriage. Though the fact is not stated in the report, it would seem probable that this was another case of a divorce by "Gett." The Privy Council held that



the declaration was one which the husband was entitled to obtain from the court by reason of the provisions of article 90 of the Ottoman Order in Council, 1910, which provided that in all matters relating to marriage the consular court should, in the case of persons belonging to non-Christian communities, recognise their religious law and custom. The judgment of the Privy Council contains the following passage:—

"The court had no jurisdiction itself to dissolve a marriage. It had, however, jurisdiction to declare rights and, in matters relating to marriage (which obviously include divorce) it was bound in the case of persons not belonging to Christian communities to recognise and apply the religious law and custom of the persons concerned. It is not necessary to cite the various cases in which the power of courts to divorce *a vinculo* has been discussed. The case of *Le Mesurier v. Le Mesurier* (1895) A.C. 517 finally settled that the proper and only court is the court of the domicile. Now the court of the domicile here could not grant divorce, but, on the other hand, it was bound by the words above cited to acknowledge the validity of a divorce good according to the religious law of the non-Christian subject. The situation seems to their Lordships identical with that which has often arisen in India. Divorce by means of the use of the phrase known as "*talak*" is not a ground which would be good by English law. None the less, the British courts have often given effect to Mohammedan divorces, and an instance may be found in the case of *Sarabai v. Rabiabai* I.L.R. 30 Bom. 537. Their Lordships are, therefore, of opinion that the appellant is entitled to the declaration as to the divorce which she seeks. The declaration as to the validity of the agreement following is a corollary, and affords in their view a justification for her appeal to the English court."

20. It is true that this judgment is one given on appeal from His Britannic Majesty's court in Egypt, and is based in part on the provisions of the Ottoman Order in Council, but, unless it is possible to imagine that after this decision of the Privy Council the English courts would have held that in England the parties must be regarded as still man and wife and as precluded from marrying again, this judgment appears to be consistent only with the view that a non-judicial divorce may be recognised in this country if under the law of the country where the parties are domiciled and where the divorce is pronounced such a proceeding is binding on the courts of that country. The basis of the decision appears to have been that the law of the domicile, whatever it may be, determines the validity of the proceeding. The importance of this decision for present purposes is that the divorce was pronounced by a non-judicial authority whose sole jurisdiction was derived from the religious law of the parties, such law in its turn being made binding upon the courts set up by His Majesty in Egypt under the Foreign Jurisdiction Act. It may well be argued, in applying the result of this decision to the case of Soviet divorces, that a Soviet divorce by registration is under Soviet law binding on the courts of Soviet Russia, although in the case of a divorce by registration no judicial authority actually takes part in the proceedings at any stage. It would follow that the rule of private international law that questions of personal status (marriage and divorce) are determined by the law of the domicile, should be applied in our courts without necessarily limiting the application of the rule to cases where there has been a judicial decree.

21. On the other hand, in the case of *R. v. the Superintendent Registrar of Marriages for Hammersmith*, ex parte *Mir-Anwaruddin* (1917) 1 K.B. 634, Lord Reading C.J. suggested doubts as to whether, even the decree of a foreign court of the domicile, founded upon the husband's unilateral right to terminate a marriage, would be recognised here as a valid dissolution of a marriage contracted in England (but, as explained in paragraphs 29-32 below, this is a decision which can be regarded as based on a number of alternative grounds); and in the case of *Papadopoulos v. Papadopoulos* (1930), P. 55, a decision of a divisional court, Lord Merrivale P. appears to have adopted, as one of the various grounds for refusing to recognise an order of a Cyprus court declaring a marriage null and void, the fact that the order was made by consent and was no more than a judicial recognition of a compact made between the parties to the effect that their marriage was null and void, but this, again, was a very complicated case where there were many grounds for refusing to recognise the Cyprus judgment, and Hill J., the other member of the court, did not adopt this ground in his judgment.

22. Nevertheless, although the case of *Whittingham v. Whittingham* clearly cannot be pressed very far, it is perhaps worth notice that in a case where counsel for the petitioner and the President were obviously seeking, in the interests of all parties, for some ground on which the Soviet divorce could be held to be invalid in England, it did not apparently occur to the President or to counsel to suggest that the English courts could not in any case recognise a divorce obtained under a law which permitted a spouse at his or her will to obtain a divorce by unilateral application.

23. It has already been stated that the Court of Appeal in the *Nachimson* case did not purport to decide the question whether a Soviet divorce could be recognised in this country, but the manner in which such divorces could be obtained was nevertheless the issue on which the question they did decide turned, and consequently was present to the minds of the court. If the judgments of the Court of Appeal are looked at, it will be seen that not only did no member of the court suggest that such divorces could not be recognised, but that a part of the reasoning of the judgment of Romer L.J. (pp. 244-246) is directed to minimising the differences in principle between the conditions under which divorces can be obtained in Soviet Russia and in other countries. "We have," says Romer L.J., "not been given any evidence as to the laws of divorce of other Christian countries, but it is easy to conceive of a law that permits of divorce merely for incompatibility of temper. A husband and wife must be the best judges of whether their tempers have proved to be incompatible, and if they both agree that it is so, I could well understand the ministerial duty of recording their agreement and of giving effect to their desire being entrusted to some official other than a judge."

Second Question: Is it necessary that the divorce should be a decree of a court given after judicial determination?

24. There are six different classes of divorces which may be affected by the answer to this question:—

- (a) Chinese divorces by mutual consent, which are registered in a Chinese court, though there does not appear to be any "judicial determination" except for the court to satisfy itself that the necessary consent of both spouses exists.
- (b) Japanese divorces by mutual consent, which are merely notified to a registrar.
- (c) Soviet divorces by mutual consent, which are notified to a registrar under the laws of 1918 and 1926.
- (d) Soviet divorces by mutual consent after 1926, which have not been notified to a registrar, the notification not being essential, but only for the purposes of evidence.
- (e) Soviet divorces by unilateral application under the law of 1918, which required an application to a court, but required nothing in the way of judicial determination except possibly that the court had to see that the other party was notified.
- (f) Soviet divorces by unilateral application under the law of 1926, which merely require an application to a registrar for registration.

In none of these cases is there anything in the nature of "judicial determination" in the ordinary sense, seeing that, by reason of the relevant provisions of the substantive law, there is really no issue for judicial determination. As Romer L.J. said in the *Nachimson* case (p. 241), commenting on the change introduced in 1927 substituting (f) for (e): "If the court by its decree had merely to give effect to the desire of the applicant, it was no doubt felt that the desire might just as well be expressed before a registrar and given effect to by registration." The function to be performed in all cases is ministerial, but, if it is relevant whether this function is performed by a court or a ministerial officer such as a registrar, then classes (a) and (e) can be distinguished from the other four classes. If it is a relevant distinction whether something more than the agreement of the parties is required, whether some interposition of the authority of the State takes place, even if that something is a mere ministerial act of registration, then class (d) can be distinguished from the other five classes.



1933

25. Both the *Whittingham* case and the *Nachimson* case provided instances of class (e). It has already been pointed out that in the *Whittingham* case the President held the divorce to be invalid in this country, but he did so on the ground that the provisions of Soviet law with regard to notice had not been complied with, and that, in his view, the decree was invalid under Soviet law. He expressed no opinion on any wider issue. It has also been pointed out that the Court of Appeal in the *Nachimson* case did not have to decide whether the divorce was valid in this country. The second question will, therefore, be considered in the light of all authorities which it has been possible to find throwing light on it.

26. In Dicey, *Conflict of Laws*, Fifth Edition, p. 422, the existing law is stated as follows:—

“Rule 98. The courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of proceedings for divorce.

This rule applies to (i) an English marriage; (ii) a foreign marriage.”

This rule is based on *Bater v. Bater* (1906), p. 209; *Harvey v. Fernie* (1882), 8 A.C. 43; *Le Mesurier v. Le Mesurier* (1895), A.C. 517; and other judicial decisions cited by Dicey, note (a), p. 422. It does not appear to be contemplated in the rule, or in the judgments to be found in the judicial decisions cited in support of the rule, that divorce can be obtained otherwise than by the decree of a court of the domicile. It is stated by the present editor of that work on p. 425 that the rule does not cover such cases as the dissolution of marriage by unilateral action under the Soviet code of 1926; and that “it may be doubted if as regards persons other than Russian subjects at least such divorces could be recognised. Nor is there authority for recognition of divorces not given by any judicial authority, and there are *dicta* to the contrary.” (The editor here refers to *R. v. Superintendent Registrar of Marriages for Hammersmith ex parte Mir-Anwaruddin* (1917) 1 K.B. 634, to which reference is made in paragraphs 29–32 below.)

27. An examination of the decisions suggests at least the possibility that the almost invariable references to the “decree or sentence of a competent court” of the foreign country concerned are due to the fact not that such a decree is the only procedure by which a marriage can be dissolved, but that it is the procedure then followed in nearly every civilised Christian country which recognised divorce at all. It is natural, in these circumstances, that English courts should constantly refer to the decrees of competent courts of jurisdiction when dealing with the principles governing the recognition of foreign divorces. Possibly this accounts for the numerous *dicta* which suggest that a decree of a court is essential to the recognition of a foreign divorce. For example, Lord Westbury, in the course of his judgment in *Shaw v. Gould* (1868) L.R. 3 H.L. 55 at p. 81, said:—

“The first essential for the validity of a foreign decree is that it should be pronounced by a court of competent jurisdiction between parties who are *bona fide* subject to that jurisdiction.”

Again in *Wilson v. Wilson* (1872) L.R. 2 P. & M. 435, at p. 442, Lord Penzance said:—

“It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt in this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. . . . It is both just and reasonable that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws.”

The dissenting judgment of Brett L.J. in the now overruled decision of the Court of Appeal in *Niboyet v. Niboyet* 4 P.D. 1 contains certain passages which are of interest in this connexion. At p. 11 of the report he says:—

“As has been frequently pointed out, a decree of dissolution of marriage cannot be the judicial declaration of a mere consequence agreed between the parties for the breach of a contract, as in ordinary cases of breach of contract, or a mere compensation or individual remedy for the breach of a private

duty as in an action for damages, but can only be a judicial sentence of the law of the country in and for which the court is acting, by which such court assumes to alter not only the relation between the parties, but the status of both.”

28. The above passages and many other passages which might be quoted from judicial decisions of the last fifty years might, as already suggested, be interpreted as excluding from recognition what may be called an administrative divorce under the law of a foreign country. But our courts have not gone so far as to lay down any positive rule on the subject, and it is believed that, apart from mere *dicta*, the only explicit references to the question whether our courts will recognise a non-judicial divorce are to be found in *R. v. Superintendent Registrar of Hammersmith*, ex parte *Mir-Anwaruddin* (1917) 1 K.B. 634.

29. In that case a marriage had been solemnised in England in 1910 between a Mohammedan domiciled in India and a Christian woman. In 1915 the husband made in England a declaration of divorce (“talak”) against the wife, this declaration being a valid dissolution of the marriage under Mohammedan law which applied to the husband under the law of India. He could not obtain a divorce in the courts of India because the courts there only possess jurisdiction to dissolve marriages of Christians, and he had tried to obtain a divorce in England, but his petition was rejected on the ground that he was not domiciled in this country. He wished to marry again in England, and the registrar refused to issue a licence. He obtained a rule *nisi* directed to the superintendent registrar to show cause why a writ of *mandamus* should not issue commanding him to issue a licence for the marriage. It was argued by the Solicitor-General, who appeared on behalf of the superintendent registrar, that the “declaration of divorce” had not validly dissolved the marriage of 1910 because (1) only a Mohammedan marriage could be dissolved by “talak”, and an English marriage could not be dissolved in this way; (2) an English marriage could only be dissolved by a decree of an English court or a court of the husband’s domicile; and (3) a Mohammedan marriage, being polygamous, was not a marriage recognised by English law. The judgments of the Divisional Court and the Court of Appeal are worth studying, but it will be seen that, though both courts decided unanimously against the recognition of the divorce by “talak”, the judges did not all agree as to the grounds upon which their decision was based.

30. Lord Reading C.J. appears to have founded his judgment mainly on two points: (a) the absence of a decree of a court, and (b) the fact that the dissolution was one according to the law of the husband’s religion only, which did not apply in India to all persons domiciled there. The fact that he carefully reserved his views as to whether the dissolution of the marriage could have been recognised, even if a court in India had made a decree if such a decree had been based on the husband’s right to pronounce a declaration of divorce, suggests that he considered (b) and not (a) the more important.

The judgment of Darling J. is based on the ground that a Mohammedan (polygamous) marriage is a different institution from English monogamous marriage, and that divorce proceedings applicable to the former can have no application to the latter.

Bray J. said that the authorities, and, in particular, *Harvey v. Fernie*, 8 A.C. 43, shows that the English courts will recognise the decree of a court of domicile, even if given on grounds which would not support a decree in England. The cases, he said, did not decide that the courts here will act on the law of the domicile in the absence of a decree; and he pointed out that there had been no such decree here.

31. In the Court of Appeal, Swinfen Eady L.J. based his judgment on the following points: (1) That a Mohammedan polygamous marriage is something quite different and gives rise to a different status as compared with a monogamous Christian marriage; (2) that the marriage in the present case had not been dissolved by a court of competent jurisdiction, and that it was not a marriage in the Mohammedan sense, which can be dissolved in the Mohammedan manner. On this last point, he referred to the following well-known passage in the judgment of Lord Brougham in *Warrender v. Warrender*, 2 Cl. and F. 488, at p. 532:—

“Indeed, another consequence would follow from this doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the courts, and their power of dealing with the

rights and duties of the parties to it; if there were a country in which marriage could be dissolved without any judicial proceedings at all, merely by the parties agreeing *in pais* to separate, every other country ought to sanction a separation had *in pais* there, and uphold a second marriage contracted after such a separation. It may safely be asserted that so absurd a proposition never could for a moment be entertained."⁽⁴⁾

Banks L.J. based his judgment on the grounds that (a) a Christian marriage is a different institution from a Mohammedan marriage; (b) a Christian marriage cannot be dissolved by a Mohammedan divorce; (c) a Christian marriage cannot be dissolved by an "agreement *in pais* to separate," even if that is recognised by the law of the domicile.

32. It seems to follow from the reliance placed by Swinfen Eady L.J. on the passage quoted above, that he thought a divorce by agreement *in pais* to separate would not be recognised as a divorce in this country, even though it were a method of divorce valid and effective under the general law of the country of the husband's domicile. On the other hand, there are certain *dicta* in the judgments of Lawrence L.J. and Romer L.J. in *Nachimson's* case, which seem to show that in their opinion at any rate the true principle governing the validity of foreign divorce is the law of the domicile, whatever it may be; and that persons domiciled in a country whose law provides for divorce, are not precluded from securing recognition of a divorce obtained in accordance with that law merely by reason of the fact that no judicial decree is required, or that the procedure does not involve the exercise of discretion by a court of law. Your attention is drawn to the passage in the judgment of Lawrence L.J. at pp. 235-6 of (1930) P., where he says that if it be right to qualify the definition of a valid marriage by the introduction of a reference to its dissolution (which, in his opinion, it was not), the qualification instead of being "unless the State dissolves the bond" (as stated by Hill J. in the court below) should be "unless the bond is dissolved during the lifetime of the spouses in accordance with the law of their domicile for the time being"; or, as Romer L.J. puts it (p. 244), "until its earlier termination in accordance with the laws of divorce that may be applicable to it." The Lords Justices appear to have deliberately refrained from qualifying this statement of the rule governing the extra-territorial validity of a divorce by reference to divorce by judicial decree. Later on (on p. 245) Romer L.J. says: "But the dissolution in Russia is as much or as little a dissolution by the State as it is in England. It is true that in Russia the ministerial act of State was, in the year 1924, performed by a registrar where both parties desired a dissolution, and at the present time even when only one party desires it. But can that make any real difference? In Russia the State official to whom has been given the duty of exercising the ministerial act is a registrar. In this country he is a judge."

33. The *dicta* in the English judicial decisions discussed above leave room for doubt as to how our courts would view the matter if called upon to adjudicate upon the validity of a Soviet divorce effected under the existing Soviet code or any non-judicial divorce under the law of Japan or China. It may, therefore, be desirable to refer briefly to the history and development of the law of divorce, with a view to seeing whether there is any historical basis for holding that a divorce obtained in the country of the domicile otherwise than by way of judicial decree, is not entitled to extra-territorial recognition. The Historical Summary annexed (Paper No. 6) shows that the principle that divorce should be granted only by the decree of a court was derived from the later canon law and incorporated in the municipal law of England and many other European countries. But it would, it is suggested, be erroneous to conclude that, because a State has followed this principle in its own law, it cannot or should not accord recognition to a foreign divorce obtained in accordance with the law of the domicile by a purely administrative process. Moreover, the existence of the system of divorce by Act of Parliament, though it follows a procedure which is in some respects of a judicial character, shows that English municipal law has itself provided an important exception from the principle referred to above.

⁽⁴⁾ It will be seen that in the passage from which this extract is taken Lord Brougham is contesting the view that the conditions as to termination of a marriage by the law of the *lex loci contractus* are incorporated as part of the contract of marriage, so that the English courts would have to apply the foreign *lex loci contractus* as regards dissolution in the case of persons domiciled in England.

Third Question: Absence of notice to the other party (proceedings contrary to natural justice).

34. This question would not appear to arise in the case of divorces by mutual consent, whether under Soviet, Japanese, or Chinese law, since in these cases, *ex hypothesi*, both parties have full knowledge. It only arises in connexion with Soviet divorces by unilateral application under the law of 1926. Under the law of 1918 notice to the other party was required, and Lord Merrivale held in the *Whittingham* case that the absence of such notice invalidated the divorce in Soviet law. There are indeed English judicial decisions, in which the courts have declined to recognise as valid in this country a decree pronounced, on the petition of one of the parties, by a court in the country of the husband's domicile without notice to or without the knowledge of the other party. The principle on which such objection to recognition is based was stated by Lord Penzance in *Shaw v. Attorney-General* L. R. 2 P. and M. 156, at p. 162. Lord Penzance, in challenging the proposition that a man might, according to the laws of this country, be divorced from his wife by the tribunal of a country in which he has never had either domicile or residence, said that in any such case the man "has never submitted himself, either directly or inferentially, to the jurisdiction of such a court, and has never, by any act of his own, laid himself open to be affected by its process, if it never reaches him. A judgment so obtained has, therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are *ex parte*, and take place in the absence of the party affected by them." This dictum was cited by Horridge J. in the recent case *Rudd v. Rudd* (1924) P. 72. In that case it was held that where a husband domiciled in England has acquired a new domicile leaving his wife in England, the wife will not be bound by proceedings for divorce in the courts of her husband's new domicile, of which she has, in fact, no knowledge and no notice.

35. In *Pemberton v. Hughes* (1899) 1 Ch. 796, however, the Court of Appeal declined to entertain an objection, on the ground of alleged irregularity of service of process (failure to give the wife ten clear days for appearance), to the recognition of a divorce decree granted in Florida, and held that such a decree would be treated and acted upon by the English courts as final, notwithstanding any irregularity of procedure under local law, provided the foreign court had jurisdiction over the subject matter and the proceedings do not offend against English views of substantial justice. In support of the objection it was argued by counsel that by reason of this irregularity the judgment or decree was not a judgment of a court of competent jurisdiction, and that the real question was "whether this Florida court was a court at all." The following passages from the judgments in the Court of Appeal may be quoted:—

per Lindley M.R. at p. 790-1:—

"Assuming that the defendants are right, and that the decree of divorce is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. It sounds paradoxical to say that a decree of a foreign court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles on which English courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to is the finality of the judgment and the jurisdiction of the court, in this sense and to this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never enquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed."



And at pp. 792-3:—

"It may be safely said that, in the opinion of writers on international law, and for international purposes, the jurisdiction or the competence of a court does not depend upon the exact observance of its own rules of procedure. The defendants' contention is based upon the assumption that an irregularity in procedure of a foreign court of competent jurisdiction in the sense above explained is a matter which the courts of this country are bound to recognise if such irregularity involves nullity of sentence. No authority can be found for any such proposition; and, although I am not aware of any English decision exactly to the contrary, there are many which are so inconsistent with it as to show that it cannot be accepted.

"A judgment of a foreign court having jurisdiction over the parties and subject matter—i.e., having jurisdiction to summon the defendants before it and to decide such matters as it has decided—cannot be impeached in this country on its merits: *Castrique v. Imrie* L.R. 4 H.L. 414 (in rem); *Godard v. Gray* L.R. 2 Q.B. 139 (in personam); *Messina v. Petrocchiano* (1872) L.R. 4 P.C. 144 (in personam). It is quite inconsistent with those cases, and also with *Vanquelin v. Bouard* 15 C.B. (N.S.) 341, to hold that such a judgment can be impeached here for a mere error in procedure. And in *Castrique v. Imrie*, Lord Colonsay said that no enquiry on such a matter should be made.

"A decree for divorce, altering, as it does, the status of the parties, and affecting, as it may do, the legitimacy of their after-born children, is much more like a judgment in rem than a judgment in personam (see *Niboyet v. Niboyet* (1878) 4 P.D. 1); and where there are differences between the two, the decisions on foreign judgments in rem are better guides for the determination of this case than decisions on foreign judgments in personam."

per Vaughan-Williams L.J. at pp. 796-7:—

"The true principle seems to me to be that a judgment, whether in personam or in rem, of a superior court having jurisdiction over the person, must be treated as valid till set aside either by the court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid as, for instance, a case where there had been not only no service or process, but no knowledge of it."

From these judgments it is evident that the Court of Appeal considered that the question of the validity of a foreign decree of divorce must be determined on exactly the same principles as would be applicable in the case of any other foreign judgment in rem, and that no mistake in municipal procedure or law could override the actual decision.

36. The underlying principle in the above judicial decisions (*Shaw v. Attorney-General* and *Rudd v. Rudd*) is that the respondent in the proceedings had been deprived of the opportunity of appearing and defending in accordance with the requirements of natural justice as understood in an English court. Where the divorce is obtained by unilateral declaration and registration under Soviet law, the want of notice may afford an additional argument for non-recognition. It would thus appear possible that, even if an English court is prepared to apply the law of the domicile and to recognise a Soviet divorce by mutual consent, notwithstanding that it was obtained without a judicial decree, the same court might decline to recognise a Soviet divorce by unilateral declaration and registration, on the ground that such a procedure is repugnant to English ideas of natural justice. On the other hand, it must be observed that in those cases where the English courts have refused to recognise a foreign divorce of a court of the domicile on the ground that one of the spouses has not received sufficient notice of the proceedings, the absence of such notice deprived such party of the opportunity which he or she would otherwise have had of defending the proceedings, and opposing the grant of the decree by the court. It was for this reason that the absence of notice made the foreign proceedings contrary to natural justice. Such a consideration has no practical application in the case of a Soviet divorce by unilateral application, seeing that either spouse has an absolute right

to terminate the marriage in this way, and the notice to the other party would not enable the latter in any way to oppose or prevent the dissolution of the marriage. It therefore seems doubtful whether the mere absence of notice, and the principles upon which the decisions in *Shaw v. The Attorney-General* and *Rudd v. Rudd* proceeded have any real application to this case at all, and that the substantial question in connexion with these classes of divorces is whether the English courts can or cannot recognise a divorce obtained under a law which gives an absolute right to either spouse to obtain the dissolution of the marriage upon his or her unilateral application. This is the first question which is discussed in paragraphs 18-23 above.

Soviet and Japanese Divorces Registered at a Consulate.

37. In cases where the spouses are resident abroad, Soviet divorces can be registered at a Soviet Embassy or consulate instead of being registered with a registrar in Russia (see Note 2 to article 111 of the law of 1927). The proceedings in the Nachimson case appear to indicate that registration at a consulate was also possible under the law of 1918. A recent communication from the Japanese Consulate-General to the Home Office indicates that Japanese divorces, by mutual consent, can also be registered at a Japanese consulate where the parties are resident abroad. If there are no other objections to the recognition of Soviet or Japanese divorces, it is thought that it is probably immaterial whether they are registered in Soviet Russia or Japan or at a Soviet or Japanese consulate, and that the principle must be that if the divorce is good by the law of the domicile, it can be recognised by the English courts. It will be remembered that, though the English courts only recognise divorces pronounced by the courts of the matrimonial domicile and do not in general recognise divorces pronounced by the courts of a country where the parties are not domiciled, it has been held that the English courts will recognise a divorce pronounced by the courts of a country where the parties are not domiciled if such divorce would be recognised in the country of their domicile (see *Armitage v. the Attorney-General* (1906) P. 135 and *Dacey, Conflict of Laws*, Fifth Edition, p. 431).

38. A note on the whole question, which has been prepared by the Solicitor for the Affairs of His Majesty's Treasury, is enclosed for your information (Paper 7).

39. I am to request that you will be good enough to state whether, in your opinion—

- (a) Soviet divorces by mutual consent under the law of 1918;
- (b) Soviet divorces by mutual consent under the law of 1926;
- (c) Japanese divorces by mutual consent;
- (d) Chinese divorces by mutual consent;
- (e) Soviet divorces by unilateral application under the law of 1918; and
- (f) Soviet divorces by unilateral application under the law of 1926

would be recognised by the English courts as a valid dissolution of the marriages upon the assumption that the parties are domiciled in the countries in which the divorces are pronounced, and that the divorces are valid by the law of the country in which they take place. You are also requested to advise whether it is material in this connexion if the Soviet or Japanese divorces have been registered at a Soviet or Japanese consulate instead of being registered in Soviet Russia or Japan.

40. Sir John Simon and Sir John Gilmour would also be grateful for any observations of a general character which you may be good enough to offer.

I have, &c.
G. R. WARNER.



1933

Enclosures.

- Paper No. 1.—Pamphlet giving text of Soviet Civil Code. [Not printed.]
 Paper No. 2.—Shorthand notes: *Whittingham v. Whittingham*. [Not printed.]
 Paper No. 3.—Memorandum by the Legal Adviser of His Majesty's Embassy in Tokyo on Japanese divorces.
 Paper No. 4.—Despatch from His Majesty's consul-general at Shanghai. [T 11378/11378/376/1932.]
 Paper No. 5.—Chinese Civil Code.
 Paper No. 6.—Summary of history and development of the law of divorce.
 Paper No. 7.—Note by the Solicitor for the affairs of His Majesty's Treasury.

Enclosures.

Paper No. 3.

Memorandum by the Legal Adviser to His Majesty's Embassy at Tokyo.

The Civil Code of Japan governs all questions as to the manner in which divorce may be obtained in Japan.

This code provides two methods of divorce, namely:—

- (1) Divorce by mutual consent; and
- (2) Judicial divorce (*i.e.*, divorce by judgment of the court).

Divorce by Mutual Consent.

Article 808 provides that "husband and wife may effect divorce by mutual agreement."

But a person who is under full 25 years of age who desires to effect a divorce by mutual consent must obtain the consent of those persons who possess the right to give consent to his or her marriage in accordance with the provisions of articles 772 and 773 (*i.e.*, the father and mother, or of one parent if the other is unknown, dead, has left the house, or is unable to express his or her intention, or of the guardian, or of the family council, as the case may be).

By the corresponding application of articles 774 and 775, an incompetent person need not obtain the consent of the guardian (committee) in order to divorce by mutual consent, and divorce by mutual consent takes effect when it is notified to the registrar.

By article 811 the registrar is not allowed to accept any notification of divorce until he has ascertained that the divorce is not contrary to the provisions of the second paragraph of article 775, *i.e.*, that the notification must be given either orally or by a document signed by both parties concerned and at least two witnesses of full age.

The procedure in question is laid down in detail in the Law Concerning Family Registries.

But article 811 proceeds to state that, when the registrar has accepted the notification of divorce by mutual consent, in error, the validity of the divorce is not affected even when the divorce is contrary to laws and ordinances.

Nevertheless, if there existed no intention to get divorced, *e.g.*, when both parties have not consented to it, or where the consent of one party has been procured by coercion, the divorce is void even though notification of it has been given and accepted.

It should be noted that the free consent of both husband and wife is necessary to effect a divorce by mutual consent.

Article 812 provides that, where the persons who have been divorced by mutual consent have not determined, by the agreement to divorce, who is to take care of the children, the custody of the children passes to the father, save that when, by reason of the divorce, the father has left the house which he entered by marriage, the custody of the children belongs to the mother.

The duties of the father and of the mother are not affected by the provisions quoted from article 812, so far as such duties are without the scope of the said custody.

In my opinion, it is very doubtful whether a husband who is not a Japanese subject (and so does not possess a family register, which all Japanese subjects

must have) can avail himself of the provisions of the Civil Code with regard to divorce by mutual consent. More than one American husband has gone through the form of divorce by mutual consent; and the Japanese registrars will, in fact, accept notifications from husbands and wives who are not Japanese subjects. But I do not know of any case in which a husband who possessed British nationality has joined with his wife in making the notification required. In my own practice, I have consistently advised against it on the ground that the method is probably available only for Japanese subjects, and have urged my clients to obtain divorce by means of a judgment of a court.

But I can see no objection to the obtaining of a divorce by mutual consent where the husband is a Japanese subject, even though the wife prior to her marriage may have been of some other nationality.

Judicial Divorce.

Article 813 of the Civil Code provides that: Neither husband nor wife may institute an action for divorce save in the following cases:—

1. If the spouse has committed bigamy.
2. If the wife has committed adultery.
3. If the husband has been criminally sentenced to a penalty for illicit sexual intercourse.
4. If the spouse has been sentenced to a penalty for a misdemeanour or graver offence in connexion with forgery, bribery and corruption, sexual immorality, theft, robbery, obtaining property under false pretences, embezzlement of property received in trust, and receiving stolen goods, or any of the offences specified in articles 175 and 260 of the Criminal Code, or has been sentenced to major imprisonment for not less than three years for an offence other than those above mentioned.
5. When such ill-treatment or gross insult as to make conjugal community unendurable has been received from the spouse.
6. When (wilfully) deserted in bad faith by the spouse.
7. When ill-treatment or gross insult has been received from the lineal ascendants of the spouse.
8. When his or her spouse has inflicted ill-treatment or gross insult upon one of his or her lineal ascendants.
9. When, for a period of not less than three years, it has been uncertain whether the spouse is alive or dead.
10. When, in the case of a "muko-yoshi," the adoption is dissolved, or in the case of an adopted son married to the daughter of the house, the adoption is dissolved or annulled.

Note.—The offences specified in articles 175 and 260 of the then Criminal Code, are those contemplated in articles 96 and 186 of the present Criminal Code.

If, with regard to Nos. 1 to 4 of article 813, one of the spouses has consented to the act of the other, no action for divorce may be commenced. And the same applies with regard to Nos. 1 to 7 when either the husband or the wife has condoned the act of the other or the act of the other's lineal ascendants.

A person who has been sentenced to one of the penalties mentioned in No. 4 of article 813 cannot institute an action for divorce on the ground that the same fact exists with regard to his or her spouse.

No action for divorce upon one of the reasons mentioned in Nos. 1 to 8 of article 813 can be brought after the expiration of one year from the time when the person entitled to institute the action has become aware of the fact which constitutes the cause of the divorce. And the same applies after the expiration of ten years from the date of the occurrence of the fact.

No action for divorce upon the ground mentioned in No. 9 of article 813 can be instituted after it has been ascertained that the spouse is alive or dead.

In the case of No. 10 of article 813, an action for divorce may be instituted incidentally with the action for dissolution or annulment of the adoption when there is one.

And an action for divorce on the ground specified in this No. 10 cannot be brought when three months have elapsed from the time when the party concerned has become aware of the dissolution or annulment of the adoption, or where the right to divorce has been waived.

The provisions of article 812, which I have already quoted under the heading of Divorce by Mutual Consent, apply correspondingly to judicial divorce. But the court is empowered to order different dispositions with regard to the custody of the children, if it thinks it in the interest of the children to do so.

Japanese people very rarely resort to judicial divorce, which they regard as rather disgraceful. They greatly prefer the expedient of a divorce by mutual consent, to which the consent of the wife is very often obtained by means which would render the divorce void if they were disclosed. But divorce is very much of a family, as opposed to a personal, matter in the eye of the Japanese law and public. I mean, of course, the family in the sense of the "house."

JOHN GADSBY,
Legal Adviser.

Tokyo, June 18, 1932.

Paper No. 5.

Chinese Civil Code.

(Translation.)

Article 971.—Relationship of marriage is extinguished by divorce.

Article 1049.—Husband and wife may effect a divorce themselves where they mutually consent to it; but, in the case of a minor, the consent of his or her statutory agent must be obtained.

Article 1050.—Divorce by mutual consent is effected in writing and requires the signatures of at least two witnesses.

Paper No. 6.

Summary of History and Development of the Law of Divorce.

Under the canon law of Rome on the subject of divorce *a mensa et thoro*—which was the law applied in the ecclesiastical courts in England—no provision at any time existed for the grant of such a divorce (*i.e.*, judicial separation) otherwise than by the decree or sentence of a competent ecclesiastical tribunal; and as marriage was regarded as a sacrament by the Catholic Church, there was no provision at all under the canon law for the complete dissolution of marriage. It is, indeed, necessary to go back to the Roman law of divorce before the time of Justinian for any system based upon the principle that a marriage could be terminated by the personal act of the husband or the wife in accordance with such procedure as is now established under Soviet law. As is stated in Kitchin, *History of Divorce*, 1910, p. 254, the divorce laws "commenced in Europe with the ancient customs of the Roman, Germanic and Frankish peoples, who by a slow process of evolution had come to regard marriage as the most intimate, the most important and the most venerable of all partnerships, in which husband and wife were equal partners. Being based upon consent and affection alone, that partnership could be dissolved by the dissent of the parties when affection had turned into aversion, without the necessity of having to disclose the secret causes of their dissension, and without having to prosecute each other before a public tribunal." Kitchin (p. 255) points out that in the east of Europe the Eastern Church . . . established the practice that divorce could only be obtained from an ecclesiastical tribunal and on any of the grounds of the Roman law except mutual consent; and that "this practice has been considerably modified by the lapse of time, but still remains in its essential principles in the Eastern countries of Europe, except that marriage has been declared to be a civil

contract and divorce is now regulated by the State through its legislative and judicial machinery." In the west, on the other hand, "the canon law was made under similar influences to those in the east, and the Catholic Church having declared marriage to be indissoluble, proceeded to establish the practice of dissolving it, but only in the publicity of an ecclesiastical tribunal." It seems of some interest to observe, however, that in England the decree of a tribunal does not appear to have been regarded as essential in pre-Norman times, since it appears, according to a statement in Pollock and Maitland, *History of English Law*, Vol. II, p. 390, that "the 'dooms' of Æthelbert, Christian though they be, suggest that marriage might be dissolved at the will of both, or even at the will of one of the parties to it."

2. In certain European countries^(*) the mutual consent still remains a ground for divorce; but in each case the parties have to proceed before, and obtain a decree from, a judicial tribunal which may have some discretion in the matter.

3. Attention may here be drawn to an article written by Lord St. Helier for the *Encyclopædia Britannica* at the time when he was President of the Probate and Divorce Division of the High Court, in which he laid stress on the fact that whereas under the early Roman law the personal act of the husband or the wife "was purely the act of the party who performed it," and no idea of judicial interference or contract seems to have been entertained, the canon law of Rome under the influence of Christianity was based on the principles: (1) that there could be no divorce *a vinculo*, and (2) that no divorce could be had at the will of the parties, but only by the sentence of a competent, that is to say, an ecclesiastical court. Lord St. Helier states that English law in 1857 adopted this second principle and that "complete divorce has never been governed by any other principle than this."

4. Before the passing of the Matrimonial Causes Act, 1857, the ordinary judicial tribunals in this country had no power to dissolve a marriage. Marriage could only be put an end to (a) by a private Act of Parliament dissolving the marriage, or (b) by decree of annulment granted by an ecclesiastical court, in the case of a void or voidable marriage, on the ground, *e.g.*, of impotence—a proceeding which was equivalent to a petition for a declaration of nullity which, however, in mediæval practice served the purpose of a true divorce (Pollock and Maitland, *History of English Law*, Vol. II, 391 n.). Apart from this, the ecclesiastical courts possessed the only jurisdiction exercisable by any court and their powers were confined to granting divorce *a mensa et thoro*. The effect of the Act of 1857 was to transfer to the court for divorce in matrimonial causes (a) the powers of the ecclesiastical courts to grant a judicial separation (divorce *a mensa et thoro*), and (b) powers equivalent to those exercised by Parliament in granting complete dissolution of marriage. Divorce by act of the legislature, of which the first instance occurred in 1551 (see *Hansard*, 1830, vol. XXIV, p. 1260), was adopted more generally after the Reformation in order to meet the growing dissatisfaction on account of the failure of the law (due to the re-establishment of the doctrine of indissolubility in *Foljambe's case* (1600), 3 Salk. 138), to put an end to the marriage in such a way as to enable the parties to remarry. There are many instances of such divorces in the 17th and 18th centuries, and during the first half of the 19th century; and divorce by private Bill is still the only means of which a divorce *a vinculo* can be obtained by persons domiciled in Northern Ireland. Further, a divorce by Act of the Parliament of Canada was the only method of dissolving marriages in the province of Ontario until 1930, and still is in the province of Quebec in the case of persons domiciled there.

5. There appears to be no reported decision in which the English courts have been called upon to pronounce on the validity in England of a divorce granted by the Canadian Parliament; but it is difficult to see on what ground such recognition could be withheld. Indeed, non-recognition would lead to the absurd position that the courts of this country would fail to give effect to a divorce obtained in accordance with the law of the domicile of the parties by a process similar to that exercisable by the Parliament in Great Britain. If a Canadian legislative divorce is recognised by the English courts, it would appear to follow that a judicial decree is not essential to the recognition of a foreign divorce. It might be contended, however, that such recognition would not afford any support

(*) *E.g.*, Belgium and Roumania: see Reports on the Laws of Marriage and Divorce in Foreign Countries, "Misc. No. 2 (1894)," Part II; p. 34 (article 233 of Belgian Law of Divorce, 1893); and p. 127 (Roumanian Civil Code, tit. "Divorce by Mutual Consent").



1933

to the view that a foreign divorce obtained by a purely administrative procedure should be regarded as binding in this country, because the functions of Parliament in respect of a private Bill of divorce are in effect judicial, and Parliament in the exercise of these powers acts as a court of justice (see per Lord Westbury in *Shaw v. Gould* L.R. 3 H.L. at pp. 84-85; Report of House of Commons Committee in *Chippendale's case* (1850), 105 H.C. Journ. 563; Roberts, Divorce Bills in Imperial Parliament, 1906, p. 3). But if this last contention is advanced, it follows that the recognition of a divorce granted by the Canadian Parliament (or another legislature) depends upon whether the English court is satisfied that the Parliament also proceeds in granting divorces in a judicial manner.

Paper No. 7.

Note by the Solicitor for the Affairs of His Majesty's Treasury.

It is submitted that most of the difficulties which arise in connexion with Soviet divorces and other divorces of the same kind disappear if the fundamental principle of English law that all questions affecting status are to be referred to the law of the domicile is firmly kept in mind. It is because the question whether the *de cuius* has the status of a married man or of a bachelor falls to be determined by the law of the domicile alone that the English courts recognise the validity of a divorce pronounced in accordance with that law. A decree of divorce is equivalent to a declaration that thenceforward the law of the domicile will regard the two persons concerned as no longer having the status of married persons.

2. If this be so, it follows as a necessary consequence that the grounds on which the law of the domicile pronounces a divorce and the machinery whereby the pronouncement is made are not matters with which on principle English law ought to be concerned. As regards grounds of divorce, this has long been settled by authority; but as regards machinery, it must be admitted that there has been a certain confusion of ideas, in which history, ecclesiastical doctrine and irrelevant notions of public policy have all played their part, and have tended to obscure the essential legal principle which lies at the root of the subject. There is in truth no more reason why English law should seek to apply its own ideas of public policy to the method adopted by the law of the domicile for terminating the marriage status than it does to the ceremonies prescribed by the *lex loci contractus* for bringing it into existence or to the principles followed by the law of the domicile for determining the essential validity of the marriage itself. It is one thing to refuse on grounds of public policy to recognise a status at all, as in the case of slavery; it is quite another in the case of a status such as marriage, which is a recognised status all the world over, to require the acceptance of English ideas or standards respecting the manner of its acquisition or loss. The possession of the status of marriage in the case of a person domiciled abroad is a question of fact; a man is either married or he is not; and though he may have lost the status of marriage in a way which does not commend itself to English thought, that is no reason for denying a fact established by the only law competent to pronounce upon it.

3. For the same reason it ought to be no concern of English law that the law of the domicile dissolves an existing marriage otherwise than by the decree of a court or even by the mere consent of the parties. There is no virtue in the intervention of a court, and marriages can still be dissolved in Northern Ireland by Act of the Imperial Parliament. The matter is one within the exclusive competence of the personal law. The status of legitimacy is equally a matter for the personal law, but it could scarcely be denied that legitimation *per rescriptum principis* (if recognised by the personal law) would be recognised in England no less than legitimacy arising from lawful wedlock or *per subsequens matrimonium*.

4. No difficulty is presented by the cases in which considerations arise of what is sometimes called "natural justice," i.e., cases in which English law has felt compelled to refuse recognition to a foreign divorce because due notice of the divorce proceedings was not given to one of the parties. The question can only arise where the divorce is the result of some judicial process, never where it

is the result of a purely ministerial act; and in the former case only where the absence of notice is something more than a mere defect or irregularity in procedure and therefore goes to the root of the court's jurisdiction. Such cases are in the nature of things likely to be rare, for the foreign court must be credited with knowing its own procedure best, and the English court has no reason to be astute for the purpose of arrogating to itself a right to nullify the foreign decree while it remains without any power to pronounce a decree of its own in substitution for that which it has declined to recognise.

5. It is believed that the English authorities, though to some extent obscure and conflicting, nevertheless are not irreconcilable with the above; but it must be admitted that a real difficulty is created by the *Mir-Anwarruddin* case, which appears to lay down the principle that a Christian, or at any rate an English marriage (i.e., a marriage celebrated in England and according to English forms), cannot be dissolved otherwise than by the decree of a competent court. This, however, was the case of a Moslem domiciled in British India, who had purported to divorce his wife by a "talak," that is, a unilateral act recognised by the law of his religion as effective to terminate at any rate a Moslem marriage. The marriage had been celebrated in England at a register office, and the view hitherto taken by the English courts is that such a marriage, even if contracted by a man whose personal law recognises polygamy, must be regarded as a monogamous marriage. There appears to have been no evidence before the court on the question whether the man's personal law (i.e., the law of his religion or caste, which is the personal law of all persons domiciled in British India) would have regarded the English marriage as binding, or, if so, as either essentially monogamous or as dissoluble by a "talak." In these circumstances, and granted the premiss that one to whom polygamy is permissible by his personal law can nevertheless contract a monogamous marriage by means of an English marriage ceremony, the judgment of the Court of Appeal can perhaps be reconciled with the view put forward in the preceding paragraphs, if (but only if) it can be assumed that Moslem law would not have recognised the "talak" as effective to dissolve the English marriage. In any event, the decision cannot safely be extended to any case in which the circumstances were not substantially the same or as applicable to the dissolution of marriages in which the element of polygamy does not appear. Indeed, it may be said with much force that the fundamental cause of the difficulties to which the *Mir-Anwarruddin* case gives rise is to be sought further back, and lies in the error made in admitting the right of those whose personal law recognises polygamy to contract a marriage at all by English rites and ceremonies, which have in contemplation only marriage as known to English jurisprudence, viz., monogamous marriage.

6. The special circumstances of the *Mir-Anwarruddin* case apart, it is submitted that the fact that the marriage subsequently dissolved was celebrated in England is an irrelevant consideration, whether there has been a change of domicile or not. If it be said that because English law requires the decree of a court before an English marriage can be dissolved, even if the dissolution is valid by the law of the parties' domicile, then a country which does not recognise divorce at all, such as Italy or the Irish Free State, would have an equal justification for asserting that a marriage celebrated in that country is incapable of dissolution in any other country. So extreme a view as the latter has never been advanced by any English court, and in these circumstances it is strange that the former should ever have been entertained. The conclusion must therefore be that the law of the domicile is alone to be looked to for the purpose of determining whether a status of marriage still exists or has come to an end, and the manner in which the law of the domicile may see fit to terminate it is a matter for that law alone, the function of the English court being to ascertain the fact and not to criticise it by reference to its own standards of public policy.

(Initialled) M. L. G.

April 3, 1933.

Report.

Upon the assumption that the spouses are domiciled in the country in which their marriage is dissolved and that the dissolution is valid by the law of that country, we are of opinion that the dissolution of their marriage in any of the circumstances mentioned in (a) to (f) would be recognised by the English Courts as valid.

There is no doubt that, so far as a decree of divorce by a court is concerned, the court of the existing *bona fide* domicile for the time being of the parties concerned has jurisdiction to dissolve a marriage irrespective of the country where the marriage took place.

The grounds upon which the foreign court may dissolve a marriage are not material. Divorce by mutual consent or upon the *ex parte* application of one of the spouses is not different in principle. It is still a question, in our opinion, of the law of the country of domicile, and the fact that divorce by these methods is not agreeable to English ideas and habits is of no consequence.

If registration at a Soviet or Japanese consulate has the same effect as registration in Soviet Russia or Japan, according to the laws of those countries, the difference in point of procedure is not, in our opinion, material.

T. W. H. INSKIP.
F. B. MERRIMAN.

Law Officers' Department, July 28, 1933.

[W 9284/7582/50/1933]

No. 2^d.

[Colonial Office.]

[July 28, 1933.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, July 18, 1933.

Utilisation,
for pur-
poses other
than those
specified, of
moneys
standing to
credit of
Falkland
Islands
Depen-
dencies
Research
and
Develop-
ment Fund.

I AM directed by Secretary Sir Philip Cunliffe-Lister to state that he desires to submit to you certain questions with regard to the future utilisation of moneys standing to the credit of the Falkland Islands Dependencies Research and Development Fund. A list of the relevant documents, copies of which are enclosed, is attached.

2. By Letters Patent dated the 21st July, 1908, the Dependencies of the Colony of the Falkland Islands were defined to be "the groups of islands known as South Georgia, the South Orkneys, the South Shetlands and the Sandwich Islands and the territory known as Graham's Land, situated in the South Atlantic Ocean to the south of the 50th parallel of South latitude and lying between the 20th and the 80th degrees of West longitude." By Letters Patent dated the 28th March, 1917, the Dependencies were declared "to include and to have included all islands and territories whatsoever between the 20th degree of West longitude and the 50th degree of West longitude which are situated south of the 50th parallel of South latitude; and all islands and territories whatsoever between the 50th degree of West longitude and the 80th degree of West longitude which are situated south of the 58th parallel of South latitude." Laws for these Dependencies are made by the Governor of the Falkland Islands with the advice and consent of the Legislative Council of the Colony.

3. British sovereignty over the Falkland Islands and certain of the Dependencies is challenged by the Argentine Government, who also claim sovereignty over the islands.

4. Between 1905 and 1912 revenue from the Dependencies was principally obtained from import duties, rents of land sites for whaling purposes and fees for whaling licences.

5. Commencing with the 1912-13 whaling season an export duty on whale oil was introduced, the rate being 3d. per barrel (40 gallons) (Ordinance No. 1 of 1912). Notice of the intention to impose this taxation was given to the whaling

companies then operating in the Dependencies by circular letters from the Falkland Islands Government dated the 29th January, 1912, and the 1st February, 1912. The letter of the 29th January, 1912, was addressed to leaseholders in South Georgia, and the letter of the 1st February, 1912, was sent to licensees in the other Dependencies.

6. During 1915 the rate of duty was raised from 3d. to 3½d. per barrel (Ordinance No. 3 of 1915), and an export duty on guano was introduced (Ordinance No. 7 of 1915). The duty on guano (of all kinds) was fixed at 1½d. for every 100 lb. or part thereof.

7. In 1918 (Ordinance No. 6 of 1918) an export duty on seal oil was added, the rate being the same as for whale oil, viz., 3½d. per barrel.

8. During 1919 (Ordinance No. 3 of 1919) the export duties on whale oil and seal oil were increased to 1s. 6d. a barrel, and in 1920 (Ordinance No. 5 of 1920) the rate was raised to 5s. a barrel. A refund of 2s. 6d. a barrel was authorised for the seasons 1920-21 (Ordinance No. 4 of 1921), 1926-27 (Ordinance No. 5 of 1928) and 1927-28 (Ordinance No. 5 of 1928). For the seasons 1921-22 to 1925-26 refunds were authorised in accordance with a sliding scale, the rate of refund varying with the average market price realised for first-grade oil. For the seasons 1928-29 to 1931-32 the duty was fixed at the rate of 2s. a barrel, the system of refunds being discontinued. For the 1932-33 season the rate was lowered to 1s. 6d. a barrel.

9. The increases from 3½d. to 1s. 6d. and thereafter to 5s. were explained to the whaling interests (including Norwegian and Argentine concerns) in a letter of the 7th May, 1920, a copy of which is enclosed. Protests followed, and copies of the more important replies are enclosed.

10. The Inter-Departmental Committee referred to in this correspondence was appointed by the Secretary of State for the Colonies in 1918, with the following terms of reference:—

"To consider what can now be done to facilitate prompt action at the conclusion of the war in regard to the preservation of the whaling industry and to the development of other industries in the Dependencies of the Falkland Islands; and to consider not only the economic questions above referred to, and the scheme for the employment of a research vessel, but also what purely scientific investigations are most required in connexion with these regions, and whether any preliminary enquiries by experts in this country could be instituted."

The report of that committee was presented in August 1919 and published in April 1920 (Cmd. 657). The programme of investigations recommended by the committee is summarised in paragraph 156 of the report, a copy of which is enclosed.

11. When authority was given in 1919 for the rate of duty to be raised from 3½d. to 1s. 6d., directions were also given, by the Secretary of State to the Governor, that the extra revenue should be carried to a separate fund. A Dependencies Research Fund was accordingly opened, and on the 1st January, 1924, its balance stood at £300,301 15s. 3d. On the same date the balance of the Dependencies General Account stood at £15,493 0s. 4d.

12. By Ordinance No. 6 of 1924 (copy enclosed) a new fund was created, under the title of "The Dependencies Research and Development Fund." To this fund were transferred the balances from the two funds referred to in the preceding paragraph, viz., (a) the Dependencies Research Fund, and (b) the Dependencies General Account. It was also provided that the new fund was to be credited with the excess of revenue over expenditure of the Dependencies at the end of each financial year.

13. Section 2 of the Ordinance No. 6 of 1924 laid down that the new fund was to be established for the following purposes:—

- (a) Research in connexion with the whaling industry and any purposes incidental thereto;
- (b) The development of the resources of the Dependencies and research in connexion therewith and any purposes incidental thereto; and
- (c) Such other purposes as the Governor may with the consent of the Legislative Council and the sanction of the Secretary of State from time to time direct.

This Ordinance was passed by the Legislative Council on the 22nd December, 1924, and on the same day the following resolution was adopted by the council:—

“Whereas it is provided in section 2 of the Dependencies Research and Development Fund Ordinance, 1924, that the fund shall be established for certain specified purposes and also for such other purposes as the Governor may ‘with the consent of the Legislative Council and the sanction of the Secretary of State from time to time direct.’

“Be it now resolved that the purposes for which the Research and Development Fund is established be held to include all the researches, whether immediately recommended or not, referred to in the report of the Inter-Departmental Committee on Research and Development in the Dependencies of the Falkland Islands which was presented to Parliament by command of His Majesty in April 1920 (Cmd. 657).”

14. The researches undertaken under the authority of the foregoing resolution have taken the form of a series of investigations, principally in the Antarctic area, carried out by the *Discovery* Committee, a body appointed by the Secretary of State for the Colonies in 1923. For a number of years the income of the Dependencies Research and Development Fund more than sufficed to meet all charges in connexion with these investigations, including the cost of the headquarters staff in London. Since 1931, however—as a result not only of the economic depression, but also of the new “pelagic” method of whaling, which virtually eliminates the use of shore stations—the amounts received in export duty have been seriously reduced; and as a consequence the charges on the fund have exceeded the income. The balance now stands at approximately £380,000.

15. Funds are urgently required for purposes of scientific research, &c., which are of the highest importance to the Empire as a whole, *e.g.*, the maintenance of the Imperial College of Tropical Agriculture, Trinidad, and of the East African Agricultural Research Station, Amani. The work of such institutions is, in the Secretary of State’s opinion, likely to produce scientific results of much greater value than the continuance of the *Discovery* Committee programme; and it would, he considers, be definitely to the public advantage if some at least of the moneys now standing to the credit of the Dependencies Research and Development Fund could be made available for their support.

16. Sir Philip Cunliffe-Lister would accordingly be glad if you would take the foregoing, and the enclosed papers, into consideration at an early date and advise him—

- (1) Whether, by virtue of paragraph (c) of section 2 of the Falkland Islands Ordinance No. 6 of 1924, it is permissible to expend a part of the balance of £380,000 now standing to the credit of the Dependencies Research and Development Fund on purposes not *ejusdem generis* as those specified in paragraph (a) and paragraph (b) of that section?
- (2) If the answer to (1) is (a) in the affirmative, or (b) in the negative, and a further ordinance were passed amending Ordinance No. 6 of 1924 in such a way as to make such expenditure permissible, and part of the said balance were so expended, whether, having regard to the terms of the letters numbered III, IV and VI to X on the attached list, the foreign interests concerned would have a good claim against the Crown, or, alternatively, whether the foreign Governments concerned would be able to establish a breach of international law against His Majesty’s Government upon which a diplomatic claim could be founded?
- (3) Generally.

I am, &c.
G. A. JONES.

1933

List of Documents.

- I.—Letters Patent, dated the 21st July, 1908.
- II.—Letters Patent, dated the 28th March, 1917.
- III.—Circular letter, the 29th January, 1912.
- IV.—Circular letter, the 1st February, 1912.
- V.—Report of the Inter-Departmental Committee on Research and Development in the Dependencies of the Falkland Islands (Cmd. 657).
- VI.—Letter, the 7th May, 1920 (to Messrs. Chr. Salvesen and Co., the Southern Whaling Company, Messrs. Brandt’s Sons and Co.⁽¹⁾ and the Association of Norwegian Whaling Companies).
- VII.—Letter, the 1st December, 1920 (to the Association of Norwegian Whaling Companies).
- VIII.—Letter, the 7th February, 1921 (to Messrs. Chr. Salvesen and Co.).
- IX.—Letter, the 17th May, 1921 (to Messrs. Chr. Salvesen and Co., the Southern Whaling and Sealing Company, Messrs. W. Brandt’s Sons and Co. and the Association of Norwegian Whaling Companies).
- X.—Letter, the 10th January, 1923⁽²⁾ (to the Association of Norwegian Whaling Companies).
- XI.—Ordinance No. 1 of 1912.
- XII.—Ordinance No. 3 of 1915.
- XIII.—Ordinance No. 7 of 1915.
- XIV.—Ordinance No. 6 of 1918.
- XV.—Ordinance No. 3 of 1919.
- XVI.—Ordinance No. 5 of 1920.
- XVII.—Ordinance No. 4 of 1921.
- XVIII.—Ordinance No. 6 of 1924.
- XIX.—Ordinance No. 5 of 1928.
- XX.—Letter from Foreign Office, No. W 7582/7582/50, the 5th July, 1933.

Report.

We answer the first question submitted to us by saying that it is not permissible, in our opinion, to expend any part of the balance of £380,000 now standing to the credit of the fund in question on any purposes unconnected with the Dependencies. The *ejusdem generis* rule of interpretation hardly seems to us to throw much light on the scope of paragraph (c) of section 2 of Ordinance No. 6 of 1924. The function of the Governor and the Legislative Council with the sanction of the Secretary of State is to select “such other purposes” as they may decide, and, provided the purposes are “for the Dependencies,” we do not regard paragraphs (a) and (b) as in any way limiting the choice of “purposes.” We attach much more importance to the long title of the ordinance and to what we regard as the obvious intention of the ordinance, particularly having regard to paragraph 3 (c), namely, an intention to use the fund so as to promote the interests of the Dependencies.

Having regard to the explicit terms of the letters mentioned in the second question submitted to us, and particularly letters VI and VIII, we entertain no doubt at all that the diversion of any part of this fund by means of a new ordinance to the proposed or similar objects would lead in due course to diplomatic representations. We do not think that a good, that is to say, as we understand the question, a valid legal claim could be made against the Crown. However binding in honour the letters may be, they are not, and do not take, the form of a contract, and they cannot be made to support a claim for damages for breach of contract. So far as international law is concerned, we are unaware of any precedent for the suggestion that a change of internal policy, even if the application of a fund raised by taxation is involved, can be treated as a breach of international law. Any claim would depend upon the question whether the subject of the country putting forward the claim could be said to have been treated in a manner incompatible with any international obligation. In the absence of the disclosure of a similar case, as the result of an investigation of the records of the Foreign Office, we should say that no international obligation is involved or has been broken.

T. W. H. INSKIP.
F. B. MERRIMAN.

Law Officers’ Department,
July 28, 1933.

⁽¹⁾ London agents of the Compañía Argentina de Pesca.

⁽²⁾ Copies of this letter were later sent to Messrs. Chr. Salvesen and Co., the Southern Whaling and Sealing Company, Messrs. Wm. Brandt’s Sons and Co. and Messrs. T. Dannevig and Co.

GERMANY

[C 9618/1788/18]

No. 3.

[November 3, 1933.]

(1)

Foreign Office to the Law Officers of the Crown.

(Important.)
Gentlemen,

Foreign Office, November 1, 1933.

Locarno
Treaty of
Mutual
Guarantee,
October 6,
1925:
effect of
Germany's
withdrawal
from
League of
Nations on
obligations
of His
Majesty's
Govern-
ment.

I HAVE the honour, by direction of Sir John Simon, to request your advice upon the question whether, in the event of Germany ceasing to be a member of the League of Nations, the obligations of His Majesty's Government under the Treaty of Mutual Guarantee, drawn up at Locarno on the 6th October, 1925, terminate. You will be aware that Germany has given notice of withdrawal from the League of Nations under article 1, paragraph 3, of the Covenant, a notice which becomes effective, if it is not cancelled in the meantime, at the expiry of two years from the date on which it is given. Certain views have been expressed in certain sections of the press to the effect that when Germany's notice of withdrawal from the League becomes effective, the obligations of His Majesty's Government under the Treaty of Locarno either automatically terminate, or can be terminated if notice to this effect is given by His Majesty's Government. A copy of the Treaty of Locarno is enclosed herewith (Paper A (1)), together with a memorandum submitted by the Secretary of State to the Cabinet, in section 3 of which (pp. 8 and 9, Paper B) the question now submitted to you is discussed.

2. In addition to the points dealt with in this memorandum, I am desired to invite your attention to certain other considerations. Article 8 of the treaty contains express provisions as to the circumstances in which the obligations of the parties to this treaty may be terminated, namely, the lapse of one year after a decision by the Council of the League of Nations voting by a two-thirds majority to the effect that the League of Nations ensures sufficient protection to the high contracting parties. While it may have been thought, at the time the treaty was signed, highly improbable that any signatory of the treaty would cease to be a member of the League of Nations, and while the membership of the League of Nations of all the parties to the treaty was clearly indicated as a condition precedent to the signature of the treaty, since article 10 provides that the treaty should not come into force until Germany has become a member of the League of Nations, the right given by article 1, paragraph 3, of the Covenant to any member of the League to withdraw was known to all the signatories at the time the treaty was concluded, and it was therefore clearly open to them, if it was their intention that the withdrawal of any of them from the League should bring the treaty to an end, to have inserted an express stipulation to this effect in the treaty. The fact that no such stipulation was inserted, although there is in article 8 a provision defining the circumstances under which the treaty should come to an end, may be invoked as an argument (on the principle *expressio unius exclusio alterius*) for holding that the withdrawal of a party from the League does not give the other parties any right to consider themselves released from their obligations thereunder. Further, if it is contended that the withdrawal of Germany from the League of Nations introduces a factor so unforeseen and so out of harmony with the scheme upon which the provisions of the treaty are based, so as to enable a party to invoke the doctrine of *rebus sic stantibus*, or the principle of frustration in Contract Law, it may be said in reply that the fact that Germany is not a member of the League of Nations does not cause the provisions of the treaty to become completely unworkable, and that there is, therefore, no complete frustration such as to bring the circumstances within the scope of these doctrines, seeing that (as pointed out in Paper B) article 17 of the Covenant provides a means by which these provisions can still be operated, even though Germany is not a member of the League of Nations. On the other

(1) Not printed. See Treaty of Mutual Guarantee between the United Kingdom, Belgium, France, Germany and Italy, drawn up at Locarno on October 16, 1925 [Cmd. 2764].

GERMANY

hand, the treaty has always been explained, both at Geneva and by Ministers in Parliament in this country, as a treaty within the framework of the Covenant of the League of Nations and as a means of strengthening its provisions. The opinion of the legal advisers of the Foreign Office is that the withdrawal of Germany from the League of Nations would not afford His Majesty's Government any legal ground for holding that their obligations under this treaty were automatically, or could be by notice, terminated, and the Secretary of State wishes to know urgently whether you concur in the opinion of his legal advisers on this point.

I have, &c.
R. F. WIGRAM.

Enclosure in (1)—Paper B.

Note on the Treaty of Locarno.

(Extract from Cabinet Paper of October 20.)

IN view of Germany's having given notice of her intention to withdraw from the League, the following points in connexion with the Treaty of Locarno are material:—

(a) The obligations of the United Kingdom under the treaty may be summarised as follows:—

(1) If the Council of the League finds that a violation of the undertaking not to go to war against each other, contained in Article 2, has been committed by Germany, France or Belgium, we are bound immediately to come to the assistance of the Power against whom the act complained of was directed. In that case, as we are a permanent member of the Council, our assent is necessary to any finding.

(2) If the Council finds that a breach of Articles 42 and 43 of the Treaty of Versailles (relating to the demilitarisation of the Rhineland zone) has been committed, we are bound to come immediately to the assistance of France and/or Belgium. In this case again our assent is necessary to the finding of the Council.

(3) In the event of a flagrant violation of one or other of the above undertakings, we are bound immediately to come to the help of the injured party, if we are satisfied that the violation constitutes an unprovoked act of aggression, and that immediate action is necessary. In this case we are the sole judge as to whether our obligation is applicable.

(4) If either France, Belgium or Germany refuses to submit a dispute to peaceful settlement or to comply with an arbitral or judicial decision, we are bound to comply with any proposals which the Council may make as to the steps to be taken. In this case our assent is necessary to the Council's decision.

(5) There is no provision in the treaty which defines precisely what amount of action constitutes "coming to the assistance" of the aggrieved Power. There can, however, be no doubt that the employment of armed force in some form is meant.

(b) The Treaty of Locarno contains no provision under which any of the parties can withdraw from it. It remains in force (under Article 8) until a year after the Council, acting on the request of one of the parties, has decided by at least a two-thirds majority that the League of Nations ensures sufficient protection to the parties to the treaty. There is no provision for termination by notice because insecurity has increased.

(c) It has been suggested that Germany's withdrawal from the League would have the effect of terminating the Treaty of Locarno. There is no provision to this effect in the treaty; the only provision for its termination being that referred to under (b) above. On the other hand, the treaty did not come into force, under Article 10, until Germany had become a member of the League, and there can be little doubt that the treaty was concluded on the assumption that Germany would, during its continuance, be a member of the League, and that France, at any rate, considered, before the conclusion of the treaty, that Germany's membership of the League was an essential condition, and there are



1933

some provisions of the treaty which assume Germany's membership of the League and might be difficult to operate if she were not a member.

In these circumstances it might be argued that Germany's withdrawal from the League, if it ever actually occurs, would cause such an essential change in the circumstances contemplated by the framers of the Treaty of Locarno as, if not automatically to terminate the Treaty, at any rate to entitle any party to give notice that it would no longer consider it as applicable. The question whether, and if so in what circumstances, such a change of conditions justifies such action in relation to a Treaty which is in force and cannot be terminated by unilateral action, is much disputed, but even assuming such a principle to exist, it seems very doubtful whether the change of conditions resulting from Germany's withdrawal from the League would bring this case within the principle. The main provisions in Article 1, under which the maintenance of the inviolability of the Franco-German and Franco-Belgian frontiers is provided for, and in Article 2, whereby Germany and Belgium and Germany and France undertake not to go to war with each other except in certain specified circumstances, are unaffected. The provisions of Article 4, under which the Council of the League is to determine whether a *casus foederis* has arisen, can be worked, even though Germany is not a member of the League. The provisions which it might be difficult to work are (i) those relating to the exceptions to the undertaking not to go to war, some of which assume that the Covenant procedure for the settlement of disputes is applied, and (ii) some of the provisions dealing with the settlement of disputes between Germany and Belgium and/or France, which involve action by the Council of the League. It does not seem, however, that these difficulties need be insuperable, especially in view of Article 17 of the Covenant, under which Germany, though not a member, could be invited to accept the obligations of membership of the League for the purposes of a particular dispute. The provisions in question could certainly be worked if Germany were prepared to let the League machinery operate as provided in the Treaty.

(d) But there is a distinction between Germany's withdrawal and Germany's notice that she intends to withdraw. Under Article 1, paragraph 3, of the Covenant, Germany's notice to withdraw from the League does not take effect till two years after the notice is given, and then only provided that all her international obligations and all her obligations under the Covenant have then been fulfilled.

H. W. M.

Foreign Office, October 20, 1933.

(2)

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, November 2, 1933.

WITH reference to my letter of the 1st November,⁽¹⁾ requesting your advice with regard to the obligations of His Majesty's Government under the Treaty of Mutual Guarantee, drawn up at Locarno, in which you were asked whether you concurred in the opinion of the Secretary of State's legal advisers that the withdrawal of Germany from the League of Nations would not afford His Majesty's Government any legal ground for holding that their obligations under this treaty were automatically, or could be by notice, terminated, I have the honour to state that, as the result of further consideration, the Secretary of State considers it desirable that the exact question submitted to you should be somewhat differently formulated, and that the questions upon which your opinion is desired should be expressed as follows:—

1. In the event of Germany ceasing to be a member of the League of Nations, would His Majesty's Government be able to hold that their obligations under the Treaty of Mutual Guarantee were thereby automatically, or could be by notice, terminated?
2. In the event of the answer to the first question being in the negative, would the obligations of His Majesty's Government under that treaty, while remaining in full force, so far as the guarantee given to France and Belgium is concerned, be in any way modified as regards the corresponding guarantee given to Germany?

⁽¹⁾ See (1) above.

In connexion with the second of the two questions stated above, I am directed to submit to you the following considerations: In support of the view that, in the event contemplated, a distinction should be drawn between the effect of Germany's withdrawal upon the obligations of His Majesty's Government towards France and Belgium on the one hand and towards Germany on the other, the principal arguments would appear to be:—

- (a) That Germany's membership of the League of Nations was clearly contemplated as the basis upon which His Majesty's Government entered into the treaty, such membership resulting in Germany being bound by all the provisions of the Covenant, including those prohibiting any recourse to war against any other member of the League, and those dealing with the settlement of disputes with any other member, and that, if Germany is not bound by all these provisions of the Covenant, the risks of His Majesty's Government under their treaty are increased;
- (b) That if Germany is not a member of the League of Nations certain provisions of the actual treaty itself, which are all based upon recourse to the Council of the League, are made more difficult of operation;
- (c) That Germany, having voluntarily taken the step of leaving the League and thus increasing the burden of His Majesty's Government under the treaty and its practical difficulties of operation, should in consequence be held not entitled to the benefit of calling upon His Majesty's Government to implement the guarantee to Germany under the treaty.

With regard to (a), the enclosed memorandum (Paper C) indeed shows that the fact that Germany, like all the other parties to the treaty, would be bound by all the provisions of the Covenant of the League, was stressed at the time when the treaty was concluded and when it was submitted to Parliament as being a consideration of great importance in connexion with the obligations which His Majesty's Government was assuming thereunder. On the other hand, so far as the matters actually guaranteed by His Majesty's Government under the treaty are concerned (violation of the western frontier of Germany, articles 1 and 2; the settlement by peaceful means of disputes between Germany on the one hand and Belgium and France on the other, article 3, guaranteed by His Majesty's Government in articles 4 and 5), it will be seen that the treaty itself provides for the application to these matters of the procedure of the Covenant of the League of Nations. Therefore, so far as the specific matters guaranteed by His Majesty's Government under the treaty are concerned, it would appear that the obligations of His Majesty's Government are not increased or altered by Germany ceasing to be a member of the League of Nations, unless this fact renders these provisions of the treaty practically unworkable. This is the point referred to above as point (b).

In connexion with this point (b), it may be desirable to add further observations supplementary to those contained in my letter of the 1st November. As it has already been stated, the submission of certain questions to the Council of the League and the decision of the Council upon those questions is the basis of those provisions of the treaty upon which His Majesty's Government's obligations depend. (See in this connexion article 3, paragraph 3; article 4, paragraphs 1 and 2 and the last sentence of paragraph 3, article 5, second paragraph.) These questions, when submitted to the Council, would be questions which were the subject of a dispute between France or Belgium on the one hand and Germany on the other, and they would therefore be submitted to the Council under article 15 of the Covenant, and be dealt with by the Council in accordance with the procedure of that article. That procedure is that the Council considers the question in the presence of all the parties to the dispute and, if any parties to the dispute are not members of the Council, they have the right to appoint a representative to take part in the Council proceedings for this purpose under article 4 of the Covenant. The decision of the Council, in order to be effective for the purposes of the treaty, would be one arrived at in accordance with paragraph 6 of article 15, namely, a decision which is unanimous (excluding for this purpose the parties to the dispute). Article 17 of the Covenant provides that in the event of a dispute between a member of the League and a State which is not a member of the League (an article which would apply in the event of such a dispute taking place when Germany was not a member of the League), the



State not member of the League shall be invited to accept the obligations of membership for the purposes of such dispute upon such conditions as the Council might deem just. If such invitation is accepted, the provisions of articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council. In the event of a question arising under the Treaty of Mutual Guarantee, which has to be submitted to the Council when Germany is not a member of the League, the Council would be bound under this article to invite Germany to accept the obligations of membership for the purposes of this dispute and, in the view of the legal advisers of the Foreign Office, the effect of the provisions of the treaty would be to make it obligatory for Germany to accept this invitation. Further, there does not appear to be anything in the Covenant to prevent Germany, although not a member of the League, herself referring a matter covered by the treaty to the Council and declaring that she is willing to accept the obligations of article 17. Once Germany has accepted the obligations of a member of the League for the purposes of a matter covered by the treaty, as it is thought she would be obliged by the treaty to do, it would seem that the effect of article 17 is to enable the Council to deal with the matter applying the procedure of article 15 in exactly the same manner as if Germany were a member of the League.

If this view of the position is correct, it does not appear that the specific provisions of the Treaty of Mutual Guarantee are rendered unworkable by reason of the fact that Germany is not a member of the League of Nations.

In considering the hypothesis that His Majesty's Government's obligations to Germany, as guarantor of the treaty, might be terminated by Germany's ceasing to be a member of the League of Nations, while their obligations to France and Belgium remain in full force, it is desirable to consider its effect on the situation under the treaty. The first consideration is whether under this hypothesis all Germany's obligations under the treaty must be regarded as still being in full force. It would appear that Germany's obligations must be regarded as all remaining in force, because any other view involves the consequence that it was open to any of the parties to terminate its obligations under the treaty at any time after two years' delay by ceasing to be a member of the League, a result which appears to be in complete contradiction with article 8 of the treaty. Such a view would entitle Germany to benefit by taking this step of ceasing to be a member of the League of Nations, *i.e.*, release herself from the obligations of the treaty to respect the integrity of her western frontier and settle her disputes with France and Belgium by peaceful means, obligations which the treaty contemplates should only be terminable by the decision of the Council of the League.

On the other hand, to hold that Germany is still bound by all her obligations under the treaty, while not entitled to invoke some or all of its benefits, produces a result which appears to be so contrary to the whole reciprocal basis of the treaty that it seems difficult to hold that it is a proper interpretation of the treaty. Moreover, since no distinction is made in the treaty, it seems hardly possible to hold that Germany would merely become disentitled to invoke the guarantee of the United Kingdom and Italy under articles 4 and 5, while still being able to invoke against France and Belgium their more extensive obligations under all the articles of the treaty.

Further, to hold that, upon Germany's ceasing to be a member of the League of Nations, France and Belgium are able to invoke the guarantee of His Majesty's Government, while Germany is not, is to make a total and radical change in the whole character of the treaty, and of His Majesty's Government's obligations thereunder. The treaty, which was framed and expressly accepted by His Majesty's Government upon the basis that it would apply equally to Germany on the one hand and France and Belgium on the other, assumes instead the nature of a Treaty of Alliance with France and Belgium.

Further, the argument already indicated in paragraph 2 of my letter of the 1st November, that the negotiators of the treaty must be deemed to have known that it was possible for any party to cease to be a member of the League under article 1, paragraph 3, of the Covenant, and that, consequently, it was open to them, if they desired that their obligations should be affected by such an event, to insert express provisions to this effect in the treaty, appears to apply with no less force to the hypothesis raised in the second question now submitted to you than it does to the issue raised in the first question.

I have, &c.

R. F. WIGRAM.

Enclosure in (2)—Paper C.

Note on the International Discussion respecting the necessity of German Membership of the League of Nations as a condition of the entry into force of the Locarno Treaty.

1. ON the 24th March, 1925, statement by Mr. A. Chamberlain in the House of Commons:—

"It is essential to such an agreement (*i.e.*, Treaty of Mutual Guarantee) in my opinion that Germany should enter the League of Nations, taking her place as she would assuredly do in the Council of the League on a footing of equality, both of obligations and of rights, with the other great and small nations."

2. Extract from Mr. A. Chamberlain's despatch No. 797 to His Majesty's Chargé d'Affaires, Berlin, of the 30th April, 1925:—

"I finally said that I must repeat to him (the German Ambassador in London) quite clearly that, as I have told Lord D'Abernon from the first, it was a condition *sine qua non* of the pact for us, no less than for France, that Germany should be ready, if the pact was successfully negotiated, to become a member of the League."

3. Extract from Mr. A. Chamberlain's despatch No. 1841 to His Majesty's Ambassador, Paris, of the 25th May, 1925:—

Mr. Chamberlain pointed out to the French Ambassador in London that "if Germany joined the League—which was our basis of the whole conception of the pact—she would automatically undertake obligations not to go to war without submitting the matter in dispute either to judicial arbitration or to the consideration of the Council of the League."

4. Extract from Mr. A. Chamberlain's speech in the House of Commons on the 24th June, 1925:—

"We hold it to be essential that at least contemporaneously with the coming into force of any new mutual arrangement of this kind, Germany should enter the League of Nations and accept the obligations while receiving the rights of every other member of that society, and thus take her proper place and have her proper influence in the comity of nations and in the councils of Europe."

5. Extract from Mr. A. Chamberlain's despatch No. 2539 to His Majesty's Chargé d'Affaires, Paris, of the 27th July, 1925:—

"Concerning the entry of Germany into the League, I think it important to repeat that Germany's entry is an essential condition of the new settlement. . . . The conditions of entry are determined by the Covenant and have already been stated by the Council of the League. It is not for the Allies to enter into a discussion of the arguments which Germany adduces against the Council's decision. It is for Germany to decide whether those considerations outweigh the solid advantages which membership of the League will give her, but, in any case, the Allies are unable to contemplate a mutual guarantee on any basis except that of common membership of all the parties in the League."

6. Extract from French Government's note to German Government of the 24th August, 1925:—

"The Allies are convinced that membership of the League of Nations would provide Germany, once she has entered the League, with the most efficacious method of establishing her requirements as other States have done in regard to their own interests. The entry of Germany into the League of Nations is the only solid basis for a mutual guarantee and a European settlement. . . . So far as they are concerned, the Allied Governments can only adhere to their former statement and repeat that the entry of Germany into the League of Nations, under the same conditions as are prescribed for everybody, remains, in their opinion, the basis of any understanding of security."

7. Extract from note from His Majesty's Government to German Government of the 29th September, 1925:—

"With reference to that part of the declaration which deals with Germany's entry into the League of Nations, His Majesty's Government note with satisfaction that the German Government raise no objection to this essential condition of any mutual pact."

Foreign Office, November 2, 1933.

(3)

Report of the Law Officers of the Crown.

1. In our opinion, His Majesty's Government would not be entitled, in the event of Germany ceasing to be a member of the League of Nations, to hold that their obligations under the Treaty of Mutual Guarantee were thereby automatically or could be by notice terminated. It is a matter of some difficulty to determine the precise effect which Germany's withdrawal from the League has upon her position in regard to the Treaty of Locarno, and we refer to this in our answer to the second question. But we are of opinion that neither by invoking the somewhat uncertain doctrine of *rebus sic stantibus*, nor by relying on the principle of frustration, could it be held that the treaty was automatically terminated or terminable by notice.

2. The obligations of His Majesty's Government towards Germany in the event contemplated must, in our opinion, depend to some extent upon the position taken up by Germany. The withdrawal of Germany from the League undoubtedly creates a situation which was not intended to arise. The third recital refers to the guarantees as "supplementary guarantees within the framework of the Covenant." Article 10 makes Germany's membership of the League a condition precedent. Further, the various pronouncements made at or about the time of making the treaty as to the underlying necessity of German membership of the League, make it quite plain to our view that the treaty was devised to fit in with the Covenant of the League. The provisions of the treaty involve the use of machinery provided by the Covenant (see particularly articles 3 and 4). On the whole, however, we have, after some hesitation, formed the opinion that the withdrawal of Germany from the League would not make any of these provisions of the treaty unworkable in their literal sense, though, so far as article 4 is concerned, the references to the Council would be to a Council of which Germany was not a member, as she was intended to be. Whether Germany, by ridding herself of the obligations of the Covenant, would produce such a material alteration in the intended risk and general position as to justify His Majesty's Government in declining to be bound by her guarantee to Germany is a question the answer to which must depend on political rather than strictly legal considerations. If the alteration is not of real importance in the matters covered by the treaty, the mere fact of an alteration in the intended position would not, in our view, justify His Majesty's Government in declining to be bound. It seems to us clear that Germany could not merely by ceasing to be a member of the League be absolved from her undertakings under the treaty. If, however, she were to evince an intention to regard herself as absolved from her undertakings or were to declare expressly that to be the case, we think that His Majesty's Government would then be entitled to choose whether they would treat such an intention or declaration as a final breach of the treaty, and themselves as no longer bound by their guarantees.

T. W. H. INSKIP.
DONALD SOMERVELL.

*Law Officers' Department,
November 3, 1933.*

NETHERLANDS

[W 3693/72/29/1933]

No. 4.

[March 31, 1933].

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 8, 1933.

I HAVE the honour, by direction of Secretary Sir John Simon, to seek your advice on the question of the interpretation of the term "Coast of Guinea" in article 5 of the British-Netherlands Convention of the 25th February, 1871. This question arises as follows:—

Interpretation of term "Coast of Guinea" in British-Netherlands Convention of Feb. 25, 1871.

2. In June last notes, copies of which are enclosed (Paper A), were received from the Netherlands Minister, claiming that under article 5 of the above-mentioned convention Netherlands goods imported in Netherlands vessels were entitled to receive the benefit of the British preferential tariff which was put into operation in Sierra Leone last April. In a later note of the 3rd August last, a copy of which is also enclosed (Paper B), a similar claim was made by the Netherlands Minister in regard to the preferential tariff introduced in the Gambia. A reply to the Netherlands Minister's notes was returned on the 10th August (Paper C), disputing these claims. In a rejoinder, dated the 24th August last (Paper D), the Netherlands Minister contested the view advanced in the reply of the 10th August so far as Sierra Leone was concerned, and adumbrated a similar claim in regard to Nigeria; but he indicated by implication that the claim in regard to the Gambia would probably not be pursued. No reply has yet been returned to the Netherlands note of the 24th August.

3. The convention of 1871 is printed as an appendix to Parliamentary Paper C 670, of which a copy is enclosed (Paper E), and it will be observed that the relevant paragraph of article 5 reads as follows:—

"Netherlands subjects, Netherlands vessels and goods imported or exported in Netherlands vessels shall be treated on the Coast of Guinea on the same footing as British subjects, vessels and goods in all that regards commerce, navigation, duties of import or export, local dues, trade duties, prohibitions, impositions, warehousing, bounties and drawbacks, without any distinction as to the respective flags under which articles of lawful commerce may be imported or exported, or as to place of origin, departure or destination."⁽¹⁾

4. The question on which your advice is sought before a reply is returned to the Netherlands Minister's note of the 24th August relates to the interpretation of the term "Coast of Guinea," which is used throughout the convention of 1871, in both the English and the Dutch texts. There is no question but that this term covers and includes the Gold Coast Colony. The Netherlands Government, however, as has been stated, contend (contrary to the view taken by His Majesty's Government) that it also includes Sierra Leone and possibly the Gambia; and a question also arises as to whether it includes Nigeria. A map of Africa is enclosed herewith (Paper F), and a map of the Gold Coast will be found in Paper E. No definite inference should be drawn from the descriptions of territories given therein, but it will be seen that the term "Guinea" occurs twice in the West African coastline, once in the north, in the shape of French and Portuguese Guinea, which lie between the Gambia and Sierra Leone, and again further south, in the shape of the Gulf of Guinea, on which both the Gold Coast Colony and Nigeria are situated. These facts, amongst others, are urged by the Dutch Government in support of their case.

⁽¹⁾ There is an error in the opening line of the above version, as, according to the original signed text, there should be a comma after the words "Netherlands vessels" the first time they occur; but this point does not affect any of the matters raised in this reference.

5. In order to consider the above-mentioned points, it will be desirable to explain the circumstances which led up to the conclusion of the convention of 1871. Apart from the Island of Goree, off Cape Verde, which the Dutch owned from 1617 until its cession to the French at the Peace of Nimwegen, 1678, the only settlements possessed by Holland in West Africa were certain forts along the coast of what is now the Gold Coast Colony. Great Britain also, in addition to settlements at Lagos and in Sierra Leone and the Gambia, acquired settlements on the Gold Coast for purposes of trade, and similarly Denmark acquired Gold Coast settlements. Thus, from the 17th until the middle of the 19th century, the Dutch and Danish forts on the Gold Coast stood side by side with the English, the respective spheres of trade being intermixed. The first half of the 19th century, however, saw a considerable extension of British power on the Gold Coast, and in 1850, with a view to placing the administration on a sounder basis, steps were taken to buy Denmark out. This was effected by a convention, which was signed in London on the 17th August, 1850, under which the Danish possessions were ceded to Great Britain. A copy of this convention is enclosed (Paper G).

6. It was soon clear, however, that, if any satisfactory administration was to be established on the Gold Coast, an arrangement must also be reached with the Dutch, and on the 5th March, 1867, a convention was signed, to take effect from the following January, under which the Sweet River, flowing into the sea between Cape Coast Castle and Elmina (see the map in Paper E), was made the boundary line, all the Dutch forts to the east of that river being ceded to Great Britain, and all the British forts to the west being ceded to the Dutch. A copy of this convention is also enclosed (Paper H). The partition thus effected improved the British position on the Gold Coast; but the Dutch authorities became increasingly involved in troubles with the native peoples, who defied their authority in that section of the coast allotted to them. Negotiations were thereupon opened with the Netherlands Government, and resulted in the cession to Great Britain of all the Dutch possessions on the Gold Coast by the convention of 1871, article 5 of which is the subject of this reference.

7. It should be added that in the first part of the 19th century the British settlements on the Gold Coast were placed under the Government of Sierra Leone, which became a Crown Colony in 1808; and that Sierra Leone, the Gold Coast and the Gambia then formed, for administrative purposes, a single Colony under the name of the West African Settlements. In 1850 the Government of the Gold Coast was made into a separate Administration, but in 1866 it was again placed under the supervision of the Governor-in-chief of the West African Settlements, whose headquarters were at Freetown in Sierra Leone. This was the position when the convention of 1871 was concluded, and the Netherlands Minister bases one of his arguments on the administrative connexion between the Gold Coast and Sierra Leone. A final separation was effected in 1874.

8. As stated above, the question which has now arisen is that of the interpretation of the term "Coast of Guinea" which is used in the British-Netherlands Convention of 1871. The matter is one of some complexity. Certain departmental memoranda which have been written on the subject are enclosed (Papers J, K and L). It seems clear that the expression "Coast of Guinea" is one to which different meanings may legitimately be attached. In this connexion attention is drawn to a Foreign Office memorandum on the subject, a copy of which is enclosed (Paper J). In its widest sense, as used by certain geographers and historians (see Papers K and L), it may be said to include the whole coastline of West Africa from Senegal to the Cameroons and even further, and it would then include the Gambia, Sierra Leone and Nigeria, as well as the Gold Coast. In a narrower sense it might be regarded as confined to the littoral of the Gulf of Guinea, in which case it would include Nigeria and the Gold Coast. On the other hand, His Majesty's Government regard the term as being in the present connexion of still more restricted meaning and as being limited solely to the Gold Coast. This interpretation is derived, not from geographical considerations, but from the sense in which, according to the view taken by His Majesty's Government, the term "Coast of Guinea" was intended to be used by the contracting parties at the time when they concluded the convention of 1871. This, and not geographical considerations, constitutes, it is suggested, the true criterion in the present connexion.

9. From a study of the 1871 convention, together with the previous convention of 1867, there appear to be grounds for supposing that the term "Coast of Guinea" was intended to be used as synonymous with the Gold Coast. The following considerations support this view:—

(i) The preamble of the 1871 convention begins by referring to "the mixed dominion exercised on the Coast of Guinea by Great Britain and the Netherlands." In fact, however, this mixed dominion existed only on the Gold Coast, and it may therefore be argued that the intention of the convention in granting rights to the Netherlands in the "Coast of Guinea" was to refer to the territory in which the contracting parties had hitherto exercised a mixed dominion, *i.e.*, the Gold Coast.

(ii) The preamble goes on to state that this mixed dominion "has occasioned to the native populations much harm, which did not cease after the interchange of territory stipulated by the Anglo-Dutch Treaty of the 5th March, 1867." The treaty of 1867, however (Paper H), referred in terms to the Gold Coast, and it seems reasonable to suppose that the territory which is referred to in the preamble of the 1871 convention is the same as that dealt with in the previous treaty. The two treaties dealt with the same matter and had the same object, *viz.*, that of removing administrative difficulties on the Gold Coast.

(iii) It is pertinent to recall also that the convention of 1850 (Paper G) between Great Britain and Denmark having the same object, under which the Danish settlements on the Coast of Africa were ceded to Great Britain, refers to "all the forts and possessions belonging to the Crown of Denmark situated on that part of the Coast of Africa which is called *the Gold Coast or the Coast of Guinea*." The Netherlands Government must have been aware of the terms of this treaty.

(iv) On the Dutch side the only obligation undertaken in the convention was the cession, effected by article 1, of Dutch "rights of sovereignty, jurisdiction and property . . . on the Coast of Guinea." Since such rights in fact existed only on the Gold Coast, it is reasonable to suppose that by "Coast of Guinea" was meant Gold Coast.

(v) Moreover, as the obligations on the Dutch side in fact related only to the Gold Coast, it may be presumed that the corresponding British obligations also related to that coast only. The natural presumption is that as the Dutch ceded, under article 1, territories situated only on the Gold Coast, the commercial rights which they received in return under article 5 were also only in respect of that coast. It is submitted that clear words, such as do not exist in the convention, would be necessary to support the contention now put forward by the Dutch Government that, whereas Holland only ceded territories on the actual Gold Coast, she was to receive national treatment in respect of commerce over an extent of coast and hinterland many times greater than that in regard to which the cessions were effected.

(vi) An examination of the correspondence leading up to the convention of 1871 has revealed a number of points which strongly support the view taken by His Majesty's Government. As this correspondence is voluminous, copies of it are not enclosed; but it can be seen, if required. It is thought that the following comments and extracts may be sufficient.

It appears that on the British side the term "Gold Coast" was as a rule used in the negotiations. Thus, the Dutch can have been under no misconception as to the British intention. It is true that the Dutch, for their part, usually referred to the Coast of Guinea, but in such a way as to lead strongly to the inference that by that term they understood the Gold Coast, and the Gold Coast only. Thus, in a note, dated the 8th December, 1870, to the Dutch Government, the British Minister at The Hague, Vice-Admiral Harris, began with reference to the third article of the convention relative "to the *Gold Coast* . . . &c." The Dutch reply to this note, dated the 3rd January, 1871, began: "La note que vous avez adressée sous la date du 3 décembre dernier à mon prédécesseur, touchant le remboursement de l'indemnité mentionnée à l'article 3 de la convention relative à la Côte de Guinée . . ." Other examples abound in the correspondence, tending to show that the Dutch identified the two terms. Thus, in the same note they refer to "le budget de la Côte de Guinée," by which they clearly mean their budget in respect of their Gold Coast possessions, since they had no others in West Africa. It appears, too, that the Dutch Gold Coast Governor



1933

styled himself indifferently "Governor of the Coast of Guinea" and "His Netherland Majesty's Commissioner for the Gold Coast." The latter title appears in despatches addressed to the British Administrator, *e.g.*, those printed on pp. 9, 10 and 20 of Parliamentary Paper C 670 (Paper E), whereas in a despatch to the Dutch Minister for the Colonies, dated the 8th January, 1871, he signs himself "Le Colonel Commissaire du Gouvernement néerlandais, Gouverneur de la Côte de Guinée, C.T.M. Nagtglas." Again, in a letter dated the 29th August, 1871, from the Dutch Foreign Minister to the British Minister at The Hague, reference is made in the first paragraph to the "conventions de la Côte de Guinée" (the plural is apparently intended to include the previous convention of 1867, which in terms related solely to the Gold Coast), while in the fifth paragraph the reference is to "la convention de la Côte d'Or," the context making it plain that the later 1871 convention is intended. Here, then, the Dutch Government clearly admit that the convention was about the Gold Coast. Another instance occurs in regard to a letter dated the 28th March, 1870, from the British Minister to the Dutch Foreign Minister, in which, referring to a recent massacre of Dutch subjects by hostile natives, he said "foreigners cannot consider their lives safe in the Netherlands Settlements on the Gold Coast." In reply, the Dutch Foreign Minister acknowledged receipt "de votre office du 28 courant . . . touchant les affaires de la Côte de Guinée," but, in a further letter, he said "Assurément les méfaits dont il s'agit sont très regrettables. Ils prennent leur origine dans l'animosité qui existe malheureusement depuis si longtemps entre les diverses peuplades de la Côte d'Or." It would be tedious to multiply examples: the matter may be summarised by saying that throughout the correspondence the Dutch reply to British notes referring to the Gold Coast with communications, which, though they as a rule specify the Coast of Guinea, clearly identify the two terms. Yet the natural expectation would be that had the Dutch understood and intended to use the term "Coast of Guinea" in a wider sense that that in which it was evidently understood on the British side (particularly coming after the convention of 1867), they would have made that fact clear.

(vii) Further points emerge from the correspondence which appear to be almost conclusive in regard to the present question. These points may best be introduced as follows. One of the present Dutch contentions (see their note of the 24th August last) is that the acquisition of special commercial rights on the Gold Coast only, would not have been a sufficient *quid pro quo* for the cession of their possessions. But the correspondence shows (a) that in reality the Dutch Government was anxious to rid itself of these possessions at almost any reasonable price; and (b) that the major consideration which moved the Dutch Government was the grant to them of certain rights in regard to Sumatra and Surinam by conventions entered into concurrently with the convention of 1871 relative to the Gold Coast. It appears in the first place that the Dutch possessions on the Gold Coast had for some time been a source of anxiety to Holland on account of the hostility of the natives and the inability of the Dutch local authorities to control them. The lives of the local Dutch residents were not secure and serious massacres had occurred. It was in these circumstances that on the 14th January, 1870, the British Minister at The Hague wrote to Lord Clarendon as follows (extract):—

"In conversations which I have had with the Minister for the Colonies respecting the settlements on the Gold Coast, transferred to the Dutch under the convention of 1867, M. de Waal, alluding to the difficulties which his Government had to encounter, owing to the hostility of the natives in some portions of them, has stated his opinion, shared, as he said, by his colleagues, that it would be advisable, both in the interests of economy and for the benefit of the settlements themselves, that they should be ceded for an equivalent to some Great Power, who could rule them with a strong hand, and under one consistent system of policy as regards the Ashantees and other native tribes. "M. de Waal said he could not make any proposal of the kind officially to me, as the King and the Council of State considered such a measure at present inopportune; but he hinted at [*sic*] an arrangement under which, by paying the value of fixtures and stores, we might hereafter be put in possession of their settlements."

Thus it appears that at this early stage the Dutch Government contemplated a cession on the sole condition of a payment for the Dutch stores and fixtures.

After further correspondence, the British Minister at The Hague wrote to the Foreign Office as follows (1st July, 1870):—

"With reference to my despatches, No. 52, dated the 12th May, and No. 61, dated the 3rd June, both confidential, the Minister for Foreign Affairs has informed me that the King of the Netherlands has, in accordance with the advice of his Ministers, and with the tenor of a report from the Council of State, given his consent to the cession of the Dutch settlements on the Coast of Guinea to Great Britain.

"His Majesty has expressed a wish that it should not be in the form of a sale, but on the grounds of mutual goodwill, good policy as regarded by the natives, as well as for the advantages of commerce generally

"The Minister repeated the statement made to me on a former occasion, that all that they would ask for would be an indemnity for the value of their stores and fixtures on that coast.

"The Minister for the Colonies informs me that he had some time ago instructed the Dutch Governor to cause a valuation to be made of them, but that Colonel Nagtglas had replied that, from the manner in which they were scattered, it would be nearly impossible to do otherwise than to make a rough estimate. M. de Waal, incidentally, but unofficially, mentioned the sum of £80,000.

"Both the Ministers reverted to the wish expressed in my despatch, No. 61, that the three conventions—that relating to Sumatra, to the emigration of coolies to Surinam, and to the cession of their settlements on the Coast of Guinea—should be signed at the same time, with a preliminary note or preamble setting forth the motives of goodwill and sound policy which recommend the conventions. I am promised a draft of this document for the consideration of Her Majesty's Government.

"Both Ministers considered that this mode of proceeding would facilitate the passing of the conventions through the Chambers.

"The note to me respecting the cession is being drawn up at the Foreign Office."

From this it appears that payment for stores and fixtures was still the only formal condition, but that the Dutch Government attached importance to the concurrent signatures of the Sumatra and Surinam Conventions. These conventions will be referred to more fully presently.

Shortly after, the Dutch Government appear to have decided to ask, in addition, for commercial rights in the ceded territories, and on the 11th July, they addressed the British Minister at The Hague as follows (extract):—

"Dans nos conversations amicales il a été souvent question des dissensions sanglantes qui se reproduisent périodiquement parmi les populations de la Côte de Guinée, et des moyens de mettre un terme à un état de choses qui paralyse tant les efforts tentés de commun accord, par les deux Gouvernements, que les mesures qu'ils prennent séparément, afin d'assurer le bien-être durable de ces populations.

"En vue de cet intérêt humanitaire, nous n'avons pu méconnaître que le meilleur moyen de la garantir et de préserver la paix de constantes atteintes, ce serait de réunir lesdites populations sous la domination exclusive d'un des deux États.

"Le Gouvernement néerlandais a pris cette idée en sérieuse considération et, après l'avoir soumise au Roi, il est autorisé à croire que la réalisation n'en serait pas impossible; il serait même disposé à céder à la Grande-Bretagne les droits que les Pays-Bas ont sur la Côte de Guinée, pourvu :

"1. Que les avantages commerciaux dont jouissent actuellement les sujets néerlandais dans ces contrées leur soient garantis aussi pour l'avenir, et qu'une protection suffisante soit assurée à tous ceux qui vivent actuellement sous le drapeau néerlandais.

"2. Que le principe, d'après lequel un terme serait mis à toute domination mixte sur la Côte de Guinée, reçoive une application plus large que par le passé dans l'Archipel des Indes-Orientales, et que le Gouvernement britannique, afin de prévenir les difficultés inséparables de toute domination mixte et de rendre justice aux effets salutaires que la domination néerlandaise a eus pour la sécurité et le développement du commerce et de la navigation dans ces parages, se déclare disposé à reconnaître expressément au Gouvernement



1933

des Pays-Bas la liberté d'étendre sa domination dans les différentes parties dudit Archipel, du moment que ses intérêts et ceux des populations qu'il est appelé à protéger rendront cette extension nécessaire ou utile.

"3. Que la convention concernant l'émigration de travailleurs libres de Colonies anglaises aux Indes-Orientales dans la Colonie de Surinam, convention sur laquelle l'accord a déjà été établi entre les deux Gouvernements, comprenne une stipulation d'après laquelle les Pays-Bas jouiront, sous le rapport de la durée et pour tout ce qui regarde toutes les autres conditions de cette émigration, du traitement accordé ou à accorder par la Grande-Bretagne à la nation étrangère la plus favorisée."

This was transmitted to the Foreign Office and thence to the Colonial Office under a covering letter in the following terms:—

"Sir,

Foreign Office, July 13, 1870.

"With reference to my letter of the 5th instant, I am directed by Earl Granville to transmit to you, confidentially, for the Earl of Kimberley's information, copy of a further despatch from Her Majesty's Minister at The Hague, respecting the proposed cession to Great Britain of the Netherlands possessions on the Gold Coast. It will be seen from this despatch that it is now proposed to attach to this cession conditions which, it appears to Lord Granville, cannot be entertained by Her Majesty's Government; and it would seem to be not improbable that these conditions are proposed with a view to delay the signature of the Sumatra Convention, the stipulations of which, in favour of British commerce, are not very palatable to the Netherlands Government. There can be little doubt that, even without any convention with Great Britain, the Dutch possessions on the Gold Coast will be abandoned. The authorities on the spot have recommended this step; it has been decided on by the Government, approved by the Council, and, after considerable hesitation, assented to by the King. It would seem, therefore, to be unwise to enter into any negotiations for the acquisition of this territory, except on the terms of the cession being unconditional. The usual guarantees would, of course, be given for the maintenance of the rights of Netherlands subjects; and if the Colonial Office are disposed to take at a valuation the relinquished stores and fixtures, provision would be made for this arrangement which might be advantageous to both parties.

"I am to enclose a draft of a reply in this sense which Lord Granville proposes to return to the Minister at The Hague, and I am to request that you will move Lord Kimberley to state, as soon as may be convenient, whether he approves of this reply, and what terms he would be disposed to make respecting the stores and fixtures in case of the withdrawal of the Dutch authorities.

"I am, &c.

"ARTHUR OTWAY.

"The Under-Secretary of State,
Colonial Office."

The reply referred to in the concluding sentence of the above letter, which was duly approved of by the Colonial Office, was as follows:—

"Sir,

Foreign Office, July 14, 1870.

"It was reported by you in your despatch No. 71, of the 1st instant, that you had been informed by the Netherlands Minister for Foreign Affairs that the King of the Netherlands had consented to the cession to Great Britain of the Dutch settlements on the Coast of Guinea, and that it had been stated to you, that no return would be asked for the cession, but an indemnity for the value of the stores and fixtures relinquished by their present possessors.

"Her Majesty's Government, having this report and the offer alluded to in it under their consideration, learned with considerable surprise from the note from the Minister for Foreign Affairs, enclosed in your No. 5 of the 11th instant, that the Netherlands Government, far from making the proposed cession unconditionally, were prepared to attach to it conditions the consideration of which would involve the reopening of negotiations which have been concluded by mutual consent, and the disturbance of arrangements upon which the two Governments have come to a definitive agreement.

"The terms of the convention respecting the emigration of coolies to Surinam have, after mature discussion, been finally settled, and the two Governments have, after long deliberation, definitely agreed on the terms of the convention respecting Siak; in addition to which Her Majesty's Government have consented to append to the latter convention a declaration respecting the Kingdom of Acheen, couched *verbatim* in the form suggested by the Netherlands Government. Full powers would have been sent to you before this, to enable you to sign these conventions as Her Majesty's plenipotentiary, but that the Netherlands Government expressed a wish that a third convention, that respecting the cession of the Gold Coast, should be signed simultaneously with the other two. It now appears, however, that the Netherlands Government propose, as a condition to the signature of this third convention, that fresh provisions should be inserted in the Surinam Convention, and that the provisions of the Siak Convention should be extended so as to include a revision of the policy which dictated the treaty of 1824, and a general consideration of the relations between the two countries as regards the extension of their eastern possessions.

"To these suggestions I have to reply that Her Majesty's Government are not disposed to enter upon fresh negotiations on these subjects or to reopen those already closed. The two conventions have been fully discussed between the two Governments, and the Netherlands Government have expressed themselves as satisfied with the shape which they have finally assumed. The alterations, suggested with a view to their favourable reception by the Netherlands Chambers, have been accepted by Her Majesty's Government, and no further obstacle to their signature appears to exist.

"As regards the cession of the Netherlands possessions on the Gold Coast, I have to observe that Her Majesty's Government would not feel justified in allowing their acceptance of the protectorate over those settlements to be hampered by any further conditions than engagements to take the relinquished stores and fixtures at a valuation, and to guarantee to Netherlands subjects the same protection and commercial advantages as they have hitherto enjoyed. If the Netherlands Government are prepared to cede their possessions on these terms, Her Majesty's Government would readily agree to a convention in which they should be embodied; but, if further conditions are required, Her Majesty's Government would prefer that the question of the Gold Coast should be deferred, and that immediate steps should be taken for the signature of the two conventions respecting which the negotiations are closed.

"I have to request you to read this despatch to M. Roest van Limburg.

"I am, &c.

"GRANVILLE.

"Admiral Hon. E. A. J. Harris,
&c. &c."

It will be seen from the concluding paragraph of this despatch (which was to be read to the Netherlands Foreign Minister) that His Majesty's Government agreed to grant commercial rights to Dutch subjects in return for the cession, but that it was clear that these rights were to be only in respect of the Gold Coast. The paragraph in question begins with the words: "As regards the cession of the Netherlands possessions on the Gold Coast," and agrees to guarantee to Netherlands subjects the same protection and commercial rights as they have hitherto enjoyed." The meaning seems evidently to be as they have hitherto enjoyed in the "ceded territories"—at any rate, Dutch subjects had not previously enjoyed any special rights elsewhere in West Africa.

When the terms of the above despatch were communicated to the Dutch Government, they wrote to the British Minister on the 12th August, 1870, accepting the British conditions and enclosing a draft convention. With the exception of one article, not relevant in the present connexion, this draft was in the same terms as that eventually signed, and article 5 was identical. In the circumstances it would seem difficult to suppose that the Dutch can have been intending to regard article 5 as conferring any rights outside the Gold Coast.

The further fact that in Dutch eyes a major part of the consideration for the cession lay in the signature of the Sumatra and Surinam Conventions is



1933

emphasised by subsequent correspondence. Thus, on the 30th September, 1870, the British Minister at The Hague wrote to Lord Granville as follows (extract):—

“With reference to my despatch No. 62, dated the 23rd instant, recording the substance of my conversation with M. Lansberg on the subject of your Lordship's objections to certain portions of the draft of convention proposed by the Netherlands Government for the cession of their settlements on the Gold Coast, and of the concessions which the latter were disposed to make, I have now the honour to enclose copy of a note which I have received from the Minister for Foreign Affairs, in which it is stated that his Government accepts your Lordship's declaration that the ratifications of the conventions relative to Sumatra and Surinam must stand and fall together. On the other hand, the Dutch Government asks for the same terms respecting the conventions of Sumatra and the Gold Coast. The Minister in his note goes at great length into his reasons for this request, and I may repeat to your Lordship what has been stated to me confidentially, that the whole drift of this argument to be used in presenting the three conventions together to the States General is to secure the passing of those relative to Sumatra and the Gold Coast, the success of which, if proposed singly, might be greatly compromised. That this Government are in earnest in their wish to get them through I have reason to believe from the concessions which they have made.”

The relevant part of the note from the Dutch Government referred to in the above despatch is as follows:—

“Les motifs pour lesquels le Gouvernement du Roi doit tenir à présenter simultanément à l'approbation des États-Généraux les deux conventions ont une importance qui ne saurait échapper à la sagacité de votre Excellence.

“En effet, ces conventions règlent non seulement, toutes les deux, des questions territoriales, mais elles contiennent en outre des stipulations qui en rendent l'examen et la discussion simultanés recommandables sous plus d'un rapport. D'abord, il est question des relations futures des deux États avec des contrées restaurées par le même traité (celui du 13 août 1814), sous la domination des Pays-Bas.

“Ensuite, si d'une part l'arrangement concernant la Côte de Guinée met fin à l'influence néerlandaise sur ce territoire, d'autre part la convention concernant Siak peut être considérée dans un sens politique comme offrant une compensation, en facilitant la consolidation de l'influence néerlandaise dans l'île de Sumatra.

“Or, l'occasion et la facilité d'indiquer cette compensation seraient perdues pour le Gouvernement des Pays-Bas, ou du moins ne pourraient être utilisées avec une égale chance de succès, si un retard dans la conclusion de la convention relative à la Côte de Guinée l'obligeait à présenter cette convention à l'approbation des États-Généraux expériment, et à discuter et réfuter de la même manière les observations et les objections que l'abandon de ladite côte par les Pays-Bas, considéré comme mesure isolée, ne manquerait pas de rencontrer.

“Je pourrais, pour faire ressortir l'existence d'une véritable solidarité entre les deux conventions, me borner aux considérations qui précèdent. Mais il ne sera peut-être pas entièrement superflu, M. le Vice-Amiral, de vous faire remarquer qu'une partie du projet de convention concernant la Côte de Guinée, notamment l'article 5, a été calquée sur la partie analogue de la convention de Siak.

“L'article indiqué en dernier lieu, après avoir été rédigé expressément en vue de l'état de choses dans le Royaume de Siak et dépendances, a été inséré sans modifications dans la convention sur la Côte de Guinée, parce qu'on savait que le Gouvernement britannique l'approuvait. Aussi Lord Granville l'ayant retrouvé dans la même convention ne l'a-t-il cité que pour y adhérer. Si la convention relative à la Côte de Guinée avait été rédigée uniquement en vue des intérêts des Pays-Bas sur cette côte, la rédaction proposée aurait été probablement différente. Telle qu'elle est, pour pouvoir la défendre efficacement devant les Chambres, il faudra se prévaloir de son analogie avec la rédaction de l'article correspondant de la convention sur Siak.

“Mais si, pour toutes ces raisons, le Gouvernement des Pays-Bas vient à son tour exprimer le désir que le Gouvernement britannique ne perde pas de vue la connexion entre les deux conventions que je viens de citer, il resterait à examiner s'il existe réellement des obstacles sérieux qui s'opposent à la réalisation de ce désir.”

It should be explained in connexion with the above that, although the three conventions relating to the Gold Coast, Sumatra and Surinam were signed at different times,⁽²⁾ the ratifications bringing each into force were exchanged on the same day, viz., the 17th February, 1872, so that they became operative together. There is a close analogy between these conventions. By the Sumatra Convention Great Britain agreed to make no objection to the extension of Dutch dominion in the Island of Sumatra, receiving in return commercial rights analogous to those conferred on Holland by article 5 of the Gold Coast Convention. By the Surinam Convention the Dutch were given the right to recruit labour for Surinam from British India. In this latter connexion, it is significant that on the 2nd November, 1871, a protocol was added to the (as yet) unratified Gold Coast Convention, by which it was provided that, if at any time the British Government allowed the recruitment of labour in the British possessions on the “Coast of Guinea” for use in other British Colonies, such recruitment for use in Dutch Colonies should also be permitted. The inter-connexion between the three conventions seems therefore clear.

(viii) In conclusion, in support of the British case, it appears further that, after the conclusion of the 1867 treaty, maps were prepared in connexion with it by the Dutch authorities, and these were stated to be of “the British and Dutch possessions on the Coast” of Guinea; but, in fact, they only covered the Gold Coast area, whereas Great Britain at least had possessions outside that area. It seems clear that by Coast of Guinea the Dutch understood and referred only to the Gold Coast.

10. The Dutch counter-arguments, as evidenced in the further note from the Netherlands Minister of the 24th August last, appear to be as follows:—

(a) It is alleged that the term Coast of Guinea has a recognised signification as covering the whole West African coast from Portuguese and French Guinea, which lie north of Sierra Leone but south of Gambia, to the Cameroons. As already stated, the term, in fact, appears to have no definite meaning, though, as ordinarily used, it no doubt covers more than the Gold Coast. But even according to the Dutch view, the term would scarcely cover the Gambia (which lies to the north of French and Portuguese Guinea); and this, it will be observed, the Netherlands note of the 24th August in effect admits.

(b) It is stated that there is no reason to suppose that the term Coast of Guinea, as used in the convention of 1871, has a meaning other than the ordinary one. Apart from the fact that the term has no definite ordinary meaning, His Majesty's Government, for the reasons given above, believe that it is clear from the wording of the convention and the surrounding circumstances that the parties were referring to the area in which they had exercised mixed dominion, i.e., the Gold Coast only.

(c) The arguments in the second paragraph of the Netherlands Minister's note of the 24th August are difficult to follow; they seem only to be intelligible or pertinent on the assumption that the entire Gold Coast was possessed by the Dutch, and ceded by them in the convention of 1871. In fact, only part of the Gold Coast was in Dutch possession. In the view of His Majesty's Government the reference to “Netherland Guinea” in article 4 of the convention is simply to that part of the Gold Coast which was Dutch, and not, as the Dutch argument seems to imply, to the entire Gold Coast.

⁽²⁾ The Gold Coast Convention was signed on the 25th February, 1871; the Sumatra Convention (*State Papers*, vol. 61, p. 19) on the 2nd November, 1871; and the Surinam Convention (*State Papers*, vol. 60, p. 22) on the 8th September, 1870.

⁽³⁾ In the letter of the 28th July from the Foreign Office to the Colonial Office “Coast of Guinea” in this passage is misquoted as “Dutch Guinea.”



1933

(d) The argument in the third paragraph of the same Dutch note is that the convention did not contemplate that the grant of commercial rights to the Dutch was to be limited to that part of the coast which included the ceded territory. Yet, in the same paragraph, the unsoundness of this contention is impliedly admitted, for it is pointed out that in return for the cession it was necessary for Holland "to obtain a guarantee that, with the disappearance of these rights and properties, the equality of conditions which up to that time Dutch trade had enjoyed on the Coast of Guinea should not likewise disappear"; yet the only part of the "Coast of Guinea" in which the Dutch had hitherto enjoyed these trading conditions, at any rate as of right, and the only part of the West African Coast in which they stood to lose any rights by the cession, was the Gold Coast, since it was here and here only that they had any possessions and could claim any rights. In any event the Dutch contention seems quite at variance with the position as revealed by the correspondence already quoted.

(e) Finally, it is argued that at the time of the convention of 1871 the Gold Coast was not a separate Colony, but was under Sierra Leone, and that even if the term Coast of Guinea did not include the whole coast line from Guinea to the Cameroons, it must have included Sierra Leone. It is, of course, true that at the time the Gold Coast was, in common with other West African settlements, administered through a Governor-in-chief, with headquarters in Sierra Leone, but it was a separate sub-Administration, with its own Legislative Council and local authorities, and since it was also a separate geographic and economic unit, it is submitted that the fact that Sierra Leone and the Gold Coast had a common Governor-in-chief has no necessary bearing on the matter. The Dutch argument really implies that, even if the convention did only apply to the Gold Coast, Sierra Leone was united to, and therefore part of, the Gold Coast, a patent absurdity.

11. The Secretary of State would be obliged if you would consider this matter, and if you would favour him with your opinion on the points mentioned in the next paragraph, bearing in mind that the Netherlands Government may press for international arbitration, and that international courts are somewhat more disposed than English ones, in construing documents, to admit evidence based on extraneous circumstances, such as previous treaties, *travaux préparatoires*, &c. The only definite pronouncement made by the Permanent Court of International Justice on this latter question is that preparatory documents are not admissible when the meaning of a treaty is clear on the face of it. By implication, however, the court would seem to admit that such documents may be considered in cases of ambiguity, and it has, in fact, shown a disposition to look at preparatory documents, though, in the cases where it has done so, it has held that, in fact, they merely confirmed the already clear meaning of the treaty (see Publications of the Court, Series A, No. 16, the *Lotus* case; Series B, No. 14, pp. 28 and 31, *European Commission of the Danube*; Series B, No. 12, p. 22, *Article 3 (2) of the Treaty of Lausanne*; Series B, Nos. 2-3, p. 41, *Competence of the International Labour Organisation*; Series A, Nos. 20-21, p. 30, *Serbian Bonds*).

12. The points on which your opinion is requested are—

- (a) Whether the scope of article 5 of the British-Netherlands Convention of the 25th February, 1871, can be regarded as confined to the Colony of the Gold Coast;
- (b) If not, whether it can be regarded as confined to the Colony of the Gold Coast and Nigeria, *i.e.*, to the littoral of the Gulf of Guinea; or
- (c) Whether it must be regarded as extending to Sierra Leone.

13. As already stated, you will observe from the Netherlands Minister's note of the 24th August that the Netherlands Government will probably not persist in contending that the Colony of the Gambia is part of the Coast of Guinea, or claim for Netherlands goods the benefit of the British preferential tariff which has recently been introduced in that Colony. It would be of value, however, if you would also say whether, in your opinion, any claim on the part of the Netherlands Government based on article 5 of the convention of 1871 that Netherlands goods should receive national treatment in the Gambia could be successfully resisted.

14. Sir John Simon would also be glad of any further observations on the case generally which you may feel disposed to offer. As some delay has occurred

in replying to the Netherlands Minister, and a further note has recently been received from him pressing for an early reply, Sir John Simon would be glad if the matter could be considered as soon as is conveniently possible.

I have, &c.

C. HOWARD SMITH.

List of Papers.

- Paper A. Netherlands Minister's Notes of the 29th June and the 4th July, 1932 [W 7499/7499/29].
 Paper B. Netherlands Minister's Note of the 3rd August, 1932 [W 8892/7499/29].
 Paper C. Foreign Office reply to Netherlands Minister of the 10th August, 1932 [W 8915/7499/29].
 Paper D. Netherlands Minister's Note of the 24th August, 1932 [W 9581/7499/29].
 Paper E. Parliamentary Paper C. 670 [Parliamentary 1525].
 Paper F. Map of Africa.
 Paper G. Anglo-Danish Convention signed in London on the 17th August, 1850 [Treaty 349].
 Paper H. Anglo-Dutch Convention signed on the 5th March, 1867 [Treaty 499].
 Paper J. Foreign Office Memorandum of the 25th July, 1932 [W 8449/7499/29].
 Paper K. Colonial Office Memorandum of the 21st July, 1932 [W 8449/7499/29].
 Paper L. Colonial Office Memorandum of the 1st September, 1932 [W 11322/7499/29].

Report.

(a) We are of opinion that the scope of article 5 of the British-Netherlands Convention of the 25th February, 1871, must be regarded as confined to the Colony of the Gold Coast. In coming to this conclusion we have been influenced chiefly by the terms of the convention itself. The expression "Coast of Guinea" is used in the preamble as denoting, in our opinion, the Gold Coast. The alternative is to read the expression in the preamble in its purely geographical sense, but that would make it convey no more than some such general expression as "the West Coast of Africa," or any other geographical term covering a far wider range than was relevant to the matter in hand. The same observations apply to the use of the expression in article 1. In article 5 the expression "the Coast of Guinea" must, in our opinion, be read as having the same meaning as in the earlier parts of the convention.

Consideration of the Danish Convention of 1850 and of the Netherlands Convention of 1867, together with the maps prepared in that connexion and of the correspondence leading up to the convention in question, all appear to us to confirm the construction which we put upon the convention when considered alone.

(b) and (c). These questions do not arise. If, contrary to our opinion, the expression denotes the whole length of coast line to which in some context or other the word "Guinea" is applied, it would most probably be found to include Sierra Leone, but not Gambia. From any point of view, therefore, we are of opinion that a claim that Netherlands goods should receive national treatment in the Gambia could be successfully resisted.

T. W. H. INSKIP.

F. B. MERRIMAN.

Law Officers' Department,
March 31, 1933.

PERSIA.

[E 6833/1273/34]

No. 5.

[November 9, 1933.]

(1)

*Foreign Office to Law Officers of the Crown.*Status of
Basidu.

Gentlemen,

Foreign Office, October 26, 1933.

I HAVE the honour, by direction of Secretary Sir John Simon, to request the favour of your advice on a question on which it is desired to reach an urgent decision, in connexion with the proposed early resumption of negotiations for a general treaty settlement with Persia.

2. The question on which your opinion is desired is the status of a small area known as British Basidu at the north-western corner of the Persian island of Qishm at the mouth of the Persian Gulf. This area, the boundaries of which have never been definitely demarcated, contains, apart from a native village, a few store-houses, guard-houses and other buildings, a flag-staff and a British-Indian cemetery. For more than a hundred years the British flag has been flown from the flag-staff; from 1823 to 1883 the area was in regular use as a naval station, and was occupied by a British garrison of varying size. In 1883 the garrison was removed, although the station continued in use for naval purposes, principally as a coal depot. In 1913 the naval station was transferred to the neighbouring island of Henjam, and since that time Basidu has been regarded as of value only as a possible alternative to Henjam (which is used by His Majesty's ships only on sufferance), or as a pawn for use in eventual treaty negotiations with Persia, and has not been in regular occupation. The flag has continued to fly there in the charge of a native caretaker, and British warships have at irregular intervals landed detachments, which, notwithstanding the uncertainty as to the exact boundaries, are understood to have performed a ceremony described as "beating the bounds."

3. In the course of recent negotiations with Persia for a general Anglo-Persian treaty settlement, His Majesty's Government had expressed their willingness, provided that a satisfactory treaty were concluded, to transfer the British rights at Basidu to Persia by an article in the proposed treaty. The terms of such an article have already been discussed and agreed upon (subject to the conclusion of a satisfactory treaty) with the Persian Government (see Paper C). It was intended to reopen the general negotiations with Persia in the near future, but certain recent events have led the Admiralty to take the view that for strategic reasons it might be preferable to transfer the naval station back to Basidu from Henjam, and that, accordingly, it may be undesirable to effect the proposed transfer of the British rights at Basidu to Persia.

4. The question whether His Majesty's Government in the United Kingdom should attempt to maintain the existing position at Basidu must depend to a large extent on the legality of that position, and it is on this question that your advice is urgently requested. Although it is clear from the attached historical note (Paper B) that rights of a fairly extensive character have, in fact, been exercised by His Majesty's Government within the concession during the period of its occupation, the precise nature and extent of those rights is not known; but, as far as it has been possible to ascertain, the Persian officials stationed in the neighbouring village of "Persian Basidu," situated outside the concession area, appear to have made no attempt until very recently to collect taxes, to conscript natives of "British Basidu," or to interfere in its affairs in any way. Order appears to have been maintained when necessary by the British naval or military authorities.

5. The concession is held by His Majesty's Government under a written grant in very general terms made in 1820 by the then Imam of Muscat (see paragraph 21 of Paper B), confirmed in a subsequent Anglo-Muscati Agreement

of 1864 (see paragraph 43 of Paper B) as having been freely made by the original grantor on behalf of himself, his heirs and successors.

6. There are two main points at issue: The first is whether the Imam of Muscat, when he made the original grant in 1820, did so as Sovereign of the island of Qishm, on which Basidu is situated (thus being entitled to transfer the sovereignty over any part of the island to a foreign Power), or merely as tenant of Qishm, and so of Basidu, from the Persian Government. The second point is, on the assumption that the rights derived from the original grant amounted to something less than full sovereignty, what rights, if any, His Majesty's Government can legitimately claim at Basidu (a) in virtue of the original grant, and (b) by prescription or otherwise in view of the history of their continued occupation as described below.

7. The question whether there is any reliable basis for a claim by Muscat to have held the island of Qishm, and so Basidu, in full sovereignty at the time when the grant was made is examined in the India Office memorandum, of which a copy is attached (Paper A). The conclusion reached by the India Office in that memorandum, on a review of the history of the island (in so far as this is on record) since 1720, and of the relevant facts, is that there is no substantial foundation for a claim to sovereignty by Muscat, and that it would be difficult, if not impossible, on the available evidence, to maintain such a claim. The Foreign Office agree with this view.

8. The Admiralty, whilst agreeing with the statement of facts as set forth in Papers A and B, nevertheless cannot associate themselves with the conclusions drawn by the India Office in the former document. They feel that, on the facts stated in the memorandum at Paper B, there is evidence that, in the view of one of the parties to the settlement of 1794, namely, Muscat, the effect of the conquest of the islands of Qishm and Hormuz was to transfer the sovereignty of these islands to Muscat in addition to the transfer of the lease of the remaining dependencies of Bandar Abbas. In their view, the only important evidence on the Persian side is the Persian refusal to lease the island in 1801 (Paper B, paragraph 7), the Persian protest in 1805 against the recovery of Bandar Abbas and its dependencies for the Imam of Muscat by a Muscati-British force (Paper B, paragraph 8), and the correspondence of 1820 (Paper B, paragraphs 22, 24, 25, 31 and 32). In these circumstances, the conclusion that they would draw is that the evidence is insufficient to settle the matter.

9. In connexion with the second point mentioned in paragraph 6 above, the following considerations may be relevant:—

(a) Notwithstanding the fact that the Persian Government protested in 1820 against the stationing of a British detachment in the Island of Qishm, which they claimed, in opposition to the claims of the Imam of Muscat, as Persian territory, and the fact that the detachment was withdrawn in 1822 in the interest of maintaining friendly relations with Persia, though specifically without prejudice to the question of the title to the island, the detachment was reinstated at the end of 1822. No protest was made at the time or since by Persia, and the British occupation of the area appears to have been unchallenged and unquestioned until, in 1923, the Persian Government revived the question of the basis of British rights in it, though even then they did not formally challenge those rights.

(b) In 1855, when the Imam of Muscat was granted a fresh lease by Persia of Bandar Abbas and its dependencies, including the island of Qishm, which formally recognised Qishm Island as Persian territory, the lease granted by the Persian Government contained the following articles:—

"On the following conditions, we entrust the Government of Bandar Abbas, the Islands of Qishm and Hormuz . . . to His Highness Syad Saeed Khan, the Imam of Muscat and Oman. . . ."

"ARTICLE 13.

"As long as Bandar Abbas, the above-mentioned two islands, Shermal, Minab, and their dependencies, are in the hands of the Imam of Muscat, he should not allow any officers of foreign Governments to go there. He should also promise to protect these places by land and sea, providing for every port having an anchorage some ships bughlas, and other vessels of war. He

should further promise to protect all the boundaries of the above-mentioned places from all interference and intrusion of strangers, whether in an amicable or hostile manner. He should not at any time allow any ship, bughla, or other vessels of war, or any hostile person, armed or otherwise, Arab or foreign, to approach or get a footing at Bandar Abbas or the Persian territory with hostile intentions or other pretexts.

“ARTICLE 14.

“The Imam of Muscat, notwithstanding these conditions, has not the right of letting Bandar Abbas and the above said places to any foreigner or others. He can only himself hold them, appointing one of his relatives for the management thereof who would act in accordance with these conditions.”

It will be observed that despite the fact that the Island of Qishm is specified as one of the areas covered by the lease; that Basidu and its anchorage are situate in that island; and that at the date of the lease there was undisguised British occupation of the station at Basidu, as evidenced by the flying of the British flag, the undisguised maintenance of a considerable station, coal depots, hospital, &c., no reference to the British concession occurs in the lease, the terms of article 13 of which are *prima facie* inconsistent with the retention of that concession by His Majesty's Government; but that despite this His Majesty's Government continued to occupy the concession without interference or protest by Persia or Muscat.

(c) In 1857 the war between Great Britain and Persia was terminated by the Treaty of Paris. Article 2 of that treaty provides that “peace being happily concluded between their said Majesties, it is hereby agreed that the forces of Her Majesty the Queen shall evacuate the Persian territory subject to conditions and stipulations hereafter specified.” Article 14 of the same treaty provides that, in certain events which duly occurred, “the British troops shall, without delay, be withdrawn from all ports, places and islands belonging to Persia. . . .” Despite the terms of the articles quoted, the British concession of Basidu remained in British occupation and was used as a naval station by British armed forces. No protest appears at any stage to have been made by Persia against its continued occupation.

(d) In 1864 a Telegraph Agreement was under negotiation between His Majesty's Government and Muscat. Sir Lewis Pelly, then Political Resident in the Persian Gulf, who handled the negotiations with Muscat, reported that while the title of His Majesty's Government to Basidu had “of course for many years been a *bona fide* one . . . the present seemed a convenient opportunity for giving to our title the sanction of a written confirmatory deed.” He accordingly arranged for the insertion in the agreement, with the concurrence of the Sultan of Muscat, of an article formally confirming the rights of His Majesty's Government. The relevant articles of the agreement, articles 5 and 6, are as follows:—

“ARTICLE 5.

“Nothing in these articles shall be held as conferring any dominion or sovereign right on the part of the British Government over the territory of Muscat through which the line may pass, neither of any additional dominion or right on my part as Sultan of Muscat, over territory which I may hold in lease from the Shah of Persia.

“ARTICLE 6.

“In like manner nothing in these articles shall be held as invalidating or derogating from the title of the British Government to the station of Bassador [*i.e.*, Basidu], that station having been freely granted to the British Government by my late illustrious father of blessed memory, the late Imaum Syed Saeed bin Sultan, on behalf of himself, his heirs and successors.”

The agreement is a public document, which has at no stage been treated as secret, and which has appeared in a collection of treaties which is on public sale and has been republished on various occasions (though its circulation is

admittedly limited) since 1865. This reference to the position of Basidu has not, so far as can be traced, at any stage produced complaint or criticism from Persia.

The terms of article 6 of this agreement quoted above appear to furnish important evidence of the fact that the somewhat vaguely-phrased original grant of 1820 (paragraph 21 of Paper B) quoted above was not in the nature of a revocable lease, but was intended to be a grant in perpetuity.

(e) In 1866 the lease of Bandar Abbas and its dependencies referred to in (b) above, which was for twenty years, came to an end. A fresh lease was granted by Persia to a member of the Muscat ruling family, but as a dependent of Persia and not as representing that family. The lessee not having complied with his obligations under the lease, the Persian Government made preparations in 1868 forcibly to eject him. At this stage the Sultan of Muscat demanded, under threats of force, that the lease should be made over to him. He was prevented by His Majesty's Government from using forcible measures against Persia, and as the result of British mediation, a fresh lease for eight years of Bandar Abbas and its dependencies (again including specifically Qishm) was granted by Persia, in 1868, to the then Sultan of Muscat and his descendants. The lease was on the same general lines as the re-lease of 1855 referred to in (b) above. It was, however, more specific, both in the obligations which it imposed on the lessee, and in its enumeration of the territories covered by it. The lease, however, contained, like the re-lease of 1855, no reference to Basidu. But its thirteenth and fourteenth articles ran as follows:—

“13th.

“So long as Bandar Abbas and the above-mentioned two islands [Qishm and Hormuz] and Shumeel and Minab and their dependencies are in the hands of the Imam of Muscat, he should not allow officers of other Governments to go there. His Highness should protect these places by sea and land, providing for every port having an anchorage some ships, bughlas, and other vessels of war.

“He should protect all the boundaries of the above places from all interference and intrusion of strangers, whether under friendly pretext or otherwise. He should not, under any circumstances, allow any foreign ship, bughla, or man-of-war, the property of an Arab or Arabs, or of any foreign Power, whether with or without ammunition, to anchor within the limits of the anchorage ground of the said territories.”

“14th.

“His Highness the Imam of Muscat, notwithstanding these conditions, has no right to let the said Bandar Abbas and the said places to any other Government, but His Highness should, according to these conditions, send one of his own people or servants to manage Bandar Abbas and the aforesaid places, who must act according to the terms of these conditions.”

As will be seen, the articles quoted, like articles 13 and 14 of the re-lease of 1855 (which they reproduce and amplify), are difficult to reconcile with the continued maintenance, without protest from Persia, of a British naval station, continually used by British forces, at Basidu in the Island of Qishm. But no protest of any kind against the retention of that station or the use of its anchorage by His Majesty's armed forces appears to have been made by Persia; nor, when on the deposition of the Sultan of Muscat at the end of 1868 the lease was automatically determined, and fresh leases of the same areas (including the Island of Qishm) were made by the Persian Government to Persian subjects, was any attempt made, as far as can be traced, to object to the presence of the British concession, or to exercise jurisdiction, or collect taxes, within its area.

(f) Between 1863 and 1868 the local Persian authorities appear on at least two occasions, but without success, to have asked for the surrender of fugitives from justice who had taken refuge in the British concession. On no occasion do they appear to have endeavoured to claim or enforce any rights within that concession.

(g) In 1905 the coal agent at Basidu was instructed to inform a Persian customs officer who had interfered that he had “no business in British territory,



1933

and that if he persisted he should not be allowed to come within British territory."

(h) Throughout the war of 1914-19, in which Persia was a neutral, Basidu was part of the British war area and was used to such extent as was necessary for war purposes by His Majesty's Government without protest from Persia. Little importance can, however, be attached to this, the station of Henjam, which is admittedly Persian territory, having been similarly used, and British troops having freely operated elsewhere on Persian soil from time to time during the war.

(i) In 1930, the Director of Customs at Lingah was informed in writing by the local British naval officer in command that the territorial waters of the concession were British territorial waters, and was required (a demand with which in fact he complied without delay, though it is not clear whether his prompt compliance was the result of acceptance of British claims or of the completion of the work on which he had been engaged) to remove his dhow from British territorial waters (*i.e.*, the territorial waters of the British concession area) to Persian waters. No protest was received against the action of the local British authorities or the claim to British sovereignty over or control of the concession area and its territorial waters which the letter in question constituted. There is no evidence, however, to show whether the British naval officer's communication was or was not communicated to the Persian Government.

(j) From 1908 until 1932 a statement appeared in the *Persian Gulf Pilot* to the effect that Basidu was "a British possession." This publication, which is an official one prepared by the Admiralty, is on public sale, but it must be borne in mind that the Persians are not a seafaring nation, and it cannot be regarded as certain that the Persian Government were aware of this fact. The statement has recently been amended to say that Basidu is "in British possession."

10. As will be seen from the incidents to which reference is made in the preceding paragraph, His Majesty's Government, even on the assumption that the rights derived from the original grant amounted to something less than full sovereignty, are able, in considering their legal position and rights at the present day in Basidu, to point to unchallenged occupancy of over a century, and to a long series of acts to which no exception has been taken by Persia. You are requested to consider whether the cumulative effect of these circumstances can be regarded as establishing: (a) The full sovereignty of His Majesty's Government at Basidu by prescription; or (b) a title to their continued occupancy on existing terms; or (c) justification for the surrender, or modification of the terms of occupation, of the area, by His Majesty's Government, only (i) on their own conditions, or (ii) in return for a substantial *quid pro quo*.

11. On the other hand, in considering the question of the rights and privileges exercised in the past by the British authorities in the concession area, and in assessing the importance to be attached to the fact that the exercise of these rights and privileges has not been challenged by the Persian Government, it may be material to bear in mind that during the nineteenth century and until recent years the authority of the Persian Government and their officials, not only at Basidu, but throughout the Persian area of the Persian Gulf, was of a most shadowy character, and that British predominance in the Gulf was such that whatever the Persian Government and their local officials may have believed to be the true legal status of the concession, it is possible that they would not, in practice, have ventured to question the British *de facto* position. Moreover, until quite recently, the authority of the central Government in Persia was so weak that many apparent derogations from Persian sovereignty, which have now been brought to an end, were allowed to pass unchallenged. On the other hand, while their effective control was small, on repeated occasions during the period now under consideration they took steps, either in correspondence, or (in two cases) by force, to maintain or assert their claims to sovereignty over other territorial areas in the Gulf. It is relevant to add that between 1820 and 1871 attention was particularly focussed on the position of Bandar Abbas and its dependencies. It is a matter for your appreciation to what extent, if at all, the above considerations may affect the argument set out in paragraphs 9 and 10. Nevertheless, whatever the attitude of the Persian Government may have been in the past, they have now definitely intimated in a written note that they regard the whole area of the Island of Qishm, including British Basidu, as being under Persian sovereignty.

12. I am accordingly to request you to take the above facts and the attached papers into your consideration and to favour Secretary Sir John Simon with your opinion on the following questions:—

(a) Can British Basidu be held to be British territory in full sovereignty—

(1) In virtue of the grant of 1820?

This involves the question whether the Island of Qishm and so Basidu are to be regarded as having been held in full sovereignty by the Imam of Muscat at the date of that grant, or whether the grant in question is to be regarded as having been made by the Imam as a tenant of Persia, so that the rights of His Majesty's Government are to be regarded as subject to the overriding rights of Persia.

(2) By prescription or otherwise?

(b) If not, is British Basidu to be considered as held in such conditions that Persia is only entitled to request that His Majesty's Government should surrender it by agreement?

(c) If the answers to the two preceding questions are in the negative, would His Majesty's Government be bound to surrender British Basidu to Persia unconditionally and immediately, if so requested by the Persian Government?

(d) If British Basidu is not considered to be held in full sovereignty, can His Majesty's Government claim on any other grounds the right to occupy the concession with armed forces, to exercise jurisdiction over the area and adjoining territorial waters, if necessary to establish fortifications therein, and in general to use the area without restriction—

(i) in time of peace,

(ii) in time of war between the United Kingdom and a third party,

(iii) in time of war between Persia and a third party?

(e) If the right of occupation, jurisdiction and user is not complete, what are the extent and nature of the limitations upon such rights in each of the three cases mentioned in (d) above? In particular, would it be justifiable, in the event of a serious attempt by Persia to interfere with the exercise of these rights within the British area or its territorial waters, to resist such interference and forcibly or otherwise to exclude Persian officials from the area or its territorial waters?

13. Sir John Simon will also be grateful for any observations of a general character which you may be good enough to offer.

14. The question whether negotiations for a general treaty settlement with Persia can usefully be resumed or not must depend to a large extent on a decision on the present question. Pending that decision it has been necessary to delay the return to Persia of His Majesty's Minister at Tehran, and as Sir Reginald Hoare was expected to return with instructions as to the resumption of negotiations before the end of October, further delay may seriously affect Anglo-Persian political relations. In these circumstances Sir John Simon would be grateful if he could receive your opinion at a very early date.

I have, &c.

G. W. RENDEL.

List of Papers.

Paper A.—Memorandum by the India Office.

Paper B.—Historical Note.

Paper C.—Draft Treaty Article regarding Basidu.



1933

122

PERSIA

Enclosure 1 in (1).

PAPER A.

MEMORANDUM BY THE INDIA OFFICE.

Status of Basidu.

THE memorandum attached sets out in some detail the relevant facts since 1720, in so far as they are on record, bearing on the status of the British concession at Basidu, in the Island of Kishm, in the Persian Gulf. The concession in question is held under a written grant of 1820 from the Imam of Muscat, at that period in effective possession of Kishm. The essential point in issue is whether the Imam in making the grant in question in 1820 did so as sovereign of Kishm or in his capacity as a tenant of Persia.

2. The matter was closely investigated in 1821 by an officer specially deputed to the Persian Gulf consequent on Persian protests against the landing of a British detachment in the Island of Kishm under the authority granted by the Imam. Great difficulty was even at that period experienced in reaching any positive conclusion as to the strength or weakness of the Imam's claims to sovereignty. The difficulty in establishing the true facts is hardly less to-day. A survey of the correspondence as a whole and of the history of the Island of Kishm, in which Basidu is situated, in the century preceding 1820 tends to suggest that the basis for the Imam's claims is unsubstantial.

1720-94.

3. According to *Lorimer's Gazetteer of the Persian Gulf*, which is the accepted authority on the history of the Gulf States, and which is based on exhaustive local researches some thirty years ago by an officer of the I.C.S. of great experience, it does not appear that the Arabs of the Oman Coast were much in evidence in the neighbourhood of Bandar Abbas, or anywhere on the Persian side of the Gulf, before the Afghan invasion of Persia which began in 1720. Consequent on the Afghan invasion in that year the Arabs of the Trucial Coast (also described on this occasion as "the Muscateers") established themselves in Basidu, in the Island of Kishm, in which they were attacked and defeated by a British naval force in April 1727. But Nadir Shah of Persia in 1737 not merely overran the South Persian coast, and so reimposed an effective Persian control over areas such as the Island of Kishm, but extended his conquests across the Gulf, and in 1737-38 occupied the Sultanate of Muscat, from which Persia was expelled only in 1744.

4. In 1747 the Persian Governor of Bandar Abbas and its dependencies entered into an alliance with the Jowasimi Arabs of the Trucial Arab coast; consequent on which those Arabs appear to have established themselves between 1750 and 1765 in various posts in the Island of Kishm. But they were expelled about 1765 from Kishm and the other dependencies of Bandar Abbas by Sheikh Abdulla, who had been appointed ruler of that area by the Persian Vakil in South Persia, and they had not regained their position so late as 1780.

5. From the above, it will be seen that there appears to have been no Arab connexion of importance (as distinct from piratic raids) with the South Persian coast, and with islands such as Kishm, at any rate for a considerable period prior to 1720; that between 1720 and 1794 Arab invaders (apparently normally from the present Trucial Oman and not from the Muscat Imamate) were established for varying periods, the total of which does not appear to have exceeded some twenty years, in Kishm Island or in Basidu; that during the bulk even of that period they were in occupation as the mercenaries of the local Persian ruler; and that there is no suggestion at any stage of an abandonment by Persia of her claims to sovereignty over Bandar Abbas and its dependencies, including Kishm. It would appear difficult, if not impossible, on the facts recorded to base any Muscat claim to sovereignty over Kishm on the history of that island between 1720 and 1794.

PERSIA

123

1794-1820.

6. In the year 1794 the Imam of Muscat defeated the Bani Ma'in rulers⁽¹⁾ of Kishm and Ormuz, and, consequent on this victory, was able to secure the transfer to himself by Persia of the revenue lease of Bandar Abbas and its dependencies. Precisely what was covered by the term "dependencies" is not very clear. But there seems a very strong probability, almost amounting to a certainty, that it included the Island of Kishm and so Basidu. Further, while the Imam appears to have secured the lease as a result of his victory over the Bani Ma'in, it is to be noted that he secured from Persia a lease and not a grant, that a substantial annual rental was paid for the lease and that, according to Lorimer, "a surety for payment seems to have been required by the Persian Government from the Saiyed and to have been provided by him in the person of a Persian merchant or banker named Haji Khalat." The rulers of Muscat temporarily lost control of some, if not all, of the areas covered by the lease, on the death of Saiyed Sultan in 1804, and while they were to some extent reinstated with British support in 1805 and again in 1809, the available records do not make it clear whether they, in fact, exercised effective dominion even as tenants of Persia in the whole of the area covered by their revenue lease of 1794 so late as 1818. In the latter year the pirate Arabs of the Trucial Coast, who are not under Muscat control, were apparently proposing to establish themselves at Basidu as a stronghold which could be held against the Egyptians, and were led to abandon this intention largely because of the defeat by one of the East India Company's ships of one of their squadrons towards the end of that year.

7. This record suggests that, while the ruling family of Muscat did, indeed, secure from Persia in 1794 a revenue lease which almost certainly included the Island of Kishm, their effective occupation of that island prior to the grant in 1820 by the Imam, quoted in paragraph 21 of the memorandum attached, was subject to lengthy interruptions. It would be as difficult in these circumstances to base any claim by Muscat to absolute ownership or sovereignty in Kishm on the history of the period 1794 to 1820 as it would to base a similar claim on the history of the island in the period 1720 to 1794.

Correspondence of 1819 to 1822.

8. When the Government of Bombay decided in 1819 that in the interests of the suppression of piracy it would be advantageous to establish a central station in the Gulf and that the Island of Kishm was geographically the best situated for this purpose, the question of the status of the island at once came up for consideration. The correspondence which passed between the local government, their officers in the Persian Gulf and the Tehran Legation, the relevant extracts from which are contained in the memorandum attached, makes it clear that the views of the Government of Bombay as to the uncertainty of the Persian title to Kishm were sincere and real, and that when they finally so far deferred to the claims of Persia as to arrange that the British detachment should be removed from Kishm, they did so formally without prejudice to the claims of the Imam of Muscat over that island. The leading document on the subject is the report of the 14th August, 1821, by Dr. Jukes, who was specially sent from Bombay to investigate this, among other aspects of the Kishm question; the report, in view of its importance, is given in full in paragraph 29 of the memorandum attached. Dr. Jukes, while elaborating the arguments in support of the Muscat claim, and in particular emphasising the statement made to him by the confidential secretary to the then Imam of Muscat that "neither Kishm, Ormuz nor Larak are specified on the receipts annually granted by the Persian Government for the stipulated sum paid to them," and the Imam's statement that "the islands of Kishm, Ormuz and Larak belonged exclusively to the Imam," admits that he was unable "to obtain a sight of the old Persian Furmauns by which His Highness the Imam farms Bandar Abbas from the Sovereign of Persia, in order to ascertain what places are particularly specified as constituting its dependencies. I think it unlikely that such an important document . . . should not be in existence; it is possible that it may have been

⁽¹⁾ Arabs, but Persian subjects.



1933

mislaïd at the time I was at Muscat, or it might have been intentionally withheld . . . Dr. Jukes rightly concludes that "the claims of Persia to the Islands of Kishm, Ormuz, &c., seem to rest entirely upon their being considered as dependencies of Bandar Abbas [and not on Persian claims as to suzerainty over Muscat itself]. These points I have not yet been able to ascertain, but it is quite evident that the Imam is not disposed to acknowledge the right of Persia to the islands in question, and it is, I believe, the universal law of nations to claim as a right that which they have obtained by the sword."

9. Dr. Jukes's premature death in November 1821, and the fact that a *modus vivendi* was for the moment reached with Persia in regard to the future of the British detachment, appears to have prevented any more exact examination of the rival claims of Muscat and of Persia to the overlordship of Kishm being proceeded with. As will be seen, his remarks are by no means conclusive on the point now in issue. The Muscat claims to which he refers were unsupported by any documentary evidence, though this should not have been difficult to produce; in so far as those claims are based on right of conquest (*i.e.*, presumably on the forcible occupation by Muscat in 1794 of Bandar Abbas and its dependencies), they appear to be vitiated by the fact that the Imams of Muscat used their victory merely to secure a revenue lease and not a grant in sovereignty of the areas affected. Finally, in estimating the importance of Dr. Jukes's report, the comments on it of Mr. Lorimer, who in matters such as this speaks with authority, are relevant. He says: "As his (Dr. Jukes's) investigations were conducted chiefly under the auspices of Oman officials, whose statements he would be inclined to accept, his report dated the 14th August, 1821, can hardly be regarded otherwise than as an *ex parte* document, but as such it is of interest."

10. The general effect of the correspondence which is set out *in extenso* in the accompanying memorandum is to suggest that there was in 1819 some degree of genuine doubt as to where the true title of Kishm lay, but that such doubts were based on statements made by the Imam of Muscat unsupported by any written document such as the text of the firman granting the revenue lease. On the facts available it is, I suggest, difficult to feel that the Muscat claim has been established, or that it has any solid foundation either in history or in law.

Period 1823 to 1928.

11. It may be convenient briefly to refer to the more important points bearing on the question of title between the reoccupation of Basidu by His Majesty's Government in 1823 and the reassertion of a Persian claim in 1928. The most important are the terms of the re-lease of Bandar Abbas and its dependencies (including Kishm) by Persia to Muscat in 1855; articles 2 and 14 of the Treaty of Paris of 1857; the reference to Basidu in the Telegraph Agreement of 1864 with Muscat, the terms of the further lease granted to Muscat by Persia in 1868, and the Government of India's pronouncement as to the status of Basidu in 1868.

12. While the Government of India's pronouncement is of much importance as indicating the considered view taken by them at that period, it is conceivable that it may have been made without close enquiry into the claims of Muscat to sovereignty in Kishm—an issue which was probably, in their view, of little active importance, since in 1855 Muscat had abandoned any independent rights she might have had in Kishm to Persia; and it cannot, of course, by itself have any decisive value. Of greater importance are the firmans of 1855 and 1868, the terms of the Treaty of Paris of 1857 and the Telegraph Agreement of 1864; and the facts that—

- (a) The re-lease by Persia to Muscat of Bandar Abbas and its dependencies, including specifically Kishm, in 1855 makes no reference to the British station at Basidu, although certain articles of the re-lease are so worded as to appear as being inconsistent with the retention by His Majesty's Government of military forces and stations in Basidu.
- (b) The Treaty of Paris provides for the evacuation by British troops in certain events which come to pass of "all ports, places and islands" belonging to Persia. Basidu was not, however, evacuated, nor does it appear that our failure to evacuate led to any remonstrance from Persia.

- (c) The Telegraph Agreement between His Majesty's Government and Muscat of 1864 specifically saves the title of His Majesty's Government to Basidu, "that station having been freely granted to the British Government by my late father . . . on behalf of himself, his heirs and successors."
- (d) The re-lease of Bandar Abbas of 1868 repeats and, if anything, emphasises the articles in the lease of 1855 referred to above.

13. It is noteworthy, moreover, that in the period 1823–1928 not only does it appear that there was no challenge even in general terms by Persia to our special position or rights in Basidu, but that we appear in 1905 and again in 1930 to have referred without contradiction to the concession as British territory in communications to the local Persian customs officials.

Conclusion.

14. The general impression left as the result of a close investigation of the relevant correspondence is that the claims of the Imam of Muscat to have held Kishm, and so Basidu, in sovereignty at any recent period are probably ill founded, and that it would be difficult to fight a case on the material at our disposal; that, on this assumption, the grant to us of the Island of Kishm (ultimately in practice restricted to the occupation of Basidu) in 1820 was made by the Imam in his capacity of a tenant of Persia; that, this being the case, Persia must be regarded as having tacitly confirmed in 1855 and again in 1868 the grant of the concession, though without specifically prejudicing her own claims in regard to sovereignty; and that, in the circumstances, such rights as we may possess in the area and such title as we may be able to claim to it must be based on—

- (a) Unchallenged occupation for over a century.
- (b) The tacit recognition by Persia of our position constituted by the phrasing of the Persian leases to Muscat of 1855 and 1868, articles 2 and 14 of the Treaty of Paris of 1857, article 6 of the Anglo-Muscat Telegraph Agreement of 1864, and such minor incidents as the assertions made apparently unchallenged by us from time to time that the station was British territory and its waters British territorial waters. It is for the Law Officers to advise, if the view suggested above as to the status of British Basidu is accepted as correct, whether we can decline to evacuate the concession save on our own terms in view of the length of the period of uninterrupted and unchallenged occupation, and the degree of recognition of our special position, which the minor incidents referred to above might be held to constitute; and to say what, if any, rights we are entitled to exercise in it, and in particular whether we are justified in regarding it as British territory and its waters as British territorial waters, so long as we remain in possession.

J. G. L.

India Office, October 18, 1933.

Enclosure 2 in (1).

PAPER B.

BASIDU: HISTORICAL NOTE, 1720–1928.

Period between 1720 and 1800.

ACCORDING to *Lorimer's Gazetteer*, the Arabs of the Oman Coast do not appear to have been much in evidence in the neighbourhood of Bandar Abbas or, indeed, on the Persian side of the Gulf before the Afghan invasion of Persia which began in 1720. About 1720 certain islands, including apparently Kishm, were seized by the "Muscateers." A Persian army under Lutf Ali Khan was sent into the interior of Bandar Abbas, but returned north to Kirman in



1933

consequence of the Afghan invasion of Persia without having effected anything, the Arab invaders apparently remaining in possession.

Lor. i, 96, 185,
631.

2. In April 1727 a British naval expedition exacted compensation from the Jowasimi Sheikh Rashid (probably the Sheikh of Ras-el-Khaimah) for losses occasioned to the East India Company's factory at Bandar Abbas by the establishment by the Jowasimis of a naval port at Basidu.

Lor. i, 84, 88,
632.

3. In 1737 Nadir Shah of Persia crossed the Gulf and overran Oman, from which the Persians were finally expelled only in 1744. In 1747, on the decease of Nadir Shah, Mullah Ali Shah, who had been Governor of Bandar Abbas and its dependencies under him, called in the assistance of the Jowasimi Arabs to help him to maintain his position against *inter alios* the hereditary ruler of Lar, and appears to have entered into a sort of alliance with them which subsisted at least until 1763. It is probably (according to Lorimer) consequent on this that the Arabs of the Oman Coast obtained a foothold on the Island of Kishm.

Lor. i, 135.

In June 1760 the Jowasimi, who appear by then to have established themselves at Kishm and Luft in the Island of Kishm, and also at Lingah and Shanas on the coast of the mainland to the west, assisted Mullah Ali Shah to seize the town of Bandar Abbas, the fort of which was then held by the Khan of Lar. In 1763 Mullah Ali Shah is reported as being in possession of the fort of Kishm, the record stating also that he had spent all his substance in the three previous years in subsidies to Ras-el-Khaimah. In the same year a treaty was concluded between the Bani Ma'in on the one side and Mullah Ali Shah and the Jowasimi Arabs on the other, one provision of which was that the revenues of Kishm should be equally divided between the three parties in future.

95.
Lor. i, 632.

Lor. i, 633,
Lor. i, 135, 110
Lor. i, 633,
1825

4. About 1765 Kerim Khan, Zand, the Persian Vakil of this area, had appointed Sheikh Abdullah of the local tribe or family of the Bani Ma'in (elsewhere described by Lorimer as an Arab tribe, but Persian subjects) as ruler over Bandar Abbas, Ormuz and Kishm, and this sheikh, who was still ruling in 1780, succeeded about 1765 in expelling the Jowasimi and other intruders from his dominions, and was able during his lifetime to keep them at a distance. In 1777 the Sheikh Sagar of Ras-el-Khaimah, on his accession, married a daughter of Sheikh Abdullah and so adjusted his differences with the Bani Ma'in family.

5. In 1769 Kerim Khan, Zand, demanded and was refused a renewal of the tribute paid by Oman during the time of Nadir Shah, and hostilities arising from this refusal continued for some years after this date.

Lor. i, 144.

6. In 1794 Saiyid Sultan, a new ruler of Muscat, found himself strong enough to add Gwadar and Chahbar on the Makran Coast to his dominions proper, and consequent on his defeat of the Bani Ma'in rulers of Kishm and Ormuz, to secure the transfer to himself by Persia from the Sheikh of the Bani Ma'in, a Persian vassal, of the revenue lease of Bandar Abbas and its dependencies. The dependencies at this stage included, according to Lorimer (who had of course before him the Muscat claim to Kishm and Ormuz referred to in Dr. Jukes's report of August 1821, quoted in paragraph 29 below), Minab and the islands of Kishm, Ormuz and Henjam: the lease, "if it was formally granted," appears to have been granted (probably, according to Lorimer, because it could not be refused) either by Agha Muhammad Khan, Qajar, or by Lutf Ali Khan Zand. The actual rental was probably not more at first than 4,000 dollars, the amount at which it still stood in 1821. A surety for its payment seems to have been required by the Persian Government from the ruler of Muscat, and to have been furnished by him in the person of a Persian merchant and banker named Haji Khelat.

Lor. i, 148.
Lor. i, 421-29

Lor. i, 422.

Lor. i, 175.

Lor. i, 180.

7. In 1800-01 Captain Malcolm, when adjusting the Commercial Treaty with Persia, endeavoured, but unsuccessfully, to obtain from Persia a cession of the islands of Kishm, Henjam and Kharag.

8. In 1804, on the death of Saiyid Sultan of Muscat, the Persian port of Bandar Abbas and its dependencies, which he held on lease from Persia were seized by the Bani Ma'in. In June 1805 a joint Muscati-British expedition which had been organised against the Jowasimi pirates of the Trucial Coast, before taking action against them, recovered by force Bandar Abbas and its dependencies for the Imam of Muscat.

Lor. i, 438-9,
633.

The steps thus taken for its recovery subsequently evoked a strong protest from the Persian Government as an act of hostility against themselves. Later in July of the same year the allies blockaded a considerable Jowasimi flotilla in the anchorage of Kishm.

9. In 1806 the Ruler of Muscat kidnapped the head of the Bani Ma'in, whom he carried off to Muscat and detained until Kishm and Ormuz should be delivered up as a ransom for his release, but the Sheikh of Ras-al-Khaimah, by throwing a force into the town of Kishm, made it impossible for the Bani Ma'in to comply with these terms.

Lor. i, 439.

10. In 1809 the Jowasimi were driven out of Lingah and Charak by the Persians, and were compelled to retire to Basidu, while in the same year the Jowasimi stronghold of Luft in Kishm was captured by the British and handed over intact to an agent of the Ruler of Muscat.

Lor. i, 184,
643;
Lor. i, 647,
1930.

11. The sequence of events in Kishm, and at Basidu between 1809 and 1818 is by no means clear, but in the latter year the Jowasimi pirates are reported to have entertained the idea of forming a settlement at Basidu, to which they could retire if attacked by the Egyptian invaders of the Gulf area. The execution of this scheme is believed to have been frustrated largely by the defeat in December 1818 of a Jowasimi squadron by the East India Company's ship *Antelope*.

Lor. i, 658.

Lor. i, 657.

12. In 1819 Gulf policy was under discussion at Bombay. The Government of Bombay appear to have inclined to a scheme under which the Ruler of Oman should be placed in charge for the future of the Pirate or Trucial Coast and the islands of Bahrein, and should in return authorise the formation of a British settlement on the Island of Kishm, and even defray the cost of maintaining it.

Lor. i, 659.

13. It may be noted that the Chief Secretary, Bombay, an expert official who had made a special study of Persian Gulf subjects, while agreeing as to the establishment of a British station at Kishm, "to this end would have negotiated with the Government of Persia rather than that of Oman." He was overruled by the local Government, but Mr. Lorimer remarks: "It cannot be doubted that he stood on firm ground when he insisted that his (the Imam of Muscat's) claim to sovereign rights over Kishm as against Persia, was probably ill-founded."

Lor. i, 660,
note.

14. The Government of Bombay on the 28th October, 1819, indicated to Major-General Sir William Grant Keir that they were of opinion that the

Précis, § 235 (?)
Lor. i, 1936.

"occupation by the British Government of a central and commanding station in the Persian Gulf was indispensable in connexion with the permanent suppression of piracy, nor is the Governor in Council aware of a more eligible station than the Island of Kishma for that purpose."

"It is understood that the Island of Kishma, as well as Angar, which is contiguous to it, belongs in full sovereignty to the Imam of Muscat, and should the reports that may be received from you and the other persons to whom the consideration of this important subject has been confided, be favourable to the measure now suggested, the necessary negotiation will be opened for obtaining possession of the spot that may be fixed upon for forming the establishment."

15. In a despatch of the 15th December, 1819, to the Government of India, the Government of Bombay remarked with reference to the same point:—

Précis, § 206.

"(10) We anticipate, however, some opposition on the part of the Persian Government to that measure [forming of a British establishment in the Persian Gulf], since it would be difficult we apprehend to satisfy that power that our views were limited to the professed object of our policy, the more especially as the Persian Government has manifested some degree of alarm at our contemplating the occupation of the Island of Bahrein."

"(11) With a view to allaying these alarms and of enabling the British Envoy at Tehran to afford to the Persian Government an explicit and candid exposition of the objects to which the expedition is exclusively directed, and of the ultimate plan which we contemplate for the permanent suppression of piracy, our President has addressed a letter to Mr. Willock [Chargé d'Affaires at Tehran], of which the enclosed is a copy, which we trust will produce the effect of conciliating the Government of Persia to the arrangements which we have submitted to your consideration, or to any other which your Lordship may be pleased to prescribe, and in particular to our permanent occupation of Kishma."

(*) The reference is to the Government of India Persian Gulf Précis (1801-1853).



1933

Précis, § 207.
Lor. i, 1937.

16. The despatch of the 15th December, 1819, to the Chargé d'Affaires at Tehran, to which reference is made in the preceding paragraph, after explaining in some detail the considerations weighing with the local Government, added:—

“(8) The Imam of Muscat having asserted a positive claim to the sovereignty of the Island of Kishma, this Government has not hesitated in fixing upon that station as a rendezvous for the expedition. The occupation by the British Government of a more commanding station in the Gulf being considered to be indispensable to enable us to exercise a more immediate and efficient control over it than can be done either from Bushire or Bussora, the possession of that island would be an important object either permanently in full sovereignty, or temporarily until the beneficial effects which the presence of a British force in the vicinity of the piratical ports may be expected to produce, in reforming their habits, may enable us to relinquish the possession. The latter expedient should, in my opinion, be preferred only on a failure of obtaining the cession of Kishma in perpetuity.

“(9) I entertain no doubt that the cession of Kishma might be obtained from the Imam of Muscat provided His Highness's pretensions to it be indisputable, but I believe that the sovereignty of the island was at one time claimed by Persia, and under any circumstances I am satisfied that the Supreme Government would not, unless on extreme emergency, be inclined to take any measure regarding the occupation of that island which you might conceive to be permanently injurious to our general interests at the Court of Tehran.

“(10) You must be the best judge whether we are required either by justice or policy to negotiate the previous consent of Persia, or whether we may content ourselves with the simple explanation of our views and intentions; in either case, after the above exposition of the motives which impel us to depart from the principles which governed our interposition in the expedition of 1810, and which its entire failure in eradicating piracy has imposed upon us. I must leave to your experience, judgment and address to adopt the line of conduct which may most effectually reconcile the important object of eradicating piracy with the maintenance of the good understanding that so happily exists between His Majesty's Government and the Court of Persia.”

Précis, § 207A.

17. A copy of this despatch was also sent to Sir W. G. Keir, with the remark that—

“(4) By the eighth paragraph you will perceive the nature of the relations which it appears to the Governor in Council to be expedient that we should form with the Imam of Muscat. . . .

“The ninth and eleventh paragraphs relate to the interests of Persia, and you will be guided in the prosecution of your operations or your negotiations with the ports and islands which may be disposed to acknowledge its allegiance by the communications you may receive from the Envoy at Tehran. . . .

“(7) It is the intention of the Governor in Council to reduce the force under your command at as early a period as practicable leaving, as you are authorised to do, one battalion of native infantry and a detail of artillery should you judge it necessary at Kishma or any other eligible island with the view of overawing the Arab tribes.”

Précis, § 235A.

18. Sir W. G. Keir's reply to the Government of Bombay's despatch of the 28th October, 1819, referred to in paragraph 14 above does not appear to have discussed the question of the status of Kishm, but he repeated (paragraph 17) in strong terms an earlier recommendation that the eventual removal of the British detachment “should be to the Island of Kishm. All that I have learned since offering that recommendation has tended to confirm my opinion of that island being the most favourable situation in every respect, and if no other circumstances existed than those of political expediency, I should be disposed to urge that the removal should take place immediately” (despatch dated the 1st April, 1820).

19. In the light of the despatch referred to in the preceding paragraph, the Governor of Bombay instructed Captain Thompson, the commander of the garrison at Ras-al-Khaima, that its removal to the Island of Kishm, to the occupation of which the consent of the Imam of Muscat was to be obtained, if not

already conceded, had now been approved (Bombay letter dated the 17th April, 1820). With this letter was enclosed a letter to the Imam from the Governor, the text of which is not available.

20. On the 15th May, 1820, Captain Thompson reported that he had despatched the *Mercury* with the Governor's letter to the Imam, and also his own letter to His Highness, for the purpose of obtaining his consent to the occupation of the Island of Kishm. In a letter of the 29th May, Captain Thompson reported that the *Mercury* had returned on that date from Muscat bearing the full consent of the Imam to the removal of the troops to Kishm, and an open letter to the sheikh of that island directing him to afford every assistance to the embarkation and conveyance of the troops.

21. The material portions of the Imam's letter to the Governor of Bombay are as follows:—

“With regard to the observations made by you, connected with the removal of the troops from Ras-al-Khaima to Kishm, God knows that the island in question, and all other territories appertaining to me and subject to my authority, appertain also to the Honourable Company, and that I do not reckon these dominions as appertaining to me, but as appertaining to the Honourable Company.”

21A. The Imam's letter is, as will be noted, in very general terms, and couched in hyperbolic language not unusual in oriental communications, and which would, indeed, on a strict interpretation, cover not only Kishm, but Muscat itself. On the other hand, the letter was with specific reference to a request (the terms of which are not on record) for the removal to Kishm of the British detachment stationed in the Gulf.

22. The Persian Government, on a communication being made to them in accordance with the instructions referred to in paragraph 16 above, made it clear that they by no means welcomed the idea of a British occupation of Kishm or any other island in the Gulf. The Shah refused a personal interview to the Chargé d'Affaires, and communicated his instructions on the point through his Ministers. These were to the effect (Tehran despatch of the 10th May, 1820) that when the proposal had been previously made (in 1800-01) for the cession of an island in the Persian Gulf, the Shah had not been prepared to entertain it; that His Imperial Majesty considered that a proposal of such importance as the present was one which ought to originate either from His Britannic Majesty, from the East India Company, or from the Governor-General of India; that according to the Persian Ambassador at London, the Prince Regent intended to send an Ambassador to Tehran, and that it would be preferable that a discussion should be deferred until the Ambassador's arrival. “His Majesty was surprised that the Imam of Muscat should claim the sovereignty of the Island of Kishm. It was contended that the Imam held the Government of Gambnun [Bandar Abbas], and of its dependencies, of which Kishm was one, under the supreme authority of the Sovereign of Persia, and the records of the Empire would establish this fact.”

23. In their despatch of the 3rd October, 1820, No. 1485, to Sir Henry Willock, at Tehran, the Bombay Government, after notifying the transfer of the British detachment from Ras-al-Khaima to Kishm, remarked:—

“(3) I have already had the honour of informing you that any claims which Persia might possess to the sovereignty of the Island of Kishm would receive the most candid consideration from the Government, but I do not consider it politic on our part to renew the discussion. Should any proofs of its claim be produced by the Government of Tehran, I would suggest your referring them to this Government, and should hope that during the period that must be occupied by the requisite investigation, the King of Persia will have leisure to observe the good effects arising from our occupation of this land, and be induced to consent to our retaining it, even if he should establish his right to demand its evacuation.”

24. On the 20th December, 1820, Sir Henry Willock reported to the Government of India that, consequent on strong representations from the Prince-Governor of Fars as to the dangers of the occupation of a part of Kishm by the British detachment, the Persian Government had demanded, in a strongly worded

[10221]

Précis, § 236.

Précis, § 237.

Précis, § 238.

Lor. i, 1936.
Précis, § 241.

Précis, § 242.

Lor. i, 1938.

Précis, § 246.



1933

note dated the 9th December, 1820, of which the following is an extract, the immediate departure of the British detachment from that island :—

Précis, § 249.

“ His Majesty's Chargé d'Affaires likewise stated that after punishment of the Joasmis it would be necessary still to keep some British troops in the Persian Gulf to prevent a recurrence of piracy, and that the Imam of Muscat (who on that part of Persia is the Governor of Bandar Abbas and its dependencies) was willing to allow of a British settlement on the Island of Kishm or Henjam. To this was answered that, first, Muscat is a dependency of Persia, and as the Imam has not the power of permitting the residence of British troops at Muscat, much less can he grant a permission at Kishm and Henjam, which are dependencies of Bandar Abbas. At this time we have heard that a British force has landed at Kishm. The state of affairs does not require the presence of British troops. We do not know on what account the troops from India have settled in the Persian Gulf. In short, orders will be issued by His Majesty to His Royal Highness the Prince of Fars, to send a person to the troops on Kishm desiring them immediately to leave it, and we now request His Majesty's Chargé d'Affaires to direct the Officer Commanding at Kishm to return to India with his troops, and to write to the Honourable Governor of Bombay, or to whomever it may be necessary, with a view to avoiding such acts, which are contrary to the spirit of the treaty between our two States.”

25. The Governor of Bombay, Sir Mountstuart Elphinstone, noted on this correspondence as follows :—

Précis, §§ 250-56.

“The King of Persia's claim to Kishm does not appear to be strengthened by his present arguments, but on the contrary to be weakened by His Majesty making it in part depend on his sovereignty over Muscat, a pretension which seems to be entirely untenable.

“The King of Persia's alarm at our occupation of Kishm appears, however, to be serious and unfeigned, and on this ground the Honourable the Governor would be disposed to give up the measure if it were not one of urgent necessity.

“It is believed also that the British Government has in some measure countenanced the claim of the King of Persia to Kishm by requesting from His Majesty in the year 1799 the cession of that island. The application seems not (? but) to have originated in an erroneous notion of His Majesty's rights, but it ought to make this Government more delicate in its conduct at present.”

Lor. i, 1939.

26. Apparently at the beginning of 1821 a Vakil of the Prince Governor of Shiraz visited Kishm, consequent on unfounded allegations that the British were building forts there, to prohibit their construction. He satisfied himself that there was no foundation for the report, and undertook to assure his master that the British detachment had evidently no other duty than that of checking piracy.

Lor. i, 1940.
Précis, § 279.

27. In May 1821 Dr. Andrew Jukes was deputed to the Persian Gulf by the Government of Bombay with a view to allaying the suspicions of the Persian Government in regard to the retention of the British force on the Island of Kishm. The following extracts from his instructions bear on the question of the title to the island.

“(1) You are already informed of the doubts which are being entertained in regard to the sovereignty over the Island of Kishm to which the Governments of Persia and Muscat assert pretensions. The former having recently betrayed the strongest apprehensions at our occupation of it, and preferred a formal demand for the removal of the detachment, as you will perceive from the accompanying despatch dated the 20th December from His Majesty's Chargé d'Affaires at Tehran the Honourable the Governor in Council determined to despatch you on a mission to the Persian Gulf with the view of allaying these unfounded claims or of adopting such measures as the exigencies of the case may render expedient. . . .

“(3) Equally solicitous has the Governor-in-Council been to ascertain the justness of the claim which the Imam of Muscat advanced to the sovereignty of Kishm, the result of Captain Sadleir's enquiries leading the

Governor to believe those claims to be well founded. The detachment was transferred from Rasool Khima to that island with the sanction of the Imam. This document will enable you to draw from the Government of Persia a statement of the grounds on which her pretensions to Kishm may be founded, and which may be as untenable as her claim to tribute from Muscat which the Imam has refused to pay and Persia has been unable to exact since the death of Shah Abbas.

“(7) Should it appear impossible to avoid hostilities by other means you are empowered to propose to the Prince that the detachment should be withdrawn from Kishm to Muscat pending the negotiation regarding the ultimate fate of it. You will explain that this concession originates in the reluctance of this Government to disturb the friendship subsisting between the British and Persian nations, especially on a point which has not been decided by the Governor-General-in-Council; that the removal of the troops is not to be interpreted into a recognition of the King of Persia's title to Kishm nor to act as a restraint on our reoccupying the position, if the decision of the Supreme Government, or any other cause, should render such a course expedient.”

(Bombay Government letter to Dr. Jukes, No. 98 of May 16, 1821.)

28. On the 14th August, 1821, Dr. Jukes submitted to the Government of Bombay the following note on the origin of the Muscat title to Kishm, Ormuz, &c., which, in view of its importance, is reproduced in full.

29. *Report, dated the 14th August, 1821, of Dr. Jukes, Political Agent, Kishm, as to the origin of the connexion of the Imams of Muscat with Kishm, Ormuz, Bandar Abbas, and other parts of the Persian coast near that place:—*

“The Persian Ministers having expressed their dissatisfaction at the small detachment of British troops being stationed on the Island of Kishm, and considering that it was likely to become a subject of future discussion between myself and the Persian Government, I have lost no opportunity of obtaining every information I could collect from the best authorities as to the sovereignty of the island, both at Muscat and Kishm, and although the information I have obtained is not so complete and satisfactory as I could wish, I beg leave respectfully to submit it to the consideration of the Honourable the Governor-in-Council.

“(2) The Bini Maainee tribe originally resided at Koong on the Persian coast, and it is now about seventy or eighty years since Sheikh Abdulla Maainee took the Island of Kishm from Mulla Aly Shah, who was then chief of the island, on behalf of the Persian Government; and Sheikh Abdulla afterwards farmed Bandar Abbas and its dependencies from Nadir Shah.

“(3) The Bini Maainee tribe remained in possession of the island for many years, and after Nadir Shah's death, continued to pay tribute to the present reigning family of Persia, for Bandar Abbas and its dependencies which they still retained.

“(4) About twenty-six or twenty-seven years ago the inhabitants of Kishm, being dissatisfied with the tyrannical system adopted towards them by Mulla Hussan Maainee, their Chief and Governor, solicited His Highness Syed Sultan, the Imam of Muscat, to take the islands under his government and control; the Imam proceeded accordingly with an army, and by force of arms took possession of the islands of Kishm, Bandar Abbas and Ormuz from Mulla Hussein, and it has ever since remained under the general control of the Imam of Muscat.

“(5) Syed Sultan, notwithstanding he had taken these places by force of arms from Mulla Hussein Maainee, continued to farm Bandar Abbas and its dependencies from the Persian Government, as the Bini Maainee tribe had done before him, and his son Syed Saeed, the present Imam of Muscat, continues to do the same; he pays 4,000 tomans annually for the town and dependencies of Bandar Abbas, including Meena Humeel and Khumeer. Syfe-bin-Mubhaun, an Arab chieftain, is at present Governor of Bandar Abbas, on the part of His Highness the Imam, and his younger brother is the Governor of Ormuz. Sheikh Abdul Rahman Maainee, the Governor of Kishm, is related to his Highness by marriage, so that the government of all the principal places farmed by the Imam of Muscat is entirely in the hands of the Arabs at present, and I do not know whether the Persian Government would venture to risk the attempt of taking these places forcibly from them, under any circumstances, but as the Imam has several ships, and could command the sources (? services) of a great number of buggalas and



1933

boats belonging to the different Arab tribes in the Gulf, it is almost certain, I think, that the Imam would be able to retain the islands of Kishm, Ormuz and Larak, in spite of every exertion of the Persian Government.

"(6) The whole of the Persian shore of the Gulf is in the possession of different Arab tribes, and though they may have little differences and quarrels among themselves, they would cordially unite to repel any attack the Persians might make to accept or subdue any one of them.

"(7) It is quite impossible that the Arab tribes and the Persians can ever cordially blend their interests and act in concert together. The habits of the people are very different, the independence of an Arab sheikh submits reluctantly to the Persian yoke, and the difference of religious feeling effectually prevents anything like a cordial co-operation between them.

"(8) I regret extremely that neither at Muscat nor at Kishm have I been able to obtain a sight of one of the old Persian furmauns by which His Highness the Imam farms Bandar Abbas from the Sovereign of Persia, in order to ascertain what places are particularly specified, as constituting its dependencies. I think it unlikely that such an important document as the grant, or furmaun of the King of Persia, by which His Highness the Imam farms so large a portion of territory and for which he pays 4,000 tomans annually should not be in existence; it is possible it might have been mislaid at the time I was at Muscat, or it might have been intentionally withheld, but I was expressly informed by Syed Abdul Kahir, His Highness's confidential secretary, that neither Kishm, Ormuz nor Larak are specified on the receipts annually granted by the Persian Government for the stipulated sum paid to them; and in reply to a series of questions which I wrote out to be answered at Muscat, and which I know were carried by Syed Abdul Kahir to His Highness the Imam himself, it was expressly declared that the islands of Kishm, Ormuz and Larak belonged exclusively to the Imam.

"(9) It appears to me extreme presumption in the Persian Government to declare that even Muscat itself is a dependency of Persia, and the information I have obtained satisfies me that Muscat never was tributary to that State; perhaps the pretensions of Persia may be grounded on the following circumstances, which I obtained in detail from what must be considered the highest authority, the Imam himself:—

"(10) About seventy-eight years ago, Sultan-bin-Syfe Gaarubi was Imam of Muscat and the Province of Oman; he made himself very unpopular by his tyranny, and was removed from the Government by the general voice of the people; he went and sought the aid of Nadir Shah, then Sovereign of Persia, to reinstate him in his Government; Nadir Shah complied with his request, and sent an army back with him to restore him to influence and to power. This army landed at Ras-sul-Khima, and, after much hard fighting, they succeeded in marching through the country as far as Muscat, which place alone seems then to have been retained by the adherents of Sultan-bin-Syfe, while all the Province of Oman remained unsubdued.

"The independent Arabs now advanced and surrounded Muscat, and the Persian army was reduced to considerable difficulties. About this time intelligence of the death of Nadir Shah reached them, the Persians made certain proposals to the Arabs, which were finally agreed to, and the Persian army returned back to Bandar Abbas without effecting the object of their coming.

"(11) In this state of affairs Ahmed-bin-Saed, the grandfather of the present Imam of Muscat, and then a chieftain commanding at Sohar, assumed the Government of Oman and was proclaimed Imam.

"(12) The claims of Persia therefore to the islands of Kishm, Ormuz, &c., seem to rest entirely upon their being considered as dependencies of Bandar Abbas. This point I have not yet been able to ascertain, but it is quite evident that the Imam is not disposed to acknowledge the right of Persia to the islands in question, and it is, I believe, the universal law of nations to claim as a right that which they have obtained by the sword. Persia, with equal presumption, claims the Island of Bahrein because it was once tributary to it, though it has thrown off the yoke, and paid no tribute for these thirty years. Persia may with equal justice lay claim to Delhi at the present day because Nadir Shah once conquered and plundered it.

"(13) In my discussions, therefore, with the Persian Ministers, I think I shall be able, in point of right, to support all the measures the British Government

have adopted in occupying the Island of Kishm; when I consider, however, the very heavy expense of supporting the establishment, the impossibility of employing the troops on any active service in the Gulf for four months in the year on account of the excessive heats, the sickness that has prevailed there ever since the hot weather commenced, and the inefficiency of the force arising from that cause alone, I confess I feel more doubts than I have heretofore done as to the expediency and utility of the measure; but, as I am aware that different sentiments have been, and probably still are, entertained by those who are far more competent to decide than I am, I beg to offer such a hint with extreme diffidence and with the most perfect conviction of the fallibility of my own judgment."

30. Dr. Jukes's report, while of great value, is, as will be observed, by no means conclusive. Mr. Lorimer comments that, "as his investigations were conducted chiefly under the auspices of Omani officials, whose statements he would naturally be inclined to accept, his report, dated the 14th August, 1821, can hardly be regarded as other than an *ex parte* document, but as such it is of interest." Lor. i, 1940.

31. Dr. Jukes subsequently proceeded to Shiraz, in a letter dated the 25th October, 1821, from which he refers to the Prince Governor, in the course of discussion, as having made some observations regarding the Island of Kishm being one of the dependencies of Fars, and that the Imam was only a subject of his. The prince, however, added that he had personally no objection to the British detachment remaining in Kishm, since, in view of Dr. Jukes's explanations, it appeared to have the peace and tranquillity of the Gulf for its only motive, and that he would so inform the Shah. Lor. i, 1941.

32. The Persian Government, however, maintained their opposition to the maintenance of a British detachment in Kishm, and the Government of Bombay accordingly referred the general question to the Government of India, in a despatch of the 9th March, 1822, No. 469. In the matter of the title of Muscat to Kishm, they remarked that, while Kishm seemed much the most satisfactory station from the point of view of suppressing piracy, however desirable it might be to retain the island we could not overlook considerations of justice and policy towards Persia; the King of Persia had not yet shown any proof of his title whatever to Kishm, except its alleged authority [*sic*], on which ground he had also claimed Muscat and the whole Province of Oman. Even the arguments mentioned by His Majesty's Chargé d'Affaires do not establish the claims of Persia. Sir John Malcolm on his first mission solicited a grant of Kishm from Persia, which was refused. If it had since appeared that Persia had no title to the territory so solicited, what should prevent our applying to the right owner? Still less did a casual expression of one of the Imam's officers destroy his master's right, if he ever had one. The Governor of Bombay in Council was not acquainted with the nature of the Imam's rights either to Bandar Abbas or Kishm, but supposing them equal, there seemed abundant reason why he should waive his claim to Bandar Abbas, an integral part of Persia, and within reach of Agha Mahomed Khan's army; and retain it to Kishm, which was probably beyond the reach of that monarch's power. A claim, however, to which His Majesty's Minister at Tehran attached importance ought not to be hastily set aside, and supposing the King of Persia to possess any reasonable ground of pretension to the island, it would be unfriendly, at the least, to oppose it by military occupation. It seemed incumbent on us to avoid giving the Shah this ground of disquiet, if we could do so without a very serious sacrifice of our own interests. . . . It remained to be considered how far our withdrawing would affect the Imam, to whose interests his zeal and fidelity to the alliance required that we should pay every attention. Lor. i, 1943.

33. The Government of Bombay's opinion was, therefore, that we should ultimately retire from Kishm; if we were to retire we should, however, they thought, take advantage of the time allowed by the King of Persia's own proposal, and in the interim apprise the Imam of the probability of our withdrawing from the Persian Gulf. Précis, § 279A.

34. To Persia we might say that the time the Shah had allowed for a reference to England would probably be sufficient for the purpose, as our occupation was only to be temporary; and that at all events the decision of His Majesty's Government would, of course, be binding on the authorities in India;



1933

Lor. i, 1943.

but in this and in all other communications the utmost care should be taken to avoid pronouncing an opinion on any claim which the Imam of Muscat might possess to Kishm.

Lor. i, 1944.

35. These views were approved by the Government of India, but owing to a sudden change of atmosphere at Tehran, which led the Chargé d'Affaires to ask for his passports, action was not taken on them; and rumours that the Shah had demanded a substantial increase in the rent payable by Muscat for Bandar Abbas and its dependencies (including Kishm) led to steps being taken to reinforce the garrison of Basidu—steps countermanded in June 1822 on the restoration of good relations with the Shah, but too late to prevent the Chargé d'Affaires from acting on instructions to notify them to the Persian Government.

Précis, § 284.

36. On the 1st September, 1822, Sir H. Willock accordingly informed the Persian Government that it had been found necessary to augment the detachment on the Island of Kishm as a temporary and precautionary measure, and received a reply in general terms.

P.G. 13, p. 118.

36A. While in the circumstances described above, Basidu was evacuated by British troops in February 1822, it proved impossible to secure an equally convenient naval station in the Gulf. Basidu was accordingly reoccupied by His Majesty's Government in 1823, from which year until 1878 it remained the headquarters of the British naval squadron in the Persian Gulf. No protest against its reoccupation appears at the time to have been made by Persia.

Lor. i, 1946-8.

37. On the 3rd September, 1822, Captain Bruce, the Resident at Bushire, reported to the Governor of Bombay the unauthorised agreement which he had concluded in the preceding month with the Prince of Shiraz, in regard to Bahrein and Gulf questions. The agreement, which *inter alia* embodied an arrangement in regard to the Island of Kishm, on the basis of Persian sovereignty, was at once formally disowned by the Government of Bombay, while the Persian Government, on their side, subsequently instructed the Prince of Shiraz that he had exceeded his powers in entering into discussion with the Resident. The Government of Bombay, in a letter of the 1st November, 1822, to the Resident, No. 1491, intimated to Captain Bruce that he had acted without authority and was removed from his appointment as a punishment. In informing him of the disavowal of the treaty which he had concluded with the Prince of Shiraz and criticising its terms, they remarked: "It admits the claim of the King of Persia to Kishm contrary to all history, to the protections (? protestations) of His Highness the Imam of Muscat and to the repeated declarations of this Government. It thereby admits the occupation of that island without the King of Persia's consent to have been an unjust aggression, and it agrees to admit a Persian force into Kishm, and to make over to the Persians the island which we received from the Imam."

Précis, § 289
Lor. i, 1948.

38. The Governor of Bombay simultaneously addressed a letter to the Prince Regent of Fars, in which, after repudiating the treaty, he remarked:—

"With regard to Kishm, I had long since applied to the Most Noble the Governor-General for his consent for the withdrawal of the detachment, and having now obtained it, the troops have been ordered to return, and the island to be made over to the Imam of Muscat, from whom it was received by the British Government; but in doing so this Government is actuated by considerations of its own convenience; and with respect to the claims of the Government of Persia on that island they have not as yet been proved."

39. The instructions issued by the Government of Bombay, in their letter of the 12th November, 1822, No. 1584, to Captain Bruce's successor as Resident at Bushire, remarked:—

Lor. i, 1948-9.
Précis, § 291.

"(4) The effect of Captain Bruce's proceedings is calculated to impress the Imam of Muscat and the Sheikh of Bahrein with an apprehension that, instead of observing a perfect neutrality in the Gulf and limiting our interference to a control of all measures likely to lead to a renewal of piracy, founded on Major-General Sir William Keir's treaties, we have thrown our whole influence in the scale in favour of Persia in support of its general views of supremacy over every island and possession in the Gulf of Persia.

"(5) The enclosed letters from the Hon. the Governor to the Imam of Muscat and the Sheikh of Bahrein are intended to remove any doubts or apprehensions which the conduct of Captain Bruce may have excited in that respect. . . .

"(6) You will also explain to them that our views have not at all changed by withdrawing our troops from Kishm, which is to be restored to the Imam of Muscat as the Power with whose permission we occupied it. . . .

"(8) You will refer to the whole tenor of our communications to the Persian Government and of our conduct since the occupation of Kishm and our negotiations with the Arab States for proof that the permanent suppression of piracy, and the conservation of the peace of the Gulf by the friendly interposition of our power and influence, has been alone the ruling principle of that policy. You will explain that it is our determination to persevere in that policy notwithstanding the removal of our troops from Kishm, which has been restored to the Imam of Muscat, under whose sanction we occupied it; and that the pretensions to its sovereignty remain precisely in the same state as at the period when that sanction was granted. . . ."

Period 1823 to 1928.

40. Between 1823 and 1826 the Persians endeavoured, but without success, to dispossess the Imam of Muscat of his revenue lease of Bandar Abbas and its dependencies. Between 1846 and 1848 a second attempt of the same nature was avoided by gifts by the Imam of Muscat to the Persian negotiators. In 1852-54, in the absence of the Imam of Muscat in Zanzibar, the Muscati Governor of Bandar Abbas was expelled by Persia, but the lost districts were subsequently forcibly recovered by the Imam. The Imam was, however, unable to hold them, and an agreement was finally reached between Persia and Muscat in 1855, under which a fresh lease for twenty years was granted to the latter, which involved not only the payment of an increased rent to Persia by the ruler of Muscat, but the specific recognition as Persian territory of the Island of Kishm.

Lor. i, 449
Lor. i, 460.

41. The Persian firman of 1855 specifies in its preamble that the Islands of Kishm, Ormuz, &c., are Persian territories leased on certain terms to the Imam of Muscat. The firman contains no specific reference to Basidu. Article 13 runs as follows:—

Aitchison xii,
p. cxxxix,
Appendix xiv

"As long as Bandar Abbas, the above-named two islands, Sernal, Minab, and their dependencies, are in the hands of the Imam of Muscat, he should not allow any officers of foreign Governments to go there. He should also promise to protect these places by land and sea, providing for every port having an anchorage some ships. . . . He should further promise to protect all the boundaries of the above-named places, from all interference or intrusion of strangers, whether in an amicable or hostile manner. He should not at any time allow any ship . . . or any hostile person, armed or otherwise, Arab or foreign, to approach or get a footing in Bandar Abbas or the Persian territory, with hostile intentions or other pretexts."

Article 14 proceeds that:—

"The Imam of Muscat, notwithstanding these conditions, has not the right of letting Bandar Abbas and the above-said places to any foreigner. . . ."

42. Article 2 of the Treaty of Paris, of the 4th March, 1857, on the conclusion of the Anglo-Persian war, provided that "the forces of Her Majesty the Queen shall evacuate the Persian territory, subject to conditions and stipulations hereafter specified."

Article 14 of the same treaty provided that "as soon as the stipulations in regard to the evacuation by the Persian troops of Herat and the Afghan territories, as well as in regard to the reception of the British mission at Tehran, shall have been carried into full effect, the British troops shall, without delay, be withdrawn from all ports, places and islands belonging to Persia." Despite this, not only did the naval station at Basidu remain in British occupation, but no evidence has been traced of any complaint on this score by Persia, nor does any request for its evacuation appear to have been made.

Aitchison xii,
p. 81, No. xviii.

42A. In 1864 the Resident in the Persian Gulf emphasised that Persia had "tacitly acknowledged our right to possession, because when at the conclusion of the war between Muscat and Persia in 1856 the treaty (under which the present lease obtains) was entered into, Persia raised no objection to the presence of our flag or to undisguised maintenance of a considerable station, coal depots, hospital, &c., at Bassidore."

Letter from
Sir L. Pelly
dated
October 22,
1864.



1933

136

PERSIA

43. The telegraph agreement of 1864 between Muscat and Great Britain, which has never been secret, contains the following article:—

“Article 6.

Aitchison,
vol. xii, p. 228

“In like manner nothing in these articles shall be held as invalidating or derogating from the title of the British Government to the Station of Bassadore, that station having been freely granted^(*) to the British Government by my late illustrious father of blessed memory, the late Imaum Syed Saeed-bin-Sultan, on behalf of himself, his heirs and successors.”

This article had been deliberately inserted at the time by the Political Resident, who remarked:—

Précis, § 145.

“Government will observe that article 6 relates to our station at Bassadore. Our title to that station has, of course, been for many years a *bona fide* one, but on telegraphic and general considerations the present seemed a convenient opportunity for giving to our title the sanction of a written confirmatory deed.”

Lor. i, 480.

44. In 1866 the lease of 1855-56, which was for twenty years only, and was limited to Sultan Said and his son, automatically came to an end. The Persians accordingly transferred the lease to a member of the Al-bu-Said family, but as a dependent of Persia, and not as representing the Sultans of Oman. The lessee having withheld the revenue due from him, steps were taken by Persia in 1868 for his forcible removal. This led to a demand by the Sultan of Muscat, backed by a threat of force, for the transfer to him of the lease. As the result of British mediation (His Majesty's Government refusing to allow the Sultan to blockade South Persian ports) the lease was accordingly renewed for a period of eight years in favour of Sultan Salim and his descendants. “In the course of the discussions the Sultan claimed Henjam and Larak as dependencies of Oman irrespective of the Bandar Abbas lease; nor was his claim to the islands either abandoned or disproved.” The re-lease in question, dated the 4th August, 1868, follows the firman of 1855 in making no reference to Basidu, but contains provisions in its 13th and 14th articles substantially identical with those quoted in paragraph 41 above from that firman. Article 13 emphasises that no foreign ships shall under any circumstances be permitted “to anchor within the limits of the anchorage ground of the said territories.”

Lor. i, 2047.

45. On the deposition of Sultan Salim at the end of 1868, the lease granted by Persia in September of that year was automatically determined, and was never thereafter renewed in favour of Muscat.

Lor. i, 2106.

Government of
India to
Government of
Bombay, Sep-
tember 8, 1868.

46. The surrender of fugitives who had taken refuge in the Basidu concession appears to have been demanded by Persia on various occasions between 1863 and 1868, but never granted, Government regarding it “as virtually British territory,” and no extradition agreement existing with Persia. In September 1868, the Government of India on an examination of the legal position of the settlement which had been raised by a demand for the surrender of a slave who had taken refuge in the concession, informed the Government of Bombay that in their opinion “the station in question cannot properly be considered as British territory. It is perfectly true that we have occupied Bassidore either as a naval or coaling station for nearly half a century. But the island has always been treated by us as a dependency of Bandar Abbas, and Bandar Abbas and its dependencies, including this Island of Kishm, and, consequently, Bassidore, have been leased to the Sultan of Muscat by the Shah of Persia in circumstances with which Government of Bombay is perfectly familiar. . . . As the British Government holds possession of the town of Bassidore by permission of the Sultan of Muscat, while that potentate derives his lease of Kishm, which includes Bassidore, from the Shah of Persia, it follows necessarily that Kishm must still be considered as Persian territory.

“There may be some obscurity as to the exact nature of our derivative title to the town of Bassidore, and it may have been thought that our rights over the town existed by continued usage or that we had obtained a prescriptive title; but in looking closely into the question it becomes evident that our rights are

(*) The reference is to the letter quoted in paragraph 21 above.

PERSIA

137

subordinate to those of Muscat, which again, admittedly, are entirely subordinate to those of Persia, and always have been so treated up to this very hour.”

46A. The opinion expressed by the Government of India in 1868 has since held the field, and was maintained by them in 1875.

In 1901 the Political Resident was instructed by the Government of India “that no official of the Persian Government can be permitted to reside in any part of the station at Basidu without the express sanction of the British Government.”

G/I to Pol.
Res., July 9,
1901.

47. In 1905 the coal agent at Basidu was instructed by the Resident, Sir Percy Cox, to warn a Persian customs officer who had interfered that “he has no business in British territory, and if he persists he should not be allowed to come within British territory.”

P.G. 13, p. 119.

48. In November 1926 the Foreign Office remarked in a letter to the India Office that, in view of the effect on the status of Henjam of admitting the Persian claim to Basidu, “it would be dangerous to allow doubt to be cast on the validity of the British rights to Basidu, which rest on undisturbed occupation over a long period.”

F.O. to I.O.,
November 6,
1926,
P. 3547/26.

49. In 1928 consequent on a suggestion that the Persian Government were likely to make an armed descent on Basidu, the Chargé d'Affaires at Tehran was instructed to make representations to the central customs authorities and, if necessary, to warn the Persian Government that any molestation of British Basidu, “which has been a British station for 100 years, would be a complete negation of Minister of Court's promise to Sir R. Clive.”^(*) The Senior Naval Officer was simultaneously instructed to resist by force in the last resort, should this prove necessary, any landing of armed Persians in Basidu.

50. In February 1930 on a Persian customs patrol dhow carrying a customs officer from Lingah to examine the books of the mudir at Persian Basidu, and anchoring off the British area, the officer in charge of the guard in British Basidu, Lieutenant Gretton, requested the official from Lingah “to move his vessel out of British waters.” The Persian official stated that he had not had any instructions from Tehran as to anchoring in territorial waters, that he did not know that he had anchored in British waters, and that he had anchored in the same place several times before without protest. He added that he was prepared to move if he had a written request from the commanding officer of H.M.S. *Ormonde* or from Lieutenant Gretton. The latter (who was subsequently informed by the senior naval officer that his action in raising the question with the Persian official was impolitic) then, with the approval of the commanding officer of H.M.S. *Ormonde*, “sent a letter to the Persian customs official in the following terms (in English and Persian):—

P. 2556/30.

“I have to inform you that your customs dhow is anchored within the territorial waters of His Britannic Majesty. I therefore request that you will cause your dhow to be moved into Persian waters as soon as this can be done. This will be effected by moving your dhow about 800 yards to the south-eastward.”

The dhow in due course removed itself on the completion of its work in Persian Basidu. No protest against the claim that the territorial waters of British Basidu were British appears to have been made.

51. In December 1932 His Majesty's Minister at Tehran informed the Foreign Office that “the archives have now been examined, and I am quite confident that no admission of the weakness of our position at Basidu has ever been made to the Persian Government in writing.”

Sir R. Hoare
to Mr. Rendel,
December 1,
1932,
P.Z. 359/33.

J. G. L.

India Office, October 18, 1933.

(*) To maintain the *status quo* in the Persian Gulf during the continuance of treaty negotiations.

[10221]

T

Enclosure 3 in (1).

PAPER C.

Draft Treaty Article regarding Basidu.

"ARTICLE 5.

"1. SA Majesté le Roi cède à Sa Majesté impériale le Schah tous les droits qu'il avait sur Bassidou et les biens qu'il y possédait.
 "2. Il reste entendu que les autorités de Sa Majesté impériale le Schah feront respecter les tombeaux dans le cimetière britannique de Bassidou et prêteront leur concours à toute personne dûment autorisée par le représentant en Perse de Sa Majesté le Roi pour assurer le maintien desdits tombeaux."

(2)

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, October 31, 1933.

IN paragraph 11 of the letter which I addressed to you by direction of Secretary Sir John Simon on the 26th October, regarding the nature of the British rights in the area known as "British Basidu" at the north-western corner of the Persian Island Qishm, at the mouth of the Persian Gulf, it was stated that the Persian Government had now intimated in writing that they regard the whole area of the Island of Qishm, including "British Basidu," as being under Persian sovereignty.

2. There are, in fact, three notes in question: one of the 21st September (Paper D), one of the 19th October (Paper E), and one of the 24th October (Paper F). As will be seen, the Persian Government in their note of the 21st September specifically refer to Persian sovereignty over the area of the British concession, while appearing to question the right of His Majesty's Government to maintain armed forces there. The notes of the 19th and 24th October claim that His Majesty's Government have no territorial rights or jurisdiction in the concession area, and in effect that the area is subject to ordinary Persian jurisdiction. It will be observed that the notes also contain references to various recent incidents, with the details of which it is unnecessary to trouble you, since, so far as can be judged, they are not relevant to the legal issues on which you were asked to advise in my letter of the 26th October.

3. Shortly after the delivery of this note, the Persian Minister for Foreign Affairs made a statement in the Persian Majlis or Parliament on the question of Persian rights in Basidu, which is summarised in Mr. Mallet's telegram No. 282, of which a copy is also enclosed herein (Paper G). The instructions which were eventually sent to Mr. Mallet regarding the further action to be taken accordingly contained the following passage:—

"... You should simultaneously inform the Persian Government orally that His Majesty's Government have learned with surprise of the Minister's statement in the Majlis; that they cannot but contrast it with steps taken by them with regard to the flag incident, out of respect for Persian feelings, to avoid publicity as far as possible; and that, while not wishing to enter into detailed discussion of Minister's statement, you must, under instructions, make it clear that His Majesty's Government are unable to accept many of the points contained in it, and add that, in particular, the allegation that many protests have been made by the Persian Government regarding Basidu during past years appears to be entirely without foundation."

I have, &c.

G. W. RENDEL.

List of Papers.

- D. Tehran telegram No. 222, September 21, 1933.
- E. Tehran telegram No. 271, October 20, 1933.
- F. Persian Chargé d'Affaires to Sir John Simon, October 24, 1933.
- G. Tehran telegram No. 282, October 23, 1933.

Enclosure 1 in (2).

D.

Mr. Mallet to Sir John Simon.—(Received September 21.)

(No. 222.)

(Telegraphic.) R.

Tehran, September 21, 1933.

MY telegram No. 219.

At noon to-day I received note from Acting Minister for Foreign Affairs to the effect that a number of British marines had recently landed with guns and machine guns at Basidu contrary to rights of Persian sovereignty. Persian Government registered a protest against this irregular action and surprise in view of desire for good relations which has always animated them. They earnestly request me to use my good offices to get British troops to leave Basidu and prevent recurrence of such events in the future.

See my immediately following telegram.

Enclosure 2 in (2).

E.

Mr. Mallet to Sir John Simon.—(Received October 21.)

(No. 271.)

(Telegraphic.) R.

Tehran, October 20, 1933.

MY telegram No. 265.

Note signed by Minister for Foreign Affairs, dated 19th October, just received as follows:—

"I have received with utmost surprise your note of 15th October regarding inexplicable treatment given to Mudir of Customs at Basidu while latter was performing his duties and his removal to Bandar Abbas.

"2. It is a source of great surprise that claim which was maintained by His Britannic Majesty's Government to a coal store at Basidu has gradually assumed another aspect, and that His Britannic Majesty's Government have now taken action as if they were the owners thereof and are preventing exercise of sovereign rights of Persia in that place, and have even called it a special British area and consider its territorial waters as being outside Persian jurisdiction.

"3. The authorities of the Imperial Government do not know why *status quo* has been invoked in this connexion and with what justification British naval authorities have taken this action, since the Imperial Government have not recognised, will not recognise, any British area or any sort of proprietary right of the British Government at Basidu.

"4. I am astonished to the utmost degree that at a time when all Powers are invited to respect rights of others such action has been taken by British naval authorities in infringement of the sovereign rights of Persia, that British naval forces have had recourse to armed intervention, have arrested a Persian official within Persian territory and waters while in performance of his duties, and have imprisoned him in a man-of-war and removed him from his post to another place, and that you have reported this to me as if it were a usual matter.

"5. In view of foregoing, I now record in the name of the Imperial Government the strongest possible protest against armed intervention on the part of British naval forces in Persian territory, irregular treatment of Mudir of Customs at Basidu and use of term special British area which has been repeatedly mentioned in note under reply; I bring to your notice the fact that Customs Mudir at Basidu and Customs Ferrash have been sent back to their post, and the Imperial Government earnestly call upon the British Government for immediate redress for this behaviour on the part of British officials and their punishment."

(Repeated to India, No. 104; Bushire, No. 118, for communication to the senior naval officer.)

[10221]

T 2

Enclosure 3 in (2).

F.

*Persian Chargé d'Affaires to Sir John Simon.**Imperial Persian Legation,
London, October 24, 1933.*

Sir,

I HAVE the honour to state that I am instructed by my Government to bring to the notice of your Excellency the following contents of a note, dated the 16th instant, addressed to His Britannic Majesty's Chargé d'Affaires at Tehran by his Excellency the Minister for Foreign Affairs, in reply to the former's note of the 15th *idem*, regarding the conduct of certain British naval officers towards the Director of Customs at the port of Basidu, and in removing him to Bandar Abbas:—

"It is with great surprise that I have received your note of the 15th instant regarding the inexplicable conduct on the part of certain British naval officers towards the Director of Customs whilst on duty at Basidu, and his subsequent removal to Bandar Abbas. It is also surprising that the pretensions of His Britannic Majesty's Government to the use of a coaling station at Basidu should have gradually assumed another form, giving rise to certain proceedings that amount to an infringement of the territorial rights of Persia, going even so far as to regard Basidu as a 'special British station,' thereby excluding any recognition of the adjacent waters being within the sphere of Persian administration.

"2. Moreover, the Persian Government is at a loss to comprehend the application of the term, *status quo*, in this connexion, or the grounds upon which the British officers concerned can justify their action.

"3. The Imperial Persian Government does not recognise, or has ever recognised, the possession by His Britannic Majesty's Government of any territorial rights at Basidu, or any claim to jurisdiction over the district.

"4. I am further surprised that, at a time when nations are enjoined to respect the rights of others, this action should have been taken by the British naval authorities, which undoubtedly is an infringement of Persia's territorial rights, and, moreover, that they should have exerted armed interference within Persian territory, causing the arrest of a Persian official engaged upon his lawful duties, having him removed to a warship and then banishing him to another place. It is still more surprising that you should have reported the matter as if it were quite a normal proceeding.

"5. In view of the foregoing statement, I beg leave to make, on behalf of my Government, a most emphatic protest against the intrusion of British naval forces into Persian territory, and their unaccountable conduct regarding the Director of Customs, on the pretext that Basidu is a 'special British station,' as you have reiterated in your note.

"6. I beg to inform you that the Director of Customs and his commissionaire have since returned to their former duties at Basidu, and that the Imperial Persian Government earnestly request that His Britannic Majesty's Government should make due restitution for the conduct of the British officers and take such disciplinary measures against them as the occasion would seem to demand."

I have, &c.

F. NOURY ESFANDIARY.

1933

Enclosure 4 in (2).

G.

Mr. Mallet to Sir John Simon.—(Received October 24.)

(No. 282.)

(Telegraphic.)

Tehran, October 23, 1933.

MY telegram No. 272.

In reply to question in Majlis yesterday, Minister for Foreign Affairs stated that news of arrest of mudir was correct, and explained that in days of Persia's weakness British Government had, without any authorisation from Persian Government, had a naval coaling depot at Basidu, with regard to which present Persian Government had made many protests during past few years. After reciting details of incident, Minister stated that he had received note from British Legation complaining of acts done by mudir in the course of his legitimate duties. He quoted principal passage, the only omission of importance being reference to previous warning given to mudir. This protest had given intense astonishment to Persian Government. He had immediately protested to British representative, and had sent similar instructions to Legation in London. Minister then recited principal point of Persian reply (see my telegram No. 271), and ended by declaring that Basidu was an integral part of Persia, that Persian Government did not, and would not, recognise either a British area or British territorial waters or any right of possession, and that Government would defend rights of Persia in this case as they had, under the guidance of the ruler of the kingdom, in all other matters.

(Repeated to Government of India, No. 112; Bushire, No. 128; and senior naval officer, No. 16.)

(3)

Report of the Law Officers of the Crown.

(a)—1. In our opinion the Imam of Muscat was not in a position at the time of the grant of 1820 to cede sovereignty over the Island of Qishm or any part of it. We doubt very much whether the Imam intended by the grant to do more than give his consent to the removal of British troops from another place to the island for a particular purpose, namely, that of checking piracy. But in any case, the facts as narrated in Papers A and B fall far short of the evidence which we think any tribunal would require before being satisfied that at the material date the sovereignty of the Island of Qishm was in the Imam of Muscat. The high-water mark of Muscat supremacy seems to have been reached in 1794, when it is to be noted the victors used their victory—not to claim sovereignty by right of conquest—but to obtain a revenue lease from Persia in respect of territories which, we assume, included Qishm. Between 1794 and 1820 nothing is recorded which, in our opinion, altered the position thus brought about. We therefore answer the first question in the negative.

2. The nature and duration of the occupation of British Basidu have not been such as, in our opinion, to establish a claim to the area in question as British territory by prescription or otherwise. So far as the principle of prescription is concerned, there is a substantial body of opinion amounting to a balance of authority in favour of including prescription among the methods of acquiring sovereignty over territory. It is generally recognised that in order to establish such a title, there must have been a continuous and undisturbed exercise of sovereignty over a sufficient period, but there is great uncertainty as to what is a sufficient period. In some circumstances a period of fifty years has been regarded as sufficient. In the case of the dispute between the United States of America and Mexico in 1910 concerning the Chamizal tract, the period relied on by the United States was from 1848 until the year 1895, but no opinion was expressed by the International Boundary Commission as to the sufficiency of that length of time, their view being that, in any event, upon the evidence adduced it was impossible to hold that the possession of the territory in question by the

United States was "undisturbed, uninterrupted and unchallenged" so as to found a prescriptive title.

In the present case we cannot regard the occupation which followed the grant of 1820 as amounting to an exercise of sovereignty. The occupation, in our opinion, continued to be occupation under the grant of the Imam down to the time when, as we are informed in Paper B (paragraph 45), the lease granted by Persia in September of that year was automatically determined and was never thereafter renewed in favour of Muscat. We have not overlooked the fact that notwithstanding the provisions of the firman of 1855 (articles 13 and 14) and the undertaking contained in the Treaty of Paris of 1857 (articles 2 and 14) Basidu remained in British occupation without complaint by Persia. This is strong evidence in support of a prescriptive title or, as it might be put, of estoppel against Persia by reason of unchallenged possession. Article 6 of the Telegraph Agreement of 1864, moreover, was deliberately inserted in order to put on record the British title to Basidu. On examination, however, an argument based on this article breaks down as it clearly refers the British title to the grant of 1820 and not to length of uninterrupted possession amounting to an exercise of sovereignty. So far as the occupation of Basidu, notwithstanding the firman of 1855 and the Treaty of Paris, is concerned, this is not sufficient in our opinion in the conditions of the time to make the British occupation of Basidu take the form of the exercise of British sovereignty.

It becomes necessary therefore to consider the history of the occupation from 1868 down to the present date. We are informed that the British flag has continued to fly there without interruption, that Basidu was occupied by a British garrison down to 1883, and thereafter down to 1913 as a naval station, principally for the purposes of a coal depot, and that from 1913 to the present time British naval parties have engaged in "beating the bounds" of the somewhat indeterminate territory known as British Basidu. If at or shortly after 1868 a piece of territory had been occupied with a clear intention to exercise sovereignty, and this had not been challenged at any time during a period of fifty years thereafter, we think there would have been a strong case for claiming sovereignty by prescription. These, however, are not the facts here. The occupation after 1868 was a continuation of the same nature as the previous occupation which, for the reasons we have given, did not take the form of an exercise of sovereignty.

We have taken into consideration all the facts put before us, including the incidents which have taken place in recent years, and we have come to the conclusion already expressed that there is not sufficient evidence to establish a British title to Basidu either by prescription or otherwise.

(b) and (c). We cannot see any reason, if our answers to the first two questions are accepted, for claiming that British Basidu should only be surrendered on terms. It is either British or it is not, and there is nothing in the nature of a lease to justify occupation if the Persian Government insist on their right.

(d) and (e). We see no grounds on which His Majesty's Government can claim the right, apart from agreement, to occupy British Basidu and exercise jurisdiction over the area in question and adjoining territorial waters, either in time of peace or time of war.

The question submitted to us as to a prescriptive title is difficult and the answer is not entirely free from uncertainty. The arguments in favour of a prescriptive title, or of estoppel preventing Persia from asserting a national title over the disputed territory, are in our opinion sufficiently strong (although we do not think they would prevail in the event of a reference to an international tribunal) to strengthen the hands of His Majesty's Government in any negotiations they may think proper.

We have, &c.

T. W. H. INSKIP.

DONALD SOMERVELL.

Law Officers' Department,
November 9, 1933.

TURKEY

[E 6008/408/44/1933]

No. 5⁴.

[Board of Trade.]

[January 30, 1933.]

Case for joint opinion of the Attorney-General, Mr. G. T. Simonds and Mr. J. H. Stamp.

THE following papers are sent herewith:—

- (A) Brief and previous papers in the Action: Whittall v. Administrator of German Property.
- (B) Copy Order of the 20th December, 1932.
- (C 1, C 2 and C 3) Copy Transcript of Shorthand Notes of Argument (three days).
- (D) Copy Transcript of Shorthand Notes of Judgment.
- (E) Copy Transcript of Shorthand Notes of Application to settle Minutes of Order.
- (F) Copy Letter from Mr. R. C. Owen-Wells of the 16th December, 1932.
- (G) Copy Memorandum by Maitre Biliotti on the Judgment dated the 10th December, 1932.

Claims of British nationals against Turkish Government: As to their being entitled to benefit of second charge on proceeds of German property.

The effect of the judgment would appear to be as follows:—

That the plaintiffs are entitled by virtue of the Treaty of Peace Order, 1919, to the benefit of the second charge on the assets in the hands of the Administrator of German Property for securing payment to them of the amounts due on the 10th January, 1920, such amounts being then ascertained or thereafter to be ascertained in respect of their claims against the Turkish Government existing on the 10th January, 1920, with regard to their property, rights and interests in Turkish territory arising out of the acts of the Turkish Government or its agents, such as are defined as exceptional war measures or measures of transfer in paragraph 3 of the annex to Part X, section IV, of the Treaty of Versailles so far as such claims were, when they arose, recognised by Turkish municipal law as valid and so far as such claims have not been or will not be satisfied.

Further, that the amount of such claims, including claims in respect of requisitions, must be ascertained by reference to the sums in Turkish currency (piastres) by which the Turkish Government might have satisfied the sum on the 10th January, 1920, converted into English currency at the average rate of exchange on that day.

Further, that, so far as such claims relate to requisitions, the debts due by the Turkish Government became due at the date of the taking of the goods.

Counsel will recollect that the plaintiff's claim related to sixteen different items of damage alleged to have been suffered by them which are set out in paragraph 3 of the amended statement of claim (Document 1 in the brief bundle), and that five of these items, as set out in paragraph 3 (a) of the statement of claim, were, by agreement between the parties, selected as raising the questions of principle which it was desired to have determined in the action. The court has further ordered that the plaintiffs and defendant are at liberty to apply in chambers for an enquiry in regard to any questions that may arise as to the application of the declarations contained in the order to the matters alleged in paragraphs 3 and 3 (a) of the statement of claim.

An opinion has been obtained from Maitre Biliotti (who, counsel will remember, was the Turkish barrister who advised on behalf of the defendant with regard to the Turkish laws relating to the subject-matter of the action and as to their effect (see Document "A" in the brief bundle)) as to the result of the judgment in relation to the particular items in paragraph 3 (a) of the statement of claim (see Document "G").

As regards item 3 (a) (i)—requisitions made while Turkey was engaged in the war in respect of which proper mazbattas or requisition notes were given—Maitre Biliotti is of opinion that it would not be possible for the plaintiffs to prove that legally they were creditors of the Turkish Government on the 10th January, 1920, for a higher amount than the amount stated in the mazbattas.



1933

So far as claims of the nature of this claim are concerned, it would seem that they would come within the judgment, and that the plaintiffs would be entitled to recover out of the German assets any amount which has not been otherwise satisfied, but that, as in the case of requisitions where mazbattas were given, the amount stated on the mazbattas as being due to the plaintiffs was invariably allowed in full by the Paris Commission, and as the rate of exchange was at 109 piastres to the £ by the Paris Commission, whereas the rate of exchange on the 10th January, 1920, was 398 piastres to the £, it would seem that, although only a dividend of 55 per cent. of the amount was paid by the Paris Commissioner to the plaintiffs, they have, owing to the difference in the rate of exchange, received more than they would have received had they been paid in full by the Turkish Government on the 10th January, 1920.

Item 3 (a) (ii) of the claim relates to requisitions which were alleged to have taken place without the issue of any mazbattas. Counsel will note that Maitre Biliotti deals very shortly with these requisitions on p. 3 of his memorandum, but he has already previously dealt fully with such claims on p. 34 of his opinion (Document "A" of the brief bundle). From a perusal of this opinion it would appear that the question as to whether the claimants would have any claim against the Turkish Government as at the 10th January, 1920, depended on the nature of the evidence which they could have brought before the Turkish court, and it is suggested by Maitre Biliotti that there is no evidence that the plaintiffs would have succeeded in proving that the requisitions alleged had taken place, or would have overcome the opposition of the Turkish State to any such claim, and he goes on to state that, in fact, the plaintiffs have done nothing in order to collect any evidence and have given no justification whatever of their inaction. From this, however, it would appear that had the plaintiffs been in a position to present irrefutable evidence to the Turkish courts with regard to the requisition of their goods by a Turkish authority having power to requisition and the value thereof, they might, under Turkish municipal law, have had a claim which might have been recognised by the Turkish courts, although they had no mazbattas to support such claim. If this is a correct view of the position, it obviously raises matters for very serious consideration. Counsel will recollect that the evidence in support of such claims in paragraph 3 (a) of the claim which was submitted to the Paris Commission is set out in Document 18 of the brief bundle, and it is a matter for consideration as to whether the documents contained in that bundle would be evidence of such a nature as would be considered by the British courts to be sufficient to prove the claim against the Turkish Government, or whether, in order to establish a claim under Mr. Justice Maugham's judgment, it would be necessary for them on any enquiry which might be held thereunder to call verbal evidence which would be subject to cross-examination in order to support a claim that they might have in regard to requisitions made by the Turkish Government in respect of which no mazbattas were given. If it were necessary for the plaintiffs to call such evidence verbally, the prospect of them being able to do so would, at this late date, seem to be small.

A further point, however, which has been raised both in the memorandum by Maitre Biliotti and in the letter from Mr. Owen-Wells, whom counsel will recollect was the British agent in Constantinople, is the possibility of some admission as to liability being obtained from the Turkish authorities by connivance. In considering this aspect of the case, it must, of course, be recollected that it might be possible for a Turkish court to make the declaration that as at the 10th January, 1920, the plaintiffs had under Turkish municipal law a good claim against the Turkish Government in respect of particular items, such as the one set out in paragraph 3 (a) (ii) of the claim, without thereby placing any liability on the Turkish Government to discharge such a claim owing to the right to such a claim having been subsequently destroyed by the terms of the Treaty of Lausanne; or, on the other hand, it might be possible that some scheme might be devised whereby the Turkish authorities would grant a certificate formally admitting such claims in full and at a greater amount than was allowed by the Paris Commission, and it would appear to be a matter for consideration as to whether, if such a position were to arise, the British courts would accept such a declaration or such a certificate as evidence of the position under Turkish municipal law, or would insist on expert evidence being called on the question. It may be that the British courts would not consider such a declaration on the ground that the Turkish courts would have no jurisdiction to

make such a declaration, having regard to the fact that there can now be no claim against the Turkish Government which Turkey could be made legally liable to discharge having regard to article 58 of the Treaty of Lausanne, and that such a declaration would, in fact, be merely in the nature of evidence and not a genuine finding of a court in an action, but, in view of the suggestions contained not only in Mr. Owen-Wells's letter, but in Maitre Biliotti's opinion, it becomes necessary to put this suggestion before counsel.

With regard to item 3 (a) (iii) of the claim, it is presumably open to the defendant to contend on any enquiry which may be instituted that requisitions before the Ottoman Government entered the war did not arise out of acts of the Turkish Government such as are defined as "exceptional war measures" or "measures of transfer" in the Treaty of Versailles.

Counsel will recollect that in paragraph 3 of the annex to Part X, section IV, of the Treaty of Versailles "exceptional war measures" includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property.

It is submitted that, until Turkey entered the war against Great Britain, British subjects were not an enemy, and that requisitions made before the date of the entry of Turkey into the war would not, therefore, be included in acts of the Turkish Government as are defined as "exceptional war measures" under the Treaty of Versailles.

In view of the judgment, it is an important consideration as to whether this argument would be open to the defence on an enquiry.

Item 3 (a) (iv) of the claim relates to the informal requisition of a house and store from about the 1st August, 1914, to the 12th August, 1924, in respect of which no mazbattas were given, but which was damaged during the occupation. No claim was made in respect of the damage within one month of the return of the property as is required by Turkish law. Maitre Biliotti points out that the Ottoman law provides that neither rent nor compensation is payable in respect of the occupation of real property, and it only authorises a claim for repairing deterioration caused by the occupation if such claim is made within one month from the restoration of the property. As no such claim has been made, there would not appear to have been any "amount due" on the 10th January, 1920, within the meaning of the judgment.

Item 3 (a) (v) of the claim appears to be ruled out by the terms of the judgment.

Although at first sight it would not appear that the plaintiffs are likely to be able to prove on an enquiry under the judgment that they are entitled to claim any substantial amount from the funds in the hands of the German Administrator, it has to be borne in mind that this action was instituted as an action in the nature of a test case in order to obtain declarations which would cover not only this case, but all claims of British nationals in Turkey who suffered damage there during the war, and it may be that there are such British nationals who may have had a legal claim against the Turkish Government under Turkish municipal law on the 10th January, 1920, with regard to requisitions of their property who did, in fact, receive no compensation from the Paris Commission, but if the present judgment is allowed to stand it is difficult to see how they could establish their claims without proving to the satisfaction of the British courts that the particular items would come within the terms of the judgment, having regard to the nature of the evidence which they possess in a particular case with regard to the requisitioning of the property. Having regard to the form of the judgment, it is difficult to see how it can be regarded as affecting claimants other than the plaintiffs. This aspect of the case, however, is a matter which needs careful consideration in considering whether an appeal should be lodged against the judgment.

Counsel will recollect that for the purpose of the arguments on principle and for the purpose of the hearing, the facts appearing by the relevant files were accepted as being conclusively established, but it is not admitted that such evidence of facts are to be accepted as evidence which would establish a claim against the Turkish Government (see bundle 21, brief bundle, pp. 1 and 9).

There is also a further matter, namely, whether the judgment could in any way be applied not only to claims by British nationals in Turkey, but also to claims by British nationals in Austria or Bulgaria, i.e., as to whether the judgment in this case would be applicable to claims arising in Austria or



1933

Bulgaria, having regard to the fact that both in the Austrian treaty and the Bulgarian treaty an article similar to article 297 of the Treaty of Versailles was included, or whether the decision in the judgment that municipal law is applicable as well as treaty law is limited to the case of Turkey, having regard to the fact that there is no article similar to article 297 of the Treaty of Versailles in the Treaty of Lausanne. There is no evidence available with regard to what is the municipal law in Austria or Bulgaria, but if it is considered that the judgment would affect these countries as well as Turkey, there might be a considerable number of further claims which would be made against the funds in the hands of the administrator.

It would appear that it will probably be contended on behalf of the plaintiffs on an enquiry under the judgment that the sums which were paid to the plaintiffs by the Sumner and Paris Commissions were not payments in respect of the debt due by Turkey, in view of the fact that these payments were merely *ex gratia* payments by a third party, and that the amount due by the Turkish Government in respect of the acts done under exceptional war measures or measures of transfer have consequently not been otherwise satisfied either in part or in whole. Counsel is referred to p. 3 of the transcript of the shorthand notes of the application to settle the form of order (Document "E"), and to the remarks of Mr. F. P. M. Schiller, K.C., on this point. It would seem that the meaning of the words "otherwise satisfied" must depend on the interpretation of the Treaty of Versailles, and although the Turkish Government is primarily the debtor, it is not a question to be decided by Turkish law. Presumably, Mr. Schiller is depending on the principle that payment by a third person is not sufficient to discharge a debt unless it is made by him as agent for and on behalf of the debtor, and with his prior authority or is subsequently ratified by the debtor (see Halsbury's *Laws of England*, second edition, Vol. 7, p. 240, paragraph 329).

In considering this it may be pointed out that article 58 of the Treaty of Lausanne under which the Allies renounced all pecuniary claims by their nationals for loss or damage suffered, Turkey renounced in favour of the Allies the right to the sum of £5 million, and also agreed not to claim from the British Government repayment of the sums for the warships, which were the sums handed over to the Paris Commission by the Allies for compensating their nationals. It is submitted that it might be possible to contend that the payments by the Paris Commission were made with the prior authority of the Turkish Government, apart from the fact as to whether the words "otherwise satisfied" under the Treaty of Versailles could be held to mean "otherwise satisfied on behalf of the debtor."

The chief risk, which there would appear to be in appealing against the judgment, is that the Court of Appeal might find that the date at which payment of any claims against the assets in the hands of the German Administrator must be paid, is earlier than the 10th January, 1920. If on appeal it was held that the date of payment must be reckoned at the date when the goods were requisitioned by the Turkish Government, or that the payment must be made at a pre-war rate, this might entail payment of the balance of 45 per cent., which was not met by the payments by the Paris Commission.

Counsel will note that it is suggested in Mr. Owen-Wells's letter of the 16th December (Document "F") that this date should not be earlier than the date of the Treaty of Lausanne.

With regard to the finding of the court that the amounts became due at the dates when the goods were requisitioned, it is submitted that this is really a question of Turkish law, on which no evidence was called at the hearing of the case upon which such finding could be based.

It is not known whether the plaintiffs will appeal against the judgment, and their course of action may be guided by the question of available funds. As counsel are aware the plaintiffs are resident out of the jurisdiction, and although the sum of £550 was ordered to be lodged in court as security for costs, this sum has now been paid out to the plaintiffs under the terms of the judgment, no order having been made as to costs in the action. If the plaintiffs appeal, a further application for security for costs can be made, and it would undoubtedly be more satisfactory if an appeal is to be lodged that the plaintiffs should appeal, when the defendant, if thought advisable, could lodge a cross appeal, but it seems advisable, in view of the uncertainty of the position, that the defendant should be in a position to give notice of appeal at the latest time before the expiry of the time for appealing in the event of the plaintiffs not doing so. The order was

entered on the 30th December, 1932, and it would appear that the last day for giving notice of appeal is the 9th February, 1933 (order 58, rule 15).

Counsel are asked to advise—

- (1) Whether an appeal should be lodged against the judgment on behalf of the defendant, and if so
- (2) to settle the form of notice of appeal, and
- (3) whether, in the event of the plaintiffs giving notice of appeal, a cross appeal should be lodged.

Joint Opinion of the Attorney-General, Mr. G. T. Simonds and Mr. J. H. Stamp.

1 and 2. We do not think that in this case notice of appeal should be given on behalf of the defendant. We are not satisfied that the judgment of Maugham, J., is correct, though there is much to be said for the view taken by him, that the second charge under the Treaty of Peace Order, 1919, covered any amounts due from the Turkish Government under Turkish Municipal Law in respect of matters which would have given rise to claims against the Turkish Government under a treaty with Turkey in the form of the Treaty of Versailles. If such a treaty had been concluded a new liability would have arisen with regard to the same claims, and other amounts might have become due in respect of them, but in the meantime there was an actual independent liability under Turkish law, and amounts were in truth and in fact due in respect of such liability which may well be held to fall within the words of article 297 of the Treaty of Versailles and the annex thereto. In view of the weight of these considerations and of the answers given to the later questions put to us, we do not think it expedient to appeal, but we do not advise that the judgment should be accepted as a correct interpretation of the treaty in the event of other claims of a similar character being made.

We do not think that the plaintiffs will establish their contention that the payments made by the Paris Commission did not in the circumstances in which they were made operate in whole or in part in satisfaction of the claims under the Treaty of Peace Order and having regard to the lower rate of exchange applicable under the order these payments appear likely to cover the whole liability.

The principle of the judgment plainly applies to claims against other enemy Governments if there are any such claims in a like position.

In our opinion certificates of a Turkish court would not be admissible to establish claims here; in our opinion, the facts would have to be proved by admissible evidence and expert evidence would have to be called to prove that the facts gave rise to a valid claim under Turkish law. Of course, where there were regular *mazbattas*, the claim would have arisen directly under them, and it would only be necessary in such cases to prove that the *mazbattas* are such as would be recognised under Turkish law without the facts lying behind them.

In our opinion a contention would on any enquiry be open that claims under requisitions made before Turkey entered the war was not within the charge, but we regard the success of the contention as very doubtful.

We doubt whether it will be possible to establish a claim in respect of item 3 (a) (iv). It appears that in such a case no right arose under Turkish law until the property was restored in a damaged condition; and this did not take place until the 12th August, 1924, long after the date at which the Treaty of Peace Order, 1919, speaks.

On the whole it does not appear likely that any serious liability can result from the order obtained by the plaintiffs.

3. If the plaintiffs appeal we think that it will be worth while for the defendant to give notice under order 58, rules 6 and 7, that he will contend that the order should be varied by negating any charge except for claims under the Lausanne Treaty.

T. W. H. INSKIP.
G. T. SIMONDS.
J. H. STAMP.

January 30, 1933.



1933

No. 5^B.

THE DATE GARDENS IN IRAQ OF THE SHEIKHS
OF KOWEIT AND MOHAMMERAH

SCOPE OF UNDERTAKINGS GIVEN BY
H.M. GOVERNMENT IN 1914

CASE FOR THE OPINION OF THE
LAW OFFICERS OF THE CROWN
and Opinion thereon dated 29th March 1933.

THE DATE GARDENS IN IRAQ OF THE SHEIKHS OF KOWEIT AND MOHAMMERAH

Scope of undertakings given by H.M. Government
in 1914

CASE FOR THE OPINION OF THE LAW OFFICERS OF THE CROWN

1. This case raises certain questions respecting the nature and scope of undertakings given by His Majesty's Government in 1914 to the Sheikh of Koweit and Mohammerah (documents 1 and 2 in the Appendix, pp. 8 and 9), upon which the Treasury desire to have the opinion of the Law Officers.

2. Certain aspects of the problems raised by these undertakings were submitted to the Law Officers in May, 1930, by the Colonial Office. The questions then submitted related in the main to issues which had arisen as between His Majesty's Government and the Iraqi Government.

The question which now falls to be considered is whether in the circumstances hereinafter described any legal obligation rests on His Majesty's Government vis-a-vis the Sheikh himself.

3. The circumstances in which the undertakings in question came to be given can, so far as they are relevant to the present question, be stated shortly as follows:—

4. In 1914 His Majesty's Government were desirous of obtaining the assistance of the Sheikh of Koweit and Mohammerah against Turkey, and letters were accordingly addressed to them by the Resident and Consul-General in the Persian Gulf, in which the nature of the assistance desired was indicated and certain promises were made in return. The letters, documents 1 and 2 in the Appendix, were in different terms but for present purposes it is necessary only to quote the following extracts. In the letter to the Sheikh of Koweit dated 3rd November, 1914, the following passage occurs:—

“Furthermore I make to you, on behalf of the British Government, certain promises concerning Your Excellency personally, viz.:—

“(1) That your gardens which are now in your possession viz. the date gardens situate between Fao and Qurnah shall remain in your possession and in possession of your descendants without being subject to the payment of taxes or imposts.”

In the letter to the Sheikh of Mohammerah dated 21st November, 1914, it was stated:—

“Further the date gardens which you now possess on the Turkish side of the Shatt-el-Arab shall remain in full possession of you and your heirs and immune from taxation.”

The reason why a variant of the expression “immune from taxation” appears in the letter to the Sheikh of Koweit is explained in paragraph 13 below.

to a bargain involving relief from taxation claims that he has performed all that he has promised to do, may perhaps be regarded as of general application.

12. In the present case there can be little doubt that the Istihlak is a "tax" strictly so called; and the question therefore appears to be whether on their true construction and having regard to the circumstances in which and the persons to whom they were given the undertakings given to the Sheikhs extend to taxation not levied on the gardens themselves as such but on their produce. Do they, for example, extend only to taxes creating a liability which arises from the simple fact of occupation or ownership of land, or do they include also a tax creating liability which only arises if the landowner chooses to export or sell some part of the produce of that land, and then payable not by the landowner as such, but by the seller or exporter.

13. It is important to examine the actual language used in the undertakings given to the two Sheikhs. When the drafts were under consideration in 1914 the wording approved for both letters was "The date gardens which you now possess . . . shall remain in the full possession of you and your heirs and be immune from taxation". An authenticated copy of the actual Arabic letter received by the Sheikh of Koweit has been obtained. The words in this which correspond to "immune from taxation" in the English draft are Arabic words which are literally translated "without there being upon them anything in the nature of taxes or imposts". Evidently Colonel Knox, the writer of the Arabic letter, used two more or less synonymous Arabic words to give the sense of taxation quite generally and comprehensively. (There is no reason to suppose that the Arabic of the letter sent to the Sheikh of Mohammerah is not the same as that of the letter sent to the Sheikh of Koweit in the particular, but as copy of it is not available here, the copy sent herewith follows the original English draft). It will thus be seen that the pledge in regard to taxation is quite general and not expressed as limited to particular kinds of taxes. At the same time it seems clear that this exemption is not a personal exemption simpliciter in the sense that it implies that the Sheikh is entitled to reside in the gardens and claim to be exempt from all taxation of every kind which may be imposed on persons resident in Iraq; it is quite definitely linked up with the possession of the gardens and it seems reasonable therefore to limit it to taxation the liability to which is closely connected with the gardens themselves.

14. It is necessary to consider very closely the exact nature of the tax recently imposed. It may be regarded on the one hand as merely a trader's tax in the sense that it is primarily a tax on produce sold or exported; or on the other it may be regarded as merely a variant of the earlier form of tax based on the value of the land under cultivation and therefore as bearing a very close resemblance to that tax.

15. Admittedly the earlier form of tax fell within the terms of the undertaking and the question is therefore whether in all the circumstances the present tax can be regarded as so far divorced from the land itself as to bring it outside the terms used by the Resident in his letter. As has been explained above, the new tax is not levied on the landowner as such and may indeed not be paid by the Landowner himself at all except in so far as he may by reason of its existence have to accept a lesser price for his produce. It is therefore a tax on produce, but not on the produce as such of any particular garden or plantation; nor does the produce attract the tax until it has been severed and has been sold or exported. But since neither of the Sheikhs is resident in Iraq, the whole of the produce of their gardens (other than that consumed by

the resident cultivators) does in fact attract the tax in the process of being sent to their places of residence for the consumption of their families and retainers.

16. Two views of the matter may it is thought conceivably be taken: (1) that the undertaking ought to be beneficially construed in the light of the practical effect of the new tax; and that as the Sheikhs are necessarily resident elsewhere than in Iraq, and since the produce of their gardens will with only trifling exceptions, always and necessarily attract the tax, because the produce is always and necessarily exported from Iraq for their consumption, the tax in their case is in fact a tax upon the produce of their gardens and therefore within the undertakings; and (2) that the undertakings are limited to taxes levied on the land itself and upon the ownership or occupation of the land, and the Istihlak tax is not a tax on land but on produce as such, divorced from the ownership or occupation of land, and therefore not within the terms of either undertaking.

17. To turn now to the second question which affects only the gardens in the possession of the Sheikh of Koweit. It appears that certain legal proceedings have been instituted against him in the Iraqi Courts at the suit of private persons claiming to be entitled to part of the gardens in his possession. In one such case the Court of Cassation at Baghdad has decided on appeal in favour of the plaintiff; and further proceedings of a similar nature are pending. It is therefore necessary to consider whether the pledge given to the Sheikh in 1914 imposes on His Majesty's Government any obligation in respect of such portions of the gardens in his physical possession in 1914 as the Iraqi Courts may decide are not the Sheikh's property. It is clearly beyond the power of His Majesty's Government to maintain the Sheikh in physical possession of property in Iraq which may be declared by the Iraqi Courts not to belong to him, and any liability must therefore be for payment of compensation.

18. The answer to this question would seem to depend on whether the undertaking given in 1914 ought, on its true construction, to be regarded as applying to a given area of land of which the Sheikh was at that time in physical possession or whether it relates only to such portions of that area as legally belong to him; in other words, has the pledge that certain gardens "shall remain in his possession" any application to property of which the Sheikh is dispossessed by the ordinary process of law, and as the result of a judgment in the Iraqi Courts? It is thought that the circumstances in which the pledge was given must be taken into account.

19. The general history of the case is contained in the accompanying Memorandum by the Political Agent, Koweit, document No. 4 in the appendix, p. 16. The essential points are, firstly, that from 1899 onwards His Majesty's Government were anxious to establish their political position in Koweit in the face of claims by the Turks that the Sheikh was an Ottoman subject; that with this end in view H.M.G. entered into secret engagements with the Sheikh; that in the years 1907 and following the Sheikh made certain large purchases of land in the then vilayet of Basra; that the Turkish authorities, apparently with a view to bringing pressure to bear on the Sheikh, refused to allow him to arrange for the necessary appearance before the Tapu department, with a view to declaring the validity of the sale, as was required by law, or to allow him to take possession, unless he registered himself as a Turkish national; that consequent on an appeal by the Sheikh to H.M.G. he was instructed not to take out Turkish nationality papers, but to have the stamped deeds secretly registered in the British Consulate at Basra; and that general discussions over this and other points affecting the status of Koweit proceeded between



H.M.G. and the Turkish Government until 1911, when they became merged in negotiations for the regularisation of the various questions in issue between H.M.G. and the Turkish Government in this area. Those negotiations culminated in the Anglo-Turkish Convention signed by the representatives of both parties on 29th July 1913. A section of the Convention in question regularised the position of the Sheikh of Koweit vis-a-vis both the Turkish and British Governments; and, with the history of the dispute which had taken place over the date gardens in view, one of the articles of the section in question provided that the Sheikh should enjoy in full security and in accordance with Ottoman Law the rights of private property which he possessed in the Vilayet of Basra. This convention had not been ratified, however, when war broke out with Turkey in 1914.

20. From the copy of the Judgment given by the Court of Cassation in Baghdad which is also enclosed (document No. 5 in the Appendix, p. 19) it will be seen that the failure of the Sheikh to take the formal steps necessary in regard to the registration of the documents of title with the Turkish authorities before the War, as described above, is one of the grounds on which he may be adjudged not to be the lawful owner of the gardens of which he is in possession and that it appears to have been strongly urged upon the Court. It is not clear whether this omission was or was not in itself a vital point in the decision already given, in the sense that but for this point the decision would have been in favour of the Sheikh, but it may well be thought in view of the history of matter prior to the giving of the undertakings, which is set out in the Memorandum of the Political Agent (No. 4, p. 16) that to the extent to which it was vital in that case or may be vital in any similar case which may be brought against the Sheikh hereafter, His Majesty's Government cannot refuse to recognise an obligation to compensate the Sheikh for any loss which he may have suffered as the result of his refusal to take the necessary steps to register his title because that involved his acceptance of the position of a subject of Turkey, and that would have been contrary to the policy which His Majesty's Government were urging upon him. It is clear that the question of the registration of his title to the gardens and the then recent difficulties created by non-registration must have been fresh in the minds of the Sheikh and the Political Resident at the time when the undertaking to the Sheikh was given in 1914. In this connection it may be significant that the first draft of the letter to be sent to the Sheikh in 1914 read: "your date gardens between Fao and Gurneh shall remain in the full possession of you and your heirs . . .", and that the Government of India deliberately directed the replacement of the words "your date gardens" by the words "date gardens which you now possess". It was in consequence of this change in the draft made by the Government of India that the pledge in the letter sent to the Sheikh of 3rd November actually reads:—"Your gardens which are now in your possession".

21. The Law Officers will also see from the Memorandum by Mr. E. Alexander (Acting Judicial Adviser to the Iraq Government) No. 6 in the appendix, p. 21, that there are grounds for doubting whether the decision of the Court on the question of the application of certain laws relating to the period of time necessary to prevent a title by adverse possession is correct. The question is one of Ottoman law on which English lawyers can scarcely express a definite opinion, but information obtained from an expert on the subject appears to afford some ground for holding that the doubt is well founded and that if the appropriate law had been correctly applied the Sheikh would not have been deprived of his land. The question may then arise whether the obligations of His Majesty's Government are affected in any way by the correctness or otherwise of the decision of the Iraqi Courts. The Sheikh does

not hesitate to allege something akin to a conspiracy to deprive him of his gardens on political grounds, and the Law Officers may be of opinion that in these circumstances it is incumbent on His Majesty's Government to examine for themselves the basis of any decision against the Sheikh; and that if, as the result of that examination, in the course of which opinions would of course be obtained from experts in Ottoman law, it should be decided that the decision against the Sheikh is contrary to the justice of the case, His Majesty's Government come under a legal obligation to compensate the Sheikh for property which was then in his possession, but of which on this basis he has been wrongfully deprived.

THE LAW OFFICERS are requested to advise:—

1. Whether having regard to the terms of the undertakings given in 1914, the imposition of the Istihlak tax on the produce of the date gardens of the Sheikh of Koweit and the Sheikh of Mohammerah involves any breach of those undertakings and whether as a result any obligation rests on His Majesty's Government to compensate the Sheikhs.

2. Whether His Majesty's Government are under any obligation to compensate the Sheikh of Koweit in respect of any portion of the gardens in the possession of his predecessor in 1914 of which he may be deprived in consequence of a Judgment of the competent Iraqi Courts.

3. Whether it is material for the purposes of the last question to consider

(a) whether the basis of the judgment of the Iraqi Courts is the failure by the Sheikh to register certain documents in 1914; that failure having been admittedly due to the fact that the Sheikh, in accordance with the wishes of His Majesty's Government, refused to declare himself a Turkish subject, or

(b) whether the Judgment of the Iraqi Courts is or is not in accordance with the justice of the case; that is to say whether in the event of His Majesty's Government being of opinion that the decision of the Iraqi Courts is wrong, any liability to compensate the Sheikh arises.

4. Generally on the case.

APPENDIX

INDEX.

- 1 & 2. The letters dated 3rd November, 1914 and 21st November, 1914, from the Political Resident in the Persian Gulf to the Sheikhs containing on behalf of His Majesty's Government the undertakings referred to in this Case:
3. Copy Iraqi Law for the collection of "Istihlak" or Land Produce duty:
4. Memorandum by Political Agent, Koweit:
5. Judgment given by the Court of Cassation at Baghdad in respect of one of the gardens of the Sheikh of Koweit;
6. Memorandum by Mr. E. Alexander, Acting Judicial Adviser to the High Commissioner, Iraq.
7. Letter to the Agent to the Sheikh of Koweit dated 14th June, 1915.

DOCUMENT 1.

Letter dated 3rd November, 1914, from Political Resident in the Persian Gulf to the Ruler of Kuwait and Dependencies, Kuwait.

After compliments,

In continuation of previous letter intimating the outbreak of war between the British Government and Turkey, I am ordered by the British Government to convey to your Excellency gratitude for your loyalty and your offer of assistance, and to request you to attack Umm Qasr Safwan and Bubiyan and to occupy them. You should endeavour, afterwards, in co-operation with Shaikh Sir Khazal Khan, Amir Abdul Azin bin Saud and other reliable Shaikhs to liberate Basrah from Turkish possession. Should this prove to be beyond your ability, you should make arrangements, if possible, to prevent Turkish reinforcements from reaching Basrah or even Qurnah, until the arrival of the British troops whom we shall send, please God, as soon as possible. I also hope that two of our men-of-war will reach Basrah before the arrival of your troops there. And though it should be your highest aim, in this connection, to liberate Basrah and its people from Turkish rule, still we request that you should use your utmost endeavour in preventing troops and others from plundering the merchandise belonging to British merchants in Basrah and its dependencies, to protect the European residents of Basrah and to safeguard them from loss and oppression. In return for your valuable assistance in this important matter, I am ordered by the British Government to promise to Your Excellency that if we succeed therein—and we shall succeed therein, please God—we will not return Basrah to the Turkish Government, and we will not surrender it back to them at all. Furthermore I make to you, on behalf of the British Government, certain promises concerning Your Excellency personally, viz. :—

(1) that your gardens which are now in your possessions, viz., the date gardens situate between Fao and Qurnah, shall remain in your possession and in possession of your descendants without being subject to the payment of taxes or imposts;

(2) that if you attack Safwan, Umm Qasr and Bubiyan and occupy them, the British Government will protect you from any consequences arising from that action;

(3) that the British Government does recognise and admit that the Shaikhdom of Kuwait is an independent Government under British protection.

I request that you will be good enough to read the enclosed letter and transmit the same to the Amir of Najd at the earliest convenience. I have addressed a letter to the Shaikh of Mohammerah similar to this I am writing you.

I am confident of your old-established friendship with the exalted Government, and I believe that Your Excellency will use your endeavour in these important matters, in every respect.

I avail myself of this opportunity to assure you of my high esteem, and may you continue to remain preserved and salaams.

(Signed) S. G. KNOX,

Resident and H.B.M.'s Consul General in the Persian Gulf.

DOCUMENT 2.

Letter dated the 21st November, 1914, from the Political Resident in the Persian Gulf to the Shaikh of Mohammerah and its Dependencies, Mohammerah.

After compliments,

With reference to the assurance conveyed to Your Excellency in my letter No. 307 dated 15th October, 1910 (11th Shawwal 1328) and having regard to the further valued services and co-operation which Your Excellency has rendered to the British Government and to British interests in Arabistan and the Shatt-al-Arab, I am now authorised to assure Your Excellency personally, and to do so by this writing, that whatever change may take place in the form of the Government of Persia, and whether it be Royalist or Nationalist, His Majesty's Government will be prepared to afford you the support necessary for obtaining a solution satisfactory both to yourself and to us in the event of any encroachment by the Persian Government on your jurisdiction and recognised rights or on your property in Persia. In like manner they will safeguard you to the best of their ability against any unprovoked attack by a foreign power or against any encroachment by such power on your jurisdiction and recognised rights or on your property in Persia. These assurances are given for yourself and for your successors from among your male descendants, and shall hold good so long as you and they do not fail to observe your and their obligations towards the Persian Government provided that the nomination of your successors from among your male descendants shall be subject to confidential consultation with, and the approval of His Majesty's Government, and so long as you and they shall continue to be guided by the advice of His Majesty's Government and to maintain an attitude satisfactory to that Government.

Vis-a-vis the Persian Government, we shall do our best to maintain Your Excellency in your present state of local autonomy.

Further, the date gardens which you now possess on the Turkish side of the Shatt-al-Arab shall remain in full possession of you and your heirs and immune from taxation.

(Signed) P. Z. COX,
Lieut.-Colonel,

British Resident in the Persian Gulf, and
H.M.'s Consul-General for Fars, etc.

DOCUMENT 3.

LAW FOR THE COLLECTION OF LAND PRODUCE DUTY, IRAQ.

Article 1.

The Land Tax shall be changed in favour of the Istihlak Duty, which shall be assessed and collected on land produce in accordance with the provisions of this Law. The Minister of Finance shall announce such change by Notification to be issued before the maturity of the produce to which such change applies.

Article 2.

The Method of Assessment and Collection of rent on Miri unalienated Lands in respect of land-rent (Mallakiyah Share), and also the Method of Assessment and Collection of Water charges on alienated and (Miri) unalienated flow lands and the method of making compensation in the case of Auqaf land the Miri dues in respect of which are allotted to a specific purpose, shall be made the subject of a special law.

Article 12.

Persons who pay the istihlak tax as provided under Article 11 above shall be authorised to deduct the istihlak tax from the sale proceeds of produce at the rate specified in this law, and shall be indemnified against any claim for any amount deducted in accordance with the provisions of this law.

Article 13.

The authorities concerned shall receive the istihlak tax on land produce against printed receipts with serial numbers in the following manner:—

- (a) Tax on land produce stored in places of istihlak determined under Article 4 (a) shall be collected within such period as specified in Instructions.
- (b) Tax on transported land produce may be collected at any Railway Station or Port.
- (c) Tax on land produce exported abroad from Iraq shall be collected at the Customs Offices before exportation; if istihlak tax has not already been collected thereon.

Article 14.

In case payment of the istihlak tax is refused, the authorities concerned shall dispose of such quantity of produce as is sufficient to meet payment of the tax demanded.

Article 15.

The authorities concerned, with a view to scrutinizing the accuracy of transactions, may weigh the produce subject to payment of consumption tax and compare the types and quantities thereof with books and other documents, and may also audit and examine such books as are maintained by owners of places of istihlak.

Article 16.

This law shall not apply to land produce subject to consumption tax which have been produced during the years preceding the date of its coming into force; provided that

- (1) Every owner of place of istihlak submits to the authorities concerned a statement, on a date to be specified by Regulation, showing types and quantities of land produce stored in his premises.
- (2) Every person who owns land produce stored outside places of istihlak and intended for sale submits a statement, showing types and quantities of such produce and the places where stored, to the authorities concerned within a period to be specified by Regulation:

This in case the produce subject to istihlak tax and owned by each person exceed 50 tons, otherwise such produce must be transported to places of consumption or Customs Offices within such period as specified by Regulations.

All produce regarding which a statement is not submitted and also produce which is not transported to Customs Offices or places of istihlak within the specified period shall be ineligible to the exemption provided for under this Article. In which case the istihlak tax shall be collected when it is brought to places of istihlak.

Article 17.

1. The sale, purchase and storage of produce subject to istihlak duty is hereby prohibited in any place other than the places of consumption within the centres of consumption determined under Article 4 above. The running of places of consumption outside

centres of consumption for the purpose of selling produce to consumers is also prohibited. There is nothing in this Article to prevent any person from removing, selling to other than consumers, any produce of his stocked in his own stores situated outside the centres of consumption. By consumers are meant persons who buy the produce liable to istihlak tax with the object of consuming it directly without sending it to any place of istihlak or export and by non-consumers are meant persons who buy the produce for commerce and with the intention of sending it to a place of istihlak or export.

2. Produce shall be considered contraband if sold, purchased or stored contrary to the first clause of this Article, and the authorities concerned shall seize such produce.

Article 18.

Whoever in contravention of this law or any Regulations, Ministerial Instructions or permit issued thereunder:—

- (a) Conducts a place of consumption;
 - (b) Smuggles taxable land produce, stocks, stores, or transports same, to places other than those specified, with the intention of sale, contrary to the provisions of Article 17, or
 - (c) Receives or retains contraband land produce knowing or having reason to believe the same to be contraband
- commits an offence against this law and shall, for every such offence, be punished by the authorities concerned with fine equivalent to half the value of the produce in respect of which the offence is committed. Every fine imposed under this Article shall be in addition to the tax imposable under this law and the place of istihlak run without permit, shall be closed down.

Article 19.

If seizure of contraband produce is ordered by the authorities concerned, then they shall notify the offender, in writing in accordance with the usual procedure, within a period not exceeding 10 days, requiring immediate payment of the fine and istihlak tax, and thereafter:—

- (1) If the offender does not forthwith pay the fine and in addition thereto the istihlak tax within 10 days from the date of service of the notification or give such security for payment as the authorities concerned shall consider satisfactory, then the order issued for the collection of the fine shall be final. The authorities concerned shall sell the contraband produce by public auction and recover, from the sale proceeds thereof, the fine together with the istihlak tax and any other expenses incurred on the sale transaction.
- (2) If the offender, within 10 days from the date on which he was notified to pay the fine and istihlak tax, applies to the authorities concerned that his case be referred to a Criminal Court, the said authorities shall do so within a period not exceeding 15 days from the date of such application and shall postpone all actions in connection with the sale of the produce; pending issue of Court decree in this respect.
- (3) If the offender pays or gives security accepted as satisfactory by the authorities concerned then the seized produce shall be released, or, if he is not satisfied with the order issued by the authorities concerned, then he may apply within 10 days from the date of making the payment or giving the security to the authorities concerned for the submission of his case to a Criminal Court.

The authorities concerned shall do so within a period not exceeding 15 days from the date of submission of such application.

(4) The offender may directly apply to the Criminal Magistrate within 10 days from the date of his application.

Article 20.

No person claiming any right of ownership of or interest in or connection with the seized produce, even if not implicated in the offence committed, shall have a claim against the Government in respect of seizure according to the provisions of this law, but his right to claim damage or loss against the person who has such produce in his possession at the time of committing the offence will not thereby be prejudiced.

Article 21.

If it is proved to the authorities concerned that land produce subject to istihlak tax is being sold or stocked or stored for with the intention of sale in places other than those duly permitted, contrary to the provisions of Article 17 above, the authorities concerned or the official authorised by them may without a warrant from a magistrate

(1) enter accompanied by a police official, a Mukhtar and another person, and when a Mukhtar is not available by other two inhabitants of the Mohallah at any time by day or by night, any land, building, enclosed place and in case of resistance break open any door and remove any obstacle to the entry upon or into such places;

(2) take possession of any land produce subject to consumption tax so stocked or stored and all goods, packages and coverings in or among which produce is concealed.

Provided the right to enter and search under this Article shall not be exercised in respect of a dwelling house unless a warrant for that purpose shall first have been obtained from a Magistrate.

Article 22.

Every owner of a place of istihlak in contravention of the provisions of this law or any Regulations, Ministerial Instructions or permit issued thereunder who—

(a) abstains from maintaining the register as provided under Article (6) of this law;

(b) with intent to evade payment of the istihlak tax fails to record the quantities and types of produce brought into the place under his charge in the ^{register} ~~book~~ or statements or records inaccurate quantities and types of produce in the register or statements to be furnished to the authorities concerned shall be deemed to have committed an offence against the provisions of this law. In such a case, the authorities concerned may:—

(i) cancel the license of such place as the owner thereof abstains from maintaining the required register, and

(ii) seize the produce in respect of which the offence was committed, and impose a fine equivalent to half the value of such produce, under Articles (17) and (18) of this law.

The offender shall, in addition, be liable to prosecution and shall, after conviction, be punished under the Penal Code.

Article 23.

Every finance official who fails to carry out the duties entrusted to him under this law or any regulations, or Ministerial Instructions issued thereunder, and whoever in contravention of the provisions of this law or any Regulations, Ministerial Instructions issued thereunder fails to report to the authorities concerned any breach of the provisions of this law, or fails or to take the action required by this law in respect of such breach shall be dismissed from his post by order from the Minister of Finance, and shall not be re-employed in Finance appointments. The Minister of Finance may issue an order for the prosecution of the official who has committed any of the contravention set forth above before a Criminal Court for trial under the Penal Code and for the refund of the loss sustained by the Treasury thereby. The decision of the Minister of Finance for dismissal or for prosecution shall be considered final and issued under the State Officials Disciplinary Law No. of 1929.

Article 24.

In any Judicial or Administrative proceedings in connection with an offence against this law, a report signed by the authorities concerned or by the official duly authorised shall, in the absence of proof to the contrary, be deemed (sufficient) evidence of the facts therein stated and the burden of proof shall lie on any person seeking to disprove the truth of such statement.

Article 25.

No claim for damages shall lie against the authorities concerned for any act or order made in good faith by them in pursuance of any duty imposed or any authority conferred by this law or by any regulations, Ministerial Instructions or orders made thereunder.

Article 26.

A reward not exceeding in the aggregate one half of the fine may be granted by the Minister of Finance to any person or persons who have been instrumental towards detecting the offence which has given rise to the imposition of such a fine provided that the fine had been confirmed in all stages of the case, also provided:—

(a) the Director General of Revenue may award a maximum amount of Rs.250/-.

(b) the Mutasarrif in the Liwa may award a maximum amount of Rs.150/-.

(c) the Qaimmaqam in the Qadha may award a maximum amount of Rs.50/-.

Such rewards may be awarded to officials with the previous sanction of the Minister of Finance provided that no such rewards shall be given to officials of the grade of Qaimmaqam and above.

Article 27.

(a) If any agreement or *iltizam* of legal validity and of specified duration and amount payable in respect of the tax already collected at places of istihlak due on produce subject to istihlak tax be in existence at the time of the coming into force of this law, the amount therein specified may continue to be collected throughout the period covered by such agreement or *iltizam* instead of istihlak tax.

(b) Agreements and *iltizams* referred to in para. (a) above may be cancelled with the assent of both parties.

(c) Agreements based on *tathlith*, *tarbi*, or *takhmis* shall be cancelled and the *istihlak* duty shall be collected the produce affected in accordance with this law.



Article 28.

If any contract which has been entered into before the date of coming into force of this law or any agreement which was made before the coming into force of this law and is based on local practice and custom as between mallak, sarqal and fallah, prescribed the proportions in which the crops subject to Istihlak duty or the proceeds thereof shall be divided (between owner, sarqal and fallah), any party to the contract may claim that the division be amended so that he shall obtain benefits thereunder as near as may be in the proportions whereby he would have benefited under the original terms of the contract.

2. Amendment or cancellation of a contract under Clause (1) above shall be in the jurisdiction of a Civil Court. A fee not exceeding Rs.25 shall be payable by the applicant for amendment.

3. The Court shall take into consideration local custom and all other circumstances in order to assess the portions of the shares of the different parties which become subject to istihlak duty.

Article 29.

The Minister of Finance may issue instructions for the application of this law.

Article 30.

1. This law, in so far as the types of land produce covered by the Notification referred to in Article (1) above are concerned, shall come into force from the date of the publication of the notification in the Government Gazette.

2. The provisions of the laws and regulations now in force shall be applicable to such types of land produce as are not covered in the Notification of the Minister of Finance referred to in Article (1) above.

Article 31.

The following laws and all regulations issued thereunder and also any laws or regulations which either specifically or impliedly conflict with the provisions of this law, shall be deemed to be repealed with effect from the date of application of this law to the produce specified in the Notification laid down in Article 30 (1) of this law.

(List.)

DOCUMENT 4.

Memorandum by the Political Agent, Kuwait.

Note on a conversation which the Honourable the Political Resident in the Persian Gulf had with the Shaikh of Kuwait on 25th October, 1931, regarding the new Iraq "Istihlak" tax, with special reference to the effect such tax would have on the Kuwait properties on the Shatt-al-Arab, if it were enforced.

In the course of a general conversation on this subject and in reply to several questions put by the Honourable the Political Resident, the Shaikh made the following points.

Under the old system, a garden owner had to pay his tax according to the number of "jaribs" he owned, and not according to the number or size of his date trees. This shortly was the system in force in Turkish times in Basrah.

In the Muntafik and some other Liwas, the system was different, and a tax was levied on each date tree a garden owner possessed, and to encourage the owner to cultivate the ground under the trees, which improved the country side and incidentally the palm-tree itself, a reduction was made in the rate of tax taken per tree in accordance as the garden was "amar" (cultivated) or "kharab" (uncultivated).

In Basrah therefore if a man had a large garden and a small area under dates he stood to lose as compared to the man who had a small or even similar sized garden which was all under dates.

It was the discontent caused by the above system which probably brought the new proposed tax into the sphere of practical politics.

Actually there was method in the Turks "madness" for behind the idea was the desire to encourage landlords who were careless garden owners like the "Saadun" families to put down an increased number of date trees each year, by penalizing the man with a large area and few trees in favour of the man who took the trouble to grow the maximum number of trees possible on his plot of land.

2. When asked how the collection of the new tax would work in the case of an ordinary garden owner who lived on his property, the Shaikh replied that as far as he understood the proposed new law which he had read, the garden owner would, after cutting down his dates, put what he, his family and fellaheen required for their own personal use, on one side. This would not be subject to taxation. The balance he would collect on his "sif" i.e., the river bank, until he could find a buyer. Such buyer coming along, would pay cash down for what he bought, and remove the dates, either for export by dhow or steamer. As such buyer would eventually have to pay the "ashur" or 10 per cent government date tax, he naturally would deduct this amount from the price paid for the dates, i.e., the market price, while each year is fixed by a committee for the whole of the Basrah date area, and would still further have to allow for his own profit, after deducting carriage expenses to dhow or ship, packing, etc.

It was of course the buyer's business also to keep in touch with the Customs authorities, take out necessary documents, and pay the "Ashur" tax. The garden owner had no responsibility in this direction at all. Should, on the other hand, the garden owner in question be faced with a bad year, and be unable to find a buyer at all, then his produce remained with him, and was either thrown into the river, or sold for a song, to wandering shepherds, Bedouin or other migrating elements, who during the date season are usually to be found camped on the desert side of gardens seeking what they can pick up cheap or steal.

The garden owner in this case pays nothing to Government and the latter loses the "Ashur" tax due from his dates.

3. The Political Resident then asked the Shaikh how he thought the new law would work if applied to the five great Kuwait properties situate on the lower reaches of the Shatt-al-Arab.

The Shaikh without hesitation replied that it would fall harder on himself than, if he had to pay the ordinary "jarib" taxation, as used to exist.

4. When asked to explain how he arrived at this conclusion, the Shaikh pointed out:—

(a) That he was not in the same position as the resident garden owner, for he was both an absentee landlord, and worse, resided outside Iraq. Actually he employed only "fallahs" (or gardeners) in the gardens and these were the only persons who resided there. Hence under the new law only these resident fellaheen would be entitled to take their share of dates free of taxation, while he and the remaining 100 branch families of the al-Subah who resided in Kuwait would presumably have to pay the "Ashur" taxation on the large stores of dates, garden produce, fruit, wood, palm fronds, barley, fodder, lucerne grass, etc., which was annually brought to Kuwait for their own use, under the plea that they had been exported from the garden areas, and also out of Iraq.



In this connection the Shaikh pointed out that the amounts brought to Kuwait by himself did not merely include that share of the garden produce which he and the 100 junior families of the al-Subah (numbering some 1,000 souls, I suppose), had a right to, in their capacity as joint shareholders in the estates, but included the annual free food ration of his body-guard and paid "fidawi" land forces numbering some 500 men who with their families all received half their pay in kind and half in cash. The former apart from rice (obtained in India), was practically all obtained from the produce of his Shatt-al-Arab estates.

(b) Again in the matter of the date produce which the Shaikh "exported" overseas to India, the Red Sea, Zanzibar, etc., the Shaikh pointed out that he came under a different category to the ordinary garden owner of Basrah or the well-known Arab and European merchants who annually bought up and exported dates from Basrah seeing that in a sense he was both owner and exporter. And while the latter class, both Arab and Europeans, purchased direct from individual garden owners and paid cash down for the produce, he as Shaikh of Kuwait sold nothing to these exporting merchants but instead dealt with his own merchants of Kuwait who nearly all owned regular fleets of dhow, "East Indian men" which made annual voyages to either India, the Red Sea, East Africa or Zanzibar, taking as outward cargoes Basrah dates, and bringing back ship-loads of wood, beams, spices, rice, building material, etc. The system under which this export business was conducted was as follows:—

The Shaikh, who it must not be forgotten runs his estate on our old feudal lines, annually and before the dates are ripe sends for his leading Kuwait merchants (largely also pearl dealers) and enquiries if any of them will take up cargoes of dates from his estates. The response is generally good, and that part of the produce of the gardens previously earmarked for overseas export, is now sold to these local merchants. The method of sale is as follows:—The dates are sold by the gosara (basket) at the rate prevailing at Basrah, but no cash passes hands, instead the buyers sign documents promising to pay the Shaikh his money, after one, two or three voyages (i.e., years), as the case may be, and only after they have disposed of their return cargoes. These signed documents are deposited with the Shaikh, who recovers his money gradually, and by a method which bears easily on his merchants and keeps his overseas dhow trade alive. Under this method dhow captains on behalf of their principals do the actual trading and with the money which they realise from the sale of the dates they carry, they buy their return cargoes.

In bad trading years as at present return cargoes fetch little, and often merchants have to ask the Shaikh for an extension of the period of repayment. The latter naturally assists more often than not, for his policy is literally to be the "father of his people."

5. Taking therefore the above two systems (paragraph 4 (a) and (b) for dealing with the produce of his date gardens in Iraq, it was clear, the Shaikh pointed out, that he himself would have to find the "Ashur" tax both in the case of:—

(a) Dates and garden produce exported to Kuwait for state purposes.

(b) Dates exported to foreign countries by Kuwait dhow owners.

In the former case, because, according to the letter of the law, the goods would be taxable, he being the owner-exporter of the produce, and in the latter case because the merchants exporters (the dhow owners) would not be paying for the dates till they returned from India, etc., and had disposed of their return cargoes. They would naturally expect the Shaikh to pay the Iraq date-tax on the top of the credit he had given, they promising to pay same back on settlement day.

6. Even if it could be arranged by negotiation with the Iraq Government that the produce sent to Kuwait (for family and state use), paragraph 4 (a), should be exempt from taxation, the Shaikh pointed out that much irritating accounting and checking by officials at both ends would be involved, and he did not see how in any case, he could avoid having to deposit large guarantee sums to the various Iraq officials in control, which would only be released after documents had been received from Kuwait to say that the goods had arrived. The conforming to such cumbersome and irritating methods before he could get the produce of his own gardens to Kuwait was in view of the Shaikh unthinkable, especially as it would lay Kuwait open to the danger of perpetual demands from rapacious junior Iraq officials for largesse, etc.

(Sgd.) H. R. P. DICKSON,
Lieut.-Colonel.
Political Agent, Kuwait.

Dated 21st November, 1931.

DOCUMENT 5.

Translation of a decree No. 66/932 dated 9th May, 1932, issued by the Court of Appeal, Baghdad, for service on Shaikh Ahmad Jabir Al Sabah, Ruler of Kuwait.

Appellor: Shaikh Ahmad Al Jabir Al Sabah (Defendant).
Represented by Lawyer Iskandar Mansur Effendi.

Appellee: Rafiah daughter of 'Ali Pasha Al Zuhair (Plaintiff).
Represented by Lawyer Kamal Effendi Al Sanawi.

The Iraqi Court of Revision, formed of Daud Effendi Samrah, Vice-President, and 'Abdullah Effendi Salam and Antoine Effendi Shammas, Members, empowered to adjudicate in the name of His Majesty the King of Iraq, met in its capacity as a Court of Appeal on 9th May, 1932, and passed the following judgment:—

The Plaintiff submitted a complaint to the Court of First Instance, Basrah, stating that she owns certain shares of a plot of land which is situated at Faddaghiyah, the boundaries of which are known, transferred to her from her father and mother. As the Defendant is opposing her she requests that he should be prohibited from opposing her and that he should pay the (court) fees.

On 30th December, 1931, the court in question issued a judgment in the case No. 77/31 prohibiting the Defendant from opposing the Plaintiff in (the administration of) her 17 shares out of 216 shares, and what has been transferred to her from the 16 shares, belonging to her mother Shafiqah, out of 120 shares of the plot of land under dispute, and compelling him to pay the fees as it has been proved in the Khaqani register that the Plaintiff and her brothers and sisters own 85 shares, and that the Plaintiff's mother owned 27 shares which, at the death of the latter, have been transferred to her heirs including the Plaintiff. It has been proved that the person now administering the land is the Defendant who bases his ownership on an ordinary document of sale. This document cannot be recognised as it includes the sale of immovable property while the seller was not the only guardian of the Plaintiff. Therefore the effect of this sale by her cannot be recognised.



The Defendant appealed against this judgment on the grounds that Lawyer Agob Effendi had attended the hearing in his capacity as the Agent of the Plaintiff at the time when the latter had dismissed him, thus his participation in this case, in accordance with a special (ordinary) power of attorney, is illegal; that he (the Defendant) administered the land for a period exceeding the "period of prescription" provided for in the Indian Law of Limitation which was in force in Basrah, which makes the hearing of the case illegal; that he had bought the shares belonging to the Appellee from her mother Shafiqah, her guardian; and that he administered the land prior to the date of the document of sale, and therefore the non-hearing of his personal (oral) evidence was illegal. Moreover the civil "period of prescription" as well passed this "tasarruf". In case the land is considered as miri land the Land Law should be applied thereto. The sale, which was made in accordance with the power of attorney, was effected with the permission of the Sharia Court. Had the sale been regarded as illegal, a judgment should have been passed to the effect that the money received by the Appellee through her guardian should be refunded. In view of the above the Appellor demanded that the judgment be reversed and the Plaintiff's case rejected, and that the Appellee should pay the court fees etc.

The following is the summary of the written statement in reply: The Indian Law of Limitation does not apply to this case. Moreover the period between the dates of its enforcement and repeal is less than the "period of prescription", and the request made by the Appellor to hear his evidence regarding "tasarruf" and the application of the "period of prescription" is not reasonable as he based his "tasarruf" on an ordinary document of sale which states that the Appellee owns these shares. This confession refutes the "period of prescription." As the sale of miri land effected without the permission of the Mamur of Khagani register is considered illegal, the "tasarruf" of the Appellor is also illegal, and in this case the provisions of the Land Law cannot be applied. As the Appellor did not raise a case in the past demanding that the price should be refunded, he has no right now to claim that price. As regards the sale permission deed, it cannot now be considered as he (the Appellor) did not present it in the Court of First Instance. The independence of one of the guardians in the administration of the property of minors is invalid. In view of the above it is requested that the judgment from which this appeal has been lodged should be approved and that the Appellor be charged to pay the court fees etc.

On the date fixed for the trial, Lawyer Iskandar Mansur Effendi, Agent of the Appellor, and Lawyer Kamal Effendi Al Sanawi, Agent of the Appellee, appeared before the Court and repeated the contents of their written statements respectively. The case having been heard the Court withdrew for discussion. As a result of the examination of the case by the Court of Appeal the important objections raised by the Appellor have been summarised as follows:—

(1) That the hearing of the case was attended by Agob Effendi, as Agent of the Appellee, after withdrawing her power of attorney in his favour.

(2) That under both the Civil and Indian Laws the period of prescription has lapsed in this case.

The first objection is out of the question because Lawyer Agob Effendi attended the hearing in accordance with another power of attorney which was unobjectionable. The lady who made this power of attorney in favour of her Agent did not raise any objection, and at the same time no objection to this was raised in the Court of First Instance.

As regards the second objection, it appears that the administration of this land by the Appellor was based on the sale agreement dated 21st Muharram, 1327. After examination and taking into consideration the date on which the Indian Law of Limitation was repealed, it appears that the "period of prescription" did not elapse. The sanad produced falsifies the allegation made by the Appellor in respect of his "tasarruf" which he demanded to prove by evidence, because the Appellor was allowed possession of this land from the date of the sanad. As regards the civil "period of prescription", it is considered that, although a period of time has passed on the "tasarruf" of the Defendant (Appellor) before the case has been raised, this "period of prescription" is of no value as long as the Appellor has clearly admitted the ownership by the Appellee of the land under dispute. This admission is made in a sale document which states that he (the Appellor) purchased the plot of land under dispute from the guardian of the Appellee. As such sales are not recognised, and as the judgment of the Court prohibiting the Appellor from opposing the Appellee in administering the shares under dispute is correct, the judgment appealed is hereby confirmed and the Appellor is ordered to pay the court fees together with 9 dinars, wages of the lawyer for one sitting, plus I.D. 11/250, wages for drafting the statement in reply. This decision is issued unanimously under Articles 196 and 198 of the Code of Civil Procedure and Article 24 of its Supplement, and declared to both parties in open Court this 9th day of May, 1932.

Certified true copy.

(Signed).....Chief Clerk.

(Seal of the Court of Appeal, Bgd.)

Court Fees.

Appeal fees	...	...	...	I.D. 37/875
Stamps	...	...	...	0/188
Lawyers' wages	...	...	...	9/000
Wages for preparing the statement in reply	...	...	...	11/250

Total ... I.D. 58/313

(Fifty-eight dinars and three hundred and thirteen fils only.)

(Signed).....Chief Clerk.

(Seal of the Court of First Instance, Basra.)

Date across stamp: 25th May, 1932.

DOCUMENT 6.

Memorandum by Judicial Adviser to the High Commissioner, Iraq.
Subjects (1) The Sheikh of Kuwait and the Bashiya Garden land suit.

(2) The possession of the Fadaghiyah garden by the Sheikh of Kuwait.

1. With reference to your letter dated 1st August, 1932, the Prime Minister and the Minister of Justice have both mentioned this matter to me and requested me to furnish all available information. I am therefore in a position to supply you with fuller comments than I would feel justified in doing if I acted only on the terms of Secretary of State letter dated 6th February, 1926.

2. The Prime Minister and the Minister of Justice realise that in your opinion the good name of the Law Courts is involved

(12) Translation copy of a letter from Ministry of Tapu to Ministry of Finance signed by the Prime Minister produced on 4.5.31. (probably 4.7.31).

(13) A letter from Mr. Dobbs dated 14th June, 1915.*

(14) An additional petition by the plaintiff dated 9.7.31.

12. In civil case No. 77 of 1930 of the Basrah Court of First Instance, Rafia bint Ali Pasha Al Zuhair, sued Sheikh Ahmad Jabir Al Sabah (Sheikh of Kuwait). She claimed that she was the owner of one share out of ten of a certain garden in Fadaghiyah. This we know is the Bashiya garden. She alleged that defendant took possession and prevented her from obtaining her share, she set out her title which was based on Sanad Khakani, that this was Miri land and any sale on such Miri land must have a special authority from Mamur of Tapu vide section 36 of Land Law. She claimed an order to prevent interference with her enjoyment.

Note: That the nearest approach to this kind of relief in England Law is for an injunction to restrain etc.

The defence dated 26.10.1930 briefly denied that the Sheikh of Kuwait took the land by force and laid certain preliminary objections which were not important. On 28.1.1931 the main grounds of defence was filed. The defendant first queried the amount of the shares shewn to be in ownership of plaintiff. No point turns on this now and it was not raised in the Court of Appeal. It merely concerns whether the plaintiff inherited one tenth or inherited 17 out of 216 shares. The third ground sets out the case for the defendant namely that his grandfather Sheikh Mubarak Al Sabah bought the shares belonging to Shafiq Khanim and her children Hassan, Bahija, Najiya, Rafia (the plaintiff in the case) and Kamila children of Ali Pasha Al Zuhair for 3033 lira and 30 kurush on behalf of herself as principal and as guardian (wasi) on behalf of the children, as proved by Sanad of sale dated 21st Muharram 1327. The defendant then referred to a condition of sale that if the business of Tafweeth i.e. transfer in Tapu were delayed, that delay would not form any ground to cancel the sale, he then stated that there was a delay in registering due to political matters because the Ottoman Government considered that the Sheikh of Kuwait had bought these lands for the benefit of the British Government (sic) vide letter No. 504 dated 14.6.1915 from Abdul Aziz Effendi el Salim el Badar, agent of defendant and for this reason the Government of Turkey sent a code telegram to Dafterkhana of Tapu Basra not to register.

Note:—I have set out this ground at a length because it contains what is the real reason for the delay in registration.

On 3.2.1931, plaintiff replied to this defence, the important points being the following:—

(a) So far as the minor children were concerned, no permission was given by the Qadhi.

Note:—I mention this because the formalities of the sale by the "Wasi" are given as one of the grounds in the judgment of Court of First Instance Basrah dated 30.12.1931, but this point was not pressed in the Court of Appeal, which decided the case on other points.

(b) Proved that this is Miri land and the sale of Miri land without the permission of Mamur of Tapu was not allowed in 1327 under Article 36 of the Land Law.

(c) That a sale outside Tapu must be registered under section 1 Law of Transfer of Possessions of Immovable Property Act.

The defendant made a rejoinder to this dated 12.2.31 which adds nothing to the matter but on 24.2.31 he filed a petition giving the reasons why the sale was not registered in Tapu. He said

* Document No. 7.

that this was not done because the Turkish Government wanted a declaration that the Sheikh of Kuwait was a Turkish subject whereas he is independent under the protection of Britain. On the 4th of May 1931 (probably an error for 4.7.1931) defendant put in letter from Dafterkhana Istana to Dafterkhana Basra ordering him to do the registration on the lines of the communication from the Prime Minister. He also filed a translation of letter from Prime Minister Mahmud Shawkat Pasha to Ministry of Finance Istana ordering it to carry through the business of Sheikh of Muhammara and that of the Qaimmaqam of Kuwait if they admit that they were Turkish subjects and agree to have this endorsed in the Sanads. During the hearing on 9.7.31 the plaintiff filed an argument in writing which recapitulates the points on which he relies.

13. I have set out at length the points made by plaintiff and defendant because at the rehearing no additional pleadings were filed and the case proceeded on these original proceedings and on the arguments recorded in the "dhabt" i.e. record of the case. You will notice that there does not appear to be raised the matter of limitation on which you have laid so much stress but in fact in the second hearing this point was expressly raised and recorded in the "dhabt" and formed the main grounds of appeal taken in the second appeal.

14. At this stage I will set out the dates of the different decisions. They are:

14.4.31 claim dismissed by Mr. Hooper for lack of prosecution. This is a very ordinary step in a case and I see no reason to comment on the remarks of the defendant's agent to the effect that at that date i.e. before judgment, Mr. Hooper was convinced of the justice of defendant's case and for that reason plaintiff withdrew her power of attorney from her advocate and allowed the case to be dismissed for default. If Mr. Hooper really was unwise enough to shew his intentions before giving final judgment, it is quite understandable why the plaintiff dropped the case but I really have no grounds on which to say that this was the reason why the plaintiff dropped the case. There may be a dozen reasons.

On 6.5.31 the plaintiff applied to continue the case by opposition to the judgment of dismissal. The case was heard on the 7th of July 1931 by the Vice-president and the judgment was given on 15.7.1931, in favour of the defendant i.e. of the Sheikh of Kuwait dismissing the case on the ground that an action must firstly be filed to cancel the deed of sale of the 21st Muharram before any action could be filed based on ownership claiming mana' mu'aradha. So far as the allegation of the Sheikh of Kuwait against the bona fides of the Iraqi judges is concerned, I cannot see that he can complain of this judgment in his favour but I now draw your attention to fact that although Mr. Hooper was known to be leaving Basrah no application was made to me as President Court of Cassation by Mohammed Effendi Wasfi, the Sheikh's advocate, to transfer the case to another court. If the Sheikh's agent had then any reason to suspect an intrigue either with lawyers or with Government officials I find it difficult not to suppose that he would have gone to the British Consul and information brought to me or after I went on leave to Mr. Drower who acted for me.

15. I attach copy of judgment of the Civil Court of First Instance Basrah which I paraphrase as follows: "The defendant relies on a contract of sale which purports to transfer ownership to him. The plaintiff relies on inheritance through the person who made the Sanad of sale. Therefore the plaintiff cannot claim ownership until he has cancelled the sale, she must therefore first file an action to cancel the Sanad. If that succeeds, she may then claim in respect of the share of the estate which she has inherited

as the owner and may then file an action claiming (Mana' mua'radha) i.e. prevent the defendant from interfering with her property". For the benefit of any lawyer who may be consulted I should explain that this is what the Turks call a judgment on a preliminary ground. Such judgments caused much scandalous delay and section 20 of the amended Civil Procedure Regulation was framed to curtail these judgments on preliminary points, but, unfortunately it left it to the discretion of the court and this case is an instance of the trouble which results when a judge does not give judgment on the merits as well as on preliminary objections.

16. Against this judgment an appeal was filed before the Court of Appeal C.A.148 of 1931.

The plaintiff appellant:

- (a) challenged the correctness of the order of dismissal,
- (b) referred to section 36 of the Land Law and the judgment of the Court of Cassation of Constantinople dated 13.1.1931 with reference to the sale made outside Tapu by the Sanad of 21st Muharram 1327 relied on by defendant respondent.
- (c) Urged that the sale of the minor' property without leave of the Qadhi is valid.

The advocate for defendant respondent maintained that the decision was correct and he also claimed that in view of the long possession of this land the Law of limitation applies. I was present at the hearing of this appeal. A fairly complete note was prepared for me and I concurred with the judges. In this judgment the court held that the decision to reject the claim on the single ground that the plaintiff must first file an action to cancel the deed of sale is wrong, in particular as it will appear clear that this deed is null and void as a transfer of property being made outside Tapu vide sec. 1 Immovable Property Act and without permission of the Mamur as required under section 36 of the Land Law and as this transaction was not one merely voidable but is actually null and void, no separate action to cancel it is required before the court can treat it as being non-existent. The case was therefore remitted for re-hearing on its merits. As this decision was given by Turkish trained judges and is framed in language which presupposes that the decision is a technical document for lawyers, the following observations will assist you in realizing what is the theory of Turkish Law regarding unregistered sale of Miri land in areas where the Tapu offices function.

In Turkey there is a difference between transfer of mulk (firagh) and transfer of miri (tafweeth). In Miri lands there is always an ultimate ownership in Govt. which may be resumed and section 36 of the Land Law preserved the right of Government to interfere with the free disposal of such Miri land by insisting that the permission of Ma'mur concerned i.e. the Tapu Ma'mur should be obtained. Further such transfer is legally effected in the Tapu Office only, therefore, unless and until, a transaction affecting Miri land was registered in Tapu and the consent obtained, usually by endorsement of the Mamur Tapu, that transaction was null and void in the year 1327 and in the eyes of the Law did not exist to pass property. The consent of the Mamur Tapu does not appear to be necessary any longer since 1329 but that does not concern the efforts to register this sale.

17. Before going on with the proceedings I will say a word as to why the Tapu Mamur refused to give his consent. The Law of the Ottomans is not in favour of immovable property being held by foreigners. Even in the case of Mulk land e.g. houses and small gardens it is only allowed on condition that the foreigner submitted to the laws and courts of the country and as regards Miri land it was forbidden. The Turkish attitude in this matter throughout

has been that no sale to foreigners will be allowed and the Government Mamur was forbidden to allow this transfer. Under the orders of the Turkish Prime Minister, however, they stretched a point as regards the known attitude of the Sheikhs of Muhammara and Kuwait towards the Turkish State and offered to allow them to register their sales if they admitted that they were Turkish subjects.

18. The Court of Appeal disposed of the first appeal on the 9th of November 1931 and papers went back to Basrah and on the 14th of December the Iraqi Vice-President fixed the 23rd of December for the re-hearing. Since the proceedings in this part of the case have been attacked because no British judge sat, I must point out that Mr. Lloyd was President of the Basrah Court and was in Basrah from 1st of December. All British judges know that they should sit if possible in foreigners cases and I cannot believe that any application was made to Mr. Lloyd to sit in this case and must therefore presume that the advocate Muhammed Wasfi Effendi and Abdul Aziz Effendi Al Salim Al Badar took no steps to draw the attention of the British President to the case. I have read the "dhabt" and it is quite clear that the following points were raised in argument by the Sheikh of Kuwait's advocate.

(a) That in this case limitation ought to run under section 144 schedule 1 the Indian Limitation Act and that the period has elapsed.

(b) If the Indian Limitation Act does not apply, limitation runs under the Law of the country and also has elapsed.

On 30th December 1931 judgment was given in favour of the plaintiff on the following grounds:—

(a) That the sale as shewn by the deed of 21st Muharram 1327 was null and void under section 1 Possession of Land Law.

(b) Section 1674 of the Majelle lays down that in view of the admission of the right of the plaintiff's ancestor no prescription can be pleaded.

NOTE:—This is the important decision as to limitation and will be discussed later on.

(c) That at any event a sale by one "Wasi" will be invalid.

19. On this judgment appeal is made to the Court of Appeal; 2nd appeal No. 66/932. Iskender Mansour Effendi appeared for the Sheikh as appellant. It is alleged that I was deliberately kept in ignorance of this case. Iskender Mansour is an advocate who often comes to Baghdad on appellate work and is quite well aware that he may at any time have access to the President if he wishes to apply to him. He made no effort to secure my presence in the case. The case was heard on the 9th May. There were 5 cases in the list including one concerning a foreigner on which I sat. The parties in the appeal by the Sheikh of Kuwait were described:

Appellant: Al Sheikh Ahmad Al Sabah, Advocate Iskender Effendi Mansour.

Respondent: Rafia bint Ali Zuhair, her advocate Kamal Effendi Al Sinawi.

I note that you apprehend that this omission to inform me that it was a foreigner's case was intentional. In view of the extremely sharp nature of your conjectures I have asked the Minister to hold special enquiry vide my letter to the Minister dated 16.8.32 copy attached. I will only observe that the grounds of appeal filed by Iskender Mansour do not state that the Appellant was the Sheikh of Kuwait nor does the copy of the judgment of the First Instance filed with those grounds state that but the Sheikh is described by the title of His Highness and the advocate's Power of Attorney state that he was the Ruler of Kuwait.

20. The judgment of the Court of Cassation sets out the grounds of appeal fully. They are as follows:—

(a) Limitation in this case should be in accordance with para. 144 Schedule 1 of Indian Limitation Act, that the period under this is 12 years, and that 12 years of actual possession had passed before Basrah Law Repeal Act of 1920 took effect and appellant claims to prove this by proving possession before the sale deed was made.

(b) If Limitation under the Indian Limitation Act is not good then the Appellant has been in possession for the necessary period under the Law of the country and section 20 of the Land Code applies which gives prescription of 10 years.

(c) Appellant has enjoyed this possession by virtue of a legal sale not in opposition to the wishes of the seller. Although the sale by the one "Wasi" yet it was with permission of the Qadhi and if the court cancels sale I ask for the recovery of the price.

The plaintiff respondent took the points already discussed in the Law Court and in particular laid emphasis on section 1674 of the Majelle claiming that once an admission of the right of plaintiff's ancestor had been made a defence of limitation cannot succeed and he also relied on section 1 of the Transfer of Immovable Property Law.

As to Limitation under the Indian Limitation Act the period runs from date of Sanad 13-2-1909 to 30th Sept. 1920 i.e. eleven years seven months and a half.

The defendant appellant submitted a further statement of grounds of appeal of which the important points are:—

(a) The possession exceeded 12 years under the Indian Limitation Act.

(b) That the Qadhi had given valid permission.

(c) That no permission of Mamur Tapu was required.

The judgment of the Court of Cassation holds that:—

(a) In as much as the Sanad of sale stated that possession of the seller continued up to the date of sale, the possession of the buyer for the purpose of Limitation runs from the date of the Sanad i.e. 21st Muharram 1327 and that 12 years has not expired under the Indian Limitation Act before the Basrah Law Repeal Act.

(b) Under the Law of the country the admission of a right to titled entirely prevents a subsequent setting up of Limitation under section 1674 of the Majelle.

(c) The sale deed is null and void.

I have examined the points of limitation under the Majelle i.e. Law of the country, and there is ample authority from the remarks of Ali Haidar the Jurist that if a defendant admits that the origin of his possession has derived from the plaintiff or his ancestor the defendant cannot plead prescription but must prove some other means of acquisition e.g. sale. In this case he tried to prove such sale but as the sale was unregistered he cannot rely on this as a transfer of property; as long ago as 1318 all such transactions outside Tapu were forbidden regarding Mulk and Miri land by Iradah Saniyah.

21. I come now to answer your specific questions:—

(a) *As to limitation*: I have set out the view taken by the Court of Cassation and I see no reason to suppose it is wrong except that the view that possession under the Indian Limitation Act only runs from the date of the Sanad is a point on which I am a little doubtful; There is, however,

much to be said for the view followed by the Court of Cassation that the written admission in the Sanad of sale as to possession commencing with the date of the Sanad is conclusive against the purchaser even though the Sanad itself as a disposition of property is null and void.

A reference to the Sanad shews that it contains admission that the land is under the possession of seller up to the date of the Sanad and will be possessed by the Sheikh of Kuwait.

(b) *As to copy of plaint and defence*: I have already stated that in the re-hearing at Basra separate written pleadings were not filed but that the "dhabt" a court record shews clearly that the point of limitation was argued. I have supplied copies of all the pleadings.

(c) I have explained how I did not come to sit in this case.

(d) See next paragraph.

22. Your question (d) presumably refers to the two gardens Bashiya and Fadaghiyah. I do not see what the Sheikh can do to contest the decision already given as regards the claims of Rafia to 1/10th of the Bashiya garden, but if he wishes to apply for a review the grounds are well known vide section 27 of the Amended Civil Procedure Regulations. Clearly I cannot possibly advise to his chance of success.

As regards the Fadaghiyah garden I remind you of the distinction between this garden and the Bashiya garden; namely, that it appears from the letter of Sir Henry Dobbs dated 14th of June 1915 that a Sanad Khakani has been issued to the Sheikh of Kuwait. If an action is filed as regards the Fadaghiyah garden the following points will certainly arise:—

(a) Is the Sanad Khakani a valid disposition in Tapu?

(b) If Valid so far as the Government is concerned was it made with the consent of the seller or her heirs?

(c) If there were minors with interests in the garden when does the period of prescription cease. I will here observe that Sir Henry Dobbs' letter shews that the entry in the register was made without the consent of the heirs of the sellers.

Under Turkish Law it is possible to file suit to declare void a transaction in Tapu and the point will be taken that it is essential that in such transactions the seller or his agent must be present and admit the sale. As regards prescription for such suit I am unable to say how far prescription may run as the claimant appears to have been a minor at the time of the sale. If a minor the period of minority must be added to the period of prescription which I am informed is 15 years. In answer to your question I can therefore say that it is doubtful whether the Sheikh can successfully contest the claim, assuming the period of prescription is not completed.

23. As regards legislation, this depends on the general conditions surrounding this case. In this matter the Iraq Government stands in the shoes of the Turkish Government. The same objection to foreigners holding Miri land prevails. The Turkish view confirmed by the courts was that this transaction is null and void but the Mamur of Tapu would, on behalf of the Government, allow registration, as the sellers agreed, on condition that the purchaser declare himself to be a Turkish subject. I do not see that any political consideration can possibly destroy the legal results of such failure to register.

The Law as to limitation laid down under section 1674 of the Majelle is peculiar to English ideas but to me it seems logical.

There have been many different decisions as regards necessity or non-necessity of registering land in different parts of Iraq but I am of the opinion that as far as the transactions in land at Basra is concerned section 36 of the Land Law certainly applied as to permission of Mamur Tapu and since the Irada Saniyah of 1318 there have been many decisions insisting that sales must be registered or they have no validity. The first part of section 1 of Law to dispose of Immovable Property 1329 lays this down and applies in Iraq according to many decisions. The Unregistered Sales Confirmation Proclamation 1919 affirms this in its Preamble.

24. Generally I am of the opinion that, even if the omission to inform me of the case, was intentional, the grounds given by the Court of Cassation will be accepted by the Iraq Government as being valid grounds for determining this claim and unless there is some treaty obligation I do not think that the Iraq Government will admit any liability. The argument may be expressed as follows:—

Minor children are not bound until they reach majority. They may take any legal steps to recover what they think is their patrimony. The sale by ancestor of plaintiff is null and void. If there is a legal flaw in the title of the purchaser from their father and mother they may recover the estate even though it has enormously increased in value unless they are time barred. They were not time barred at the date of the Basrah Law Repeal Act and under the Civil Law no prescription can be good as the Sheikh admitted he held his titles from the ancestor of Plaintiff.

I will put the matter in another way. The Sheikh of Kuwait has induced the British Government to guarantee his possession of lands to which he cannot (presumably) establish his legal title.

I draw attention to the following:—

It is in fact clear from the conditions of the deed that he was aware of the necessity of registration and aware that there were difficulties he endeavoured against the express provisions of the Law to ensure that the sale should not be considered null.

25. As to the promise by the British Government, the Iraq Government, so you inform me, don't admit this promise to be binding on the Iraq Government. If there is a dispute between the two Governments, presumably the matter will go to the Hague Court. If the Hague Court holds that this is an international obligation of Iraq, then, the Iraq Government may have to pass a law expropriating those persons who establish their claims in those gardens.

If the Hague Court holds that there is no international obligation on the Iraq Government it seems to me that this becomes a matter between the British Government and the Sheikh of Kuwait and it is for the British Government to decide whether the Sheikh should be compensated.

26. I notice that the Sheikh of Kuwait refuses to employ Mr. Mirza Mohammed. It will be extremely difficult for the High Commissioner to get legal opinion unless some advocate of standing is employed and I am of the opinion that it is advisable to obtain the advice of an experienced local advocate. It may be that the ruling on limitation under the Indian Limitation Act can be attacked and the ruling that article 20 of the Land Code is subject to the overriding provisions of article 1674 of the Majelle may be challenged by the advocate.

27. The Political Resident of the Gulf asked about the claim to be independent of the Law Courts. All I can say is that the

Sheikh of Kuwait can raise the point in the 3 cases filed at Basrah. When a foreign potentate possess land in another country it is easy to believe that the court will not admit that an action affecting immovable property can be excluded from their jurisdiction.

28. The Court gave no order regarding the point raised on appeal that a refund of the purchase price should be claimed. There is nothing to prevent the Sheikh claiming to recover this. No doubt the court did not decide this as it would mean an adjournment for payment of the court fees on the claim.

29. The court did not go into the point whether the second guardian should have joined in the sale. There may be a good deal of substance in the argument that when there are two "Wasis" both must join, failing which a disposition by one can be upset.

30. I cannot recommend any legislation except to alter the application of the Majelle, to possession of land under article 20 of the Land Code.

31. Finally do not let it be supposed that I am in favour of the present Civil Code known as the Majelle nor of the provisions of the Land Code. I have frequently pressed for the revision of both the Majelle and Land Code and you will find my comments in my annual reports especially for 1923, 1924, 1926 and 1931, copies of which should be in your office.

(Sgd.) G. Alexander,
A/G Judicial Adviser,

20th August, 1932.

DOCUMENT 7.

Copy Letter by Sir H. Dobbs, Revenue Commissioner, Basrah, to the Agent of the Sheikh of Koweit, dated 14th June, 1915.

I promised you that I would send you a written reply to the application presented by you on the 16th May, 1915, for the registration in the Tapu Department of the sale to the Sheikh of Koweit of a certain Estate in Fadaghiya. The shares in the Estate were as follows:—

(1) Estate Called Bashiya.		Shares.
Ahmad Pasha ez Zuhair	...	36
Abdul Bagi son of Ali Pasha	...	34
Shafiq mother of Abdul Bagi	}	146
5 daughters		
1 son Hassan		

(2) Estate Comprising 6 holdings and 3 river frontage holdings.

Ayesha wife of Ahmad Pasha ez Zuheir, sole proprietors. In 1326 A.H. (1324 Ottoman Year) Ahmad Pasha acting on his own behalf in regard to the 36 shares in Bashiya and as agent of Abdul Bagi for his 34 shares and also agent for Ayesha for her whole estate, covenanted to sell the shares to the Sheikh of Koweit as follows:—

		Shares.	Piastres.
Ahmad Pasha	36	...	£T 769-12½
Abdul Bagi	34	...	£T 706-62
Ayesha, whole estate	...	...	£T 44217-33

At the same time Shafiq on behalf of herself and 5 daughters and minor son covenanted to sell her 146 shares in Bashiya to the Sheikh for £T 3304-37 piastres. Ahmad Pasha was at that time starting for Constantinople and he received from the Sheikh of Koweit before starting a *hawala* on Bombay for £T 10,000 in part payment. He left a power of attorney with Abdul Wahab Pasha

Kartas, empowering him on behalf of himself and Abdul Bagi and Ayesha to complete the transaction of the sale by Tapu registration and thereon to receive the balance of the purchase money. Thereafter you, as agent for the Sheikh of Koweit and Abdul Wahab as agent for Ahmad Pasha and Abdul Bagi and Ayesha, went before the Mudir of the Tapu to register the sale. But the Mudir of Tapu in an order dated 9 Shabat 1324 refused to register the sale owing to orders received from Constantinople, that no more sales of land in the name of the Sheikh of Koweit were to be registered. After this you and Abdul Wahab went before the British Consul at Basrah and privately registered before him a deed of sale of the Estate—in so far as the holdings of Ahmad Pasha and Ayesha were concerned. Nothing was registered before the British Consul as regards the holdings of Abdul Bagi and Shafiqah and her daughters and minor son. Abdul Wahab received from you the balance of the purchase money viz. £T 38706 and handed the Estate over to the Sheikh of Koweit, in whose name it stands in the Muhasibi registers, though not in the Tapu registers. The Sheikh of Koweit has during the last few years been paying the Miri tax on the Estate to the Ottoman Government, which must be held to have by receipt of the tax, acquiesced in the transfer of the Estate to the Sheikh of Koweit.

Now that Ottoman authority has been removed from Basrah and that the British Military authorities have reopened the Tapu Department the former difficulty about Tapu registration of the sale of the Estate has been removed, and you ask for formal registration. But in the meanwhile Ahmad Pasha ez Zuhair has died in Constantinople, but his death has of course cancelled the first power of attorney given to him by Ayesha and Abdul Bagi and the second power of attorney given by him to Abdul Wahab. Ayesha herself and the heirs of Ahmad Pasha are most of them in Constantinople, and they refused before the War to answer letters sent from Basrah asking them to appoint another agent for the completion of the sale before the Tapu Department. They have an agent in Basrah Ahmad ez Sani, but he holds authority only to arrange about the produce of their lands in Basrah and about the payment of taxes to Government and not for such matters as the registration of a deed of sale. The position is accordingly this. Under the Tapu Law the sale of land cannot be registered and finally validated unless the owner and the buyer appear before the Tapu Department in person or by authorised agent and testify to the fact of the sale and to the giving and receipt of the purchase money. The present owners of the shares of Ahmad Pasha and Ayesha cannot now themselves appear before the Tapu and have failed to appoint an authorised agent for the purpose. Nor is there any prospect of their intentions being discovered before the end of the War. But the Tapu Department has satisfied itself by an inspection of the papers signed before the British Consul at Basrah that there was a formal sale and delivery of the shares of Ahmad Pasha and Ayesha in the Estate and that the sale for those shares was paid; and in the peculiar circumstances this would justify the Tapu Department in granting a Tapu Sanad in respect of the sale of these shares.

There remains the question of the shares of Abdul Bagi and Shafiqah and of her five daughters and minor son. If these persons are now prepared to appear before the Tapu in person or by authorised agent and testify to the sale of their shares, you should call upon them to do so. The whole transaction can then be completed and Tapu Sanads granted for the whole portion of land in question.

Usual ending.

(Sgd.) H. Dobbs,
Revenue Commissioner, Basrah.

OPINION OF THE LAW OFFICERS OF THE CROWN

1. In our opinion if His Majesty's Government themselves, while in control of the Government of Iraq, had imposed the Istihlak Tax on the produce of the date gardens of either of the Sheikhs, it would have been a breach of the undertakings given in November, 1914. On this basis, we think that an obligation rests on His Majesty's Government to compensate the Sheikhs for the imposition of the tax by the present Government of Iraq.

2. Yes.

3. We think that the test is whether the then Sheikh of Koweit was, at the date of the undertaking, *de facto* in possession of the portions of the gardens affected by the judgment. We are of opinion that it is not material to consider either of the two alternatives.

4. We have nothing to add.

(Sgd.) T. W. H. INSKIP.

(Sgd.) F. B. MERRIMAN.

Law Officers' Department,

29th March, 1933.



1933

THE DATE GARDENS IN IRAQ
OF THE SHEIKHS OF KOWEIT
AND MOHAMMERAH

SCOPE OF UNDERTAKINGS GIVEN
BY H.M. GOVERNMENT IN 1914

CASE FOR THE OPINION OF THE
LAW OFFICERS OF THE CROWN
and Opinion thereon dated
29th March 1933



1934

THIS DOCUMENT IS THE PROPERTY OF HIS BRITANNIC MAJESTY'S GOVERNMENT

Printed for the use of the Foreign Office

CONFIDENTIAL

(14697)

REPORTS BY THE
LAW OFFICERS OF THE CROWN, &c.

1934



1934

(ii)

LIST OF REPORTS

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 1^A, &c.

GENERAL.

No.		Date.	SUBJECT.	Page.
1 ^A	Law Officers... [Board of Trade]	Apr. 6, 1934	Reservation to British vessels of trade between ports in the United Kingdom and inter-Colonial and inter-Imperial trade, and meaning of the expression "Coasting Trade"	1

IRAQ.

1	Law Officers...	Jan. 23, 1934	Date gardens in Iraq of Sheikhs of Koweit and Mohammerah	21
---	-----------------	---------------	---	----

NETHERLANDS.

2	Law Officers...	Jan. 30, 1934	Anglo-Netherlands Treaty of 1824: Interpretation of articles 2 and 3	27
---	-----------------	---------------	---	----

PERSIA.

3	Law Officers...	July 31, 1934	Bahrein: Persia's rights of sovereignty or suzerainty	35
---	-----------------	---------------	--	----

(iii)

ALPHABETICAL INDEX

(NAMES AND SUBJECTS)

1934

The figures refer to the numbers of the pages.

Cases cited are indicated by italics.

ACT—ISL.

A.

Act—*See* Navigation Acts.
Arbitration—Possible submission to, of Iraqi Government's obligation to implement assurances given by His Majesty's Government to Sheikhs of Koweit and Mohammerah, 21–24.

B.

Bahrein—Persia's claim to sovereignty, 35–102.
Historical memorandum, 41–86.

C.

Cabotage—Meaning of, 6–7.
Coasting Trade—Meaning of expression, 2–3, 5–7, 9–10, 12.
Reservation to British vessels of trade between ports of the United Kingdom and of inter-Colonial and inter-Imperial trade, 2–12.
Situation in foreign countries having overseas dependencies, 12–17.
Dominions, existing law and contractual obligations, 19–20.
Commerce—*See* Trade.

D.

Duties—On goods on the criterion of origin, as opposed to flag and nationality; position under Anglo-Netherlands Treaty of 1824, 27–34.
Imposition in Malay States and India; position as regards Dutch goods, 27–34.

I.

Immunity—Of foreign sovereign from process in a foreign State; exception as regards ownership of land, 22–24.
Importation—*See* Duties.
Iraq—Date gardens of Sheikhs of Koweit and Mohammerah; Iraqi Government's obligation to implement assurances of His Majesty's Government, 21–24.
Islands—Bahrein, Persian claim to sovereignty, 35–102.

8008 [11921]

JUR—PRO.

J.

Jurisdiction—General immunity of a foreign sovereign from process in a foreign State; exception as regards ownership of land, 22–24.

K.

Koweit, Sheikh of—Date gardens in Iraq, 21–24.
International status of, 22–24.

L.

Land—Ownership within territory of foreign State forming exception from general immunity from process of a foreign sovereign, 23–24.

M.

Malay States—Applicability of Anglo-Netherlands Treaty of 1824 to, 31–34.
Imposition of tariffs by rulers; position of His Majesty's Government under Anglo-Netherlands Treaty of 1824, 32–34.
Mohammerah, Sheikh of—Date gardens in Iraq, 21–24.
Most-favoured-nation clause—Extension to treatment to which most favoured nation is entitled, whether actually claimed or not, 9, 11.

N.

Navigation Acts—Restrictions on coasting and colonial trade, 2, 7.
Restriction of colonial trade to national vessels, 28.

O.

Origin—Meaning of, as applied to goods, 27.
Dutch claim that Anglo-Netherlands Treaty of 1824 prevents discrimination between goods of British and Dutch origin, 27–34.

P.

Possession—Word does not include protectorates and protected States, 31.
Protected States—Not included in term "colony or possession," 31.
Protectorates—Not included in term "colony or possession," 31.

a



1934

(iv)

SHI—TRA.

S.

Shipping—Restriction of colonial trade to national vessels, 2-12, 28.
See also Coasting Trade.

Sovereignty—Persia's claim to sovereignty over Bahrein, 35-102.

Basing of claim by a Power to territory on basis of absence of consent to that territory's earlier detachment, 36, 38, 94-95.

T.

Tariffs—See Duties.

Taxation—Date gardens in Iraq of Sheikhs of Koweit and Mohammerah, 21-24.
See also Duties.

Territory—Claim of Power to sovereignty over territory on basis of absence of consent to that territory's earlier detachment, 36, 38, 94-95.

Trade—See also Coasting Trade.

Reservation to British vessels of inter-Colonial and inter-Imperial trade, 2-12.
Policy of His Majesty's Government as regards relaxation of restrictions on colonial trade, 28.

TRE—VES.

Treaty—See also Most-favoured-nation clause.
Interpretation of treaties by subsequent diplomatic correspondence, 30.

Treaties not applicable to protectorates or protected States under expression "colony or possession," 31.

Navigation articles of commercial treaties; exclusion of carrying trade between ports of either contracting party, 2-5, 8-9.

United Kingdom treaties which do not include coasting trade exception, 8, 11.
Great Britain and Iraq, 1922 and 1930, international obligations assumed by Iraqi Government, 21-26.

Anglo-Netherlands Treaty of 1824; interpretation of articles 2 and 3, 27-34.
Ditto; applicability to Malay States, 31-34.

V.

Vessels—See Coasting Trade.
See Shipping.

Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.: 1934

GENERAL.

[W 3740/291/50/1934]

No. 1^A.

[Board of Trade.]

[April 6, 1934.]

Case for the Opinion of the Law Officers of the Crown.

THE following documents are sent herewith :—

- (1) Annex I.—Coasting Trade : Summary of General Situation in Foreign Countries having Overseas Dependencies.
- (2) Annex II.—Coasting Trade : Existing Treaty Provisions of United Kingdom Treaties and Agreements with Countries having Overseas Dependencies.
- (3) Annex III.—Coasting Trade in the Dominions.
- (4) Annex IV.—Second General Conference on Communications and Transit, 1923. [W 2758/291/50/1934]

1. Among the possible remedies for the present situation of British shipping, consideration is being given by His Majesty's Government to the possibility and desirability of reserving to British ships—

- (a) Trade between ports of the United Kingdom, hereinafter referred to as United Kingdom trade.
- (b) Trade specified in (a), and trade between ports of the United Kingdom and ports of the Colonies and between ports of the Colonies, hereinafter referred to as inter-colonial trade.
- (c) Trade specified in (a) and (b), and trade between ports of the United Kingdom and ports of the Dominions, between ports of the Colonies and ports of the Dominions and between ports of the Dominions, hereinafter referred to as inter-Imperial trade.

Trade between or with protectorates, protected States and mandated territories (all of which are technically foreign countries), has been excluded from the purview of this case.

2. The question as to which the Law Officers' opinion is desired relates to the compatibility of the suggested action with the treaty obligations of His Majesty's Government, and it seems necessary to set out the situation in some detail.

3. Until about a century ago it was the common practice of maritime nations to reserve the trade between any ports in their dominions to national vessels. Further, the so-called "colonial trade" was frequently reserved to national

8008 [11921]

B

Reserva-
tion to
British
vessels of
trade
between
ports in
the United
Kingdom
and Inter-
Colonial
and Inter-
Imperial
trade, and
meaning
of the
expression
"Coasting
Trade."



vessels. The position so far as the United Kingdom was concerned is thus described in Pulling's *The Shipping Code*:—

"Under the form the Navigation Acts had assumed in 1847, no produce of Asia, Africa or America could be imported for consumption in the United Kingdom from Europe in *any* ships, the object being that the trade should be direct and in British bottoms. The whole of the coasting trade of the United Kingdom was restricted to British ships, and the colonial trade was prohibited to all foreign ships unless under the sanction of a special Order in Council. Various restrictions were imposed on imports except in British ships. Differential dues and restrictions on importations could be imposed by Order in Council on the ships of any foreign country which imposed similar restrictions on British trade. It is to be observed that, with the exception of restrictions on exportation from this country to certain British possessions, the prohibitions of the Navigation Acts were entirely restricted to imports. This necessarily followed from certain important trading Powers having anticipated Great Britain in the enactment of navigation laws, their refusal to receive our goods except in their own ships preventing the possibility of the British Parliament effectually restricting exportation in this direction."

4. This being the position, the commercial treaties concluded during this period naturally did not confer on the ships of other parties the right to carry goods between ports in the British Empire. The articles dealing with navigation in such treaties frequently gave only the right to carry goods between the territories of the two contracting parties, and it was the common practice to exclude from the operation of the treaty the carrying trade between ports in the dominions of either contracting party. As an example may be quoted the Treaty of Commerce and Navigation with Portugal of the 3rd July, 1842:—

"Article VIII (2).—In like manner, Portuguese ships shall be allowed to proceed direct from any port of Her Most Faithful Majesty's Dominions to any Colony of Her Britannic Majesty"

"Article IX (2).—In like manner, Portuguese ships shall be allowed to export from any Colony of Her Britannic Majesty to any place not under the dominion of Her said Majesty, any goods not generally prohibited"

"Article X.—It is hereby declared that the stipulations of the present treaty are not to be understood as applying to the navigation and carrying trade between one port and another situated in the dominions of either contracting party, if such navigation and trade should in those dominions be reserved by law exclusively to national vessels"

Similarly, Article X of the Treaty with Austria of the 3rd July, 1838, provided as follows:—

"Article X.—The present treaty does not include the navigation and carrying trade between one port and another, situated in the dominions of one contracting party, by the vessels of the other, as far as regards the carrying of passengers, commodities, and articles of commerce; this navigation and transport being reserved to national vessels."

5. Such Orders in Council as were made under the Navigation Acts for the purpose of allowing foreign ships to take part in the colonial trade appear to have given only the right to carry goods between the territory of the other party and ports in British Colonies.

6. It will be seen, therefore, that under the régime of the Navigation Acts there was no question of the ships of any foreign country possessing a treaty right to carry goods between two or more British ports, wherever situated.

7. The Navigation Acts were repealed in 1849 (12 and 13 Vict., c. 29) subject to a reservation of the coasting trade. What was intended by the phrase "coasting trade" in this connexion is shown by the following extracts from an Act of 1853 (16 and 17 Vict., c. 107):—

"CLII.—No goods or passengers shall be carried *coastwise* from one part of the United Kingdom to another, except in *British* ships.

"CLXIII.—No goods or passengers shall be carried from one part of any *British Possessions* in *Asia, Africa* or *America* to another part of the same *Possession* except in *British* ships.

"CCCXXVIII.— . . . or if the Legislatures of any two or more *Possessions*, which for the purposes of this Act Her Majesty in Council shall declare to be neighbouring *Possessions*, shall present addresses or a joint address to Her Majesty, praying Her Majesty to place the trade between them on the footing of a *coasting trade*, or of otherwise regulating the same, so far as relates to the vessels in which it is to be carried on, it shall thereupon be lawful for Her Majesty, by Order in Council, so to authorise the conveyance of such goods or passengers, or so to regulate the trade between such neighbouring *Possessions*, as the case may be, on such terms and under such conditions as to Her Majesty may seem good."

8. Since the repeal of the Navigation Acts maritime nations have generally abandoned the policy of reserving to national ships the trade between any ports in their dominions. The navigation articles of modern commercial treaties normally give the ships of the other party the right to participate in such trade, subject to a right to reserve the coasting trade to national vessels. This is the case with regard to a large number of treaties concluded by the United Kingdom, and it is the existence of these treaties which necessitates the present reference to the Law Officers. The question of the meaning to be attached in modern conditions to the phrase "coasting trade" in these treaties is the main question which arises in the present case. In the case of the United Kingdom, however, not only has the trade between the mother country and the colonies been open to foreign shipping since the repeal in 1849 of the Navigation Acts, but the coasting trade of the United Kingdom itself has been similarly open since 1854 (17 and 18 Vict., c. 5), and, consequently, there has been no need to decide to what extent the trades in question could, under our commercial treaties, be closed to foreign shipping as being coasting trade.

9. The so-called "Navigation Articles" of existing treaties with many foreign countries prescribe national treatment in practically every respect for ships of the high contracting parties (which are defined, in the case of British ships, so as to cover ships registered in any part of the Empire, and not merely in the United Kingdom), *i.e.*, treatment on the same footing as ships of the other contracting country, together with a supplementary provision for most-favoured-nation treatment. Provision is also made against "flag discrimination," *i.e.*, the differential treatment of goods in respect of customs duties, &c., according to the flag of the vessel by which they are imported. Typical examples of such "Navigation Articles," taken from the Anglo-German Commercial Treaty of 1924, read as follows:—

Article 1.—"There shall be between the territories of the two contracting parties reciprocal freedom of commerce and navigation. The subjects or citizens of each of the two contracting parties shall have liberty freely to come, with their ships and cargoes, to all places and ports in the territories of the other to which subjects or citizens of that contracting party are or may be permitted to come, and shall enjoy the same rights, privileges, liberties, favours, immunities and exemptions in matters of commerce and navigation as are or may be enjoyed by subjects or citizens of that contracting party."

Article 3.—"The two contracting parties agree that in all matters relating to commerce, navigation and industry, any privilege, favour or immunity which either of the two contracting parties has actually granted or may hereafter grant to the ships and subjects or citizens of any other foreign country shall be extended simultaneously and unconditionally, without request and without compensation, to the ships and subjects or citizens of the other, it being their intention that the commerce, navigation and industry of each of the two contracting parties shall be placed in all respects on the footing of the most favoured nation."

Article 18.—"Each of the two contracting parties shall permit the importation or exportation of all merchandise which may be legally imported or exported, and also the carriage of passengers from or to their respective territories, upon the vessels of the other; and such vessels, their cargoes and passengers shall enjoy the same privileges as, and shall not be subjected to any other or higher duties or charges than, national vessels and their cargoes and passengers or the vessels of any other foreign country and their cargoes and passengers"

Article 19.—"In all that concerns the stationing, loading and unloading of vessels in the ports, docks, roadsteads and harbours of the territories of the two contracting parties, no privilege or facility shall be granted by either party to vessels of any other foreign country or to national vessels which is not equally granted to vessels of the other party from whatsoever place they may arrive and whatever may be their place of destination."

Article 20.—"In regard to duties of tonnage, harbour, pilotage, light-house, quarantine or other analogous duties or charges of whatever denomination levied in the name or for the profit of the Government, public functionaries, private individuals, corporations or establishments of any kind, the vessels of each of the two contracting parties shall enjoy in the ports of the territories of the other treatment at least as favourable as that accorded to national vessels or the vessels of any other foreign country."

At the same time, the German treaty, in common with all our other treaties containing analogous provisions (with the exceptions noted in paragraph 17 below), contains a clause excepting *the coasting trade* from the provisions of the treaty, or at least from the provisions regarding "national" treatment of shipping. This excepting clause appears in the Anglo-German Treaty in the following form:—

Article 21.—"The provisions of this treaty relating to the mutual concession of national treatment in matters of navigation do not apply to the coasting trade, in respect of which the subjects or citizens and vessels of each of the contracting parties shall enjoy most-favoured-nation treatment in the territories of the other, provided that reciprocity be assured."

Of the articles of the treaty with Germany quoted above, article 18 appears to be the most relevant to the question under consideration. Under this article it would not be possible to prevent a German ship from landing in the port of Liverpool a cargo brought from (a) Glasgow, (b) Ceylon or (c) Canada, unless trade between Liverpool and (a), (b) and (c) respectively is covered by the words "coasting trade" in article 21.

10. The general situation as regards the admission of British ships to, or their exclusion from, the trade between the ports of foreign countries with Overseas Possessions is summarised in Annex I to this case. In Annex II counsel will find a note of the existing provisions of United Kingdom treaties and agreements with foreign countries having overseas possessions.

11. The situation as regards the exclusion by other countries with overseas possessions of foreign ships from trade between different parts of their dominions, and the treaty position of His Majesty's Government in relation thereto, may be further summarised as follows: The only cases where trade between the component parts of the whole of a considerable colonial empire is reserved to national ships are the United States (though, as regards the Philippine Islands and the Virgin Islands, the law reserving the trade has not yet been put into operation) and (theoretically at any rate) Portugal. In the case of the *United States*, His Majesty's Government possess no relevant treaty rights, and therefore the question whether trade with America's overseas possessions can, for treaty purposes be regarded as coasting trade, does not, so far as His Majesty's Government is concerned, arise, but Her Majesty's Government protested (unsuccessfully) in 1898 against the idea that trade between United States ports and those of Porto Rico, the Philippine Islands and the Hawaiian Islands could properly be declared to be coasting trade, on the ground that such a measure "would go far beyond anything which has hitherto been regarded as coasting trade." In the case of *Portugal*, the exception in article 12 of the 1914 treaty refers not to coasting trade but to "the trade between any ports within the territories of either party"; accordingly, there can be no doubt as to Portugal's right under the treaty to reserve such trade to national vessels, and the question whether it can properly be regarded as "coasting trade" does not arise so far as His Majesty's Government is concerned. In the case of *Japan*, where His Majesty's Government enjoy national treatment, subject to the exception of the coasting trade, the trade between Japan proper and Korea, Formosa, Kwantung and Sakhalin, and also with Japanese mandated islands in the Pacific, is regarded as coasting trade and closed to foreign vessels. Korea, Formosa and Sakhalin are not regarded under Japanese law

as an integral part of Japan, but rather as overseas possessions, and Kwantung is a territory held under lease from China. Geographically, however, all these territories are situated generally in the same area. In the case of *France*, where the rights of British shipping are subject to the exception of the coasting trade, the only trade with overseas possessions which appears to be reserved is that with Algeria (which is in law an integral part of France), and in that case His Majesty's Government agreed specifically that this step should not be regarded as precluded by their treaty. In the case of *Spain*, where His Majesty's Government enjoy national treatment in matters of navigation subject to the exception of the coasting trade, the trade between Spain, the Spanish North and North-West African possessions, and the Balearic and Canary Islands (as well as certain foreign ports⁽¹⁾), is reserved, but not that between Spain and the other Spanish colonial possessions. Of these possessions, the Balearic and Canary Islands, and Ceuta and Melilla in North Africa, but not the others, are apparently regarded as forming part of the territorial entity known as Spain.

In these circumstances, it may be said that the extent to which His Majesty's Government can be regarded as having acquiesced in trade with overseas possessions being regarded as coasting trade is distinctly limited, and confined to cases where geographical considerations could be adduced in support of such a measure.

12. The most important instance of the reservation to national vessels of trade with overseas possessions being those of the United States of America and Portugal, it may be convenient to state the treaty position in regard to those two countries of States other than the United Kingdom, so far as it has been possible to ascertain it.

The following countries appear to have national treatment in the United States, except as regards coasting trade:—

Colombia (1846).	Germany (1923).
Denmark (1826).	Italy (1871).
Estonia (1925).	Turkey (1929).

In each of these treaties, except that with Italy, the provision excepting the coasting trade contains an additional phrase to the effect that the coasting trade is to be regulated according to the laws of the respective high contracting parties. In the case of the treaties with Estonia, Germany and Turkey, at any rate, which were concluded after the enactment of all the existing United States legislation defining the coasting trade, this phrase would apparently preclude any complaint against the definition of the coasting trade contained in American law as it stood at the time when the treaty was concluded.

In the case of Portugal, the provision in the treaty with the United Kingdom containing the exception as regards trade between any ports in the Portuguese dominions does not appear in the treaties with other countries.

The shipping provisions grant general most-favoured-nation rights, or in two or three treaties a provision is included to the effect that (Estonian) shipping in Portugal and the adjacent islands is granted a reduction of 25 per cent. on the shipping dues and is granted most-favoured-nation treatment in the Portuguese colonies.

13. When the question of closing inter-Imperial trade to foreign vessels was discussed at the Colonial Conference of 1907 it was made clear that His Majesty's Government were not prepared to take such action, viewing the proposal on its merits and apart from the complications introduced by treaty engagements or the limitation of legislative power. Mr. Lloyd George (then President of the Board of Trade) stated in one passage: "Apart altogether from the question of reservation, it is clear that the assimilation of our world-wide 'inter-Imperial trade' to mere coasting trade could not be effected without a considerable departure, not only from our own long-established practice, but also from the practice of other nations, except perhaps Russia and the United States. The term 'coasting voyage' used in its natural sense implies a voyage from one port to another in the same country without the vessel touching, for purposes of trade, at any intermediate port not belonging to that country, and if this definition be

⁽¹⁾ Spain's claim to include trade with ports in Portugal and with Gibraltar as Spanish coasting trade is unique, though it does not seem to have been challenged under commercial treaty rights.



accepted as accurate there would seem to be grave difficulties in the way of the extension of regulations affecting such voyages to long overseas voyages involving in many cases calls at intermediate ports."

14. Finally, in this connexion reference must be made to the Conference on Communications and Transit held under the auspices of the League of Nations at Geneva in November and December 1923, at which maritime coasting trade was one of the subjects discussed. An attempt was made to secure agreement upon a definition of the term "maritime coasting trade," and the Japanese delegation proposed that, if maritime coasting trade were not defined by the conference the following article should be incorporated in the Statute on the International Régime of Maritime Ports:—

"The transport of passengers or goods between two ports placed under the sovereignty or authority of the same State which is effected across the ocean and which may in practice be assimilated to ocean navigation, shall not be regarded as maritime coasting trade within the meaning of the present statute."

This proposition was not accepted. The French representative stated—

"It will be very difficult for certain States represented at the conference to sign the convention if a definition is adopted which changes the meaning of the term 'coasting trade' as it is understood in the various countries."

As will be seen from Annex IV, the conference was unable in this connexion to do more than recommend that all States, including those which are not members of the League of Nations, should refrain from an abusive extension of the scope of "maritime coasting trade."

15. It has not been possible to discover in textbooks on international law much material as to the question of the meaning of the term "coasting trade" in commercial treaties. It was, however, dealt with at some length in *Oppenheim on International Law* (Third Edition), paragraph 579 (Volume I, pp. 745 to 749). This paragraph, which is based on an article by the same author in the *Law Quarterly Review*, XXIV (1908), pp. 328 to 334, is as follows:—

"579. The meaning of the term coasting trade in commercial treaties must not be confounded with its meaning in international law generally. The meaning of the term in international law becomes apparent through its synonym *cabotage*—that is, navigation from cape to cape along the coast combined with trading between the ports of the coast concerned, without going out into the open sea. Therefore, trade between Marseilles and Nice, between Calais and Havre, between London and Liverpool, and between Dublin and Belfast is coasting trade, but trade between Marseilles and Havre and between London and Dublin is not. It is a universally recognised rule of international law that every littoral State can exclude foreign merchantmen from the *cabotage* within its maritime belt. *Cabotage* is the contrast to the overseas carrying trade, and has nothing to do with the question of free trade from or to a port on the coast to or from a port abroad. This question is one of commercial policy, and international law does not prevent a State from restricting to vessels of its subjects the export or the import to its ports, or from allowing such export or import under certain conditions only.

"There is no doubt that originally the meaning of coasting trade in commercial treaties was identical with its meaning in international law generally, but there is likewise no doubt that the practice of the States gives now a much more extended meaning to the term coasting trade, as used in commercial treaties. Thus France distinguishes between *cabotage petit* and *grand*; whereas *petit cabotage* is coasting trade between ports in the same sea, *grand cabotage* is coasting trade between a French port situated in the Atlantic Ocean and a French port situated in the Mediterranean, and—according to a statute of 21st September, 1793—both *grand* and *petit cabotage* are exclusively reserved for French vessels. Thus, further, the United States of America has always considered trade between one of her ports in the Atlantic Ocean and one in the Pacific to be coasting trade, and has exclusively reserved it for vessels of her own subjects; she considered such trade to be coasting trade, even when, before the Panamá Canal was built, the carriage

took place, not exclusively by sea around Cape Horn, but partly by sea and partly by land across the Isthmus of Panamá. Great Britain has taken up a similar attitude. Section 2 of the Navigation Act of 1849 (12 & 13 Vict., c. 29) enacted that 'no goods or passengers shall be carried *coastwise* from one part of the United Kingdom to another, or from the Isle of Man to the United Kingdom, except in British ships,' and thereby declared trade between a port of England or Scotland to a port of Ireland or the Isle of Man to be coasting trade exclusively reserved for British ships, in spite of the fact that the open sea flows between these ports. And although the Navigation Act of 1849 is no longer in force, and this country now does admit foreign ships to its coasting trade, it, nevertheless, still considers all trade between one port of the United Kingdom and another to be coasting trade, as becomes apparent from Section 140 of the Customs Consolidation Act of 24th July, 1876 (39 & 40 Vict., c. 36). Again, Germany declared by a statute of the 22nd May, 1881, coasting trade to be trade between any two German ports, and reserved it for German vessels, although vessels of such States could be admitted as, on their part, admitted German vessels to their own coasting trade. Thus trade between Königsberg in the Baltic and Hamburg in the North Sea is coasting trade.

"These instances are sufficient to demonstrate that an extension of the original meaning of coasting trade has really taken place, and has found general recognition. A great many commercial treaties have been concluded between such countries as established that extension of meaning and others, and these commercial treaties no doubt make use of the term coasting trade in this its extended meaning. It must, therefore, be maintained that the term coasting trade or *cabotage* as used in commercial treaties has acquired the following meaning: 'Sea trade between any two ports of the same country, whether on the same coast or different coasts, provided always that the different coasts are all of them the coasts of one and the same country as a political and geographical unit, in contradistinction to the coasts of colonies or dominions of such country.'

"In spite of this established extension of the term coasting trade, it did not include colonial trade until nearly the end of the 19th century. Indeed, when Russia, by ukase of 1897, enacted that trade between any of her ports should be considered coasting trade, and be reserved for Russian vessels, this did not comprise a further extension of the conception of coasting trade. The reason was that Russia, although her territory extended over different parts of the globe, was a political and geographical unit, and there was one stretch of territory only between St. Petersburg and Vladivostok. But when, in 1898 and 1899, the United States of America declared trade between any of her ports and those of Porto Rico, the Philippines, and the Hawaiian Islands to be coasting trade, and consequently reserved it exclusively for American vessels, the distinction between coasting trade and overseas or colonial trade fell to the ground. It is submitted that this American extension of the conception of coasting trade, as used in her commercial treaties before 1898, is inadmissible, and contains a violation of the treaty rights of the other contracting parties. Should these parties consent to the American extension of the meaning of coasting trade, and should other countries follow the American lead, and apply the term coasting trade indiscriminately to trade along their coasts and to their colonial trade, the meaning of the term would then become 'trade between any two ports which are under the sovereignty of the same State.' The distinction between coasting trade and colonial trade would then become void, and the last trace of the synonymity between coasting trade and *cabotage* would have disappeared."

16. It may be added that while in the law of the United Kingdom there has been no attempt to extend further the meaning of "coasting trade," by section 8, sub-section (5), of the Pilotage Act, 1913, it is provided that "for the purposes of this section a ship which habitually trades to or from any port or ports outside the British Islands shall not be deemed to be trading coastwise."

17. So far the case has proceeded on the basis that the coasting trade is excepted from the navigation articles of the commercial treaties concluded by His Majesty's Government. There are, however, certain treaties which do not contain

the coasting trade exceptions, and it may be, therefore, that the countries concerned have a treaty right to engage even in the United Kingdom trade.

These treaties are—

- (1) The Anglo-Persian Agreement of 1920, article 4 of which reads—

“The rights of most-favoured-nation treatment mutually enjoyed under the Convention by the subjects and commerce of the two contracting States is to be understood as extending to the treatment of ships and boats belonging to such States, which shall, moreover, continue to enjoy equal treatment with national ships and boats in all matters relating to trade and navigation, including port and harbour facilities and charges of all kinds.”

It will be seen that these very explicit provisions are not made subject to any exception for the coasting trade.

- (2) The Anglo-Austrian Treaty of 1924 (articles 1 and 17); and
(3) The Anglo-Hungarian Treaty of 1926 (articles 1 and 12).

The above-mentioned articles of the Austrian and Hungarian treaties are identical with articles 1 and 18 respectively of the Anglo-German treaties already quoted. Neither the Austrian nor the Hungarian treaty, however, contains an exception in respect of the coasting trade.

18. In addition to the above treaty instruments with Austria, Hungary and Persia, attention should, perhaps, be drawn to the exchange of notes—18th/20th September, 1904—with Italy (see *Handbook of Commercial Treaties*, 1931, pp. 377 to 378). By these notes the Italian Government gave an assurance that the *status quo* under which the British flag is admitted to the coasting trade of Italy will be prolonged *sine die*. The notes contemplated reciprocal treatment for Italian ships in the United Kingdom. While, on the one hand, it may be argued that the notes do not place any obligation on this country to keep the coasting trade open, it seems possible to contend that so long as the notes are in existence Italy may claim a right to participate in the coasting trade of the United Kingdom.

19. If Austria, Hungary and Persia, and possibly Italy, or any one of them, can claim national treatment in respect of the coasting trade of the United Kingdom, then the claims of other States under a most-favoured-nation clause have to be considered.

Article 15 of the Commercial Treaty of 1922 with Spain provides—

“The provision of this treaty relating to mutual concessions of national treatment in matters of navigation do not apply to the coasting trade, in respect of which the subjects and vessels of the contracting parties shall enjoy most-favoured-nation treatment.”

Similar provisions appear in the treaties with Estonia, Finland, Latvia, Nicaragua, Roumania, and Siam, and also subject to a proviso regarding reciprocity in the treaties with Germany, Greece and Yugoslavia. The treaty of the 3rd April, 1911, with Japan, as revised by the Supplementary Convention of the 30th July, 1925, provides that “the coasting trade is excepted from the provision of the present treaty, and shall be regulated according to their respective laws. It is, however, understood that the subjects and vessels of either high contracting party shall enjoy in this respect most-favoured-nation treatment in the territories of the other, but this benefit will be claimed only under the condition of reciprocity in the event of such condition being required by the laws of either party, or by the terms of an arrangement with a third party by which special concessions in that respect may be granted to that third party.”

The exchanges of notes with Albania (10th June, 1925), Bulgaria (12th November, 1925) and Lithuania (6th May, 1922) provide that vessels of these various countries shall enjoy in the ports, rivers and territorial waters of the United Kingdom treatment not less favourable than that favoured to British vessels or vessels of the most-favoured-nation country, subject, however, to the right of His Britannic Majesty's Government to reserve the coasting trade to British vessels. The treaty with Poland of the 26th November, 1923, contains in article 4 a similar provision. The general most-favoured-nation article in the treaties with the Argentine Republic of 1925 (article 2) and with Venezuela of 1925 (article 2) would cover coasting trade. Article 7 of the treaty of 1848 with

Liberia (conditional form of most-favoured-nation treatment) probably also covers coasting trade. It will be seen, therefore, that the right to most-favoured-nation treatment as regards the coasting trade in the United Kingdom depends on the interpretation to be given to the varying terms of the provisions in the treaty instruments, but it seems possible to say that if it is held that any country can claim national treatment in this respect there are other countries which can definitely lay claim to such treatment by virtue of the most-favoured-nation rights.

20. So far as Persia, Austria and Hungary are concerned, they have never exercised the right to national treatment so far as the coasting trade of the United Kingdom is concerned, and the question arises whether national treatment must be claimed or enjoyed in actual practice before another State entitled to most-favoured-nation treatment can claim that right. In March 1906 the Board of Trade submitted a case for the opinion of the Law Officers of the Crown and Mr. Rowlatt, in which (*inter alia*) they were asked to advise whether the right claimable by subjects of nations is an absolute right by reason of the operation of the most-favoured-nation clause, or whether the right is one which is claimable only if and when the subjects of States who have been granted national treatment have claimed and had granted to them the particular privilege then under consideration, and the following advice was given on the 11th April, 1906⁽²⁾ :—

“This must depend upon the true construction of the particular most-favoured-nation clause upon which it may arise, but, speaking generally, we are of opinion that the right extends to the treatment to which the most favoured nation is entitled, whether actually claimed or not. On the other hand, the treatment accorded in actual practice would be very material upon the construction of the treaty upon which it depends.”

Since that time His Majesty's Government have consistently acted on that advice.

21. In this connexion, it is important to note that, unlike the Anglo-Persian agreement (which can be denounced at twelve months' notice), the Austrian treaty and especially the Hungarian treaty have some time still to run before they can be denounced (in the case of the Hungarian treaty not till the 26th July, 1937).

22. In the light of the observations set out above, the Law Officers are asked to advise whether, having regard to our treaty obligations with other nations, it is possible to reserve to British ships—

- (a) United Kingdom trade.
- (b) Inter-Colonial trade.
- (c) Inter-Imperial trade.

23. The first matter for consideration which is applicable to all three categories would appear to be the position created by the absence of the coasting trade exception in the agreement with Persia and in the treaties with Austria and Hungary, and by the exchange of notes with Italy. If these nations are entitled to participate in British coasting trade (whatever may be the meaning of that term), does the provision in treaties and agreements with other nations conferring most-favoured-nation treatment prevent His Majesty's Government from closing coasting trade to those other nations?

24. The second matter for consideration would appear to be the meaning of the term “coasting trade” in relation to the three different categories. In this connexion, it should be noted that His Majesty's Government, as well as the Governments of many other countries which would be affected by a reservation of coasting trade, are parties to the optional clause of the Permanent Court of International Justice, and, moreover, many of the commercial treaties concerned contain a provision for arbitration in the case of disputes as to their interpretation or application. In the event, therefore, of any of these countries disputing the legitimacy of the action of His Majesty's Government, the question of the meaning to be given to the expression “coasting trade” would be decided by an International Tribunal.

25. It has not proved possible to discover any case in which an international tribunal has had occasion to consider the meaning of the expression “coasting trade,” nor (see paragraph 14 above) is much assistance to be derived from the

⁽²⁾ Confidential 9007, p. 10.



1934

text-books on international law. In these circumstances, the decision of such a tribunal would presumably be based mainly on the practice of nations, and particularly of this country, and from this point of view the most relevant considerations would seem to be as follows: (a) The fact that at the time when it was usual to exclude foreign shipping from trade between any ports under the same sovereignty such exclusion was not based on a contention that the trade in question was coasting trade (paragraphs 3 to 6 above); (b) the fact that in the case of the United States, which is the only one which, from a geographical point of view, approximates to the proposals now under consideration, the question whether trade between all the American possessions could properly be regarded as coasting trade did not, so far as His Majesty's Government were concerned, arise, but, nevertheless, they are on record as having protested against the action of the United States Government (paragraph 11); (c) that, with the exception of Japan and (theoretically at any rate) Portugal, where the term "coasting trade" is not used in the treaty with His Majesty's Government and other countries possess only most-favoured-nation rights, no other State attempts to treat trade between the whole of its overseas possessions as coasting trade (paragraph 11); (d) that certain other countries who have a treaty right as against the United States to national treatment, with the exception of the coasting trade, have apparently not protested against the extension given by the United States to the term "coasting trade," though the extent of their treaty rights is, at any rate in some cases, uncertain (paragraph 12); (e) the case of Spain, where the trade with some colonies is reserved, and (anomalously) that with certain foreign ports (paragraph 11); (f) the statement of the position of His Majesty's Government made by Mr. Lloyd George in 1907 (paragraph 13); (g) the resolution of the Second General Conference on Communications and Transit, 1923 (paragraph 14 and Annex IV).

26. So far as the United Kingdom trade is concerned, it would seem that no difficulty can arise. In the light of the observations set out above, there appears to be little or no possibility of a contention that coasting trade, as the expression has been understood internationally for a long time past, does not cover the trade defined as coasting trade in section 140 of the Customs Consolidation Act, 1876.

27. So far as inter-Colonial trade or inter-Imperial trade is concerned, similar considerations would appear to apply to trade between ports of any particular Colony or Dominion. It is also suggested that it is a matter for consideration whether it is legitimate to apply the term to trade between different colonies in a defined geographical area, *e.g.*, trade between the different colonies in the West Indies, or on the West Coast of Africa (*cf.* 16 and 17 *Vict.*, c. 107, section 328, quoted in paragraph 7 above).

28. Looking, however, at inter-Colonial trade in its wider sense, is it possible to apply the term "coasting trade" to trade between the mother country and the various colonies, or to trade between different colonies which have no geographical connexion? So far as this country is concerned, we have up till now in our own legislation restricted the meaning of the expression, and in the case of the United States of America have protested against the extension of the meaning of coasting trade.

29. So far as inter-Imperial trade is concerned, the present constitutional position of the Dominions as defined in the declaration of 1926 gives rise to a further serious question whether, on the assumption that inter-Colonial trade is covered by the expression "coasting trade," the principle upon which this conclusion is based is the fact that the colony and the mother country are under the same Sovereign, or whether it is the fact that the colony is subordinate and subject to the jurisdiction of the mother country. If the latter is the principle, it does not cover inter-Imperial trade. If this be the case, the position of the Irish Free State needs consideration. Before the creation of the Irish Free State trade between Great Britain and Southern Ireland certainly came within the generally accepted view of coasting trade, and the question arises as to whether, by reason of the creation of the Irish Free State, trade between Great Britain and Southern Ireland has now ceased to be "coasting trade."

It will, of course, be realised that the decision to reserve inter-Imperial trade on a reciprocal basis would not be reached without an agreement with the Dominions, or a resolution at an Imperial Conference, and that a decision even

to proceed unilaterally in the United Kingdom, so far as ships trading with the Dominions are concerned, would necessitate previous consultation with the Dominions.

The Law Officers of the Crown are requested to advise—

- (1) Whether any, and if so which, of the following countries, Austria, Hungary, Italy and Persia, have the right under the treaty provisions applicable to them to engage in the United Kingdom trade, as defined in paragraph 1 (a) of this case.
- (2) Whether, in the event of question (1) being answered in the affirmative, but its being possible to show that the country or countries concerned had not claimed or exercised their right, a country possessing a treaty right to most-favoured-nation treatment in regard to the coasting trade could claim the right to engage in the coasting trade of the United Kingdom.
- (3) Whether (apart from any difficulties arising from the answers to questions (1) and (2)) an international tribunal would hold that His Majesty's Government were entitled to reserve to British ships, as being "coasting trade" within the meaning of the relevant treaty provisions—
 - (a) Inter-Colonial trade, as defined in paragraph 1 (b) of this case.
 - (b) Inter-Imperial trade, as defined in paragraph 1 (c).
- (4) Generally on the case.

Opinion of the Law Officers of the Crown.

(1) We think the answer is yes. No explanation is given as to why there is no clause excluding coastwise trade in the three treaties with Austria, Hungary and Persia. The fact, however, that the exclusion is expressed in other treaties and the fact that Italy expressly allows British vessels to take part in her coasting trade make it, in our view, impossible to argue that such exclusion can be implied in the absence of an express provision to that effect. It is very arguable that articles 1 and 18, for example, of the German treaty standing alone would on their true construction deal only with trade to and from the respective countries and that therefore the privileges referred to in article 18 do not extend to coastwise trading. The presence of article 21 in the German treaty would, however, in our opinion, prove fatal to such an argument.

(2) We think the answer is yes. We agree with the previous opinion of the Law Officers and Mr. Rowlatt cited in paragraph 20 of the case that, "speaking generally . . . the right extends to the treatment to which the most favoured nation is entitled, whether actually claimed or not." We think that the point is perhaps more precisely covered if the words "or exercised" are added after the word "claimed." The wide words used, for example, in article 3 of the Anglo-German treaty of 1924, in our opinion, supports this view. If the other view was held, a very anomalous position might arise. Coastwise traffic might be forbidden to the countries who had no treaty right to engage in it, but had most-favoured-nation clauses on the ground that, say, Austria had never exercised the right which she had and would still have, so long as her treaty lasts, to engage in that traffic. If Austria proceeded to send one ship to do one coastwise voyage, all the other countries could then presumably claim the same right to engage in the traffic. It cannot, of course, be suggested that Austria and the other three countries have lost their right under the treaty because they have not so far exercised it.

(3) (a) and (b) We think the answer to both questions is no. An international tribunal would probably give a somewhat extended meaning to coastwise trade so as to cover (1) cases where the continuous area of one country has ports in different seas, *e.g.*, France, and (2) where one country or one country and one or more of its dominions or possessions are in the same maritime area, so that the voyage is more like a coasting voyage than an ocean voyage. To extend it, however, to cover either colonial or Imperial trade would, in our opinion, make nonsense of the expression "coasting trade," and we do not think any tribunal



1934

would give it this meaning. There are further forcible reasons stated in the case which would make it very difficult for this country to put forward any such contention.

(4) The third question submitted to us and our answers are general. It may well be that the expression "coasting trade" occurring in a particular context in a treaty would have a perfectly clear meaning, either more or less extended than the meaning of the same expression in a different context in treaty between different high contracting parties. The opinion we have above expressed must therefore be read as being subject to qualifications which may be required in particular cases not brought to our attention.

T. W. H. INSKIP.
D. B. SOMERVELL.

*Law Officers' Department,
April 6, 1934.*

Annex I.

Coasting Trade: Summary of General Situation in Foreign Countries having Overseas Dependencies.

Belgium, Denmark, The Netherlands, Italy.

In the case of Belgium, Denmark and the Netherlands, there are practically no reservations on the coasting trade or on the territorial trade. In the case of Italy, though the coasting trade of Italy itself and that of some of her overseas possessions is reserved, the trade between them is not reserved.

In these cases, therefore, the question of the meaning of "coasting trade" does not arise.

France.

By article 4 of the Navigation Act of the 21st September, 1793, foreign vessels may not transport from one French port to another any commodities, products or merchandise, grown, or produced or manufactured in France or in French colonies and possessions, under penalties laid down in article 3. A decree of the 9th July, 1869,⁽¹⁾ repealed articles 3 and 4 in the French colonies, where the Act was still in force.

The French law of the 30th January, 1893, as amended by a law of the 19th April, 1906, defined the terms long distance navigation ("navigation au long cours"), international coasting trade ("cabotage international"), and French coasting trade ("cabotage français").

Vessels of all nationalities may participate in long-distance voyages and international coasting trade, although, as regards the latter, French vessels are granted certain advantages over foreign vessels.

French coasting trade embraces voyages from one French port to another, including ports in Algeria.

When Algeria was made an integral part of France and the trade between them was reserved by a law of 1889, Her Majesty's Government agreed specifically that, subject to receiving most-favoured-nation treatment, this step should not be regarded as precluded by the convention with France of 1882. This convention (which has just been denounced by France) provides that British vessels shall enjoy in France and Algeria the same treatment as national vessels, the coasting trade, however, being specifically exempted (articles 7 and 9). It would appear, therefore, that the exemption made in article 9 was not intended to cover trade between France and Algeria, and it was presumably for this reason that it was considered necessary to make the special arrangement of 1893.

By a French law of the 20th October, 1919, Tunisian and Moroccan vessels⁽²⁾ were assimilated to French vessels for the purposes of article 4 of the Navigation Act of 1793, and of the law of 1889 (navigation between France and Algeria).

⁽¹⁾ "Les produits de toute nature et de toute provenance peuvent être importés par tous pavillons dans les divers établissements français d'outre-mer où l'acte de navigation du 21 Septembre 1793 est encore en vigueur. Les produits chargés dans ces mêmes établissements peuvent être exportés pour toute destination et par tout pavillon."

⁽²⁾ Tunis and Morocco (French zone) are French protectorates.

By the law of 1919, therefore, Tunisian and Moroccan vessels may participate in the French coasting trade proper, but there appears to be nothing to prevent foreign vessels participating in the trade between Tunis and Morocco and French ports.

Information has, in fact, been received from British representatives abroad concerned, that trade between France and the protectorates of Tunis and Morocco is open to foreign vessels, though it appears that the cargo carried by foreign vessels is not accorded the preferential treatment accorded to goods carried in French bottoms, and, as regards trade between France and Morocco, British participation rarely occurs owing to the intensive service maintained by French companies. The coasting trade in Morocco and Tunis is open to British vessels.

Spain.

The national coasting trade is defined in article 33 of the law of the 14th June, 1909, as "that which is carried on by national vessels directly between the Spanish ports of the Peninsula, North and North-West African possessions, and the Balearic and Canary Islands, as well as that carried on by them between the said ports and that of Gibraltar, and those of the coasts of Portugal and Morocco, where Spain has consulates." Article 2 of the law reserved national coasting trade between Spanish ports exclusively for vessels of national flag and construction.

The provisions of article 2 of the law were suspended in 1916, but the prohibition in respect of foreign vessels was restored by a decree of the 3rd November, 1923, which provided that the coasting trade shall be strictly regulated in accordance with the law of the 14th June, 1909, with certain exceptions which related to vessels of foreign construction introduced into Spain between 1909 and the date of the decree of 1923. A Royal decree law of the 21st August, 1925, reproduces the definition of national coasting trade contained in the law of 1909, as well as the reservation to national vessels of national coasting trade between Spanish ports.

Therefore, trade between Spanish ports of the Peninsula is reserved generally for Spanish ships, no distinction being made between voyages between ports on one and the same coast, and voyages between ports on the coasts which are separated from one another. An exception is made, on the basis of reciprocity, as regards carriage by foreign transatlantic vessels of cabin passengers and luggage.

The trade between Peninsula ports and ports in the Balearic and Canary Islands and Spanish ports on the north and north-west coast of Africa is similarly reserved for Spanish ships. Foreign vessels were permitted under regulations of 1913 to carry fruit from the Canary Islands to other Spanish ports, and also goods until such time as a Spanish line can undertake the traffic, but the Royal decree of 1925 appears to restrict the traffic to Spanish vessels.

Nothing is said in the laws or regulations regarding trade between Spain and Spanish possessions in other parts of Africa.

His Majesty's Government enjoy national treatment in matters of navigation (articles 1, 14, 16 and 17 of the treaty of the 31st October, 1922), but the coasting trade is excepted (article 15), subject to His Majesty's Government receiving most-favoured-nation treatment.

Portugal.

A decree of the 23rd January, 1905, reserved to national shipping maritime traffic—

- (1) Between Portuguese ports and between these and the Azores, or from one port in the Azores to another.
- (2) Between Portuguese possessions bordering the Atlantic and the ports of Portugal, the Azores and Madeira.
- (3) Between the ports of any of the Portuguese possessions on the Atlantic (excluding the coastal zone within the Congo conventional basin).

The decree also provided that maritime traffic between Portuguese ports east of the Cape of Good Hope and between these ports and any ports in the Portuguese possessions on the Atlantic, the Azores, Madeira or Portugal was open



1934

to all national and foreign vessels. Traffic between the inland ports of Mozambique (exclusive of the Zambesi) and between such ports and the ocean ports of the province was reserved to the national coasting services of the province.

By a decree of the 25th September, 1922, maritime traffic between Portugal, the adjacent islands and the Portuguese Colonies was reserved to the Portuguese flag, as well as traffic between the ports of the Colonies or between one and the other, *provided that such traffic was regularly served by national vessels.*

As regards shipping between Portugal and the Colonies and between one Colony and another, His Majesty's Ambassador at Lisbon was informed in 1925 that the above decree of 1922 had not yet been put in force in the Colonies, and that consequently the provisions of the decree of 1905 held good.

The enforcement of a Mozambique decree of 1924 reserving the coasting trade of Mozambique to Portuguese vessels has been postponed from time to time in recent years, as Portuguese shipping has apparently not been adequate to take over the coastal traffic.

Article 12 of the treaty between the United Kingdom and Portugal of the 12th August, 1914, provides that "notwithstanding anything in this treaty, either of the contracting parties reserves the right to confine to national vessels the trade between any port within its territories." In this case, therefore, the meaning of the term "coasting trade" does not arise.

Japan.

From 1911 onwards, Japanese coasting trade has been restricted to vessels of Japanese nationality, and apparently the reservation is applicable, not only to trade round Japan proper, but also to trade with Chosen (or Korea), Taiwan in Formosa, the Kwantung Leased Territory and Karafuto in Sakhalin. It should also be noted that the Japanese mandated territories in the Pacific are held under "C Mandates," by which they are subject to Japanese law as if they were integral parts of Japanese territory. There is no doubt that trade with all those territories is regarded by Japan as coasting trade.

The extent to which British vessels may participate in the coasting trade of Japan is determined by the following:—

(1) The Japanese Shipping Law, namely, Law No. 46 of 1899, revised by Law No. 68 of 1905, of which article 3 is as follows:—

"None but Japanese vessels may call at unopened ports, or convey cargo or passengers between Japanese ports. However, this prohibition does not apply when there is a special provision in laws or treaties, when an attempt is made to escape disaster by sea, or capture, or when the special permission of the competent Minister has been obtained."

(2) The Korean Shipping Ordinance, namely, Ordinance No. 7 of the 7th April, 1914, issued by the Government-General of Korea, of which article 3 is as follows:—

"None but Japanese vessels, as described in article 1 above, may call at unopened ports or convey cargo or passengers between any ports. However, this prohibition does not apply when there is a special provision in laws or treaties, when an attempt is made to escape disaster by sea or capture, or when the special permission of the Governor-General of Korea has been obtained."

(3) The Formosa Ships' Nationality Regulations, namely, Ordinance No. 4 of the 21st May, 1898, issued by the Government-General of Formosa, revised by Ordinance No. 19 of October 1900, and by Ordinance No. 15 of November 1901. Article 5 of the ordinance is as follows:—

"None but Japanese vessels within the meaning of article 1 of the Shipping Law, and vessels having certificates of ships' nationality or ships' licences in accordance with these regulations, may call at unopened ports or convey cargo or passengers between any ports in Formosa. However, this prohibition does not apply . . . (as above, substituting Governor-General of Formosa for Governor-General of Korea)."

(4) The Kwantung Province (Liaotung Leased Territory) Ships' Nationality Ordinance, namely, Ordinance No. 35 of the 30th December, 1911, issued by the Kwantung Government, revised by Ordinance No. 23 of October 1914, and by Ordinance No. 3 of April 1919. Article 3 of the ordinance is as follows:—

"None but Japanese vessels within the meaning of article 1 of the Shipping Law, and Japanese vessels within the meaning of this ordinance, may call at unopened ports in the Province of Kwantung or convey cargo or passengers between any ports in the Province of Kwantung. However, this prohibition does not apply when . . . (as above, substituting Governor-General of Kwantung)."

(5) The Anglo-Japanese Treaty of Commerce and Navigation of 1911, article 21, which is as follows:—

"The coasting trade of the high contracting parties is excepted from the provisions of the present treaty, and shall be regulated according to the laws of Japan and the United Kingdom respectively. It is, however, understood that the subjects and vessels of either high contracting party shall enjoy in this respect most-favoured-nation treatment in the territories of the other.

"Japanese and British vessels may, nevertheless, proceed from one port to another, either for the purpose of landing the whole or part of their passengers or cargoes brought from abroad, or of taking on board the whole or part of their passengers or cargoes for a foreign destination.

"It is also understood that, in the event of the coasting trade of either country being exclusively reserved to national vessels, the vessels of the other country, if engaged in trade to or from places not within the limits of the coasting trade so reserved, shall not be prohibited from the carriage between two ports of the former country of passengers holding through tickets, or merchandise consigned on through bills of lading to or from places not within the above-mentioned limits, and while engaged in such carriage these vessels and their cargoes shall enjoy the full privileges of this treaty."

The Board of Trade memorandum enclosed in Foreign Office despatch No. 39 of the 29th January, 1925, to His Majesty's Ambassador at Tokyo, enumerates four heads under which information is desired as to British participation in the coasting trade of Japan. The present position under these four heads is as follows:—

(i) *Treaty Rights*.—The statement enclosed in the Board of Trade memorandum correctly defines the present position, and Japan has at the moment no treaty with any other Power under which the vessels of that Power enjoy better treatment than British vessels, and which His Majesty's Government could claim for British vessels under a most-favoured-nation clause.

(ii) *Domestic Law in regard to Coasting Trade*.—The Japanese Laws and Ordinance in regard to coasting trade have been given above. Their effect is that—

- The coasting trade between ports in Japan proper is reserved to Japanese vessels, with the exceptions mentioned in article 21 of the Treaty of Commerce and Navigation as given above.
- Trade between ports in Japan proper and ports in Japanese overseas territories is likewise reserved to Japanese vessels, with the same exceptions.
- Trade between ports in different Japanese overseas territories is reserved to Japanese vessels, with the same exceptions.
- The coasting trade between the ports of each separate overseas territory is reserved to Japanese vessels, with the same exceptions.

(iii) *The Actual Position*.—The actual position in practice does not differ from the legal position as indicated in (i) and (ii) above.

(iv) *The Extent to which British Shipping participates*.—British vessels have enjoyed for many years and do, in fact, at present enjoy the exceptions granted under article 21 of the Treaty of Commerce and Navigation. They regularly



1934

carry between ports in Japanese territory passengers travelling on through tickets to or from points outside Japanese territory, and cargo on through bills of lading to or from points outside such territory.

Although not definitely so stated, there is no doubt that the words "port" and "ports" in article 21 of the treaty quoted above mean "open port" and "open ports" respectively, and that the exceptions provided by the said article do not allow British vessels to enter unopened ports. But this is not material, as all commercial ports of consequence in Japan are now open ports.

As regards the Japanese mandated territory of the Marianne, Caroline and Marshall Islands, no specific regulations on the subject of coasting trade have been published, but the Japanese authorities state verbally that they apply in the islands the same regulations as obtain elsewhere in Japanese territory.

United States of America.

The United States has always considered trade between one of her ports in the Atlantic Ocean and one in the Pacific Ocean to be coasting trade, and has exclusively reserved it for vessels of her own subjects.

On the annexation by the United States in 1898 of Hawaii, Porto Rico and the Philippine Islands, it was thought that the United States might extend this principle to these newly acquired overseas possessions. His Majesty's Government possessed no relevant treaty rights in the matter, but, nevertheless, representations were made by them to the United States in 1898 on the subject. It was there stated that, "if such a measure were to be applied to ports in islands at a distance from the mainland of the American continent, it would go far beyond anything which has hitherto been regarded as coasting trade," and the consequent hardship to the commerce of the United Kingdom and British Colonies was pointed out. In their reply, the United States Government contended that trade between San Francisco and New York by way of the Straits of Magellan, which had for many years been regarded as coasting trade in so far as the laws restricting such trade to United States vessels was concerned, is very much greater than that between islands at a distance from the mainland of the American continent. Also, under the treaty of 1815 with Great Britain (article 3), United States vessels were not permitted to carry between Calcutta, Madras and Bombay, and London or Liverpool. "Should Congress see fit to restrict to national vessels the trade between Honolulu and San Francisco, such a measure would be well within what has hitherto been regarded both by the United States and Great Britain as coasting trade." The United States Government were aware that Great Britain had abandoned the principle involved in article 3 of the treaty of 1815, "but the reasons which led to that change of policy by Great Britain do not at the present time suggest a corresponding change of policy on the part of the United States." Finally, the United States Government referred to the impending action by the Russian Government to restrict trade between the Asiatic and European ports of Russia to Russian vessels.

By a law of the 20th April, 1900, the trade between Hawaii and the United States of America was declared to be coasting trade and the same principle was applied to Porto Rico about the same time.

A section of the United States Merchant Marine Act, 1920, provided that, from and after the 1st February, 1922, the coastwise laws of the United States "shall extend to the island territories and possessions of the United States not now covered thereby" (of which the most important were the Philippine and Virgin Islands), but if adequate shipping service was not established by the 1st February, 1922, the President was given power to extend the period allowed for the establishment of such service.

The period has been extended from time to time as regards the Philippine Islands and the Virgin Islands, and the application of the law to those two territories awaits a presidential proclamation certifying that adequate shipping facilities exist to deal with the trade.

At the time of the passing of the above Act of 1920 it was pointed out by the Board of Trade that it had long been the practice of the United States to reserve to national vessels trade between Atlantic and Pacific ports of the United States, and that it did not appear that any objection could be taken to this extension.

The following quotation from a volume entitled *Shipping and Shipbuilding Subsidies*, by Jesse E. Saugstad, and issued by the United States Department of

Commerce in 1932, is of interest. On pp. 75 to 78 of that book are set out certain observations of the late Mr. Eugene Tyler Chamberlain, formerly United States Commissioner of Navigation:—

"The words 'coasting trade' derive their import not solely from geographical facts now or at the time of the ratification of the treaties; jurisdiction over terminal ports and its implications also determine their meaning. Some of the steps by which these implications in the words 'coasting trade' have superseded the narrow geographical meaning conveyed originally by the word 'cabotage' or trade from headland to headland have been set forth in the quotation above (i.e., the quotation from *Oppenheim on International Law* set out in paragraph 15 of the case). Indeed, so subordinate is the geographical meaning that nations generally recognise that a ship is not engaged in the coasting trade or cabotage while employed along a coastline under one jurisdiction in discharging or taking on cargo at two successive ports if the cargo is from a foreign port, and the trade accordingly is a matter involving the co-operation of two national jurisdictions. Such considerations impelled the United States to apply its system of legislation for the trade between ports on its coasts for its successive acquisitions of territory, including Alaska, which, like Hawaii or Porto Rico, is a political unit with the United States; but surely it is no more a geographical unit with it than is either of those islands. The policy was followed under the form of an application of the coasting trade law, of which the commercial and political essence was and is the recognised right to reserve it to national ships. In 1898 the coast of Hawaii was as much a coast of the United States for commercial purposes as was the coast of California. Trade originating in California and destined for Hawaii was as much trade between the coasts of the United States as was trade originating in California and destined for Alaska, or for the State of Washington, and was not improperly in 1900 described and regulated as 'coasting trade.'"

Annex II.

Coasting Trade: Existing Treaty Provisions of United Kingdom Treaties and Agreements with Countries having Overseas Dependencies.

(NOTE.—Wherever national treatment is prescribed, most-favoured-nation treatment is normally provided also and specific mention is not, in such cases, therefore, made of it below.)

Belgium.

Exchange of notes of 1898 continues "system actually applied" to subjects and goods (*not shipping*) on condition of reciprocity: but modifications may be made if applied to all countries.

Applies to United Kingdom, Irish Free State, Newfoundland, India and certain Colonies.

Denmark.

No treaty provisions affecting coasting trade, except that it is considered to be covered by the general most-favoured-nation provisions of article 40 of the treaty of 1670. Article 1 of 1824 convention provides national treatment in respect of duties and charges levied on vessels; the convention applies to the United Kingdom and Irish Free State only, and to Denmark, but not to her colonies (article 6).

France.

Treaty 1882. National treatment (articles 7 and 8), but coasting trade excepted (article 9).

Applies to the United Kingdom and Irish Free State.

[11921]

D

Italy.

Treaty 1883. National treatment (articles 1, 5—which covers importation into ports of “dominions and possessions” of both parties—6 and 7); coasting trade excepted (article 8), but an exchange of notes of 1904 prolongs the *status quo, sine die*.

Applies to the whole Empire.

Japan.

Treaty, 1911. National treatment (articles 6, 16, 17, 19), but coasting trade excepted (article 21, modified by article 2 of supplementary convention of 1925, which prescribed most favoured nation, subject to a possible requirement of reciprocity).

Applies to United Kingdom, Canada, Irish Free State, Newfoundland and Colonies.

The supplementing convention of 1925 applies to United Kingdom and Colonies, but not Dominions or India.

(As to coasting trade, see minutes of meeting of British and Japanese representatives, p. 397 of *Treaty Handbook*.)

Netherlands.

Treaty, 1824: Article 2 provides that Dutch subjects and vessels shall not pay, at British ports in the East, duties more than twice what British subjects and vessels pay, and *vice versa*; also that duties on imports and exports at a British port in Ceylon or India, on Dutch bottoms, shall not be more than twice the duties paid by British subjects and on British bottoms. (Applies to United Kingdom Possessions in Eastern Archipelago, India and Ceylon.)

Treaty, 1837: Article 1 most favoured nation (coasting trade not specifically mentioned). Applies to the United Kingdom and Irish Free State.

Convention of 1851, supplementing 1837 treaty; article 1 gives national treatment as regards dues on vessels from whatever place arriving, and as regards duties, charges, restrictions or prohibitions on goods imported or exported in the vessels of the parties. Article 3 provides that if either party restricts the privileges regarding commerce and navigation which it then granted by law, the other party may withdraw from the convention at six weeks' notice. (Applies to the United Kingdom and Irish Free State.)

(NOTE.—Our then existing law reserved the coasting trade of the United Kingdom and Possessions, but not the trade *between* them.)

Norway.

See Sweden.

Portugal.

Treaty, 1914. National treatment as regards “freedom to come, &c.” (article 1) and freedom to import and export goods and passengers to and from the parties’ “respective territories” on the vessels of the other (article 11). Most favoured nation in other respects (articles 3, 11, 13, 14). Article 12 reserves the parties’ right to confine to national vessels “the trade between *any ports within its territories*.”

Applies to Portugal, Madeira and Azores, but not to other Portuguese territories except on notice given (article 21).

Applies to United Kingdom and Newfoundland.

Spain.

Treaty, 1922. National treatment (articles 1, 14, 16 and 17), but coasting trade excepted, subject to most favoured nation (article 15).

Applies to United Kingdom, Canada and various Colonies.

Sweden.

Treaty, 1826 (with Sweden and Norway): most favoured nation (article 9). (Applies to United Kingdom, Dominions (except Australia), India, and all Colonies.)

Coasting trade is open on conditions of reciprocity under the Exchange of Notes of 1854 with Sweden and Norway, which applies to the United Kingdom and Irish Free State only.

United States of America.

Treaty, 1815. National treatment as regards duties and charges on vessels, but only in the United States of America and His Majesty’s territories *in Europe* (article 2). Reciprocal freedom for shipping to come to ports in the United States of America and British territories in Europe to which other foreigners are admitted, but subject to laws of the two countries (article 1). No provision giving unconditional most favoured nation for coasting trade; indeed, it is provided that United States ships are excluded from the coasting trade of various British territories (article 3).

Applies to United Kingdom, Irish Free State, India and Colonies in Europe and East Indies. The navigation of the St. Lawrence is opened to United States citizens, and of certain other rivers to British subjects and United States citizens, by the treaty of 1871 (article 26). Applies to United Kingdom and Canada.

Maritime Ports Convention, 1923.

Parties undertake, subject to reciprocity, to grant to each other’s vessels equality of treatment with their own vessels or those of any other State, in their maritime ports—as regards access, use of port, facilities, dues, &c.

The convention does not apply to maritime coasting trade; but the conference passed a resolution recommending that all States should refrain from inequitable economic measures, such as, in particular, *an abusive extension of the scope of the maritime coasting trade* (see Annex VI).

The convention has been ratified by twenty-three countries (Austria, Belgium, the United Kingdom, Newfoundland, Southern Rhodesia, and most British Colonies, &c., Australia (except dependencies), New Zealand (including Western Samoa), India, Czechoslovakia, Denmark, Estonia, France, Germany, Greece, Hungary, Iraq, Italy, Japan, Netherlands, Norway, Siam, Sweden, Switzerland, Yugoslavia).

Act of Algeciras, 1906.

Article 69 provides that the coasting trade of Morocco shall (except as regards the carriage of certain sorts of animals) be open to vessels of all nationalities. The obligation is unilateral.

Annex III.

*Coasting Trade in the Dominions.*1. *Existing Law.**Australia.*

The coasting trade is not reserved to British ships. British ships, in order to engage in the Australian coasting trade, have either (i) to obtain a licence and comply with Australian conditions as to wages, &c., or (ii) to obtain a permit which does not carry such conditions. All foreign ships have to obtain a licence on the lines of (i).

Canada.

The coasting trade is reserved to British ships.

India.

The coasting trade is open.

Irish Free State.

Coasting trade open.

[11921]

New Zealand.

The right to engage in the coasting trade is given to all nations, but vessels engaged in it must comply with New Zealand rates of wages and manning scale.

The Customs Law Act of 1908 provides that the Governor-General may by Order in Council, so far as treaty engagements permit, prohibit or restrict the engaging in coastwise trade in New Zealand by vessels of any country which prohibits or restricts British ships from engaging in its coastwise trade (*cp.* the United Kingdom Customs Consolidation Act of 1853, referred to in paragraphs 3 and 27 of the memorandum).

Union of South Africa.

Coasting trade open; but the South African Government retains the right to reserve it (see article 19 of the German-South African Treaty of 1928).

2. Contractual Obligations of the Dominions.

The following list comprises only treaties which provide for national treatment; those treaties which provide only for most favoured nation have not been included, as not being immediately relevant. (All the treaties enumerated contain exceptions for "coasting trade").

(a) Adherence of Dominions to United Kingdom Treaties.

Applies to—

Colombia and Venezuela, 1866 ...	Dominions, except Australia and India.
Germany, 1924 ...	Southern Rhodesia.
Italy, 1883 ...	Dominions (except Canada and certain ports of Australia and South Africa) and India.
Japan, 1911 ...	Canada, Irish Free State, Newfoundland.
Lithuania, 1922 ...	Irish Free State.
Netherlands, Supplementary Convention of 1851 ...	Irish Free State.
Nicaragua, 1905 ...	New Zealand, Irish Free State.
Persia, 1920 ...	Dominions (except Australia) and India.
Portugal, 1914 ...	Newfoundland.
Siam, 1925 ...	India.
Spain, 1922 ...	Canada.
Sweden and Norway, Exchange of Notes of 1854 ...	Irish Free State.
Turkey, 1930 ...	Southern Rhodesia.
Yugoslavia, 1927 ...	Southern Rhodesia.

(b) Independent Obligations of Dominions.

Canada and France: May 12, 1933. Coasting trade excluded. (Not yet in force; not ratified.)

Irish Free State and Germany: May 12, 1930 (similar to South Africa-Germany).

Irish Free State and France: June 23, 1931. Reciprocal most-favoured-nation treatment in regard to coasting trade. (Not yet ratified and not in force.)

The only case where a Dominion is under an independent obligation to grant national treatment in matters of navigation to a foreign country appears to be the South African-German Treaty of 1928; this contains an exception for "coasting trade."

1934

IRAQ

[E 541/274/93/1934]

No. 1.

[January 23, 1934.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, November 25, 1933.

I HAVE the honour, by direction of Secretary Sir John Simon, to invite a reference to the opinion given to the Treasury on the 29th March last by the then Law Officers of the Crown in the matter of the date gardens in Iraq of the Sheikhs of Koweit and Mohammerah. Copies of the case submitted to them and of their opinion⁽¹⁾ are enclosed for convenience of reference (Paper A).

Date
gardens in
Iraq of
Sheikhs of
Koweit and
Moham-
merah.

2. In view of that opinion it has become necessary to consider whether it would be desirable to submit to arbitration the question whether the Iraqi Government are bound under their treaty obligations towards His Majesty's Government to assume responsibility for implementing the undertakings given in 1914 by His Majesty's Government to the two sheikhs. This question formed the subject of an opinion⁽²⁾ given by your predecessors to the Colonial Office in 1930, copies of which are enclosed (Paper B), but the situation has changed in certain respects since that opinion was given, and Sir John Simon is accordingly anxious to have the benefit of your opinion as to the prospects of such an arbitration in the circumstances as they now exist.

3. The most important change in the situation is that, while the arbitration contemplated in 1930 would have taken place under the treaty of the 10th October, 1922 (Paper C), the situation is now governed by the treaty of the 30th June, 1930 (Paper D), which, in accordance with article 7 thereof, has now replaced the treaty of 1922. It follows from this that the provision under which the case would have to be referred to arbitration would be article 10 of the 1930 treaty instead of article 17 of that of 1922, while the provision under which it would be contended that the obligations of His Majesty's Government towards the two sheikhs had devolved upon the Government of Iraq would be the second paragraph of article 8 of the later treaty instead of articles 10 and, possibly, 4 of the earlier one.

4. Under article 17 of the 1922 treaty, His Majesty's Government had a right to refer the present question to the Permanent Court of International Justice without the agreement of the Government of Iraq. The effect of article 10 of the 1930 treaty is that the dispute must be submitted either to the Council of the League of Nations or to some form of arbitration. For the purposes of this reference, Sir John Simon thinks that it may be assumed that the Iraqi Government would agree to the question being referred to the Permanent Court of International Justice, but, as Iraq has not signed the optional clause, the reference would have to be by special agreement and not by a unilateral written application (see article 40 of the statute of the court). The terms of a special agreement for this purpose would, of course, be a matter for negotiation with the Iraqi Government; but, before these negotiations are opened, Sir John Simon would be glad to know whether, in existing circumstances, you agree with the view expressed by your predecessors in 1930 that any reference to the Permanent Court should, if possible, be framed in the widest possible terms so as to cover all the grounds on which it might be held that the obligation to implement the undertakings given by His Majesty's Government to the two sheikhs has devolved on the Iraqi Government.

5. The question then arises whether those grounds have been affected by the developments which have occurred since 1930. As stated above, the relevant provision of the 1930 treaty is the second paragraph of article 8, which replaces article 10 of the 1922 treaty. Paragraph 3 of the reference by the Colonial Office

⁽¹⁾ Confidential, 14468 No. 5B.⁽²⁾ Confidential, 13925, p. 15.

to your predecessors, dated the 17th May, 1930,⁽¹⁾ shows that, while the under- given by His Majesty's Government to the two sheikhs were mentioned to the Iraqi Government after the signature of the 1922 treaty, they were not included in the list of the commitments referred to in article 10; and paragraph 4 of the same reference states what occurred in regard to these undertakings in connexion with the abortive treaty of 1927. After the signature of the 1930 treaty, but before its submission to the Iraqi Parliament, the British High Commissioner in Iraq addressed a note (Paper E) to the Iraqi Prime Minister, in which he referred to the method to be adopted for dealing with these commitments of His Majesty's Government in the list of international obligations devolving upon Iraq under article 8 of the new treaty, and he proposed, in the event of certain negotiations for the possession of the sheikhs' properties not having reached finality before the communication of this list to the Iraqi Government, to insert mention of these obligations towards the sheikhs in the list, but to append a footnote to the effect that, in the event of these negotiations proving unsuccessful, the question would need to be discussed further between the two Governments. The Iraqi Prime Minister replied on the same day (Paper F) that this procedure was acceptable to the Iraqi Government. Accordingly, on the 18th October, 1930, the High Commissioner addressed a letter to the Iraqi Prime Minister (Paper G) in which he referred to the correspondence of the 19th August and enclosed a list of "international instruments referred to in the second paragraph of article 8" of the new treaty, in which the undertakings entered into with the two sheikhs were included, with a footnote in the terms which had been agreed upon. It will be seen, therefore, that, while the undertakings given to the two sheikhs were never officially communicated to the Iraqi Government under article 10 of the 1922 treaty, and while the communication made in 1927 was in connexion with negotiations for a new treaty, which has never come into force, the obligations in question were included in the list officially communicated to the Iraqi Government of the commitments devolving on Iraq under article 8 of the 1930 treaty. To this extent the position of His Majesty's Government would seem to be stronger now than it was in 1930, though the effect of this communication, as showing that the obligations in question have now devolved upon the Government of Iraq, may be somewhat weakened by the statement that, in the event of the negotiations for purchase failing (as, in fact, they have so far done), the question would need to be discussed further between the two Governments.

6. The reasons put forward in paragraph 5 of the reference to your predecessors of the 17th May, 1930, for suggesting that, apart altogether from the express provisions of any treaty, it might be possible to contend that the responsibility in respect of these undertakings had devolved on the Iraqi Government would appear to be unaffected by subsequent developments.

7. As regards the point suggested in paragraph 8 of that reference relating to the fact that the Sheikh of Kuwait is an independent sovereign, and consequently not subject to the jurisdiction of the Iraqi courts or authorities, the legal position of the sheikh remains what it was in 1930, but the Istihlak tax (see paragraphs 7 to 9 of the recent reference to you from the Treasury (Paper A)) is a tax of rather a different nature from the tax on the gardens which was under consideration by your predecessors in 1930, and levied in a different manner. It is for consideration whether any contention based on the international status of the sheikh could be supported in the case of the Istihlak tax, except in so far as it is levied on dates which never ceased to be the property of the sheikh. It may also be relevant that, in a case affecting the title to a small date garden (Bashiyeh) included in those the position of which is under consideration judgment was given recently against the sheikh in the Iraqi courts, without, so far as is known, his Excellency having either challenged the jurisdiction of the courts on the ground of his sovereign status or explicitly waived his immunity. Efforts, so far unsuccessful, have also been made to serve a writ on him in respect of the most important of the gardens (Faddaghiyeh). It should be made clear, however, that the acceptance of service without protest in the case of the small Bashiyeh garden appears to have been an isolated incident, which cannot, it is arguable, carry the weight of a long dealing extending over a course of years,

⁽¹⁾ Confidential, 13925, p. 15.

much less operate as a bar to the sheikh's raising the question of sovereignty, and it should be added that, in the event of the suitors in respect of the Faddaghiyeh garden proving successful in their efforts to serve a writ on the sheikh in respect of that garden, his Excellency would be advised formally to raise a plea of sovereignty in the first place, and, if it is overruled, to submit to the jurisdiction of the Iraqi courts only under protest. In this connexion it may also be observed that, according to some writers, questions arising out of the ownership of land within the territory of a foreign State form an exception from the general immunity from process of a foreign sovereign.

8. There remains the question whether, in the event of an arbitration under the treaty of 1930, it would be possible to rely to any extent, should it be desired to do so, on the provisions of the treaty of 1922. On this point it is suggested that, in order to answer the question whether, under article 8 (2) of the treaty of 1930, the undertakings given to the sheikhs had devolved on Iraq, a court would have to go into the whole previous history of the matter, including what had taken place under the treaty of 1922, and, in particular, the position under article 10 of that treaty. In 1930 it was also proposed to rely to some extent upon article 4 of the 1922 treaty, and it is suggested that some use could still be made of this point, on the ground that Iraq had, during the currency of the 1922 treaty, been under an obligation to ask the advice of His Majesty's Government under article 4 with regard to these undertakings, and had failed to do so.

9. I have accordingly the honour to request you to be so good as to take the enclosed papers into your consideration and to favour Sir John Simon with your opinion upon the following points:—

- (1) Whether, in the event of the matter being submitted to arbitration, there would be a reasonable possibility of its being held that the Iraqi Government are bound to implement the undertakings given to the two sheikhs.
- (2) Whether, in any other respect, the opinion given by your predecessors in 1930 requires modification in the light of existing circumstances.

In dealing with the above questions, you will perhaps be so good as to give your opinion upon the force in the present circumstances of the different arguments suggested in the reference to your predecessors in 1930.

10. Sir John Simon would also be grateful for any observations of a general character which you may be good enough to offer.

I have, &c.

G. W. RENDEL.

List of Papers.

- Paper A: Treasury case submitted to Law Officers, and opinion (March 29, 1933) (E 1735/308/93/33).
 Paper B: Law Officers' opinion given to Colonial Office, 1930 (Confidential, 13925, p. 15).
 Paper C: Treaty of October 10, 1922 (Cmd. 2370).
 Paper D: Treaty of June 30, 1930 (Cmd. 3797).
 Paper E: High Commissioner for Iraq to the Iraqi Prime Minister, August 19, 1930 (Annex 1).
 Paper F: Iraqi Prime Minister to the High Commissioner for Iraq, August 19, 1930 (Annex 2).
 Paper G: High Commissioner for Iraq to the Iraqi Prime Minister, October 18, 1930 (Annex 3).

Report.

1. We answer this question in the affirmative, assuming as we do that the terms of reference will be framed in such a way as to render relevant all the arguments suggested to our predecessors in 1930. The letter addressed by the High Commissioner to the Iraqi Prime Minister of the 18th October, 1930, is an important addition to the material considered by our predecessors, thus strengthening the claim that the Iraqi Government is bound to implement the undertakings in question.

2. Apart from the necessary adjustment consequent upon the substitution of the treaty of 1930 for the treaty of 1922, the opinion of our predecessors does



1934

24

IRAQ

not appear to us, subject to the two points set out below, to require any modification in the light of existing circumstances:—

- (i) We do not think any real point can now be made of article 4 of the treaty of 1922.
- (ii) We are doubtful whether it would be desirable or logical to include in the arbitration reference the question whether the Sheikh of Koweit as an independent Sovereign should hold the properties immune from taxation. This has nothing to do with the promises given in 1914. The authorities are not clear, and it seems to us rather a matter for the Sheikh of Koweit to take up.

The force of the different arguments suggested in the reference to our predecessors must depend upon the setting in which those arguments are presented. If the Government of Iraq can be persuaded to submit the question to arbitration under a special agreement drafted in the widest possible terms as suggested, we are of opinion that there is considerable force in the arguments suggested in paragraph 5 of the Colonial Office letter of the 17th May, 1930, addressed to our predecessors, and particularly in the second suggested argument. The arguments appear to us to derive additional force from the list of British international obligations in respect of Iraq mentioned in the memorandum drawn up at the time of the abortive negotiations for a treaty in 1927, and also from the letter to which we have previously referred in this opinion from the High Commissioner to the Iraqi Prime Minister of the 18th October, 1930.

3. Generally, we think that, in default of agreement, a reference to arbitration, even if the result was unfavourable, might improve His Majesty's Government's position with regard to claims for compensation by the sheikhs. It would help to show that His Majesty's Government had used its best endeavours to get the promises implemented by the State having sovereignty over the territories, and on one view this may be the full extent of the promises made, as the undertakings were clearly, we think, contingent on the British Government having the power as a result of the war to implement them.

T. W. H. INSKIP.
DONALD SOMERVELL.

*Law Officers' Department,
January 23, 1934.*

Annex 1 (Paper E).

Sir F. Humphrys to Iraqi Prime Minister.

(Confidential.)

Sir,

London, August 19, 1930.

IN the course of our conversations on the subject of the immunity from taxation enjoyed by the Sheikhs of Mohammerah and Koweit in respect of their date gardens in Iraq, your Excellency and I discussed the method of dealing with this matter in the list of international obligations devolving upon Iraq under article 8 of the Treaty of Alliance signed on the 30th June, 1930, which I have undertaken to communicate to your Excellency before the Iraq Parliament is invited to approve of the ratification of the treaty. As I have informed your Excellency, His Majesty's Government in the United Kingdom approve of your proposal that the Iraq Government should open private negotiations with the sheikhs for the purchase of their properties in Iraq.

It is possible, however, that these negotiations may not have reached finality before the time comes for me to communicate the above list to the Iraq Government. In such event, His Majesty's Government propose to insert mention of the obligation towards the sheikhs in the list, but at the same time to append a footnote to the effect that private negotiations are proceeding with a view to the

IRAQ

25

liquidation of this obligation, and that if these are unsuccessful the question will need to be discussed further between the two Governments.

I shall be glad to learn from your Excellency that this procedure will be acceptable to the Iraq Government.

I have, &c.

F. H. HUMPHRYS.

Annex 2 (Paper F).

Iraqi Prime Minister to Sir F. Humphrys.

London, August 19, 1930.

Sir,

I HAVE the honour to acknowledge the receipt of your Excellency's letter of to-day's date, relative to the method of dealing, in the list of international obligations devolving upon Iraq under article 8 of the Treaty of Alliance signed on the 30th June, 1930, with the question of the immunity from taxation enjoyed by the Sheikhs of Mohammerah and Koweit in respect of their date gardens in Iraq.

I have the honour to inform your Excellency in reply that the procedure indicated in the second paragraph of your letter is acceptable to the Iraq Government.

I have, &c.

NOURY SAID.

Annex 3 (Paper G).

Sir F. Humphrys to Iraqi Prime Minister.

(Confidential.)

My dear Prime Minister,

Bagdad, October 18, 1930.

WILL you please refer to your Excellency's letter dated the 30th June, 1930, addressed to me on the occasion of the signature of the new Anglo-Iraq Treaty, asking to be furnished in due course with a complete list of the international instruments referred to in the second paragraph of article 8 of the treaty.

I have now received from His Britannic Majesty's Government a list of these instruments, of which I enclose a copy for your Excellency's information. His Britannic Majesty's Government desire me to explain that, although an exhaustive examination has been made of the various international instruments to which His Majesty's Government are a party, and which involves them in some degree of responsibility in respect of Iraq, it is possible, although unlikely, that the present list may not prove to be exhaustive, and that instruments which would properly fall within the category envisaged in the second paragraph of article 8 may later be found to have been overlooked.

I should also explain that only those instruments have been included in the accompanying list which might be held to involve a continuing obligation on the part of His Majesty's Government after the entry of Iraq into the League of Nations and thus to call for the process of substitution contemplated in the second paragraph of article 8, and that no instruments have been included creating obligations of such a character that they must, in so far as the responsibility of His Majesty's Government is concerned, terminate automatically upon the termination of the mandatory régime.

With regard to item 1 on the accompanying list, I would invite your Excellency's attention to the notes exchanged between your Excellency and myself on the 19th August on the subject of the immunity from taxation enjoyed by the Sheikhs of Mohammerah and Koweit in respect of their date gardens in Iraq.

Yours sincerely,

F. H. HUMPHRYS.

[11921]

E

List of International Instruments referred to in the second paragraph of Article 8 of the Anglo-Iraq Treaty of June 30, 1930.

1. Undertakings entered into with the Sheikhs of Koweit and Mohammerah in 1914 in respect of their date gardens in Iraq.⁽¹⁾
2. The San Remo Oil Agreement, the 25th April, 1920.
3. The Anglo-French Boundary Convention, the 23rd December, 1920.
4. The Treaty Settlement of Lausanne, the 24th July, 1923.
5. The Treaty of Angora, the 5th June, 1926.

⁽¹⁾ Private negotiations are proceeding with a view to the liquidation of this commitment. If these are un-successful, the question will need to be discussed further between the two Governments.

[W 1118/198/29/1934]

No. 2.

[January 30, 1934.]

Foreign Office to the Law Officers of the Crown.

Foreign Office, January 16, 1934.

Gentlemen,
I HAVE the honour, by direction of Secretary Sir John Simon, to request that you will be so good as to furnish him with your opinion on certain points which have arisen concerning the interpretation of the Anglo-Netherlands Treaty of 1824 relating to commerce with India and the East Indies, a copy of which is attached hereto (Paper A).

Anglo-Netherlands Treaty of 1824 : Interpretation of articles 2 and 3.

2. Article 2 of the treaty runs as follows :—

“The subjects and vessels of one nation shall not pay, upon importation or exportation, at the ports of the other in the Eastern seas, any duty at a rate beyond the double of that at which the subjects and vessels of the nation to which the port belongs, are charged.

“The duties paid on exports or imports at a British port, on the continent of India, or in Ceylon, on Dutch bottoms, shall be arranged so as, in no case, to be charged at more than double the amount of duties paid by British subjects, and on British bottoms.

“In regard to any article upon which no duty is imposed, when imported or exported by the subjects, or on the vessels, of the nation to which the port belongs, the duty charged upon the subjects or vessels of the other shall in no case exceed 6 per cent.”

It will be seen that the terms of this article do not relate to goods of British, Dutch or any other *origin*,⁽¹⁾ but to goods, of whatever origin, imported by British or Dutch subjects or on British or Dutch vessels, as the case may be. Thus, on the strict wording of the article, it seems that, so long as any duties imposed in a British territory to which the treaty applies are based solely on the *origin* of the goods and apply equally whether the goods are imported by a British or a Dutch subject, or on a British or Dutch vessel, no violation of article 2 can be involved, even if the rates of duties imposed on goods of Dutch origin should exceed those imposed on goods of British origin by more than the limits laid down in the article (viz., be more than double, or where goods of British origin are free, more than 6 per cent. *ad valorem*).

3. The Dutch Government are, however, now contending that, upon an interpretation resulting from subsequent diplomatic correspondence, article 2 of the treaty of 1824 prevents discrimination above the limits specified in the article between goods of British and Dutch *origin*. This correspondence is discussed in paragraph 6 *et seq.* below. The circumstances in which the present Dutch contention has been put forward are as follows :—

4. Discrimination in the matter of duties on imports based on the flag of the carrying vessel or on the nationality of the importer was the normal practice at the time of the treaty of 1824 (see further below paragraph 6 (i) and (ii)), but such discrimination has long since been abandoned in all British territories, and, indeed, almost universally, and the sole basis of differentiation now is, and for many years has been, the origin of the goods themselves. Until recently the duties imposed in India, Malaya, &c., on goods of Dutch origin (whatever the manner of carriage or import) have never been more than double the duties imposed on goods of British origin (or, where the latter entered free, more than 6 per cent.); indeed, the duties on goods of Dutch origin have in fact always been well within these limits. Thus, on any interpretation of article 2 of the treaty

⁽¹⁾ The word “origin” here and subsequently is used to denote, in relation to goods, the country in which they are produced or manufactured. It is a question of construction whether the word “origin” in the diplomatic correspondence of the early part of last century, hereinafter to be referred to, bears the same meaning or some other meaning, such as, *e.g.*, the country from which the goods are shipped, whether produced or manufactured there or not.

of 1824 the Dutch Government had no cause for complaint. But in the early part of last year the duties on certain classes of goods of foreign origin (including, of course, those of Dutch origin) imported into India and parts of Malaya were raised to a level such that the limits above referred to were exceeded (*i.e.*, to more than double the duties imposed on goods of British origin, or where no duties were levied on the latter, to more than 6 per cent. *ad valorem*). Thereupon notes were received from the Netherlands Minister in London dated the 23rd May and the 13th June last, respectively, complaining that the new duties imposed in certain parts of Malaya and in India constituted an infraction of the treaty of 1824. Copies of these notes are attached (Papers B and C). A further note, dated the 5th July, was received in regard to India (copy attached, Paper D) and there have been subsequent notes asking for the favour of an early reply. The Netherlands Minister has been informed that the matter is being carefully considered by His Majesty's Government.

5. It will be seen that the Netherlands Minister bases himself, not on the literal meaning of article 2, but on an interpretation of it which he claims results from subsequent diplomatic correspondence between His Majesty's Government and the Dutch Government. He states that the former themselves insisted that the article related to goods (by which he means goods according to their origin), as well as to subjects and vessels, and that this view was finally accepted by the Dutch Government in 1836. (In all three of his notes the Netherlands Minister speaks of "British goods" and "Dutch goods." From the context it is clear he intends to denote goods of British and Dutch origin respectively.) The correspondence to which the Netherlands Minister refers started in 1825, and continued with intervals until 1836. It arose out of complaints by British merchants trading in the Dutch East Indies that the provisions of the treaty of 1824 were not being carried out by the Dutch Government. The exact nature of the contentions put forward by His Majesty's Government in their correspondence and of those ultimately accepted by the Dutch Government are questions on which your opinion is desired.

6. It will be seen that the correspondence (copies of which are attached, Paper E) is very confused and, at this distance of time, difficult to interpret with certainty. There are undoubtedly passages in it which appear to support the present Dutch contention, inasmuch as it was urged on the British side that article 2 of the treaty of 1824 was intended to apply to "British goods" and "Dutch goods," respectively. It seems clear that the term "British (Dutch) goods" was regarded as meaning or, at any rate, as covering "origin" in the sense in which the word was used at the time. This is evident from the context and from the use, in certain cases, of such terms as "British (Dutch) produce" and "British (Dutch) manufacture," or "goods imported from Holland" (see, *e.g.*, Documents 8, 12 and 28 in Paper E). It is submitted, however, that it is difficult to base any certain argument, in the sense advanced by the Netherlands Minister, on the use of these terms or on the correspondence in general, for the following reasons:—

(i) The correspondence and the expressions used in it must be appreciated in the light of the conditions under which colonial trade was carried on at and about that time. Under the Navigation Acts of the United Kingdom and similar legislation of other colonial Powers, trade between a mother country and its colonies, or between different colonies of the same mother country, was, in general, restricted to vessels under the national flag, although such vessels might, of course, carry goods of any origin. This condition of affairs may have led to goods carried by a given vessel being identified with the nationality of the vessel or that of the shipper or importer, and it was natural and probably usual, at that time, to describe, *e.g.*, as "British goods," goods produced or manufactured in any country whatever which had been collected for consignment in the United Kingdom and imported under the British flag. Shortly before the conclusion of the treaty of 1824, the restriction of colonial trade to national vessels began to be relaxed, and it then became necessary to conclude treaties whose object was to prevent, or at least to limit (as in the case of the 1824 treaty), discrimination against British ships and traders. Thus the primary considerations of commercial policy at this time were of a mercantile rather than of an industrial nature. For some time to come, and until the great development of British industrial output later in the century, the policy of His Majesty's Government in negotiating treaties applying to oriental territories was to secure rights for British ships and subjects rather

than to obtain concessions relating to goods produced in the United Kingdom, as such.

(ii) It is suggested that the above-mentioned considerations are probably sufficient in themselves to explain the confusion of terms in the Anglo-Dutch correspondence of 1825-36, and the apparent identification of goods with the ships they were carried in, of which striking illustrations are afforded, *e.g.*, in the fourth paragraph of Document 28 in Paper E, and again in Document 12 in which the writer, after speaking throughout of "British goods," ends by referring to "all that has been unjustly taken from our merchants upon import under the British flag."

(iii) That His Majesty's Government were not, in fact, intending to suggest any variation of the flag and nationality criterion laid down by the actual wording of article 2 of the treaty, seems clear from Documents 18, 19 and 23 in Paper E.

(a) Documents 18 and 19 may be read together, being the instructions given to the British Minister at The Hague, and the note based thereon addressed by him to the Dutch Government. This note was apparently written in reply to a Dutch note (Document 14), in the last paragraph of which the Dutch Government purported to give way to the British views, and spoke of the taxation of goods according to their *origin*. In Documents 18 and 19 (see especially Document 19, paragraphs 4 and 5) His Majesty's Government seem to state in clear and explicit language what they conceive to be the position resulting from the Dutch acquiescence. This statement (at any rate as embodied in paragraphs 4 and 5 of Document 19) says nothing about origin, or about British or Dutch goods, as such; it seems to relate solely to importations by British and Dutch subjects and vessels, and recites the rates which His Majesty's Government understand will be levied on such importations.

(b) Equally striking is the British note of the 12th April, 1836 (Document 23), which was apparently called forth by the instructions which, following on their apparent acceptance of the British views above referred to, the Dutch Government gave to their authorities in the East Indies. The gist of these instructions was communicated to His Majesty's Government in two notes (Documents 20 and 21), and the instructions themselves appear to have been promulgated by the Governor of the Dutch East Indies some weeks later (Document 22). These instructions, it will be seen, are directed to the taxation of goods, according to their origin, and an immediate protest against them was made by His Majesty's Government in the note of the 12th April, 1836, already referred to (Document 23), in which it was pointed out that flag and not origin was the proper criterion.

(iv) The British note of the 12th April, 1836 (Document 23), was replied to in a Dutch note of the 2nd May (Document 24), the exact meaning of which is very difficult to grasp. The significant thing is, however, that the views expressed in the British note of the 12th April, 1836 (Document 23), appear ultimately to have prevailed, for, after some further correspondence, the Dutch Government appear to acquiesce in them (see Document 29, especially the latter part) and the tariffs thereupon actually instituted in the Dutch East Indies were, it seems, based on the criterion of flag and not on that of origin (see Documents 30 and 31 in Paper E). Thus, at the conclusion of the correspondence when the Dutch had, as the Netherlands Minister now alleges (Paper B), accepted the British point of view, the tariffs instituted were in no way such as to bear out the present Dutch contention.

(v) If, therefore, as seems to be the case, His Majesty's Government were not, in the correspondence of 1825-36, purporting to do more than press for the literal application of article 2 of the treaty, it becomes pertinent to enquire in what way exactly the Dutch authorities were, according to His Majesty's Government, violating that article. While the correspondence is very confused on this point and many of the British notes extremely vague, there are certain passages which suggest that the dispute was not, as may appear at first sight, a dispute as to whether origin, or whether flag and nationality, constituted the true criterion to be applied under article 2 as regards the levying of duties on goods; but rather that it was a dispute as to whether "goods" in any shape or form were covered at all by article 2. It can be argued from parts of the correspondence (see, *e.g.*, the Dutch notes, Documents 4 and 7 in Paper E) that the Dutch authorities had taken the view that article 2 did not, in referring to ships and subjects, refer to goods imported on those ships or by those subjects, but referred



solely to the actual vessels and individuals and did no more than forbid the levying, above the specified limits, of such charges as port dues, landing charges, poll taxes, visa fees, &c. Thus, in the Dutch note of the 26th July, 1825, the Dutch Government refused to admit that their tariff was "En opposition avec le traité, qui ne limite que la différence à faire entre les pavillons respectifs, et laisse d'une part et d'autre une entière liberté pour la fixation des droits d'entrée pour les marchandises." In consequence, the Dutch apparently regarded themselves as free to levy any duties they pleased on goods, whatever their origin and whatever the nationality of the importer or flag of the importing vessel. The British argument, it is suggested, particularly as developed in Document 19 in Paper E (see especially the passages following on the textual quoting of the terms of article 2 of the treaty of 1824, about half-way through the note), was directed to showing that the wording of article 2 was quite inconsistent with any such limited interpretation and it is submitted that the correspondence, in spite of the loose language so liberally used in it, contains no clear or definite evidence that His Majesty's Government intended to go any further, or to claim that origin was the proper criterion to be applied; while Document 23 in Paper E (see subparagraph (iv) (b) above) tends to negative any such view.

7. From the fact (referred to in paragraph 6 (iv) above) that the tariffs finally introduced in the Dutch East Indies were, actually, based on flag, not origin, it appears that, even if the view suggested above is wrong, and His Majesty's Government had really been urging that article 2 of the treaty related to goods according to their origin instead of according to the nationality of the ship or importer, this contention was not accepted by the Dutch. No doubt countries which have entered into a treaty are entitled by subsequent diplomatic correspondence to elucidate the meaning of any article which may be obscure; and the interpretation so arrived at, if definite and clearly agreed upon, is thereafter binding on the parties. In the present case, however, whatever may have been urged on either side in the course of the correspondence, the actual result does not seem to have amounted to more than an agreement that article 2 of the treaty of 1824 did undoubtedly relate to duties on goods. But, having regard to the confused and often contradictory nature of the correspondence, and to the action, in fact, taken by the Dutch as a result of it, it hardly seems possible to maintain that any definite agreed interpretation was ever arrived at to the effect that article 2 related to goods according to their origin.

8. It is further suggested that, if His Majesty's Government were, indeed, purporting to argue that article 2 related to the origin of goods, they were, having regard to the clear wording of the article, urging, not a mere interpretation, but an actual variation of its terms. But it is submitted that only the clearest indication in the correspondence that such was the intention of the parties could operate to vary the clear terms of a treaty, and that the correspondence of 1825-36 was wholly inadequate to effect any such variation.

9. Your opinion is also desired on another point which has arisen in regard to the treaty of 1824. Tariffs similar to those recently introduced in India and the Straits Settlements, and of which the Netherlands Government are now complaining, have been established in the Federated and certain of the Unfederated Malay States, all of which came under British protection subsequent to the treaty of 1824. These States are under native rulers and subject to British protection, but His Majesty does not claim sovereignty or jurisdiction there. Nevertheless, it is evident from the Netherlands Minister's first note (Paper B) that he regards the treaty of 1824 as applying to them. The relevant provisions of the treaty in this connexion are as follows:—

"His Majesty the King of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the Netherlands, desiring to place upon a footing, mutually beneficial, their respective possessions and the commerce of their subjects in the East Indies, . . .

"Article 1. The high contracting parties engage to admit the subjects of each other to trade with their respective possessions in the Eastern Archipelago, and on the continent of India, and in Ceylon, upon the footing of the most favoured nation; their respective subjects conforming themselves to the local regulations of each settlement.

"2. The subjects and vessels of one nation shall not pay, upon importation or exportation, at the ports of the other in the Eastern seas, any

duty at a rate beyond the double of that at which the subjects and vessels of the nation to which the port belongs, are charged.

"The duties paid on exports or imports at a British port, on the continent of India, or in Ceylon, on Dutch bottoms, shall be arranged so as, in no case, to be charged at more than double the amount of duties paid by British subjects, and on British bottoms.

"In regard to any article upon which no duty is imposed, when imported or exported by the subjects, or on the vessels, of the nation to which the port belongs, the duty charged upon the subjects or vessels of the other shall in no case exceed 6 per cent.

"3. The high contracting parties engage, that no treaty hereafter made by either with any native Power in the Eastern seas shall contain any article tending, either expressly, or by the imposition of unequal duties, to exclude the trade of the other party from the profits of such native Power; and that if, in any treaty now existing on either part, any article to the effect has been admitted, such article shall be abrogated upon the conclusion of the present treaty.

"It is understood that, before the conclusion of the present treaty, communication has been made by each of the contracting parties to the other, of all treaties or engagements subsisting between each of them, respectively, and any native Power in the Eastern seas; and that the like communication shall be made of all such treaties concluded by them, respectively, hereafter."

10. It will be seen that, so far as the preamble and article 1 are concerned, only "possessions" are covered. There is no doubt that a protected State is not a possession, and this view has been maintained by His Majesty's Government in the past. Natives of territories under protection are not British subjects, but only British-protected persons. Further, the powers of His Majesty in respect of such territories are normally regulated and determined by treaty with the native ruler. The question was considered in 1909 in regard to the interpretation of the terms colony and possession in the Anglo-Paraguayan Treaty of 1884. A memorandum prepared in the Foreign Office at the time is attached (Paper F). It will be seen that the conclusion reached was that a protectorate was not a colony or possession, and various opinions of former Law Officers of the Crown are referred to as tending to support this view. The Paraguayan Government were accordingly informed that the treaty of 1884 was not applicable to protectorates. The same view was maintained in 1926 regarding the question whether the Aden protectorate came within the meaning of article 2 of a treaty with Italy concluded in 1883 referring to "Her Britannic Majesty's dominions and possessions." If a protectorate is not a possession *à fortiori* a protected State is not one either.

11. The same view is apparently taken by the Netherlands Government in regard to these same Malay States, for in April 1918 a note from the Netherlands Minister was received (attached, Paper G) arguing that British protectorates were not covered by article 18 of the Anglo-Dutch Extradition Treaty of 1898. This article provided that the treaty should be applicable to the "colonies and foreign possessions" of the high contracting parties. The Dutch accordingly asked for the conclusion of a special extradition agreement regarding the Federated Malay States, and this was done.

12. It should also be noticed that article 2 of the 1824 treaty only appears to apply to ports in places "belonging" to the party concerned, *i.e.*, possessions.

13. It seems less clear, however, that the Malay States are not covered by article 3 of the Anglo-Netherlands Treaty of 1824 (*supra*, paragraph 9) on the assumption that, under the treaties at present in force with the native rulers, His Majesty's Government are in a position to control the tariff policy of these States. It should be noticed that article 3 is different from article 2, inasmuch as it appears to be directed against anything "tending, either expressly, or by the imposition of unequal duties, to exclude . . . trade," whereas article 2 merely prevents the imposition of duties above a specified limit. Article 3 also applies to "trade" (*i.e.*, Dutch trade or British trade), and this might mean either origin or flag, or both, though it is possible that on this point article 3 was intended to have the same effect as article 2, whatever that may be.

14. It is clear that the literal terms of article 3 do not do more than forbid the conclusion by one party to the 1824 treaty of agreements with native rulers



containing articles tending, either expressly, or by the imposition of "unequal duties" to "exclude" the "trade" of the other party. It is, further, the fact that no treaty between His Majesty's Government and the ruler of a Federated Malay State contains any stipulation having as its object, or as its necessary result, the exclusion of Dutch trade. The native rulers, however, have agreed to accept the advice of His Majesty's Government on commercial matters, and the question therefore arises whether, if His Majesty's Government may not by treaty bind any native ruler to introduce measures tending to exclude Dutch trade, it would not equally be contrary to article 3 of the treaty of 1824 for His Majesty's Government to cause or allow such measures to be taken.

15. It may, of course, be argued that, in so far as article 3 is directed against the imposition of *unequal* duties, the tariffs until recently imposed in the Federated Malay States on goods of Dutch origin, while not exceeding the limits specified in article 2 of the treaty, have undoubtedly for a long time past been "unequal" in the sense that a preference has been accorded to goods of British origin, and yet the Dutch Government have never till now alleged any violation of the treaty. It may in consequence be possible to maintain that they have tacitly admitted that no circumstances have yet arisen bringing into operation the terms of article 3 of the treaty in respect of the Malay States. It is noticeable that, while the Netherlands Minister in his notes complains of the new tariffs in the Malay States, he does so not on the basis of article 3, but exclusively on the basis of article 2, which, however, appears to apply only to possessions in the strict sense. It must not, however, be overlooked that the emphasis in article 3 must probably be laid on the words "tending . . . to exclude," and that it is only in the event of duties being so unequal that they amount to an exclusion that any violation of the article will occur, *i.e.*, that the question is one of degree. This may explain why the Dutch have not until now complained of the duties in the Malay States, which, although unequal, have not hitherto been so unequal as to exclude. Possibly, in the Dutch view, the criterion of what duties will amount to an exclusion under article 3 is that indicated by article 2, *viz.*, double duties, or, where no duties are charged, 6 per cent.; so that it would only be now, upon the introduction of the recent tariffs, that a case for complaint in regard to the Malay States would arise. Even on this view, however, it is difficult to see why the Dutch case is based not on article 3, but exclusively on article 2, which has no application to the Malay States. Moreover, it does not necessarily follow that double duties would tend to exclude, as the level of the duty is only one of the factors to be taken into account, among others being the relative competitive positions of the industries concerned.

16. His Majesty's Government and the Dutch Government are both parties to the Optional Clause, and the questions dealt with herein may therefore eventually be referred for decision to the Permanent Court of International Justice. Sir John Simon would accordingly be grateful if you would take the above matters into your consideration and if you would furnish him with your opinion on the following points:—

- (1) Whether, on its strict textual interpretation, there is anything in article 2 of the Anglo-Netherlands Treaty of 1824 to prohibit the introduction, in any British territories to which the article applies, of tariffs on goods of Dutch origin at rates in excess of those specified in the article, *viz.*, more than double those on goods of British origin, or, where these enter free, more than 6 per cent. *ad valorem*, assuming, of course, that such tariffs are based solely on the origin of the goods and do not involve any differentiation in respect of the nationality of the importer or the flag of the importing vessel, *i.e.*, that the same rates are charged on all goods of Dutch origin, whether imported by Dutch, British or other vessels or importers.
- (2) If the answer to (1) is in the negative, whether the subsequent correspondence and action of the parties to the 1824 treaty amounted to an agreed interpretation or modification of article 2 such as to prohibit the introduction of differential tariffs of the kind specified in the preceding question.
- (3) Whether, apart from article 3, there is anything in the treaty to render it (and in particular article 2) applicable in respect of protected States.

- (4) Whether, on the assumption that the British treaties with rulers of the Malay States, while containing no specific provision of the kind mentioned in article 3, have the effect of enabling His Majesty's Government to control the tariff policy of these States, it would be contrary to article 3 for His Majesty's Government to cause or allow the local ruler to take measures of a kind against which the article is directed.
- (5) If the answer to (4) is in the affirmative, (a) whether article 3 is directed against all tariffs other than equal tariffs, or whether it is only directed against tariffs tending by their inequality actually to exclude, and, in the latter event, whether the question of what rates tend to exclude is a question of fact to be determined by all the circumstances of the particular case (see end of paragraph 15 above), or whether it can be held to have been the intention of the parties that rates should be regarded as tending to exclude when and if (and only if) they exceed those specified in article 2, *viz.*, are more than double, or, where there is free entry, more than 6 per cent. *ad valorem*; (b) whether the differentiation against which article 3 is directed is intended to be differentiation based on the origin of the goods or discrimination based on the flag of the importing vessel or nationality of the importer.

17. Sir John Simon would also be glad of any observations of a general character which you may be good enough to make, and if in this connexion you would take into consideration a telegram from the Government of India, dated the 15th August last, a copy of which is attached (Paper H).

18. In view of the time which has elapsed since the Netherlands Minister's original notes, Sir John Simon would be grateful if this matter could be treated as one of urgency.

I have, &c.

A. W. A. LEEPER.

List of Papers.

- A.—Text of Anglo-Netherlands Treaty of 1824. [Treaty 206.]
- B.—Note from Netherlands Minister of the 23rd May, 1933 [W 5835/5835/29].
- C.—Note from Netherlands Minister of the 13th June, 1933 [W 7075/5835/29].
- D.—Note from Netherlands Minister of the 5th July, 1933 [W 8010/5835/29].
- E.—Correspondence 1825-36 [W 314/198/29/1934].
- F.—Foreign Office memorandum of the 25th January, 1909 [2861/1909].
- G.—Note from Netherlands Minister of the 11th April, 1918 [64993/1918].
- H.—Telegram from Government of India to Secretary of State for India of the 15th August, 1933 [W 9583/5835/29].

Report.

- (1) No.
- (2) The correspondence is confused and inconclusive, and in our opinion it does not amount to an agreed interpretation or modification of article 2. Without going into the earlier letters, the Dutch Minister, in his letter of the 29th April, 1836, states his willingness to accept the consequences of the view that the words "subject and ships" should represent merchandise (bottom of p. 2). Lord Palmerston, in his note of the 5th June, 1836, characterised this as nonsensical. In consequence of Lord Palmerston's note, a further communication is made by Sir Edward Disbrowe on the 29th July, 1836, expressing dissatisfaction with the orders issued and asking that they should be in strict and literal accordance with the second article of the treaty. Document 30, which is communicated to Lord Palmerston by Sir Edward Disbrowe on the 16th December, 1836, indicates that the duties, in fact, being charged were based on the flag without reference to origin.
- (3) No.
- (4) On the whole, yes. The question is whether "unequal duties tending to exclude" would be a breach of the article if imposed not expressly by a treaty, but through powers obtained under a treaty. On the strict letter of the article

[11921]

F

there would not have been a breach, but we think an International Court would construe the article more broadly and would hold that unequal duties imposed as the result of the control of tariff policy exercised by His Majesty's Government by virtue of a treaty would be within this article.

In the English translation, the word "profits" should presumably be "ports"; the Dutch word is "havens."

(5)—(a) We think article 3 is directed against tariffs tending actually to exclude, and that whether a tariff or tariffs tend to exclude is a question of fact to be decided in all the circumstances of the case. We do not think the inequalities allowed under article 2 could be taken as a definite criterion. They could be looked at as showing an inequality which both sides were prepared to accept as reasonable for their own territories, but it would be possible to show that greater inequalities did not tend to exclude; whereas in certain circumstances less inequalities might do so. The evidence would, we think, have to show some substantial exclusion.

(b) This is a difficult question. It depends on the construction of the words "duties" and "the trade" of the other party. On the one hand, these words can be construed with reference to article 2, which indicate on this view the "trade" which it was the intention of the parties to protect and the duties which it was intended to cover, i.e., trade by nationals and in national vessels, and duties directed against trade as so defined. This argument is perhaps re-enforced by the word "ports." On the other hand, it could be said that the words are quite general and should receive a general meaning. The difficulty of this latter contention is to give any satisfactory definition of what "the trade" of the United Kingdom or Holland does mean if article 2 is disregarded. Does it mean trade in goods of British or Dutch origin or trade in British or Dutch ships, or trade by British or Dutch merchants and dealers?

We think, on the whole, that article 2 would be looked at to see what "duties" are contemplated in article 3 and what trade was intended to be covered. The answer to the question therefore is that the differentiation contemplated is differentiation based on the flag of the vessel or nationality of the importer.

In view of our opinion, the point suggested by the Government of India does not arise. The fact that in the letter of the 25th December, 1835, the Dutch Government express their willingness to modify their practice only "aussi longtemps que l'industrie de ses sujets n'exigera pas une protection plus efficace" is no doubt important if the Dutch Government continue to seek to rely on the correspondence.

T. W. H. INSKIP.

DONALD SOMERVELL.

*Law Officers' Department,
January 30, 1934.*

[E 5011/2369/91/1934]

No. 3.

[July 31, 1934.]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, July 23, 1934.

I HAVE the honour, by direction of Secretary Sir John Simon, to transmit to you the papers noted in the accompanying list, and to request the favour of your opinion on the subject of the rights claimed by Persia in the Archipelago of Bahrein.

Bahrein:
Persia's
rights of
sovereignty or
suzerainty.

2. Bahrein is a small archipelago lying on the Arabian littoral of the Persian Gulf and almost land-locked by the Arabian province of Hasa in the dominions of Ibn Saud, the ruler of Saudi Arabia, and by the Peninsula of Qatar, which is the territory of the independent Arab Sheikh of Qatar. The population of Bahrein is essentially Arab by race, though since the beginning of the present century there has been a considerable influx of Persian nationals.

3. The archipelago is of considerable commercial importance. The pearl banks by which it is surrounded make it the centre of a pearl trade which, in good years, is of very considerable dimensions, while oil has recently been discovered there. Its strategic position in the centre of the Persian Gulf, always important, has become still more so of late years with the development of the air route to India and the possibility that it may be desirable to use the island as a British naval station.

4. A historical memorandum prepared by the India Office, and dealing in detail with the history of Bahrein both before and after 1783 is attached (Paper A). It is conceived that the answers to the question as to which your advice is desired will depend almost entirely on the view taken of the historical facts there set out, and it has therefore been thought necessary to state those facts in detail. The situation may, however, be summarised as follows:—

5. The sheikhdom was for some time prior to 1783 under Persian rule. The Persians were in that year driven out of the islands by Arabs from the mainland of Arabia under the leadership of the direct ancestor of the present ruling house, in whom sovereignty has rested since that date. Claims to sovereignty, or possibly in some cases suzerainty, over Bahrein have repeatedly been preferred by Persia since 1783. They were also preferred by Turkey (suzerain up to the war of the adjoining mainland) with great insistence on a number of occasions between 1847 and 1913, in which latter year the Turkish Government finally recognised the independence of the island; and they have been put forward in the past by Muscat; by Egypt; and by the Wahabi Amirs of the Arab mainland. Tribute was last certainly paid to Persia in 1799. It has at one time or other between 1800 and 1870 been paid also to Muscat, to Egypt, and to the Wahabi Amirs, although in the case of the last-named, at any rate in the more recent period, possibly only in respect of possessions on the mainland of Arabia. Bahrein, at least since 1820, has consistently been regarded as independent by His Majesty's Government, who have been in special treaty relations with its rulers on that basis since that date. Those treaty relations (which have throughout involved contingent liabilities for protection) were strengthened in 1861, while by engagements contracted in 1880 and 1892 the ruling house have undertaken obligations which place their external relations in the hands of His Majesty's Government and preclude them from ceding territory save to, or with the consent of, His Majesty's Government.

6. In 1927, 1928 and 1929 important notes were exchanged between His Majesty's Government and the Persian Government in regard to the latter's claim to Bahrein, of which copies have been communicated to the Secretary-General of the League of Nations for communication to the States Members of



1934

the League. Copies of these notes are attached as Paper B. On five other occasions since 1927 the Persian Government have addressed protests to the Secretary-General of the League of Nations, or communicated to him copies of protests against alleged violations of their sovereignty, which they claim over the Bahrein Islands. Copies of the Persian Government's letters to the Secretary-General of the League are attached as Papers C-G. In the first four of these latter cases, His Majesty's Government thought it unnecessary to return replies. In the case of the latest Persian protest (Paper G), His Majesty's Government have drawn the attention of the Secretary-General to their notes to the Persian Government of January 1928 and February 1929 (see Paper B) and requested him to circulate this reply to the Members of the League. In January 1933, the International Bureau of the Universal Postal Union circulated to the members of the union a protest from the Persian postal authorities regarding the proposed issue of Indian postage stamps, surcharged "Bahrein," and in April the bureau circulated the reply of the Indian postal authorities (Paper H).

7. On political and strategical grounds it is regarded as of the first importance to retain the *status quo* in Bahrein and to continue to reject the claims put forward by Persia. His Majesty's Government, however, are anxious, to enable them to consider how best to deal with any further assertion of the Persian claim, for the advice of the Law Officers as to whether Persia possesses any rights in Bahrein.

8. While the Persian claim has been asserted with great insistence over a very long period of years, the grounds adduced in support of it have varied from time to time and have never been stated by the Persian Government in any very great detail. The fullest expression of the Persian attitude is that contained in the notes of the 26th November, 1927, and the 2nd August, 1928. The various arguments which, from time to time, Persia has advanced in support of her claim are as follows:—

- (1) The history of the islands prior to 1783. Persia contends that an appeal to history shows that prior to this date the islands were from a remote period subject, and tributary, to her.
- (2) The absence of Persian consent to the detachment of Bahrein, admittedly at one stage prior to 1783 a Persian possession, from Persia; and the fact that Persia has never recognised the islands as independent and has consistently urged a claim to them.
- (3) Certain provisions of the treaty (unratified and disavowed by both parties) concluded between Captain Bruce, Political Resident in the Persian Gulf, and the Minister of the Prince Governor of Shiraz, in 1892.
- (4) A gold coin alleged to have been struck at Bahrein in 1817.
- (5) Payment by Bahrein at various stages of "peeshkesh," offerings, or tribute to Persia.
- (6) Flying of the Persian flag by the Sheikh of Bahrein.
- (7) Letters from past rulers of Bahrein admitting Persian suzerainty.
- (8) A note addressed by His Majesty's Government in April 1869 to the Persian Minister in London.
- (9) Closeness of relations at the present day between Persia and Bahrein.

9. The arguments referred to in the preceding paragraph are briefly examined in paragraphs 147-152 of the historical memorandum (Paper A) attached, which suggests the conclusion that they afford no solid basis for a Persian claim to sovereignty or suzerainty over the Island of Bahrein.

10. Apart from the arguments based on historical events, the only important legal consideration which has been advanced by the Persian Government in support of their claim is that contained in paragraph 2 of the note addressed by the Acting Persian Minister for Foreign Affairs to His Majesty's Chargé d'Affaires at Tehran on the 2nd August, 1928 (p. 4, Paper B). You will observe that a detailed reply to this argument was made in paragraphs 5-8 of the note addressed by Sir Austen Chamberlain to the Persian Minister in London on the 18th February, 1929 (pp. 8 and 9, Paper B). Reference may also be made in this connexion to the article entitled "Sovereignty, Seisin and the League" by Sir John Fischer Williams (*British Yearbook of International Law*, 1926, p. 24).

11. I have accordingly the honour to request you to take the enclosed papers into your consideration, and to advise, in the light of the facts stated in the historical memorandum (Paper A), the various arguments which have been employed on either side in the course of the discussion of this question, and of any other considerations which may appear to you to be relevant, whether, in your opinion, Persia possesses any rights in or over Bahrein, and if so what the nature of those rights is.

12. The question of the future policy of His Majesty's Government in regard to Persia, as to which the Ministerial Middle East Sub-Committee may have to take important decisions at any moment, may be to a considerable extent dependent upon the nature of your opinion on the above point, and Sir John Simon would therefore be grateful if it were possible for you to furnish your opinion at a very early date.

I have, &c.
G. W. RENDEL.

List of Papers.

- (A) Historical memorandum prepared by India Office.
- (B) Notes exchanged with Persian Government between 1927 and 1929.
- (C) Letter from Persian Minister for Foreign Affairs to Secretary-General of the League of Nations, dated the 13th January, 1929, communicating copy of note to His Majesty's Minister at Tehran.
- (D) Copy of letter from Persian Minister for Foreign Affairs to Secretary-General of the League of Nations, dated the 17th January, 1930.
- (E) Copy of letter from Persian Minister for Foreign Affairs to Secretary-General of the League of Nations, dated the 24th July, 1930, enclosing copy of note to His Majesty's Minister at Tehran, dated the 23rd July, 1930.
- (F) Letter from M. Sepahbodi, Persian representative to the League of Nations, to Secretary-General of the League of Nations, dated the 14th October, 1932.
- (G) Letter from Secretary-General of the League of Nations, dated the 12th June, 1934, communicating copy of note from Persian Minister for Foreign Affairs to United States Minister at Tehran, dated the 22nd May, 1934.
- (H) Two circular letters from the Director of the International Bureau of the Universal Postal Union, dated the 26th January, 1933, and the 20th April, 1933, communicating a protest from the Persian postal authorities and the reply of the Indian postal authorities respectively.

Report.

The Persian claim to sovereignty over Bahrein appears to be based upon the view that from time immemorial the islands were Persian territory, and that by virtue of the fact that Persia has never expressly recognised their independence, coupled with various assertions of sovereign right on the part of Persia, and of admissions from time to time of the Persian claims on the part of the rulers of Bahrein and of His Majesty's Government, Persian sovereignty has never been lost.

The facts as narrated in the historical memorandum prepared by the India Office do not, in our opinion, support this view. There is no satisfactory evidence of any kind that at any date before 1783 Bahrein was incorporated in Persian territory. The most that can be said is that there was a period of Persian occupation at the beginning of the 17th century, and that for a short period in the 18th century a *de facto* control was exercised by a Persian Governor. Whether this control ever acquired the character of *de jure* sovereignty may be doubted, but, in our opinion, the expulsion of the Persian garrison in 1783 never to return makes it impossible to rely upon what had happened before that event.

The later history of Persian claims to sovereignty over the islands affords no evidence of any recognition either by His Majesty's Government or by any other sovereign power of Bahrein as Persian soil. The Bruce Treaty of 1822 cannot be relied on, while the three treaties of 1809, 1814 and 1857 appear to us to be wholly silent as to Persian rights over Bahrein. The British note of 1869 is the high-water mark of any admission of Persian rights. Even this note, however, falls far short of a recognition of sovereignty, and nothing said or done thereafter gives any support to Persian claims.

[11921]

G



1934

38

PERSIA

Even if Persia were able as a matter of historical fact to show that Bahrein had been Persian territory prior to 1783, the fact that she has never expressly recognised Bahrein's independence affords, in our view, no foundation for her present claim. We agree with the arguments on this point in paragraphs 5 to 8 of Sir Austen Chamberlain's letter of the 18th February, 1929.

Upon a review of all the facts as stated in the memorandum and of the arguments advanced in the course of the correspondence in recent years, we are of opinion that Persia has no rights, either of sovereignty or suzerainty, in or over Bahrein.

T. W. H. INSKIP.
D. B. SOMERVELL.

Law Officers' Department,
July 31, 1934.

39

Paper A.

CONFIDENTIAL.

INDIA OFFICE.

P.Z. 4718/1934.

HISTORICAL MEMORANDUM ON
BAHREIN.

INDEX.

	PARAS.	PAGES
I. Geographical situation - - - - -	1-2	1
II. Bahrein prior to 1783 - - - - -	3-4	1
Summary - - - - -	5	2
III. 1783-1820. From the expulsion of the Persians to the conclusion of the Treaty of 1820 with His Majesty's Government - - - - -	6-18	3
Summary - - - - -	19	6
IV. 1820-30 - - - - -	20-25	6
Summary - - - - -	26	8
V. 1830-40 - - - - -	27-35	8
Summary - - - - -	36	10
VI. 1840-50 - - - - -	37-58	11
Summary - - - - -	59	16
VII. 1850-61 - - - - -	60-71	16
Summary - - - - -	72	19
VIII. 1861-67 - - - - -	73-75	20
Summary - - - - -	76	20
IX. Discussions and Incidents, 1868-70 - - - - -	77-97	20
Review of discussions of 1868-70 - - - - -	98	27
X. 1870-80 - - - - -	99-108	28
Summary - - - - -	109	30
XI. 1880-92. From the conclusion of the First to the conclusion of the Second Exclusive Agreement with Her Majesty's Government - - - - -	110-115	30
Summary - - - - -	116	31
XII. 1892-1913. From the Second Exclusive Agreement to the Anglo-Turkish Convention of 1913 - - - - -	117-129	31
Summary - - - - -	130	34
XIII. 1913-34 - - - - -	131-144	34
XIV. Conclusion - - - - -	145-153	37-46
A. Claims to or assertions of sovereignty over Bahrein, 1783 to 1934 - - - - -	146	37-38
B. Basis of the Persian claim - - - - -	147-148	38-44
Review of Persian claim - - - - -	149-152	44-45
C. Attitude of His Majesty's Government, 1820-1934 - - - - -	153	45-46

India Office.

CONFIDENTIAL.

P.Z. 4718/1934.

Historical Memorandum on Bahrein.

[The Memorandum which follows deals with the history of Bahrein from the point of view primarily of the political status of the islands at various periods and in particular with the claims to sovereignty over them put forward by Persia at various dates since 1783, and with the correspondence and discussions which have taken place in connection with such claims.]

The principal authorities quoted, apart from original despatches and letters, are the following:—

- (1) Lorimer: "Gazetteer of the Persian Gulf."
- (2) Selections from "Records of the Government of Bombay," Vol. XXIV (1856).
- (3) Aitchison: "Treaties" (1933 Edition), Vols. XI (Persian Gulf) and XIII (Persia).
- (4) "Précis of Correspondence regarding the Affairs of the Persian Gulf" (1801 to 1853), by J. A. Saldanha (1906).
- (5) Sir A. T. Wilson: "The Persian Gulf" (1928).
- (6) Curzon: "Persia."
- (7) Hertslet: "Memorandum on the separate Claims of Turkey and Persia to sovereignty over Bahrein" (1874).
- (8) P.G. 13: "Historical Summary of Events affecting the British Position in the Persian Gulf, 1907-28."

I.—Geographical Situation.

1. The Principality of Bahrein consists of the archipelago formed by the islands of Bahrein, Muharraq, Umm Na'asan, Sitra, and Nabi Salih, and by a number of lesser islets and rocks. Taken altogether these form a compact group almost in the middle of the V-shaped gulf on the Arabian littoral of the Persian Gulf which divides the independent Arab Trucial Sheikdom of Qatar from the coast of Qatif in the Kingdom of Saudi Arabia.

Lor. II, 234.

2. The term "Bahrein" formerly embraced the promontory of Qatar and the oases of Qatif and Hasa on the Arabian mainland, as well as the islands of the archipelago, and, according to Lorimer, "some authorities would attribute to it in the past an even more extended application, affirming that it once denoted the whole western side of the Persian Gulf from Ruus-al-Jibal to the mouth of the Shatt-el-Arab."

Lor. II, 233.

II.—Bahrein prior to 1783.

3. The very conflicting evidence available goes to show that Bahrein was subject to Persian rule for a period in the early part of the Christian era, and between A.D. 615 and 723. It is stated to have been conquered by one Keshan bin Abdul Malik, and to have come under the sway of the Oommiyyad Caliphs, in the latter year, and to have remained under the control of the Caliphs until the close of the Abbaside dynasty in the 11th century, when it again became subject to chiefs of its own race. Its mediæval history is obscure, but a writer who visited the islands in A.D. 1051 refers to the fact that half of the pearls taken in Bahrein belong to the Chiefs of Hasa on the Arab mainland. Idrisi, the Arab geographer, writing about a century later, states

Bombay
Selections,
XXIV, 23.
G. of I.
Desp. No. 18
of 22.2.1870,
para. 2.
Wilson,
Persian Gulf,
pp. 85-6.

Wilson,
88-90.

that the island "is governed by an independent chief. The inhabitants of the two shores are satisfied with his justice and piety, and when he dies he is replaced by a person of equal virtue and piety." It was conquered about 1320 by the (Arab) rulers of Hormuz, a kingdom finally subdued by the Portuguese in 1506, but which appears to have been tributary to Persia in at any rate its later days. Bahrein appears at the same date to have fallen under Portuguese control. The Persians have adopted in a recent Note on the subject a statement that it remained under Portuguese control from 1507 to 1622. It would appear, however, that there are at any rate some breaks in the continuity of Portuguese control. An agreement of 1515 between the Portuguese and the Persians, under which the King of Hormuz was to be "ruler of Hormuz in the name of King Dom Manuel, his Lord," provided *inter alia* that Portuguese shipping should be available to enable the Persians to invade Bahrein and Qatif. In 1522 a revolt stimulated by the King of Hormuz broke out against the Portuguese at Bahrein among other places, but was quelled, and in 1528 endeavours by the Portuguese to quell a subsequent rebellion in Bahrein against the King were beaten off. In 1559 it was temporarily occupied by the Turks, who were, however, driven out by the Portuguese in the same year. In 1602 the Portuguese were forcibly expelled from the islands by the Persians. The Persian occupation was of uncertain duration, and in their Note of 2nd August 1928 they refer to 1622 as the date on which Persia regained possession of Bahrein. They appear in any event to have had a military depôt in Bahrein in 1622. Curzon states that "the Portuguese . . . in 1625 concluded a treaty with Shah Abbas, by which they restored to him all his coast possessions, retaining only the pearl banks at Bahrein. . . ."

4. In or about 1718 the islands were occupied by the Arabs of Muscat, who, however, appear to have maintained their occupation for a short time only. It is not clear whether at the date of this attack the islands were derelict or whether they were held by a Persian garrison. About 1753 the Ruler under the Persian Government of the town of Bushire made a descent upon Bahrein, the chief resident tribe in which (the Huwalah Arabs—at the present day still strongly represented in the islands) was seriously divided by internal feuds, and established his authority there. In this manner the islands again became, at least in name, dependent on Persia. In 1782 the Arabs of Zubarah, on the Arabian mainland, efforts to reduce which had been made by the Governor of Bahrein under the Persians in the years immediately preceding that date, retaliated by a descent on the island of Bahrein. They defeated the Persian Governor, drove him to his fort, plundered and destroyed the town of Manama, and took possession of a Bushire vessel, with which they retired to Zubarah. A counter attack was repulsed, and in the following year the Uttabi Arabs of Zubarah, assisted by contingents from various tribes of Qatar, occupied the Bahrein islands, the Persian garrison of the Manama Fort capitulating on 28th July 1783, after a siege of about two months' duration, and being allowed to return to Bushire.

Summary.

5. It will be seen that while the history of Bahrein prior to 1783 is very obscure, it would appear that Persia for not inconsiderable periods exercised control over the islands. The nature of that control is not, however, very clear; it seems probable that it was only very rarely of a definite character; and even in more recent periods

Wilson, 105.

Wilson, 116.

Wilson, 121.

Wilson, 124.

Lor. I, 841.

Wilson, 140.

Lor. I, 836.

Curzon,
Persia, II,
419.

Lor. I, 837.

Lor. I, 839-
40.

Persian relations with the islands were for a substantial number of years interrupted by Portuguese occupation of or overlordship over them. It is, however, clear that Persia or a Persian vassal was in effective control of the islands during the 30 years prior to the expulsion of the Persians by the Arabs of the mainland in 1783.

III.—1783-1820. From the Expulsion of the Persians to the conclusion of the Treaty of 1820 with His Majesty's Government.

Bahrein pays Tribute to Persia, 1799.

6. Projects by the Persian Government for the re-establishment of its authority in Bahrein between 1783 and 1800 did not materialise. In 1799 the Imam of Muscat declared war on the Uttabis of Bahrein, who, alarmed by his proceedings, opened a correspondence with the Persian Governor of Bushire, in the course of which they stated that the island originally belonged to the Turkish Government, but that it was many—about 70—years since the Turks had been in possession of it.* He, on their offering to become tributary to Persia, proceeded privately to Bahrein and received from them an instalment of revenue on account of the preceding year.

Lor. I, 841.

Muscat occupies and loses Bahrein, 1800-01.

7. In 1800 Bahrein was occupied by the Imam of Muscat, the occupation lasting until 1801, when the Muscat forces were invested by the Uttabis and compelled to surrender and evacuate Bahrein. In 1802 the Imam of Muscat, having obtained some assistance from Bushire, again landed in Bahrein and attacked the Uttabis. The latter had, however, by now secured the support of the Wahabi rulers of Central Arabia and the Muscat project was abandoned.

Bahrein under Wahabi influence, 1803-11.

8. From 1803 to 1809 the Uttabis of Bahrein appear to have been under the influence of the Wahabis, (the Bombay Government declined to take action on an enquiry made by them in 1805 as to whether, if they withdrew from the Arabian mainland and withheld their assistance from the Wahabis, the British Government would give them a ship or two to enable them to remain undisturbed at Bahrein) and they were under strict control by the Wahabi Government during 1810-11.

G. of L.
Desp. No. 18
of 22.2.70,
para. 5.
Lor. I, 842-3.

Dispute with Muscat, 1816.

Persian Envoy to Bahrein, 1816-17.

9. In 1811 the islands were freed from Wahabi rule by the Imam of Muscat, when the Uttabis were restored to power, though according to a claim subsequently made by the Imam, in subordination to Muscat. In 1816 the Uttabis sought the protection of the Wahabi rulers of Central Arabia, and the Imam of Muscat undertook an armed expedition against Bahrein, explaining to the British authorities that he was compelled so to act by the repudiation by the Attabis of his suzerainty, which they had admitted in 1811, by their alliance with the Wahabis and by their piratical practices. The Muscat expedition, to which three Bushire vessels were added by the Persian Government, effected a landing in the summer of 1816, but was signally repulsed and withdrew. Unsuccessful negotiations took place later in the same year between Muscat and the Persian Government with a view to a fresh attempt on Bahrein. Subsequently, but apparently in the same year, a Persian emissary, one Sikander Khan, arrived in Bahrein, who

Bo. Sel.,
XXIV, 372.

* This was, of course, incorrect. Turkey does not appear to have held the island since 1559 and then only for a few months.

accepted presents from the Sheikhs of Bahrein for the Prince of Shiraz and conferred on them in return Persian Robes of Honour.

Teh. Desp.
No. 6 of
16.4.1817.

10. In April 1817 His Majesty's Minister in Persia reported the arrival at Tehran of an agent from the Imam of Muscat, the object of whose mission was credibly stated to be to inform the Shah that His Majesty's Government contemplated the capture of Bahrein, and to ask for armed assistance for the Imam in order that he might thwart their design by taking possession of the island in the name of the Persian Government. His Majesty's representative stated that an agent of the Sheikh of Bahrein was also at Tehran, bearing a letter which stated that as the inhabitants of the island were of the same sect as the natives of Persia, they had always looked up to the Persian monarch as their protector and head, and that they therefore hoped for the assistance of His Majesty to cloak them from the oppressions of the Wahabis. Approval for the grant of the military assistance desired was stated to have been given by the Shah to the Imam, but no action appears to have followed.

Teh. Desp.
No. 10 of
6.5.1817.

11. In 1818, on the appearance of the Egyptians in Hasa, the Sheikh of Bahrein appears to have offered to assist them with sea transport. In February 1819 the Sheikh entered into an agreement with the British Government, with the terms of which he subsequently failed to comply, for preventing the sale of captured British property in his dominions, and in the same year he expressed great indignation at the violation by the British authorities, under a misapprehension as to the nationality of certain vessels, of the neutrality of his port.

Lor. I, 846.

Teh. Desp.
No. 16 of
25.5.1819.

12. On the 19th April 1819 His Majesty's Representative at Tehran reported to the Government of India that the Imam of Muscat had complained bitterly against the non-fulfilment of the engagements contracted with him by the Persian Government for the capture of Bahrein. The Minister added that letters received by him showed that the troops of Ibrahim Pasha, the Viceroy of Egypt, had occupied Bahrein (this appears to have been incorrect) and that the Imam had suggested to the Shah that he should send a messenger to the Pasha asking him to evacuate the island. The Imam is stated to have urged upon the Shah the necessity of endeavouring to recover a possession which according to him "had for ages acknowledged the sovereignty of Persia." He was, however, unsuccessful, and in June 1819 His Majesty's Minister reported that the Shah had "for the present" dropped all intention of taking any steps in pursuit of his pretensions to the sovereignty of the island. It may be added here that the Government of Bombay in a despatch of 21st July 1819 to the Government of India, in which they discussed the desirability of assisting the Imam of Muscat, in return for assistance in connection with the expedition proposed against the Gulf pirates, to establish his claims to Bahrein, referred to an "arrangement some time since concerted" between the Shah and the Imam, whereby the former "had agreed to relinquish all claims to the island of Bahrein in favour of the Imam, under the condition of receiving a portion of its revenues."

BAHREIN SUBMITS TO MUSCAT, 1820.

13. The Persians, at the beginning of 1820, moved apparently by a desire to anticipate any attempt by Muscat to establish control over Bahrein with the support of His Majesty's Government, unsuccessfully requested the Imam to convey their troops to Bahrein. They addressed a similar

application, equally unsuccessful, to the Commander of the British Expedition in the Persian Gulf. In the early part of 1820 the rulers of Bahrein made full submission to the Imam of Muscat and agreed to pay him a tribute of 30,000 dollars. An instalment (12,000 dollars) of this tribute appears subsequently to have been actually remitted.

POLICY OF BRITISH GOVERNMENT, 1819-20.

14. The policy to be adopted by the British Government in regard to Bahrein was examined between the Government of Bombay and the Government of India in 1819-20, and was ultimately defined as one of complete neutrality. The transfer of Bahrein to the Imam of Muscat had been contemplated, but this project, so far as the British Government were concerned, was now abandoned. The Government of Bombay suggested that the Sheikh should be informed that so long as he restrained his subjects from piracy he would reap the advantage of a friendly neutrality on the part of Britain, whereas should a piratical spirit manifest itself forcible measures of coercion would be applied to him. They added that the conclusion of an engagement in general terms with the Sheikh "would probably tend to convince the Uttabi Arabs of the integrity of our intentions."

Govt. of
Bombay to
G. of I.,
15.12.1819,
paras. 2, 3.

British Offer to Persia of Mediation with Bahrein, 1820.

15. Simultaneously the Government of Bombay, in a despatch to the Chargé d'Affaires at Tehran, remarked that "we mean to avoid all interference in respect of the island of Bahrein. . . . There is, however, reason to believe that provided the Persian Government will consent to the Uttabis continuing in the undisturbed occupation of Bahrein the Sheikh would readily agree to pay them tribute, and for this purpose the mediation of the British Government would be gladly afforded provided it could be employed in such a manner as to avoid anything which might in any shape involve us in the transactions of the parties after the conclusion of the negotiation immediately referred to. . . ."

Dated
15.12.1819,
para. 11.

TREATY OF 1820 BETWEEN BAHREIN AND HIS MAJESTY'S GOVERNMENT.

16. On the 17th January 1820 the Sheikh agreed to surrender certain pirate craft which had taken refuge in his territories, and undertook to the British Government not to admit any more boats of the same character until authorised to do so by the British authorities. On the 5th February 1820 a preliminary Treaty of Peace was signed between the Sheikh and His Majesty's Government, and on the 23rd February 1820 the Sheikhs were admitted to the benefits of the General Treaty of Peace which had been made between His Majesty's Government and the Arab rulers of the Persian Gulf and under which His Majesty's Government undertook, in return for abstention by those rulers from piracy and the slave trade, that "if any shall attack them the British Government shall take notice of it" (Article 10). The Sheikh of Bahrein went so far as to claim subsequently that the treaty in question established relations of protection and dependence between the British Government and himself, but it was made clear to him by the Political Resident in the Persian Gulf while on a visit to Bahrein in 1823 that this was not the case.

Aitchison,
Vol. XI,
No. viii, 233.
Aitchison,
Vol. XI,
No. xix,
245-9.
Lt. McLeod
to Govt. of
Bombay,
No. 8, dated
17.2.1823,
paras. 30,
64-5.
Précis, 297.

Proposal for British Mediation with Bahrein not taken up by Persia.

17. On 10th May 1820 His Majesty's Minister at Tehran reported to the Government of Bombay that he had been received in audience by the Shah on 5th May and had put

Teh. Desp.,
10.5.1820.

to him the proposal referred to in paragraph 15 for British mediation with a view to securing tribute to Persia from Bahrein. The Shah had replied that "he wished that advices should be received from Shiraz before the mediation of the British Government to render Bahrein a tributary to Persia can be accepted." Sir H. Willock remarked that "the great repugnance of the Shah to the formation of any British settlement in the neighbourhood of Persia was strongly manifested by His Majesty's not immediately accepting the British mediation to obtain a tribute from the island of Bahrein, an object which he so urgently desired and which His Majesty was aware must at a future period be difficult of attainment from the already advanced stage of negotiations between the Sheikhs of Bahrein and the Imam of Muscat."

and withdrawn (1820).

No. 1485 to
Tehran.

18. On the 3rd October 1820 the Government of Bombay instructed Sir H. Willock to take the earliest opportunity of informing the Persian Government "that as our views are exclusively limited to the extirpation of piracy, it would be contrary to our policy, in the present state of the Gulf, to afford the mediation we formerly offered between His Majesty [the Shah] and the Uttabis of Bahrein."

Summary, 1783-1820.

19. In 1799 the Sheikdom, independent since 1783, professed allegiance to Persia and paid a year's tribute, but it was immediately afterwards conquered by the Imam of Muscat, and thereafter fell under the influence and ultimately the control of the Wahabi Amir. Liberated by Muscat in 1811, it appealed to the Wahabis in 1816 against the Imam and defeated him.

In 1816 or 1817 a Persian envoy was received at Bahrein and presents exchanged. While no details are available as to what precisely took place on this occasion, the incident had no effective sequel. Persian authority was not asserted in the island between the date of the visit and 1820, and in the latter year the island became temporarily subject and tributary to Muscat.

In 1820 Bahrein entered into its first formal treaty with the British Government, and that Government, on condition that the Sheikhs abstained from piracy, undertook to "take notice" "if any shall attack them."

IV.—1820-30.

UNAUTHORISED AGREEMENT BETWEEN CAPTAIN BRUCE AND THE PRINCE GOVERNOR OF SHIRAZ, 1822.

20. In 1822 Captain Bruce, then Political Resident in the Persian Gulf, acting on his own initiative and without any authority from or prior reference to Government, having proceeded of his own accord to Shiraz there signed an agreement with the Minister of the Prince Governor of Shiraz, on the part of Persia. This agreement alleged, *inter alia*, in regard to Bahrein, that the islands had always been subordinate to the Governor of Fars, against whose authority the Uttabi Sheikhs had lately become rebellious; that the flag assigned to the Uttabis of Bahrein under the General Treaty of Peace with Britain in 1820 should accordingly, if already granted, be withdrawn, that no assistance should in future be rendered by Britain to the Uttabis of Bahrein, and that on the contrary the British Government should, if requested, assist the Persians against Bahrein with "one or two" vessels of war. In other words, the title of Persia to the possession of Bahrein was explicitly admitted. The arguments which carried weight with Captain Bruce in concluding this unauthorised agreement appear to have been

Capt. Bruce
to Govt. of
Bombay,
3.9.1822.

that the reversion of Bahrein to Persian authority would tend "more to the tranquillity of the Arabian side of the Gulf than almost any other act."

21. The Resident's action was immediately disavowed and disapproved by the Government of Bombay, in letters from the Governor to the Prince Regent of Fars (which stated that "it is not the intention of this Government to take any part in the claims of the several Powers and States of the Persian Gulf further than may be necessary to prevent a renewal of piracy. . . . There can be nothing in the flag [granted to the Uttabis] to give offence to Persia, as there is not the smallest connection between it and the British flag, nor the smallest pretension to superiority on the part of the British Government"), the Imam of Muscat, and the Sheikh of Bahrein, and as a mark of disapprobation he was removed from his appointment. With regard to the clause of the agreement affecting Bahrein the Government of Bombay remarked: "It acknowledges the King of Persia's title to Bahrein, of which there is not the least proof, and which the British Government cannot assert without injuring the pretensions of the Imam [of Muscat] and the Uttabis. . . ." On the Persian side, the Shah not only refused to approve the arrangements which had been made, but expressed his displeasure that the Prince of Shiraz should have entered into any engagement with the British Government without his knowledge and injunctions. The agreement was thus repudiated by both sides.

Govt. of
Bombay to
Capt. Bruce,
No. 1491 of
1.11.1822,
para. 6.

Teh. Desp.
No. 1,
25.1.1823.

1822-29. BAHREIN—MUSCAT DISPUTES.

22. By 1822, if not earlier, the Sheikhs of Bahrein had ceased to observe the engagement undertaken by them in 1820 to pay an annual tribute to Muscat. In August 1822, an attack by Muscat on Bahrein seeming in consequence imminent, the Governor of Bombay, in letters to the Sheikh and to the Imam of Muscat, suggested that if this tribute was of ancient origin it should be regularly paid, but that otherwise it should be dropped. In January 1823 the Political Resident (Lieut. McLeod) visited Bahrein to reassure the Sheikhs in regard to the unratified treaty concluded by Captain Bruce with the Prince Governor of Shiraz, and to inform them that that treaty was of no effect and that no change of policy was contemplated by Government. In the spring of 1823, on rumours of a contemplated joint attack on Bahrein by Persia, Muscat and the Arabs of the mainland, the Minister at Tehran was asked at a suitable juncture to dissuade the Persians from disturbing the tranquillity of the Gulf.

Lor. I, 851.
Govr. to
Imam,
19.8.1822.
Govr. to
Sheikh,
19.8.1822.
Precis, 307.
Lor. I, 850.
Resdt. to
Govt. of
Bombay,
No. 8,
27.2.1823.
Lor. I, 852.
Govt. of
Bombay to
Teh.,
No. 394,
26.3.1823.

23. In February 1824 the Resident composed for a period of two years the acute internal disputes between members of the ruling house which were for many years a feature of the history of Bahrein. In 1825 the Governor of Bombay personally remonstrated with the Imam of Muscat on an endeavour by the latter to interfere in the question of the Bahrein succession consequent on the death in that year of Sheikh Salman, who had ruled the Sheikdom since 1796 (in association in his later years with his brother Abdulla).

Lor. I, 851.
Lor. I, iii, X,
Table 9.

Reassertion of Persian Claim, 1825.

24. In 1825 an intimation was made by the Political Resident to the Prince Governor of Fars, who had been meditating an expedition to subdue Bahrein, and whose Minister had requested the Resident to give directions to the Sheikh to strike the flag which the British Government had authorised the Uttabis of Bahrein to fly. "He was informed that no control was assumed over the people of



Bombay
Political
letter dated
2.7.1825.
Abstract.

Bahrein and that the letter disapproving of Captain Bruce's treaty had manifested the line of conduct Government would pursue in regard to Bahrein." The expedition was abandoned on a pretext, "but the Sheikh averted the danger which threatened him by presents of considerable amount."

Lor. I, 854.

Lor. I, 855-6.

25. In October 1828 a last attack by the Imam of Muscat was severely defeated and driven off, "after several undignified attempts to conclude a peace with the" Sheikhs of Bahrein, and on 2nd December 1829 peace was finally made between the Sheikhs and the Imam. The main provisions of this agreement were that tribute should not in future be paid by Bahrein to Muscat, and that neither ruler should henceforth interfere in the affairs of the other. By a supplementary verbal agreement the parties bound themselves to aid one another in the event of an attack by a third party.

Summary, 1820-30.

26. During the first two years of this period the islands acknowledged the supremacy of and, for a time, paid tribute to Muscat. From 1822 to 1829 they were intermittently at feud with Muscat. In 1829 a treaty was concluded by which Muscat withdrew its claims to supremacy and to tribute. The Persian claim was alluded to in 1822 and 1825 but not pressed.

V.—1830-40.

Bahrein and the Wahabis, 1830-35.

27. In the course of 1830-31 the Sheikhs, His Majesty's Government having refused to intervene in their favour, and fearing a combination between the Amir and Muscat, formally submitted to the Wahabi Amir of the Arab mainland. They agreed to acknowledge the Amir's supremacy and to pay a tribute to him. He on his part undertook to protect Bahrein against external aggression. In 1833, however, the Sheikh felt strong enough to repudiate Wahabi supremacy, and he conducted a not unsuccessful offensive against the Wahabis between 1833 and 1835.

Lor. I, 856-7.
Lor. I, iii,
Table 9.

Bahrein and the British Government.

28. Sheikh Khalifah-bin-Salman, who had been joint ruler with his uncle Sheikh Abdulla since the death of Sheikh Salman in 1825, died in 1834, and was succeeded as joint ruler by his son Sheikh Mohammed bin Khalifah. Effective control continued to rest with Sheikh Abdullah. Internal dissension in the ruling family became more marked between 1834 and 1839, and the misgovernment of the island continued to grow with unfortunate effects on its prosperity. His Majesty's Government, although in 1834 they had to take forcible measures against the Sheikh to secure reparation for an insult to their Residency Agent in Bahrein, were, however, content to abstain from any interference in the internal affairs of Bahrein so long as the Sheikhs discharged the obligations undertaken by their Treaty of 1820.

RESTRICTIVE LINE APPLIED TO BAHREIN, 1836.

Lor. I, 860
Précis, 350.

29. In 1835 the British Government renewed the maritime truce which they had imposed in 1820 on the Arab rulers of the Gulf in the interest of the suppression of piracy. The Sheikh of Bahrein was not, however, included in the renewed truce, partly apparently because he had behaved so well that this was thought unnecessary, partly because he could be easily punished in the event of this proving desirable, and partly lest in the event of his inclusion he might claim British intervention if attacked by Muscat. In March 1836 the Sheikh agreed, however, to the

application to Bahrein of the "Restrictive Line," this being a line laid down in that year by His Majesty's Government between which and the Persian coast no naval hostilities were in future to be permitted.

Reassertion of Persian claim. Bahrein tributary to the Wahabis, 1836.

30. In the middle of 1836 the Sheikh, alarmed by a communication from the Governor of Shiraz calling on him as a Persian subject to tender his submission to the Shah and by the possibility of the co-operation of the Imam of Muscat in a Persian attack on Bahrein, took steps for a reconciliation with the Wahabi Amir. As a result, he agreed to pay a nominal tribute of \$2,000 to the Amir, the Amir on his side agreeing to supply troops for the defence of Bahrein against external attacks and to refrain from calling on the Sheikh for marine transport in the event of a Wahabi attack on Muscat by sea.

Bombay
Selections,
XXIV, 385.
Lor. I, 858.

31. In 1837 the Sheikh, with the prior approval of Her Majesty's Government, was allowed to punish certain pirates. In 1839 the Resident was invoked to settle internal disputes in the ruling family, but the parties would not agree to any settlement without a guarantee by Her Majesty's Government, which Her Majesty's Government were not prepared to give.

Lor. I, 860.

EGYPTIAN INVASION OF HASA: SHEIKH PROFESSES TO BE A PERSIAN SUBJECT, 1839.

32. In 1838-39 the Egyptians conquered Hasa and captured the Wahabi Amir. They thereupon demanded the payment of tribute and certain territorial concessions from the Sheikh of Bahrein. The Egyptian Commander about the same time intimated to the British authorities his intention to attack and reduce the island. The Sheikh appealed for assistance to the Government of India, but in the absence of instructions from Her Majesty's Government the Government of India were at first not prepared to give him any pledge and the Sheikh was instructed to decide for himself as to waiting on the Egyptian representative. Much alarmed by the proceedings of the Egyptians, "and perhaps even more so by a rumour, apparently well founded, that the Saiyed of Oman was intriguing with the Egyptians to obtain and hold Bahrein as a fief under the Viceroy of Egypt," the Sheikh thereon professed, in reply to demands made on him in the name of the Egyptians, to be a subject of the Persian Government. Apparently as the result of overtures by the Sheikh designed to substantiate this, the Prince Governor of Shiraz thereupon sent an envoy—one Haji Qasim, formerly supercargo of a trading vessel—to reside in Bahrein as Persian agent, "and to be the medium of receiving and transmitting the annual tribute which the Persian authorities vainly flattered themselves the Bahrein Chief was disposed to pay for their countenance and protection," and to bear a Robe of Honour and a letter to the Sheikh. The envoy was accompanied by a guard of 10 Persian infantry. No details appear to be available about his mission, which was apparently a failure.

Bombay
Selections,
XXIV,
387-8.

Lor. I, 862.

Bombay
Selections,
XXIV, 388.

33. On 1st April 1839 Admiral Sir F. Maitland, then commanding the Gulf Squadron, was instructed by the Government of Bombay to give the Sheikh all support against the Egyptians, short of actually entering on hostilities. If the Sheikh asked for a new engagement with Her Majesty's Government he should offer to transmit his proposals to India. The Resident was simultaneously to send a formal protest to the Egyptians. On the 18th April

Précis, 375,
Govt. of
Bombay to
Res., No. 661,
dated 4.1839

Lor. I, 864.

the Government of India empowered the Admiral, if the Sheikh claimed British intervention and offered to place his territories under British protection, "to assure him of the temporary protection of Her Majesty's squadron in the Gulf," to inform the Egyptians that this pledge had been given and to urge them to abstain from further military proceedings until the views of both Governments were known, failing which Bahrein would be defended against intervention by them until the pleasure of Her Majesty's Government had been communicated to the local authorities. In the same month the Sheikh promised the Assistant Political Resident to take no steps to place himself under the authority or protection of a foreign Power without first consulting the Political Resident.

SHEIKH SUBMITS TO EGYPTIANS (JULY 1839).

Lor. I, 865.
Bombay
Selections,
XXIV, 389.Pol. Res. to
Govt. of
Bombay,
4.7.1839.

34. In July 1839 the Sheikh "suddenly and unexpectedly" acknowledged the supremacy of the Egyptians and agreed to pay them a tribute of 2,000 dollars a year, on the understanding that his local authority would be observed and that no representative of the Egyptians would be sent to reside in Bahrein. The Resident protested in writing to both the Sheikh and the Egyptians, and expostulated with the Sheikh on the way in which he was sacrificing his independence. The Sheikh explained that his action was the result of the refusal of Her Majesty's Government to give him advice or a specific assurance of support. For a trifling financial payment he had now secured immunity from interference. He offered, however, in return for a written and distinct pledge of protection, to repudiate his agreement with the Pasha and to avow himself a dependent of Her Majesty's Government; but on being pressed he refused to confirm this in writing and said that in any event it would be necessary for him to justify his change of attitude to the Egyptians on the ground that it was the result of compulsion by Her Majesty's Government.

1839-40. VIEWS OF HER MAJESTY'S GOVERNMENT ON FUTURE POLICY TOWARDS BAHREIN.

Précis, 393.

Hertslet,
1874, p. 5.

35. As a consequence of the activities of the Egyptians discussion appears about this time to have taken place as to the desirability of declaring a regular protectorate over Bahrein. On 1st July 1839 the Secret Committee of the East India Company informed the Government of India that if necessary they would "not disapprove of your entering into an engagement with the Chief of Bahrein to protect him against encroachments from Mehemet Ali, but we concur in the doubt expressed by Captain Hennell [then Political Resident] as to whether it would be expedient for that island to be taken under the protection of the British Government." On 24th February 1840 the Foreign Office wrote to the India Board (with reference to an enquiry from the Bombay Government) that it was important that the Egyptian troops should not be allowed to take possession of Bahrein and that if the Company's troops could occupy it, even provisionally, such a measure could not fail to be attended with advantage. On the retirement of the Egyptians from Hasa in 1840 their relations with the Sheikh came to an end.

Summary, 1830-40.

36. From 1831-33 Bahrein was subject and tributary to the Wahabi Amirs. She revolted from them in the latter year, but in 1836 again entered into an understanding, which

appears to have lasted until 1838, under which Bahrein paid a tribute and received guarantees of assistance against external attack. In 1838 the Wahabi Amir was himself conquered by the Egyptians.

The Persians reasserted their claim in 1836, the Bahreini answer being a renewal of their understanding with the Wahabi Amirs.

In 1839, when faced by a demand for tribute from Egypt, Bahrein appealed to Persia, claimed to be a Persian subject, and received a Persian envoy. But immediately after she formally acknowledged Egyptian supremacy and paid tribute to Egypt. The visit of the Persian envoy had thus no effective sequel.

VI.—1840-50.

37. In 1840 the Government of India, provoked by the attitude which the Sheikh had adopted, decided not to restrain the Imam of Muscat in the event of his wishing to conquer Bahrein. On 27th March 1840 the Secret Committee remarked to the Government of India "We consider ourselves . . . relieved from all regard to the interests of the Sheikh of Bahrein, and we should be glad to hear that his island was in possession of a friendly chieftain."

No. 591,
27.3.40.
Précis, 394.

38. Towards the end of 1840 the Imam of Muscat informed the Resident that while his views in regard to Bahrein remained unaltered, he had been restrained from giving effect to them by his impression that Her Majesty's Government were averse to the prosecution of his claim and that without their assistance or that of the Egyptians, he would have no chance of success.

India Board
letter,
22.10.1840.

EXPULSION OF SHEIKH ABDULLAH. SUCCESSION OF SHEIKH MOHAMED BIN KHALIFA (1843-68).

39. Internal dissensions in the Sheikhdom between the ruler, Sheikh Abdullah, and his grand-nephew and co-ruler, Sheikh Mohamed, became increasingly bitter, and Sheikh Mohamed was finally expelled from the island. In November 1842 he was given permission by Her Majesty's Government to attack Sheikh Abdullah. After a civil war which lasted from January to April 1843, Abdullah was expelled by Mohamed, who thereafter held the Sheikhdom, no reply being sent to an appeal to restrain the attackers which was made by Abdullah to the British authorities in February 1843.

Lor. I, 866.

INTRIGUES OF EX-SHEIKH, 1843-49.

40. Between 1843 and 1849 the ex-Sheikh appealed at various times for the assistance of the Wahabis, the Trucial Sheikhs, the Sheikh of Koweit, and the British and Persian authorities to enable him to recover his position. In 1843 Her Majesty's Government dissuaded Muscat from trying to conquer Bahrein—considerations which weighed with them being *inter alia* the risk of provoking the Wahabis and the danger of giving Persia an excuse to espouse the cause of the ex-Sheikh. In the same year the ex-Sheikh twice visited Bushire, where he failed to find any consolation from the Resident, who, on his stating that if disappointed by Her Majesty's Government he was ready to throw himself into the arms of Persia, informed him (October 1843) that the adherence of Persia to his cause would not be recognised by Britain unless it was open and declared.

Lor. I, 873.

41. In the course of his visits the ex-Sheikh entered into discussions with the nephew of the Persian Sheikh of Bushire, who, while holding no official position himself,

Teh. Desp.
86, Oct.
1843.

Lor. I, 875.

promised him military assistance from Persia. On representations being thereupon made to the Persian Prime Minister by Her Majesty's Minister at Tehran, the Prime Minister "informed me that Sheikh Suleiman had acted with great presumption in having interfered in political affairs without having any authority from the Government, and he said that he would reprimand him for his conduct. His Excellency added that Bahrein belonged to Persia and that she would take possession of it when more pressing affairs were disposed of. As I looked on this as mere idle boasting which was never likely to be fulfilled, I thought it unnecessary to pursue the conversation."

42. It may be recorded that on a second visit of the ex-Sheikh to Bushire from December 1843 to March 1844, he is stated to have been received with distinction by the Persians, and to have offered, if reinstated, to pay the cost, to remit in future a large annual tribute to the Shah, and to leave one son as a hostage in Persia. His proposals were not, however, accepted by the Persian Government.

43. In 1844 the Political Resident in the Persian Gulf was instructed by the Government of India to resist by force any attempt by Persia to establish troops on the island of Bahrein. During the same year the ex-Sheikh, having, while residing at Naband in South Persia, captured two Bahreini vessels, the ruling Sheikh appealed to the Resident, with the result that an injunction was issued by the Central Persian Government at the instance of the British envoy directing the Governor-General of Fars to compel Sheikh Abdulla to give up the boats he had taken and abstain from disturbing the peace of the Gulf.

VIEWS OF HIS MAJESTY'S GOVERNMENT ON PERSIAN CLAIM AND ON FUTURE POLICY, 1844-45.

44. Consequent on indications that Persia intended to intervene in the succession at Bahrein on behalf of the ex-Sheikh Abdullah the general question of policy was considered by Her Majesty's Government in the early part of 1844, in the light of an intimation by the Government of India that they would see the strongest objections to any such interference by Persia, which could not but react adversely on British interests. As a result, Her Majesty's Minister was informed (Foreign Office Despatch to Tehran, No. 23, dated 1st May 1844) that "the question of the right of Persia to interfere and of the Indian Government to prevent interference necessarily depends upon the validity of the pretension put forward by Persia to the sovereignty of Bahrein. Her Majesty's Government are ignorant of the grounds of such pretension, and, assuming those grounds to be insufficient, they would claim for the British Government the right to prevent, if it accorded with its policy to do so, any direct interposition of Persia in the quarrels of rival claimants to the possession of Bahrein. The British Government in India at present consider that any such disturbance as may be occasioned by military operations on the part of Persia directed against the island of Bahrein would be injurious to British interests, and, therefore, unless Persia can show that she has a clear and indisputable right to the sovereignty of Bahrein; that she has exercised it without interruption under the dynasty of the Kajar family; that consequently her present policy is directed to the maintenance of her lawful claims and not to the assertion of a pretension not founded on law, she must be

prepared to encounter in any scheme of this kind the active opposition of the British Government in India." In these circumstances the Minister was instructed to inform the Persian Government that "Her Majesty's Government had heard with regret that that Government contemplated taking part in the disputes respecting the Government of Bahrein; that such a proceeding would be viewed with much jealousy by the British Government in India; and that unless the right of Persia to interfere in the matter is beyond dispute, any interference on her part might lead to unpleasant discussions with England. For, although Her Majesty's Government do not dispute the right of Persia as an independent power to adopt any line of policy not inconsistent with its engagements to foreign states which she might think advantageous to herself, they claim for themselves a corresponding right to judge and act in such matters as they may think fit."

Discussions with Persia, 1844-45.

45. On a communication in these terms being made to the Persian Prime Minister, the Prime Minister "said he would undertake to prove the right of Persia to possession of that island, and that in the meantime he would not make any movement against it without giving previous notification of such an intention to the British Government."

46. In February 1845 the Minister at Tehran sent home a letter received from the Prime Minister, from which it appeared that the Persian claim was essentially based on the Convention of 1822 between Captain Bruce and the Minister of the Prince Governor of Fars. (See paragraphs 20-21 above.)

47. In a subsequent despatch the Minister said that he had informed the Prime Minister that the Bruce Agreement was unauthorised and had been repudiated at the time, and that the Prime Minister had thereupon sent him a fuller statement of the grounds of the Persian claim. The result of enquiries which His Majesty's Minister had made consequent on the receipt of this statement "confirmed me in the opinion that this island has not formed part of the dominions of Persia since the accession of the Kajar dynasty [1795]. It is true that the Chiefs of Bahrein have in all probability from time to time given *peeshkesh*, offerings, or tribute to this country [Persia] as a mark of superiority, as Kandahar and Herat continue to do, without an acknowledgment of subjection,* and it is also not unlikely that the rulers of that island may have declared themselves to be subjects of the Shah when threatened with subjugation from Bagdad, but I cannot ascertain that Persia has exercised any real control over it within the last 50 or 60 years." The Minister added that in further support of their claim the Persian Government had sent him a gold coin struck at Bahrein in 1817 in the name of Fateh Ali Shah Kajar, which he believed to be genuine.

48. The fuller statement of claim put forward by the Persian Government was investigated by the Secret Committee of the East India Company, who, after detailed examination of it, reached the conclusion "that Persia has no legitimate claim to the sovereignty of Bahrein." It may be remarked that the Persian claim was largely based on a general claim that the Persian Gulf from the Shatt-el-Arab to Muscat and all the islands in it belonged to

* On this point the Secret Committee of the East India Company remarked: "Presents and complimentary messages do not imply an acknowledgment of sovereignty, and they have not been confined to Persia." (Secret Committee to India Board, 31st July 1845.)

Persia; that the employment in English of the term "Persian Gulf" was itself evidence of this; that from about 1300 A.D. the island of Bahrein had always been in the possession of the Governors of Fars and had paid revenue to them until its conquest in 1783 by the Uttabi Arabs, from which tribe "itself, likewise, presents have generally been sent to the Governors of Fars"; that Her Majesty's Government had recognised the position when they warned Mehemet Ali of Egypt in 1840 not to attack Bahrein, which did not form part of Arabia, but rather of the Persian Gulf; "and that accordingly the British Government would not allow him to extend the hand of possession over that island"; that the British authorities had formally and repeatedly asked Persia to rent the island to them and that British representatives at Tehran had frequently declared that Her Majesty's Government had no right whatever to the Gulf or its islands [there is no foundation for either statement]; and that the fact that Captain Bruce's treaty was on record supported the Persian claim. The following extract, which (except as regards the initial date) appears correctly to represent the true facts, may, however, be placed on record from the Prime Minister's memorandum: "In the commencement of the reign of His Majesty the late Shah, the Arabs of Beni Attabi came from the desert and conquered the island by sea. The object and desire of the Persian Government has since always been and is the recovery of that island from its spoilers."

49. Her Majesty's Government, in view of the unlikelihood that Persia had, or could give effect to, any serious designs in Bahrein and the undesirability of engaging in those circumstances in a correspondence which might merely cause irritation without serving any useful purpose, instructed the Minister at Tehran not to revert to the subject unless it was forced upon him by the Persian Prime Minister. In that case he was to employ certain arguments supplied to him (apparently the critical comments of the Secret Committee of the East India Company on the Prime Minister's memorandum) to show generally the grounds on which Her Majesty's Government were "unable to recognise as valid the claims advanced by Persia to the sovereignty of Bahrein, and you may add that they would . . . very much disapprove of any attempts on the part of Persia to interfere in the affairs of that island and thus disturb the peace of the Gulf and to afford an opening to piracy." The question appears to have dropped for the time being.

Treaty of Peace with Wahabis, to whom Bahrein pays Tribute (1847).

50. Meanwhile, the ex-Sheikh (who in 1845 had unsuccessfully attempted to capture Bahrein with the aid of the Wahabis) had been invited in June 1846 by the Governor-General of Fars to return to Bushire, where he should be liberally entertained "until . . . the season for action had arrived," but he declined the invitation. In October 1846 the Wahabi Amir asked the permission of the Resident to call in the Trucial Sheikhs of the Arab littoral against Bahrein. This was refused. A request by the ruling Sheikh of Bahrein to be allowed to call in the assistance of the Sheikh of Debai against the Wahabis was equally refused in November 1846. In August 1847 a Treaty of Peace was concluded between the Wahabi Amir and the ruling Sheikh, under which the ruling Sheikh agreed to pay a tribute of 4,000 dollars a year, while the Wahabi Amir agreed not to encourage the ex-Sheikh.

Slavery Treaty with Great Britain, 1847.

51. On the 8th March 1847 Her Majesty's Government entered into a Slavery Treaty with the ruling Sheikh.

Turkish Designs on Bahrein, 1847.

52. In the same year the first Turkish claim to suzerainty over Bahrein was put forward, the Turkish Mutasallim of Basra writing to the Sheikh inviting him to declare his allegiance to the Sultan and to submit lists of his shipping for registration. These overtures were evaded by the Sheikh, while the Porte assured Her Majesty's Government that they did not intend to use compulsion against him; but that "if the Governor of Bussorah had attempted by negotiation to induce any of the Maritime Chiefs of the Persian Gulf to return to their allegiance to the Porte, they could not disapprove his doing so."

Persian Intrigues, 1848.

53. In the following year correspondence took place between the Persian Consul-General at Bagdad, the ex-Sheikh (whom he advised to press ahead, since Persia would surely assist him) and the ruling Sheikh, whom he addressed in friendly terms. The correspondence was put a stop to consequent on representations by the British Resident at Bagdad. In 1849 the ex-Sheikh died.

VIEWS OF HER MAJESTY'S GOVERNMENT ON FUTURE POLICY, 1847-49.

54. The overtures made by the Turks in 1847 gave rise between 1847 and 1849 to consideration by the Government of Bombay, the Government of India, and Her Majesty's Government of the policy to be adopted in regard to Bahrein. The Sheikh hinted in 1847 that unless certain grievances were met he might become a Turkish subject. His grievances were accordingly remedied by the Government of Bombay. That Government represented, however, that it was desirable to exclude interference in Gulf affairs by foreign Powers, since unless Her Majesty's Government retained the supreme control they could not secure the permanence of the objects (the suppression of piracy, &c.) on which so much money had been spent. The Court of Directors concurred in the Government of Bombay's recommendation "that any attempts upon Bahrein ought to be resisted by the British Naval Force" and that the Resident should be so informed.

55. On 11th October 1847 the Foreign Office, in a letter to the India Board, in which they referred to recent Turkish assurances that the Turkish Government had no intention of using compulsion with regard to Bahrein, added that "if the Indian Government has any further apprehensions on the subject, and if the Bahrein Chief is really an independent ruler, the best course would be to make with him a treaty of alliance which would secure his independence and his friendly connection with England." The Resident, who deemed it inexpedient that Her Majesty's Government should involve itself in the embarrassments likely to arise from a closer alliance with Bahrein (letter of 25th January 1848), was, however, opposed to making the existing connection closer, as were the Secret Committee of the East India Company, who expressed the view that the Resident "had exercised a wise discretion in not taking any step for the negotiation of a new treaty with Bahrein." The Resident was, at the same time, authorised, while avoiding discussion with the Turks, to ascertain whether the Sheikh was inclined to enter into a closer connection with Her Majesty's Government.

SHEIKH'S REQUEST TO BE TAKEN UNDER BRITISH PROTECTION REFUSED (1849).

56. In January 1849, however, the Sheikh spontaneously asked to be taken under British protection. The Resident, who, as stated above, had originally opposed, ultimately supported this request, but after a lengthy discussion the Government of India and Her Majesty's Government agreed

Lor. I, 881.

F.O. to India Bd. 28.9.1847.

Bushire to Tehran. No. 177 of 5.6.1848.

Lor. I, 881. Bo. to Res. 334 of 31.7.1847.

Lor. I, 882. Bombay Selections, XXIV, 429. India Bd. to F.O. 3.2.1851.

India Bd.
to F.O.,
26.7.1849.

that a change of policy was inexpedient, and the Resident was instructed in September 1849 to decline the Sheikh's overtures, but to assure him of the continuance of the good-will and friendship of Her Majesty's Government.

Persian Protest, 1848.

Hertslet, 9.
Teh. Desp.
No. 15,
17.2.1848.
Teh. Desp.
No. 11,
2.5.1848.

57. During the course of these discussions, the Persian Government protested against British interference in the affairs of Bahrein, whereupon they were informed by the Minister at Tehran in February 1848 that the British Government were unable to recognise as valid the claims advanced by Persia to the sovereignty of Bahrein.

Designs of Muscat, 1849.

F.O. to L.O.,
11.6.1849.

58. In June 1849 the Imam of Muscat, having intimated his desire to send an expedition to take possession of Bahrein, and having asked the opinion of Her Majesty's Government, was strongly dissuaded from doing so by Her Majesty's Government.

Summary, 1840-50.

59. The ruling Sheikh was expelled in 1843 and continued to intrigue to regain the throne till his death in 1849, appealing for assistance during this period to the Wahabis, Persia, Muscat and Great Britain, in all cases unsuccessfully.

In 1847 Turkey asserted a claim to Bahrein. In the same year the islands submitted themselves to the Wahabi Amir and agreed to pay tribute to him.

Claims by Persia were advanced, but rejected, in 1844-45 and 1848.

Muscat was dissuaded from attacking Bahrein in 1849.

Her Majesty's Government, on consideration of the policy to be adopted in regard to Bahrein, decided against establishing a protectorate and refused a request put forward in 1849 by the Sheikh to be taken under British protection. They assured him at the same time of their general goodwill, and their deliberations made it clear that they regarded the island as independent, but were reluctant to assume further responsibility in relation to it so long as its independence and the performance of the engagements undertaken by the Sheikh could be secured without their doing so.

VII.—1850-61.

DISPUTES WITH WAHABIS, 1850-51.

Lor. I, 884.

60. In 1850 the Resident found it necessary to take disciplinary action against the ruling Sheikh—an individual of "irresponsible character." Consequent on strained relations between the Sheikh and the Wahabi Amir, the Amir, with whom the sons of the ex-Sheikh Abdulla were associated, in 1850-51 threatened Bahrein, whereupon the Sheikh "against his own better judgment . . . tendered a small annual tribute to the Amir," a circumstance from which it may perhaps be inferred that he had failed to observe the agreement of 1847 referred to in paragraph 50 above. The Amir rejected the offer and made exorbitant demands instead. The Sheikh was about to succumb to a combination of the sons of the ex-Sheikh and the Wahabi Amir "when a British squadron arriving off Bahrein took the islands under their protection." Peace was subsequently made with the Wahabis in July 1851.

HER MAJESTY'S GOVERNMENT AND THE CLAIMS OF TURKEY (1851).

F.O. to
India Bd.,
24.1.1851.
India Bd.
to F.O.,
3.2.1851.
F.O. to
India Bd.,
6.2.1851.

61. In the same year Her Majesty's Government decided that the Turkish Government should be informed at Constantinople that Her Majesty's Government, having heard that the Sheikh was desirous of placing himself under Turkish protection, could not acknowledge or acquiesce in any such arrangement, seeing that the Government of British India had had relations with Bahrein as an independent

State and had concluded with it certain treaties, namely, one in 1820 for the suppression of piracy and one in 1847 for the prohibition of the exportation of slaves, and that Her Majesty's Government must object to any arrangement which would transfer Bahrein to the dominion or protectorship of any other Power.

62. In the correspondence leading up to this decision Lord Palmerston remarked: "I come to the conclusion that it is the opinion of the East India Company that the object first to be aimed at is to prevent Bahrein from falling under the control of any foreign Power, and to keep that island in its present condition of political independence. But I infer from what has been stated in the despatches which you have communicated to me, that if that independence could no longer be maintained, and if the ruler and the people of Bahrein were determined to place themselves under some foreign protection, the East India Company would think that less evil would arise from affording to Bahrein British protection than from allowing French, Persian or Turkish authority to be established in that island."

Attitude of the Wahabis and of Muscat, 1852-53.

63. In 1852 the Sheikh proposed to withhold his tribute from the Wahabi Amir, but on the advice of the Resident decided to pay it. In the same year the Consul at Zanzibar was instructed to inform the Imam of Muscat that Her Majesty's Government saw no reason to alter the views regarding the possession of Bahrein communicated to His Highness in 1849 (paragraph 58 above). In May 1853 the Government of India authorised the Government of Bombay to offer every obstacle to an attack on Bahrein by the Wahabi Amir (who was now nominally subject to the Turkish Government) on the ground that Her Majesty's Government would not permit the occupation of Bahrein by the Turkish Government or by anyone acting for them or in their interest.

PRINCIPLE OF NON-INTERFERENCE IN INTERNAL AFFAIRS LAID DOWN BY BOMBAY GOVERNMENT (1854).

64. On 20th November 1854 the Government of Bombay in a letter to the Resident laid down the principle of non-interference in the internal affairs of Bahrein, and authorised the Resident simultaneously to inform the Sheikh of Qatif on the Arab mainland that the British Government would not tolerate his further interference with the affairs of Bahrein.

SLAVERY AGREEMENT WITH HER MAJESTY'S GOVERNMENT (1856).

65. On the 10th May 1856 an agreement supplementary to the Treaty of 1847 (paragraph 51 above) regarding the slave trade was made with the Sheikh. Its contents were identical with that of corresponding engagements entered into at the same time by the Arab rulers of the Trucial Coast.

66. The Sheikh's internal government continued to go from bad to worse. In September 1858 reparation was secured from him for the ill-treatment of British subjects in Bahrein. In 1859 a Wahabi attack was averted by British intervention. The local Wahabi Governor sued for pardon to the Senior Naval Officer; the Wahabi ruler, however, made a formal protest, asserted his authority over Bahrein, and declared that he was himself a vassal of the Sultan of Turkey. The Resident, in reply, informed him of the determination of Her Majesty's Government to preserve the independence of Bahrein, and pointed out the inconsistency of his piratical attacks on Turkish shipping with his professions of dependence on the Ottoman Government.

SHEIKH'S APPEAL TO PERSIA AND TURKEY, 1859-61.

67. At the end of 1859 or early in 1860, as the result, apparently, partly of apprehensions of the Wahabis and partly of irritation at the restraint exercised by the Resident

India Bd.
to F.O.,
7.2.1851.
Lor. I, 885.
F.O. to Sir
S. Canning,
Constanti-
nople, No. 40,
12.2.1851.

Lor. I, 885.

Lor. I, 887.

Aitchison,
Vol. XI,
No. ix, 234.

Lor. I, 887.

Lor. I, 888.



Resdt. to
Bombay,
No. 118,
14.4.1860;
No. 2A,
7.5.1860;
No. 219,
26.7.1860.
Resdt. to
Tehran,
No. 210,
16.7.1860.
Resdt. to
Constant.
3.6.1860.

over his piratical activities directed against the Wahabis, the Sheikh made a simultaneous appeal for assistance to the Persian Governor of Fars and the Turkish Wali of Baghdad. The Turkish answer was delayed. A Persian agent (Mirza Mehdi Khan), bearing a Persian Firman to the Sheikh, arrived in April 1860. The Persian flag was hoisted, Persian sovereignty proclaimed, and the Sheikh's agreement to pay tribute secured. These ceremonies were, however, scarcely over when a Turkish emissary arrived. The Persian flag continued to fly during the Sheikh's negotiations with the Turks, but on the latter withdrawing, and subsequently communicating assurances of a character satisfactory to the Sheikh from the Turkish Government, the Turkish flag was hoisted on the forts in place of the Persian flag in May 1860 and the Sheikh agreed to pay tribute to Turkey. The Persian emissary, however, refused to leave Bahrein "or surrender his imaginary authority in the Sheikhdom." The Resident reported in July 1860 that "the Ottoman flag has now become the national one." The Sheikh appears to have endeavoured to play off each party against the other.

Views of the Minister at Tehran and the Government of Bombay.

68. The Minister at Tehran regarded the matter as one of relatively small importance. He pointed out to the Persian Government "that under no circumstances can the British Government be expected to concur in the proposed transfer of the sovereignty of Bahrein to the Persian Crown, since we have contracted engagements with the Arab Sheikhs of the island as independent Chiefs, and since the maintenance of their independence is indispensable to the successful working of those plans of maritime police in the Persian Gulf which we have been at so much pains and expense to establish"; and obtained an assurance from Persia that no military occupation of Bahrein should be attempted until the title to the island had been settled through the diplomatic channel. He advised the Resident that, while hostilities against Bahrein were to be repelled by force, a voluntary tender of allegiance by the Sheikh to any other Power might, so long as it was unaccompanied by any military occupation, be ignored as of no particular importance. In the light of the Minister's views the Government of Bombay instructed the Resident that he should not interfere with the occupation of Bahrein, whether by Persia or Turkey, save by protest and by an intimation that the matter had been referred to Her Majesty's Government; but at the same time that the agents of both Powers (Turkey and Persia) should be warned that aggression by or in the name of Bahrein on neighbouring tribes would not be allowed and would, if necessary, be prevented by force. In representing the matter to the Secretary of State for India they urged that in the interests of the peace of the Gulf it would be better that Bahrein should be regarded as independent and as subject neither to Turkey nor to Persia, that its independence should be recognised, and the engagements into which in the interests of humanity we had entered with its rulers for the preservation of the peace and good order of the Gulf should be maintained.

HER MAJESTY'S GOVERNMENT DECIDE THAT BAHREIN SHALL BE REGARDED AS INDEPENDENT (1861).

69. In February 1861 Her Majesty's Government, after discussion between the India Office and the Foreign Office, approved the recommendation of the Government of Bombay. The Resident and the Minister at Tehran were so informed. During part of the time at any rate that the question was under consideration in London the Turkish and Persian agents or their representatives appear (though it is not clear how consistently) to have remained in Bahrein, and the flags of both Powers to have been flown

Teh. to Bu.
No. 16 of
4.5.1860.

Dec. 1860.

I.O. to F.O.,
11.2.61.
F.O. to I.O.,
12.2.61.
S. of S. to G.
of I., No. 2,
18.2.61.

simultaneously. On the 27th February 1861 the Political Resident reported that "the Persian and Turkish flags still fly on the forts of the island and in an interview that Commander Cruttenden had with Sheikh Md. bin Khalifah at his own request he (the Chief) remarked in respect to them that they were displayed 'merely to suit his own fancy. What did he care for Turk or Persian? He valued the friendship of the British Government highly.'"

British Convention of 31st May 1861 with the Sheikh.

70. In May 1861 the Sheikh, refusing to discontinue a blockade which he had imposed on the Wahabi coast, was informed by the Resident of the decision of Her Majesty's Government that he was regarded as an independent Chief and that in these circumstances he must be held responsible by them for any piratical activities in which he might indulge. The Sheikh proved obdurate; he was threatened with forcible measures by the Resident and two of his ships were seized. He accordingly submitted, and on 31st May 1861 he signed a Friendly Convention with the Resident, acting on behalf of Her Majesty's Government, by which he entered into a "perpetual treaty of peace and friendship" with Great Britain, and in which, as "independent ruler of Bahrein," he acknowledged as valid and in force the earlier conventions entered into between Bahrein and Her Majesty's Government, and undertook in return for a guarantee of protection against aggressions "by the Chiefs and Tribes of the Gulf" to abstain from maritime aggression, piracy, the slave trade, &c., and to agree to certain conditions in regard to residence and trade in Bahrein by British subjects and to jurisdiction over them. One of the ships seized from him was thereupon returned; the second, the *Hamrah*, was retained.

Pol. Res.
to Sheikh,
25.5.1861.

Aitchison,
Vol. XI,
No. x, 234.

71. The Turkish and Persian agents would seem to have disappeared from Bahrein before the Resident's arrival. The Persian authorities at Bushire in June 1861 asked the Resident for an explanation of his proceedings. The Resident, however, contented himself with forwarding their enquiry to Her Majesty's Minister at Tehran. The Convention was approved by the Government of India in 1861, and the Turkish and Persian Governments were informed of what had happened.

Pol. Res. to
Teh., No. 20,
8.6.1861.

Summary, 1850-61.

72. The Turkish Government were informed in 1851 that Her Majesty's Government could not recognise any claim on their part to Bahrein.

The Sheikhs appear to have continued to pay tribute to the Wahabi Amir in the early part of and possibly throughout this period.

In 1859 the Sheikh appealed simultaneously to Turkey and to Persia, as the result of apprehensions of a Wahabi attack, and received a Persian envoy, who hoisted the Persian flag. On the arrival immediately afterwards of the Turkish envoy the Persian flag was hauled down. Subsequently the Sheikh for a time flew both flags side by side. The envoys seem to have left Bahrein in the early part of 1861. No action was taken by the British authorities pending a decision by Her Majesty's Government as to whether they regarded Bahrein as independent. The Persian Government undertook not to endeavour to occupy the islands until the title to them was settled.

Her Majesty's Government decided in February 1861 to regard the Sheikh as an independent ruler and so hold him responsible for piracies, &c. Punitive action against him by Her Majesty's Government having proved necessary in May 1861, he entered in that month into a convention with them in which he was described as "independent ruler of Bahrein," and secured certain guarantees of protection.

VIII.—1861-67. From the Convention of 1861 to the Punitive Expedition of August 1868.

PERSIAN PROTEST (1862).

Lord Cowley to F.O., No. 15, 7.7.1862. F.O. to Lord Cowley, No. 209, 22.2.1862.

73. In January 1862 the Persian Minister in Paris protested to Her Majesty's Ambassador in Paris against the seizure of the *Hamrah*. He was informed in reply that Her Majesty's Government could not recognise any claim on the part of Persia to question their proceedings in regard to Bahrein, and must therefore decline to offer him any explanation on the subject of his complaint.

PERSIAN PROTEST (1866).

Lor. I, 891.

74. Between 1863 and 1865 the Sheikh continued to misbehave, and in the latter year his ship, the *Dinar*, was seized under the instructions of the Resident. The Persian Government in 1866 made a complaint in regard to the *Dinar* proceedings on the ground that Bahrein under the unratified agreement of 1822 was a dependency of Persia. The Government of India, after ascertaining from the Government of Bombay the nature of the agreement of 1822, communicated the result of their enquiries to the Minister at Tehran, and added their own opinion that "whatever might have been the pretensions of Persia or the grounds of the same to the sovereignty of Bahrein in former days, the Shah could not now be regarded as possessing in point of fact any rights in the principality." This communication was approved by Her Majesty's Government in the same year, and the matter appears to have dropped.

Lor. I, 691.

I.O. to G. of I., No. 37 of 28.2.1867.

NATURE OF RELATIONS BETWEEN BAHREIN AND WAHABI AMIR (1867).

75. In 1866-67 the Resident, on the instructions of the Government of India, investigated the relations of the Sheikh of Bahrein and the Wahabi Amir. He reported as a result that the Sheikh claimed to be independent so far as his islands were concerned, and that the annual tribute of 4,000 dollars "which he indubitably paid" (cp. paragraph 50 above) to the Amir was on account of the possessions held by him in Qatar on the Arabian mainland, the object of the payment being to secure those possessions against attacks by Arab tribes under Wahabi influence. The Government of India, in the light of the Resident's investigation, expressed the view in March 1867 that the Sheikh was independent of all other Powers in respect of his insular possessions and owed fealty to the Wahabis only in regard to Qatar.

Lor. I, 892.

Summary, 1861-67.

76. This period is marked by assertions of the Persian claim in 1862 and 1866. Her Majesty's Government on both occasions made it clear that they could not regard that claim as well founded.

Investigation showed that the tribute still paid (1867) by the Sheikh to the Wahabi Amir was in respect of Bahreini possessions on the mainland of Arabia, and not in respect of Bahrein, which the Sheikh held independently of all other Powers.

IX.—Discussions and Incidents, 1868-70.

77. Questions of considerable importance as bearing on the status of Bahrein arose in 1868-70 consequent on—

- (a) the disciplinary action taken by the Government of India against the ruling Sheikh Md. bin Khalifa, in view of his breaches of the Maritime Truce of 1820, which resulted in his flight from Bahrein in September 1868 and the succession as sole Sheikh of his brother, Sheikh Ali bin Khalifa;
- (b) the punitive action taken at Bahrein by the Government of India in November-December 1869, consequent on the invasion of Bahrein by the ex-Sheikh Md. bin Khalifa, the murder of Sheikh

Ali, and the attempt of Sheikh Md. bin Khalifa and Sheikh Md. bin Abdullah to establish themselves in control of the islands.

78. In view of the weight attached by the Persians to the declarations made in the course of those discussions as indicating the view held by Her Majesty's Government on the status of Bahrein, of the Persian allegations that overtures to Persia had been made by the ruling Sheikh, Ali bin Khalifa, and by the ex-Sheikh, Md. bin Khalifa, and of the misleading but categorical accusations made against the Resident by the Persian Government, it seems desirable to examine in some detail the correspondence which passed and the sequence of events.

Punitive Expedition of August-September 1868.

79. In 1868, consequent on an attack on Qatar by the Sheikh of Bahrein, the Government of India resolved to take disciplinary action against Sheikh Mohamed bin Khalifa. The Sheikh sent an agent to Bushire to satisfy the Resident, but the agent having no powers from his master, his mission proved fruitless, and he returned to Bahrein in August 1868. An armed expedition was thereupon sent against the Sheikh in August-September of that year. Before it reached Bahrein the Sheikh fled to the Arab mainland, and he was thereafter regarded by the people of Bahrein and by Her Majesty's Government as having abdicated the Sheikhdom. The expedition found it unnecessary to use any force, a full submission being made on its arrival by Sheikh Ali bin Khalifa, brother of Sheikh Mohamed, who had previously been associated with Sheikh Mohamed to some extent in the Sheikhship. An agreement was reached by the Political Resident with Sheikh Ali, which disposed of the matters in dispute, on 6th September 1868. The agreement was signed by "Ali bin Khalifah and the inhabitants and subjects of Bahrein." It declared *inter alia* that "Md. bin Khalifah having repeatedly committed acts of piracy and other irregularities at sea, and having now, after his recent piratical acts, fled from Bahrein, has forfeited all claim to his title as principal Sheikh and Chief of Bahrein."

Bushire
Desp. 3 of
25.9.1868.

Aitch. XI,
No. xi,
236-7.

80. Subsequently to the conclusion of this agreement the Resident, by way of punishment, destroyed the fort of Muharraq by gunfire and burnt certain vessels of war belonging to Sheikh Mohamed bin Khalifah. His despatch, which contains a detailed report on the course of events, makes no reference to any flying of the Persian flag by Mohamed bin Khalifah, and the bombardment of Muharraq and the punitive destruction of the warships took place after the submission of Bahrein, and so after Mohamed bin Khalifah had fled from the islands.

Pol. Res. to
Govt. of
Bombay,
No. 3,
25.9.1868.

Persian Protest, November 1868.

81. The facts appear to be as stated in the preceding paragraph. It was some time before a full account of these proceedings reached either India or London. Meanwhile, as will be seen from the correspondence, extracts of which are quoted below, the action of the Government of India drew a vigorous protest from the Persian Government. The protest, after appealing to the treaties concluded between England and Persia in 1809, in 1814, in 1822 (unratified) and in 1857, urged that the Resident, instead of respecting the rights of Persia in the Gulf to the extent provided for in those treaties, had, without any prior intimation to the Persian authorities, attacked Bahrein, which island had been and still was the property of Persia; had bombarded and destroyed the Governor's fort and house and caused considerable damage; had appointed the Sheikh's brother

Teh. Desp.
to G. of I.,
28.10.1868.

Teh. Desp.
149 of
17.11.1868.



as Governor over the island on the flight, through fear, of the Sheikh; had imposed a fine; and had required the new Sheikh to find his brother and deliver him up to the British authorities. These proceedings had taken place at a time when "Sheikh Md. bin Khalifah, the Governor of Bahrein, was openly avowing his submission to and dependence upon Persia and declaring that he considered Bahrein to be indisputably Persian, in proof of which the Persian flag was flying over his fort."

F.O. to I.O.
1.2.1869.

82. Her Majesty's Minister at Tehran was instructed to communicate a suitable explanatory statement to the Persian Government. The Foreign Office suggested, however, that it might be advisable, in the event of similar proceedings again becoming necessary, that communication should be had with that Government. While this question was still under consideration a formal protest against the Resident's action was received (11th February 1869) from the Persian Chargé d'Affaires in London, who complained, *inter alia*, that the Resident had sunk three ships belonging to the Governor of Bahrein and fired on his palace on which the Persian flag flew, and requested that the British Government would give orders for the repair of the damage caused. He was informed in reply that "the Sheikh of Bahrein was an independent chief with whom the British Government had treaty engagements and whom they must hold strictly to the performance of those engagements."

From Gen.
Mohsin
Khan,
11.2.1869.
To Gen.
Mohsin
Khan,
5.3.1869.

Gen. Mohsin
Khan to
Duke of
Argyll,
13.4.1869.

83. This contention the Persian representative disputed, and in support of his view he forwarded letters addressed "from 1858 to 1869 by the Sheikh of Bahrein to His Imperial Majesty the Shah and the Prince Governor of Shiraz." The translations of these letters are dated 9th April and 12th April 1869 respectively. From internal evidence it seems probable that they were, however, written in 1860 on the occasion of the visit to Bahrein of the Persian envoy, Mirza Mehdi Khan (paragraph 67 above). They acknowledge the receipt of a Firman from the Mirza (apparently recognising Sheikh Md. as Sheikh and accompanying a Firman and a Sword of Honour for Sheikh Ali). They state emphatically that Bahrein forms part of Persia, and has always done so. They refer to an agreement reached for the future payment of tribute; remark that "the slight neglect which was lately shown on our part towards Your Imperial Majesty's Government was because they had not for a while superintended and protected us, but as now the Government of Your Imperial Majesty has intended by sending over Mirza Mehdy to enquire into and manage the affairs here, I, with my brother and all the inhabitants, feel quite ready to declare at once that we are most willing to render any services required from us towards Your Majesty's Government, being already aware that Bahrein (Persian Gulf) is part of Persia," and add "... I will hasten to hoist the flag on my residence bearing the Lion and the Sun which are the signs of the Persian Standard."

British Note of 29th April 1869.

I.O. to F.O.,
21.4.1869.

84. The question of the reply to be given to this further protest was carefully considered between the India Office and the Foreign Office. The Duke of Argyll, then Secretary of State for India, remarked that although he was of opinion that the line of policy which had hitherto been pursued of regarding the Sheikh of Bahrein as an independent sovereign, and of refusing to recognise the right of sovereignty advanced by Persia, as had been done in 1845, 1848 and 1860, could not now be abandoned without very serious risk of endangering the peace of the Gulf, yet that "he was not blind to the expediency of avoiding all causes of unnecessary irritation at the Court of Tehran and that

he was willing, therefore, should Lord Clarendon desire it, as a matter of courtesy to the Persian Government, to issue instructions to the Government of India to direct the Resident in the Persian Gulf (whenever he might on any future occasion, under orders from India, be about to call the Chief of Bahrein to account for any breach of his engagements with the British Government) to notify the fact to the British Minister at Tehran for the information of the Shah's Government." Circumstances might, however, arise in which the Resident might, in the general interests of peace and order, be called upon to act promptly on his own responsibility, and in such cases the Secretary of State was not willing to waive what he considered "as not only a right pertaining to, but a duty incumbent upon, the British Government." The Foreign Office concurred in these views and the Persian representative was informed accordingly.

To Gen.
Mohsin
Khan,
29.4.1869.

85. The Persian representative on receipt of the Foreign Office letter asked that in order to make it more palatable to the Shah, certain modifications should be made in it. After private discussion between Lord Clarendon and the Duke of Argyll, of which no record exists, and an interview between the Envoy and Lord Clarendon, it was finally agreed to accept the modification embodied in the opening paragraph of the letter which follows, but also to make the addition contained in the last paragraph of that letter; and a letter so amended was despatched to him. The text (omitting an introductory paragraph) of the amended letter, which is of importance as one of the principal pieces of evidence subsequently adduced by the Persian Government in support of their claim that Her Majesty's Government have recognised Persian sovereignty over Bahrein, is as follows. The sentences in *italics* are those which were added in deference to the further representations from General Mohsin Khan referred to above:—

F.O. to I.O.,
11.5.1869.
I.O. to F.O.,
19.5.1869,
5.6.1869.

"The British Government readily admit that the Government of the Shah has protested against the Persian right of sovereignty over Bahrein being ignored by the British Authorities, and they have given due consideration to that protest. But it is the fact, as yourself and the Government of the Shah are undoubtedly aware, that the Sheikhs of Bahrein have at different periods entered directly into engagements with the British Government; and I beg to assure you that the British Government hold the Sheikh to these engagements solely for the purposes of preventing Piracy and Slave Trade, and of maintaining the police of the Gulf. If the Persian Government are prepared to keep a sufficient force in the Gulf for these purposes, this country would be relieved of a troublesome and costly duty; but, if the Shah is not prepared to undertake these duties, Her Majesty's Government cannot suppose His Majesty would wish that in those waters disorder and crimes should be encouraged by impunity."

"I need scarcely assure you of the friendly feelings entertained by Her Majesty's Government towards Persia, and their desire on all occasions to meet as far as possible the wishes of the Shah; and, in regard to this question, I have the honour to state to you that, whenever it is practicable to do so, Her Majesty's Government will cause the Persian Government to be informed beforehand of any measures of coercion against himself which the conduct of the Sheikh of Bahrein may have rendered necessary."

"But the British Government cannot consent to debar its officers, to whom the superintendence of the police of

the Persian Gulf is entrusted, from the exercise of the right of punishing by prompt measures any violation of Treaty engagements by the Sheikh of Bahrein, when a reference to the Court of Tehran would be attended with embarrassing delays which might endanger the general peace of the Gulf; but whenever such a necessity shall arise a full communication respecting it shall be made to the Persian Government."

Overthrow and Death of Sheikh Ali (August—September 1869).

Pol. Res. to
Govt. of
Bombay,
165 of
11.9.1869,
181 of
25.9.1869,
184 of
5.10.1869.

Teh. Desp.
No. 81,
14.11.1869.

86. In August—September 1869 Bahrein was invaded by the ex-Sheikh Mohammed bin Khalifah, who was joined by one Mohammed bin Abdullah, son of the Sheikh who had been deposed in 1843 (paragraph 39 above). The ruling Sheikh Ali was defeated and killed, while Sheikh Mohammed bin Abdullah assumed the leadership of the usurping party.

87. Her Majesty's Minister reported on 14th November 1869 a conversation on this incident with the Persian Minister for Foreign Affairs in the course of which the latter admitted that Persia had not acquired sufficient power or authority in that part of the Gulf to enable her to repress acts of piracy and to maintain order, but added that he hoped that before long the Shah's authority would be fully established at Bahrein, when full redress would be given for losses suffered through the recent events, and that in the meanwhile it would not be considered necessary that the British authorities should undertake coercive measures. Her Majesty's Minister further reported that "Ali bin Khalifa having forwarded letters to this Court admitting his allegiance to the Shah and offering his services to the Persian Government," an agent (Mirza Mehdi Khan, who had been Persian Envoy to Bahrein in 1859 (paragraph 67 above)) had been despatched with a Royal Firman, recognising Sheikh Ali bin Khalifah as Chief of Bahrein, but that on receipt of the news of the murder of the Sheikh by the ex-Sheikh Mahomed bin Khalifah, the Firman had been recalled and the name of the ex-Sheikh substituted (from paragraphs 94-5 below it will be seen that these statements subsequently proved to be incorrect in material particulars).

British Punitive Expedition (November—December 1869).

Pol. Res. to
Teh. tel. of
14.11.1869.

15.11.1869.

Teh. Desp.
83 of
16.11.1869.

88. Punitive operations consequent on the murder of Sheikh Ali were undertaken by the British Government in November of the same year. Previous notification was given to the Persian Government of the grounds of this expedition, the object of which was stated to be "to call the chief now in possession of Bahrein to account for his breach of the maritime peace and for the attack on Sheikh Ali bin Khalifah, who had been placed in power by the British Government."

89. The Persian Minister for Foreign Affairs on receipt of the notification in question stated that the ex-Sheikh Mohammed bin Khalifah, who had, he said, been the cause of the recent disturbances, had been killed (this was in fact incorrect); that the Resident's action would therefore be useless, and that the Persian Government hoped that he would be telegraphically instructed not to proceed to Bahrein. He added that the Persian Government would themselves keep the affairs of Bahrein by land in order and that should anything happen to affect its affairs by sea they would request the British Government to send a naval force to put affairs in order, "but up till now the state of affairs in Bahrein had not fallen into disorder."

90. The Persian agent referred to in paragraph 87 above arriving in the Gulf at this stage addressed letters to Sheikh

Mohammed bin Abdullah (see paragraph 86 above) intimating his recognition as Sheikh, and despatched them by a special messenger, who proceeded to the island in a native boat belonging to a Persian. The messenger was, however, on his arrival prevented by the Resident from landing or communicating with the Sheikh, and his letters were detained and ultimately handed by the Resident to Sheikh Mohammed bin Abdullah after the submission of that Sheikh, who returned them to Colonel Pelly after perusal. The messenger stated that he had himself no authority from the Shah's Government and was deputed by the Chief of Dayer, who was acting in obedience to Mirza Mehdi Khan.

SUBMISSION OF USURPING SHEIKHS.

Sheikh Isa bin Ali becomes Sheikh.

91. The punitive operations against Bahrein resulted in the complete submission of Sheikh Md. bin Abdullah and the ex-Sheikh Md. bin Khalifah in September 1869. It may be remarked that prior to the opening of operations Sheikh Abdullah made overtures to the Resident, which were, however, rejected, with a view to securing recognition by His Majesty's Government. He also appealed to the Wahabi Amir for recognition and protection. Sheikh Isa bin Ali, son of the murdered Sheikh Ali, voluntarily assumed the vacant Chiefship and was recognised by the Resident on behalf of the Government of India ("in no way did Colonel Pelly influence the succession") and the ex-Sheikh and Mohammed bin Abdullah were deported to India. Shortly after his installation the new Sheikh received a letter from one Hydar Khan, Zabit of the Dashti district on the Persian coast, advising him to place himself under the Shah's protection, but the incident appears to have been unimportant.

Pol. Res. to
Govt. of
Bombay,
165 of
11.9.1869,
181 of
25.9.1869,
184 of
5.10.1869.

Teh. Desp.
No. 94 of
11.12.1869.
Teh. Desp.
No. 7 of
12.1.1870.

PERSIAN PROTEST, 1869-70.

Views of Government of India.

92. The Persian Minister for Foreign Affairs appears at first to have received news of the removal of the ex-Sheikh with equanimity and is said to have remarked that Persia and Great Britain had an equal interest in the maintenance of peace by sea and that Persia had therefore no reason to object to the punishment of the delinquent. But he protested in strong terms against the Resident's action in preventing the Persian agent from landing and holding communication with the Sheikh, and a still stronger protest was made by the Persian Minister in London. The Government of India, in the exhaustive reports they submitted on the Resident's action, urged, after a review of the history of the islands, that the Shah had no legitimate control over the Sheikh of Bahrein; that his Government had nevertheless encouraged the piratical faction in the Persian Gulf by sending letters of recognition to the piratical leader; that in styling Sheikh Md. bin Abdullah Chief of Bahrein the Persian Government ignored the facts that he had never held sway in Bahrein, belonged to the younger branch of the ruling family, and so had neither by right nor possession claim to this title; and that, so far from the Shah having any just cause of complaint against the Resident, the Persian Government should be called upon to give some explanation of the conduct of its officers in encouraging a piratical expedition which was prejudicial to British interests in the Persian Gulf and for the successive appointment by them of Ali bin Khalifa and Md. bin Khalifa to the sovereignty of a district over which they had no legitimate control. The Government of India added that they had no confirmation of the alleged overtures of Sheikh Ali bin Khalifa to Persia (paragraph 87 above), as to which further enquiry was being made of Her Majesty's Minister

(see paragraphs 94-95 below), but in any event could not admit "that such overtures, made without its knowledge and consent, can in any way affect its treaty relations with Bahrein."

British Reply to Persia, March 1870.

To Teh.,
No. 22,
30.3.1870.

93. Her Majesty's Minister was therefore instructed by the Foreign Office that it appeared possible that Her Majesty's Government, instead of furnishing explanations to Persia, might have cause to complain "of the proceedings of the Persian authorities in endeavouring to communicate with a piratical chief who had been guilty of a breach of the Maritime Truce, and who had attacked the Chief placed in power at Bahrein by the British Government," and was informed that no notice would be taken of the complaints against the Resident until the Persian Government gave a full explanation of the intercepted letters.

Supplementary Reports by Her Majesty's Minister, Tehran, April 1870.

94. On 6th April 1870 the Minister at Tehran reported as follows to the Government of India:—

"In my Despatch No. 81 . . . I reported that the Firman of appointment was originally in the name of Ali bin Khalifa, but that, on hearing of his death, it was altered in favour of his brother, Md. bin Khalifa. This information had reached me from a relation of . . . one of the principal Persian officials in Shiraz, and not . . . from the Persian Minister for Foreign Affairs. When further intelligence reached Shiraz from the Gulf and it was supposed that Md. bin Abdullah would retain possession of Bahrein, the Firman was probably again altered in his favour, as it was to him that it was eventually forwarded. In conversation with the Persian Minister this afternoon His Excellency admitted that this was probably the case. He said that Mirza Mehdi Khan on leaving Tehran had received general instructions for his guidance respecting the Bahrein question, but that the details were settled at Shiraz and the Firman was issued in the name of the Persian Governor of Fars and not in that of the Shah. The name inserted in this document had certainly, he said, been altered once to his knowledge, and it was not unlikely that it had been changed a second time before being forwarded to its destination.

"With regard to the overtures said to have been made by Ali bin Khalifa to the Persian Government, as reported in my Despatch No. 81, I have the honour to state that that information also reached me from a private source and not from the Ministry for Foreign Affairs. His Excellency has, however, asserted very positively to me to-day that Ali bin Khalifa had repeatedly written to the Persian Government professing allegiance to the Shah and that a number of letters containing assurances of this kind are now in his (the Minister's) possession.

"It appears to me that on the receipt of a correspondence which passed last April between Her Majesty's Government and the Shah's representative in London, the Persian Ministers, believing that the Bahrein Chief was himself well disposed to further their designs, resolved to take measures with a view to establishing, if possible, the Shah's authority in that quarter and make good his claim to exercise sovereign rights over Bahrein. Mirza Mehdi Khan was accordingly dispatched to Shiraz and Bushire and a certain latitude was given to him as to the mode in which he should proceed to carry out the wishes of his Government. The Persian authorities in Shiraz finally determined that a Firman should be addressed to Md. bin Abdullah, conferring

upon him the government of Bahrein and with this the Khan hoped to be able to come to terms with the Chief then in possession of the place. But in this matter the sole object of all concerned would seem to have been to carry out the policy of the Persian Government at Bahrein without reference to the interests or wishes of Her Majesty's Government in that quarter."

95. On 8th April 1870 the Minister at Tehran addressed the following despatch to the Government of India:—

"With reference to my despatch of the 6th instant, in which I stated that the Minister for Foreign Affairs had informed me that Ali bin Khalifa had repeatedly made overtures to Persia admitting his allegiance to the Shah, I have the honour to report to Your Excellency that Mirza Sayed Khan has just sent to inform me that he was mistaken in making this assertion, and that he finds on enquiry that the letters to which he referred were not from that Chief, but from Md. bin Khalifa."

Views of Government of India, May 1870.

96. The Government of India, commenting on these facts, remarked that Mehdi Khan appeared to have left Tehran with a general discretion as to which of the various Sheikhs should be recognised as ruler. "At the capital no more definite plan appears to have been resolved on than that measures should be adopted to establish the Sheikh's assumed right of sovereignty over the island."

97. The Government of India proceeded that they had already pointed out that any disposition to admit the claims of Persia would probably lead to the revival of similar claims on the part of Turkey, a result which had in fact now been brought about (*cp.* paragraph 99 below). "This (i.e. the Turkish) claim rests on no better foundation than that of Persia. It was summarily rejected by Lord Palmerston in 1851 and in our opinion should not again be reopened. With equal reason the Wahabi Amir and the Sultan of Muscat could claim the sovereignty of the island, if the nominal and temporary tender of allegiance, in times of difficulty, and as a security against foreign intervention, be considered sufficient ground on which to base such pretensions. On the same ground indeed we might claim Bahrein as a part of the British dominions. But, as we have repeatedly observed, the real status of the island, and the only one which we have recognised and admitted, or are prepared to recognise and admit, in all our dealings in the Persian Gulf and our negotiations with the Chiefs, is that of an independent State, subject neither to Persia nor to Turkey, neither to the Wahabis nor to Muscat, nor yet to the British Government."

G. of I.
Desp. No. 28
of 20.5.1870.

Review of Discussions of 1868-70.

98. The matter ultimately lapsed. But from the facts and the correspondence summarised above it will be seen, in the first place, that there appears to be no foundation for the alleged overtures to Persia by the ruling Sheikh, Ali bin Khalifa, or for the statement that the Persian flag was flying at the time of the punitive expedition of 1868; and that if any overtures were made to Persia in 1868-69 (and there is no confirmatory evidence of any such overtures) they would appear to have been made by the ex-Sheikh Md. bin Khalifa, presumably in his anxiety to secure Persian support for his restoration. Secondly, while the statements contained in the Note sent by the Foreign Office on behalf of Her Majesty's Government to the Persian Chargé d'Affaires on 29th April 1869 were widely phrased, and afford some justification for the interpretation placed on them by Persia, and while the Persians may have been confirmed in their view by the absence of any protest by Her Majesty's Minister against the mission of Mirza Mehdi Khan, the terms of that Note do



not, in fact, constitute more than a recognition that Persia had in the past repeatedly pressed her claim to Bahrein, and that Her Majesty's Government did not claim sovereignty over that island and interested themselves in its affairs only to the extent necessary to discharge their treaty obligations to its rulers (which included a guarantee of defence against external aggression) and to ensure the peace of the Gulf. Finally, that while Her Majesty's Government agreed to notify Persia, when circumstances permitted, before taking punitive action against Bahrein, on the only occasion on which (immediately after) they appear to have given effect to this undertaking, the terms of their communication made it clear that they regarded themselves as at liberty to punish the usurping Sheikhs Md. bin Abdullah and Md. bin Khalifa (in accordance with the obligations assumed by them under the Treaties of 1820 and 1861 with Bahrein) for their piratical attack on Bahrein and murder of the Chief placed in power there by the British Government.

X.—1870-80. From the Turkish Occupation of Hasa to the First Exclusive Agreement.

Turkish Protest, 1870.

99. In January 1870 a protest was received from the Turkish Government against the recent actions of the Resident at Bahrein. In reply the Turkish Government were informed that Her Majesty's Government could not recognise the Turkish claim to sovereignty over Bahrein; and were courteously reminded of the intimation made to them in 1851 on Lord Palmerston's instructions (paragraph 61 above).

F.O. to I.O.,
11.1.1870,
5.3.1870.
Lor. I, 901.

Turkish Occupation of Hasa. British Assurances to Bahrein, 1871.

100. In 1871 the Turks occupied Hasa. Protests at Constantinople in April and May 1871 against rumoured Turkish designs on Bahrein resulted in a repudiation by Turkey of any such designs. The assurances received from the Turkish Government were communicated to the Sheikh of Bahrein, who had asked Her Majesty's Government for their advice and their protection against the Turks in May 1871, and he was informed that so long as he observed the provisions of the Convention of 1861 (paragraph 70 above) the reciprocal obligations towards him of Great Britain would be fulfilled.

Lor. I, 902.

101. Protests about the same time at Constantinople led to a Turkish repudiation of the designs which the Turkish Government were alleged to have entertained at Bahrein, and the Turkish authorities in Hasa were given instructions by their Government which debarred them from approaching Bahrein. In May 1871 the Shah enquired from Her Majesty's Representative at Tehran as to the probable effect on Bahrein of the Turkish occupation of Hasa and was informed in reply of the assurances which had been given to Her Majesty's Government by the Turks.

Lor. I, 919.

Reply to Persian Legation at Constantinople as to meaning of British Note of April 1869.

102. In November 1871 the Secretary of the Persian Legation at Constantinople made enquiries of Her Majesty's Ambassador in connection with a rumour that a Turkish expedition was to be sent for the reduction of Bahrein, "which island the Persian Secretary stated had been acknowledged by the British Government as a portion of the Persian dominions and . . . in proof of this assertion he had handed to Sir H. Elliott a copy of the note which Lord Clarendon addressed to General Haji Mohsin Khan on 28th April 1869. Sir H. Elliott, however, observed that he

Hertslet, 28.
cp. G. of I.
No. 16,
15.3.1872.

saw in that note nothing more than an acknowledgment that the claim had previously been made, but that he was unwilling to discuss the point, as he believed there was no danger of any attempt being made to interfere with the position of Bahrein as it then stood."

Turkish Claims, 1871-79.

103. Consequent on the murder of a Turkish messenger in Bahrein in August or September 1871, the Turkish Government demanded reparation direct from the Sheikh and received a conciliatory reply. On their demand being pressed the Sheikh, on the advice of the Resident, suggested that the matter be arranged between the British and the Turkish Governments, by whose joint decision he would abide, but the Turkish Government preferred that it should be settled direct by the parties by agents. Her Majesty's Government saw no objection to such a procedure so long as no compulsion or show of force by Turkey was involved. The Turks, however, let the matter drop. The incident is of some interest as illustrating the view taken by Her Majesty's Government of the Sheikh as an independent ruler who might deal direct with foreign Powers.

104. In August 1872, a further complaint having been received from Turkey of British proceedings in regard to Bahrein and the commission of "acts of sovereignty" on the part of the English, the Ambassador was informed in reply that enquiries would be made into the point raised by him and that his Government might rest assured that it was not the intention of Her Majesty's Government to interfere in the affairs of the Persian Gulf beyond what was imposed upon them by treaty for the preservation of peace in the waters. The Ambassador was finally informed in April 1873, after investigation, that there were no grounds whatever for the statement that the British Government had attempted to exercise acts of sovereignty over Bahrein.

F.O. to
Turkish
Ambassador
8.8.1872.
Hertslet, 30.
I.O. to F.O.,
30.7.1872.

105. In 1874, consequent on a Turkish claim to conscript Bahreinis resident in Basra, the Turkish Ambassador in London was referred to the British Notes of 1851 and 1870 (paragraphs 61 and 99 above), which stated that Her Majesty's Government did not admit the claims of Turkey to consider Bahrein as part of the Ottoman dominions. In the same year, on a piratical attack being made on the island by certain Bahreini exiles who had signed a petition claiming Turkish protection, the Ambassador at Constantinople handed a memorandum to the Porte in which it was stated that Her Majesty's Government could not recognise any rights or pretensions of the Porte over Bahrein. In 1875 a rumour that Her Majesty's Government were fortifying Bahrein led to representations from Turkey. The rumour was unfounded and the Turks were so informed. On its becoming known about the same time that the Turks themselves contemplated building a lighthouse on the island, the British Government entered a protest at Constantinople (October 1875), with the result that the project was abandoned.

Lor. I, 914.

Lor. I, 915.

106. In 1876, consequent on steps taken by the Turkish authorities to enforce the claims of Qatar merchants against Bahreinis, a Note was addressed to the Porte reminding them of the determination of Her Majesty's Government to protect Bahrein against any attack on its independence.

107. In 1879-80 the Turkish Government took up the cause of the rebels of 1869. Her Majesty's Government, after again disclaiming the exercise of sovereignty over Bahrein, which they regarded, they said, as independent, promised to make enquiries as to certain acts of which complaint was made by petitioners to the Turkish Government.

Lor. I, 915.

First Exclusive Agreement between Her Majesty's Government and the Sheikh of Bahrein (1880).

108. In 1880 the Political Resident, finding that the Sheikh was disposed to conclude a special arrangement with the British Government, entered on the 22nd December into what is known as the First Exclusive Agreement with him. By this Agreement the Sheikh undertook on behalf of himself and his "successors in the Government of Bahrein to the British Government to abstain from entering into negotiations or making treaties of any sort with any State or Government other than the British without the consent of the said British Government, and to refuse permission to any other Government than the British to establish diplomatic or consular agencies or coaling depôts in our territory, unless with the consent of the British Government. This engagement does not apply to or affect the customary friendly correspondence with the local authorities of neighbouring States on business of minor importance." The agreement was approved by Her Majesty's Government and ratified in 1881.

Summary, 1870-80.

109. The claims of the Wahabi Amir disappear with the subjugation of Hasa by the Turks in 1871. The Turkish claim was repeatedly pressed during this period and was consistently rejected by Her Majesty's Government.

The Persian claim appears to have been dormant.

Her Majesty's Government repudiate suggestions that they have committed "acts of sovereignty" and continue to express their view that the Sheikh is an independent ruler. In 1880 the Sheikh entered into his first exclusive agreement with Her Majesty's Government.

XI.—1880-92. From the conclusion of the First to the conclusion of the Second Exclusive Agreement with Her Majesty's Government.

Persian Démarche, 1886.

110. In September 1886 the Shah sent a verbal message to Her Majesty's Government through the Minister at Tehran that he considered the communication made to him in April 1869 as tantamount to an admission of his rights in Bahrein and that he was anxious to establish his authority effectually over the islands either by sending a Governor to Bahrein or possibly by recognising the Sheikh as representative of Persian authority, but that he wished the maritime police to remain in the hands of the British authorities. An answer was prepared by Her Majesty's Government to the effect that they did not concur in His Majesty's interpretation of the communication of April 1869. They had treaty engagements with the Sheikh, whom they considered to be independent, and must hold the Sheikh to his engagements while fulfilling those they had contracted towards him. As, however, the Shah did not return to the subject, the message was not delivered.

111. In the same year presents sent from the Persian Governor of Lar to the Sheikh were returned to the sender.

112. In 1887-88 Persian intrigues took place with a view to the establishment of Persian influence on the Arab littoral of the Persian Gulf. These were of little importance in the case of Bahrein, but it may be recorded that it appears that in the case of that principality the Persian Government had sanctioned a scheme for the seizure of Bahrein by Sheikh Jasim of Dohah in Qatar, who had seemingly undertaken to put the Persians in possession of the Sheikhdom. Two British ships were in February 1888 stationed off Bahrein, with instructions to prevent by force any hostile attempt to land by the Turks, Arabs or Persians, and the Minister at

Aitchison,
Vol. XI,
No. xxii,
237.

Lor. I, 919.

Teh. tel. 188,
27.9.1886.

F.O. to I.O.,
30.7.1886.

F.O. to Teh.,
tel. No. 58,
8.10.1886.

Lor. I, 911.

Lor. I, 920.

Tehran was asked by the Government of India so to inform the Persian Government. As, however, the Amin-us-Sultan, "on being questioned disavowed all designs on Bahrein, Her Majesty's Minister thought it better to avoid the reference to forcible action."

Warning to Turkey, 1888.

113. In March 1888 the Turkish Government were informed that any attempt to effect a landing in Bahrein would be opposed by force, and that no claim by the Porte to jurisdiction over Bahrein could be admitted, since Her Majesty's Government regarded the Sheikh as an independent ruler with whom they were in treaty relations.

Second Exclusive Agreement between Her Majesty's Government and Bahrein (1892).

114. On the 13th March 1892 the Political Resident signed a second Exclusive Agreement with the Sheikh of Bahrein on behalf of Her Majesty's Government. The provisions of the Agreement (which was ratified on 12th May 1892, and which was expressed to be binding on the Sheikh, his heirs, and successors) were as follows:—

- (1) "That I will on no account enter into any agreement or correspondence with any Power other than the British Government."
- (2) "That without the assent of the British Government I will not consent to the residence within my territory of the agent of any other Government."
- (3) "That I will on no account cede, sell, mortgage or otherwise give for occupation any part of my territory, save to the British Government."

Aitchison
(1933),
Vol. XI,
No. xiii, 238.

Further Warning to Turkey, November 1892.

115. In November 1892 the Ottoman Government were warned (apropos of the position of Bahrein at Basra) that Bahrein was under British protection, and that no interference with its natives by the Ottoman authorities could be admitted. In the same year the Porte was informed, with reference to a rumoured intention to land Turkish troops, that such action would be opposed by Her Majesty's ships.

Const. Desp.
No. 348 of
15.11.1892.

Summary, 1880-92.

116. The Turkish claim was again pressed vigorously during this period and was consistently rejected by Her Majesty's Government.

The Shah raised the question of the Persian claim in 1886, but did not press the matter.

In 1892 the Sheikh entered into his Second Exclusive Agreement with Her Majesty's Government.

XII.—1892-1913. From the Second Exclusive Agreement to the Anglo-Turkish Convention of 1913.

British repudiations of Turkish Claims, 1892-98.

117. In 1895 steps were taken at Constantinople by Her Majesty's Government to check an attempted invasion of Bahrein from Qatar, which seemed not improbably to have been inspired by the Turks, and later in the same year Her Majesty's Government twice reiterated to the Porte that Bahrein was under British protection and that no interference with it would be tolerated. The views of Her Majesty's Government on the status of the island were again officially repeated at Constantinople on two occasions in 1896. In 1897 the Constantinople Board of Health proposed to establish a sanitary post in Bahrein. The proposal was abandoned on the objections of the British delegate, who represented that Bahrein was an independent principality under British protection.

Lor. I, 935.

118. In 1898 a Turkish request that a British Vice-Consul alleged to have been appointed at Bahrein should

Lor. I, 935.

apply to the Turkish Government for his exequatur was refused on the ground that Her Majesty's Government could not admit the right of the Turkish Government to insist that a British Consular Officer in Bahrein should be provided with a Turkish exequatur. In 1899 the Minister at Tehran informed the French representative at that capital that since 1880 the Sheikh was precluded by treaty from holding direct relations with any Power other than Her Majesty's Government and that his subjects abroad were now under British protection.

119. A native British Agent had for a long period of years been maintained in Bahrein. In 1900 a British Political Agent was appointed at Bahrein. The post has been maintained since that date, and has been filled by an officer of the Indian Political Department since 1904.

THE INCIDENT OF 1901.

Lor. I, 935-6.

Teh. Desp. No. 140 of 18.9.1901.

120. On 31st August 1901 a Belgian customs official in the service of the Persian Government visited Bahrein, where he called on the Sheikh and informed him that he had been deputed by the Shah to obtain his consent to place Persian custom officials in Bahrein. An official protest was at once made by His Majesty's Minister to the Persian Government, in the course of which Sir A. Hardinge remarked that no intimation had been given to the Political Resident in the Persian Gulf "of this Persian mission to an Arab State under British protection and bound by special treaties, of which the Persian Government cannot be ignorant, to the Government of India . . . It is my duty to place on record in the clearest manner that His Majesty the Emperor of India cannot acquiesce in any foreign interference in the affairs of Bahrein . . . and that any attempt to disturb the relations established by treaties of long standing between those Chiefs and the Government of India will be regarded as an unfriendly act." The Attabeg-i-Azam, in a note received on the 17th September 1901, replied: "As I have told you verbally, M. Simais has had no instructions from the Persian Government on this matter, and if there have been any steps on his part it must have been by mistake and he will be reprimanded for it."

THE DISORDERS OF 1904-05.

Lor. I, 938-42.

121. In 1904-05, consequent on a series of attacks on Persians and on German subjects in Bahrein, the Persians appealed to the Shah. The Persian Government replied that His Majesty's Government would take action on their behalf. The text of their telegram was as follows: "To the Merchants and Traders of the High Government living in Bahrein. Your telegram on the subject of the assaults which have been made upon you by the Arab roughs of Bahrein has been received. Certainly let your minds be at rest. Consultations with the English Legation have taken place on this subject, and it will shortly be settled in such a way that the oppression will be removed and that the offenders will receive their proper punishment."

122. The Germans complained to the German Vice-Consul at Bushire, who made a direct request to the Sheikh for reparation, in reply to which he was referred by His Excellency to His Majesty's Government. The Sheikh was ultimately compelled by His Majesty's Government to give redress.

Turkish Protest, 1904-05.

123. On the Turks pressing in 1904-05 for an explanation of the action taken by His Majesty's Government in connection

with the ill-treatment of the German subject, the Turkish Ambassador was informed by Lord Lansdowne that it was a matter of common knowledge and well known to the Turkish Government, that His Majesty's Government had direct relations with the Sheikh of Bahrein; that the island and its natives were under British protection; and that His Majesty's Government were within their rights in taking measures to obtain redress for the outrage committed there. On the Ambassador reverting to the subject later in 1905, he was informed (20th May 1905) that His Majesty's Government must decline to entertain any further representations from the Turkish Government on the subject.

F.O. to Constantinople, No. 59 of 22.2.1905.

Reassertions of Persian Claim, 1905-13.

124. In 1905 the Persians again reasserted their claim. On the 19th February 1906, in reply to a further reiteration which appears to have been based on the treaties of 1809, 1814 and 1857, the Minister at Tehran informed the Persian Government that "The Treaties of 1809, of 1814 and of 1857 on this subject have always been scrupulously observed by His Majesty's Government, but have no bearing on the present question. His Majesty's Government have never admitted the ownership or sovereignty of Persia over Bahrein. Such a claim is in their view entirely inadmissible. His Majesty's Government consider the island of Bahrein and its inhabitants to be under British protection, and must decline to entertain any further representations on the subject. I am further to mention that this reply has invariably been made to the Ottoman Government, who have on several occasions advanced a claim to Bahrein." The Note concluded by a reference to the Persian appeal for our assistance in 1904-05 and quoted *in extenso* the telegram of reassurance (paragraph 121 above) to the Persian inhabitants of Bahrein then sent on behalf of the Persian Government.

19.2.1906.

125. On 13th September 1906 the Persian Grand Vizier revived the Persian claim in a letter referring to Captain Bruce's unauthorised agreement of 1822. He was reminded in reply that that agreement had been expressly disavowed by His Majesty's Government and that Captain Bruce had been recalled. In a supplementary note the Grand Vizier's attention was drawn to the fact that the then Shah himself had "refused to recognise" the stipulations of the Treaty of 1822, which had never been ratified, and had "expressed his displeasure that the Prince of Shiraz should have entered into any engagements with the British Government without his knowledge or instructions."

Teh. Desp. No. 3 of 3.1.1907.

Teh. Desp. No. 61 of 27.3.1907.

126. On the Ala-es-Sultaneh reviving the Persian claim, on the ground of the Agreement of 1822, in August 1907, his attention was drawn in a Note dated 13th August 1907 to the Notes referred to in the preceding paragraph; and to the fact that the Agreement had been disavowed alike by His Majesty's Government and by the Shah. The Note added that "since 1822 the Turkish Government have raised claims on Bahrein, and, like the Persian Government, have been informed that Bahrein is under British protection."

Teh. Desp. No. 179 of 15.8.1907.

127. In 1908 the Persian Government, in a correspondence regarding the punishment of a Bahrein subject at Lingah, intimated that instructions had been sent to Lingah that reparation should be made, but added that His Majesty's Minister would admit that "the proprietary right of the Persian Government over the island is not a matter to be disputed." The Note was returned as inadmissible to the Ministry of Foreign Affairs. A modified version was subsequently accepted by His Majesty's Government, which was acknowledged by a Note from His Majesty's Minister,

Teh. tel. 95 of 11.4.1908.

Teh. Desp. No. 40 of 22.1.1909.

reaffirming that His Majesty's Government maintained as regards the status of Bahrein in Persia the position that the island of Bahrein and its inhabitants were under British protection, and that they would be guided entirely by their own views of the position should any action of the Persian Government make representations necessary.

Teh. Desp.
No. 95 of
26.4.1910.
P. 3539/10.

P.G. 13: 67,
§ 24.

128. Early in 1910 the Persian Government assimilated the formalities to be fulfilled in the case of persons visiting Bahrein to those prescribed in the case of travellers to Persian ports, a measure which, as pointed out by the Foreign Office at the time, constituted a fresh attempt to assert Persian sovereignty over the island, but it was agreed that in view of the undesirability of raising the general question, no protest should be made to them. In July of the same year it was reported that internal Persian coastal passes issued to persons proceeding to Bahrein from Persian ports were visé by a Persian merchant residing in Bahrein. In 1912 the individual in question was forbidden to take any action in regard to the endorsement of passes held by Persian subjects for travelling in Bahrein. The endorsements in question were, however, henceforth granted by the Political Resident—a practice, as pointed out by the Political Resident nine years later, "of itself open to objection, as it might be construed into a tacit admission that the Persian passport authorities are justified in giving passes for another Persian port to persons going to Bahrein."

Withdrawal of Turkish Claim to Bahrein in Anglo-Turkish Convention of 29th July 1913.

129. On 29th July 1913 His Majesty's Government signed a convention (which still awaited ratification on the outbreak of the War of 1914-18) with the Ottoman Government, under which that Government renounced all their claims to the islands of Bahrein, the independence of which they recognised. His Majesty's Government on their part declared that they had no intention of annexing the islands and undertook not to allow the Sheikh of Bahrein to disturb the autonomy of the peninsula of El Katr or to annex it, and to ensure that the Sheikh should not discriminate against Ottoman subjects in the matter of dues levied upon pearl fisheries. The Turkish Government on their side accepted a reservation of the right of the population of Bahrein to visit Zakhnuniyah Island for fishing, and recognised the rights of subjects of the Sheikh to British consular protection in Turkey. This arrangement, followed, as it was, by the disappearance of Turkey from the Gulf after the War of 1914-18, disposed of the Turkish claim to Bahrein, which had been reasserted on numerous occasions and with great insistence since 1847.

Summary, 1892-1913.

130. The Turkish claim was repeatedly raised during the early part of this period, but consistently opposed by His Majesty's Government. It was finally abandoned in the (unratified) Anglo-Turkish Convention of July 1913. While that Convention was never ratified, the abandonment of the Turkish claim was confirmed by Article 16 of the Treaty of Lausanne of 1923.

The Persian claim was also frequently pressed and was consistently repudiated in strong terms by His Majesty's Government.

XIII.—1913-34.

Exercise of Jurisdiction over Foreigners by British Agent in Bahrein.

P.G. 13,
§ 8, p. 62,
§ 10, p. 63.

131. In virtue of the Convention of 1861 (paragraph 70 above) and of subsequent delegations by the Sheikhs, the British Representative in Bahrein has for over 70 years

exercised important judicial powers in the islands. The Sheikh in 1909-12 formally requested His Majesty's Government to exercise jurisdiction over foreigners in Bahrein other than the subjects of Arab potentates. An Order in Council conferring such jurisdiction on the Political Agent was made in 1913. It was supplemented by a further Order in 1922. Since 1920 jurisdiction over all foreign subjects has rested with the British authorities within the limits of the Orders in Council.

132. The Sheikh, on 14th May 1914, undertook not to entertain any overtures for an oil concession save after consultation with the Political Agent and with the approval of His Majesty's Government. Aitch., XI, No. xvi, 239.

Undertakings secured from Ibn Saud, December 1915.

133. In 1915 His Majesty's Government, in entering into an Agreement with Ibn Saud, then ruler of Nejd, secured an undertaking from him "to refrain from all aggression on, or interference with the territories of ... Bahrein. . . ." Aitch., XI, No. ii, 206-8.

Persian Claim reasserted, 1922-23.

134. In 1922 His Majesty's Consul at Bunder Abbas reported that the Persian passport officials at Lingah had ruled that Bahreinis were Persian subjects and should be given Persian passports. They seized two British certificates of identity granted to Bahrein subjects, but on representations being made by the Minister at Tehran instructions were given by the Central Government that there was to be no repetition of this incident. In 1922, also, the Persian delegate at a Postal Conference held at Bushire stated that while not for the moment pressing for the transfer to Persia of the Bahrein post office, his action was without prejudice to the Persian claim to Bahrein. P.G. 13, 67, § 26.

135. In 1923, consequent on a Press campaign and a discussion in the Majliss on the desirability of giving Bahrein the right to return a member to the Persian Parliament, which was referred to a Commission for report, His Majesty's Government decided that it was desirable to address a formal Note to the Persian Government in terms similar to those employed in 1906 (paragraph 124 above). Owing to the difficult internal situation in Persia this proposal was dropped, but in September 1923 the Persian Government was informed that the island was now a British protectorate, and that His Majesty's Government did not contemplate any alteration of its status. The Persian Minister for Foreign Affairs replied that the Government of which he was a member had no intention of laying claim to Bahrein on behalf of Persia. But despite this statement the Minister for Foreign Affairs again reverted to the question in the following month. P.G. 13, 67-8, §§ 27-9.

His Majesty's Government remove Sheikh Isa for Misgovernment (1923).

136. Consequent on the gross misgovernment of Sheikh Isa, who had been ruler of Bahrein since 1869, the Sheikh was deprived by His Majesty's Government of his control of affairs in Bahrein on 26th May 1923, and was granted an allowance, his son, Sheikh Hamad (whose right of succession had been recognised by His Majesty's Government in 1901) being appointed to act for him "as his father's fully empowered agent." P.G. 13, 63-4, §§ 11-14.

Oil concession granted by Sheikh, 1925.

137. In 1925 an oil concession was granted by the Sheikh of Bahrein to the Eastern and General Syndicate, a British corporation, with the approval of His Majesty's Government.

Undertakings secured from Ibn Saud in Treaty of Jedda, 1927. Persian Protest.

138. The Treaty of Jedda, concluded on 20th May 1927, between His Majesty's Government and Ibn Saud, the ruler of Saudi Arabia, in substitution for the Treaty of 1915 (paragraph 133 above), provided *inter alia* that "His Majesty the King of the Hedjaz and of Nejd and its Dependencies" should "maintain friendly and peaceful relations with the territories of . . . Bahrein and with the Sheikhs of Qatar and the Oman Coast who are in special treaty relations with His Britannic Majesty's Government." Consequent thereon, a strong protest was received on 26th November 1927 from the Persian Government, copies of which were despatched to the League of Nations. The Persian protest was based essentially on the recognition stated to have been accorded to Persian sovereignty over Bahrein in Lord Clarendon's Note of 29th April 1869 (paragraph 85 above). A reasoned reply to the Persian Note was despatched by His Majesty's Government on 18th January 1928, and circulated to the League. While avoiding any definite statement as to their own position in Bahrein or its basis, His Majesty's Government in their Note repudiated the Persian claim in the strongest terms, and intimated that no argument such as was suggested could be based on the communication of 29th April 1869.

Aitch., XI,
No. vii,
227-9.
26.11.1927.
P. 5559/27.

P. 322/28

Attitude of Sheikhs to Persian claim (1928).

139. The Sheikhs of Bahrein, on being apprised of the revival of Persia's claim, gave a letter to the Political Resident, requesting His Majesty's Government in accordance with their treaties "to defend Bahrein from outside interference" and to act as their agents in rebutting the Persian claims, and intimating that the Sheikhs proposed to send Sheikh Mohamed, brother of Sheikh Hamad, the deputy ruler, and son of the deposed ruler, Isa, as their representative in answering the claim should the case be taken to Geneva.

P. 1409/28.

Further Persian Protest, 2nd August 1928.

140. On the 2nd August 1928 the Persian Government communicated a lengthy and reasoned reply to the British Note of 18th January 1928. The Note based its reiteration of the Persian claim on the principle that territory belonging to a sovereign State could definitely be detached from that State only with the consent of the State in question, which had not been given in the case of Bahrein; and alleged that the terms of the Foreign Office Note of 29th April 1869 were conclusive evidence of the view then held of the rights of Persia by His Majesty's Government; that Bahrein had consistently recognised Persian sovereignty, as could be proved by documentary evidence, up to the date when the Sheikhs were instigated to rebellion by a foreign government; that no valid argument could be founded on the direct relations into which the Sheikhs had entered with His Majesty's Government, since their action had been without the approval of their suzerain; that the relations of Bahrein with Persia were more highly developed than with any other independent civilised country; that the Persian claim had been consistently and uninterruptedly pressed; and finally that even if the Treaty of 1822 was disavowed by His Majesty's Government, it was material evidence of the view held by a British officer of great experience at the time of its conclusion, and that its disavowal by the then Shah of Persia was not because of any doubt on his part as to the true status of Bahrein.

P. 1640/29

141. A reasoned reply, which examined in detail the arguments put forward by the Persian Government and reached the conclusion that they were without substance, was despatched and circulated to the League at the request of His Majesty's Government on 18th February 1929.

Assignment of Bahrein Oil Concession to American Interests, 1930. Fresh Persian Protest.

142. On 23rd July 1930, the oil concession granted to the Eastern and General Syndicate in 1925 having been assigned by that Corporation, with the approval of the Sheikh and His Majesty's Government, to an American subsidiary of the Standard Oil Company of California, a formal protest against such assignment was received from the Persian Government, based on the ground that, Bahrein being Persian territory, neither the Sheikh nor His Majesty's Government had any right to grant a concession. The protest reserved the right of Persia to claim damages. Treaty negotiations were at the time proceeding with Persia, and it was thought unnecessary to send any reply to this Note, which was, however, circulated, at the request of the Persian Government, to the League of Nations.

DISCUSSIONS BETWEEN HIS MAJESTY'S GOVERNMENT AND PERSIA, 1928-34.

143. Between 1928 and 1934 treaty negotiations, with a view to the conclusion of a general treaty which should dispose of outstanding points of difference, were in progress with Persia, the question of Bahrein figuring prominently in those negotiations. The general attitude taken by the Persians was that Bahrein was a point of great importance to them, but that in return for a sufficient *quid pro quo* they would be prepared to abandon their claims. His Majesty's Government on their side consistently maintained that the Persian claim was worthless, and that while they would gladly see it finally disposed of as part of a general settlement, they would not be prepared to make any specific concession in return for its abandonment. Various formulæ were worked out in discussion between His Majesty's Representatives in Tehran and the representatives of the Persian Government with a view to an agreed solution. The negotiations have, however, failed to reach any conclusion and are at the moment suspended without any prospect of early resumption.

144. In 1932 the Persian Government protested to His Majesty's Government against the issue of British Indian postage stamps surcharged "Bahrein," and repeated their protest to the League. Their protest was rejected by His Majesty's Government, and the stamps issued in August 1933.

On 22nd May 1934 a further protest against the operation of the Bahrein oil concession was addressed by the Persian Government to the United States Minister at Tehran, the United States Government and His Majesty's Government, and copies were circulated at the request of Persia to the League of Nations. His Majesty's Government propose to reply to this communication in a Note drawing attention to their Notes of January 1928 and February 1929 and to request the League of Nations to circulate this reply to the States Members of the League.

XIV.—Conclusion.

145. It may be convenient in concluding this memorandum on the recent history of Bahrein to summarise very briefly the claims to sovereignty over the island which have been advanced by various countries since 1783; the particular basis of those claims in the case of Persia (whose claim is alone at the present time of any importance); and the basis and development of the attitude of His Majesty's Government.

A.—Claims to or Assertions of Sovereignty over Bahrein, 1873 to 1934.

146.—(a) *Muscat*.—Bahrein subject to Muscat 1800-01, 1811? to 1816, 1820-22. Tribute paid to Muscat 1820.

2953

K

Bahreini independence recognised by Treaty 1829. Muscat thereafter deterred by His Majesty's Government from pursuing its claims.

(b) *Egypt*.—Representative of Mehemet Ali, Viceroy of Egypt, informed by Her Majesty's Government in 1839 that no claim upon Bahrein could be admitted. But in 1839-40 the Sheikh acknowledged Egyptian supremacy and he paid tribute during this period.

(c) *Wahabi Amirs of the Arab Mainland*.—Bahrein under protection of or subject to Wahabi Amirs 1803-11; 1816; 1830-33 (tributary); 1836-1838-39 (tributary); 1847 (tributary); 1852 (tribute). In 1867 (see paragraph 75) it was held by Government of India that tribute was paid to the Wahabis only in respect of mainland possessions and not of Bahrein. The claims of the Amirs disappeared with the conquest of Hasa by Turkey in 1871.

(d) *Turkey*.—The islands have never in the period subsequent to 1783 been occupied by Turkey or (if the incidents of 1860-61 (paragraphs 67-9 above) are ignored) subject to Turkish sovereignty. But Turkish claims to them were advanced, directly or indirectly, in 1847, 1851, 1870, 1874, 1875, 1876, 1879, 1888, 1892, 1893, 1895, 1896 and 1905, and on each occasion, save in 1847, when certain assurances were given by Turkey (paragraph 52), were rejected by the British Government. The Turkish claim was finally withdrawn in the Anglo-Turkish Convention of 1913. That Convention was never ratified, but the withdrawal of the claim was confirmed by Article 16 of the Treaty of Lausanne of 1923.

(e) *Persia*.—The Persian claim has been consistently urged on a variety of occasions through the period in question. The Sheikhs momentarily submitted themselves to Persia in 1799 and paid tribute. In 1816-17 they received a Persian envoy and apparently appealed for help to Tehran. They again momentarily submitted to Persia and received an envoy in 1839. Persian aid was invoked and a Persian emissary received at Bahrein in 1860-61, while in 1869 the deposed ex-Sheikh Mohammed bin Khalifa may have made overtures to Persia (though there is no confirmation of this) to enable him to re-establish his control over the island.

The Persian claim appears, apart from this, to have been asserted in 1822, 1825, 1844, 1848, 1861, 1862, 1866, 1868, 1869, 1886, 1901, 1905, 1906, 1907, 1910, 1927, 1928, 1930, 1932-33 and 1934, and to have been rejected by His Majesty's Government in 1822 (as part of their refusal to accept Captain Bruce's Treaty), 1825, 1844, 1848, 1861, 1862, 1866-67, 1869, 1901, 1906, 1907, 1908-09, 1923, 1928, 1929, 1933 and 1934.

B.—Basis of the Persian Claim.

147. Ignoring contentions such as that the use of the term "Persian Gulf" is a recognition of Persian sovereignty over the various islands of the Gulf, Persia has at one time or other based her claim on the nine grounds examined below:—

(1) *History of the Islands prior to 1783.*

The history of the islands prior to the expulsion of the Persians in 1783 is dealt with in paragraphs 3 to 5 above. It will be seen that at various periods since the beginning of the Christian era, Persia has exercised a degree of control over the islands, and in particular that during the 30 years prior to 1783 her control was of a more definite character. On the other hand, the facts recorded above do not support any claim by Persia to an uninterrupted occupation or control of the islands.

Persia has on various occasions in the past appealed to the early history of Bahrein in support of her claim that it is historically Persian territory. Since 1930, too, certain Persian newspapers, presumably inspired, have dealt at considerable length with the history of Bahrein in the more or less remote past, and have supported their statements by quotations from, or references to, Arab or Persian geographers or historians. Owing to the absence of records and the shortness of time available, it has been impossible to check these statements in detail, or to conduct elaborate researches into the writings of Arab geographers and others from which further information might be secured. But it is arguable that the position of the islands prior to 1783 is at most only of very indirect importance in the present connection. The essential weakness in the Persian claim is, it is suggested, that there has been no effective exercise of authority in the islands by Persia since her expulsion in 1783, and that the Sheikhs, who originally established themselves by conquest, have now acquired a prescriptive title, based on an uninterrupted occupation of 150 years by the present ruling family.

(2) *The Absence of Persian Consent to the Detachment of Bahrein from Persia.*

The Persian Government, in paragraph 2 of their Note of 2nd August 1928 (Appendix B), invited attention to "the following international juridical principle. . . . A territory belonging to a sovereign State cannot be lawfully detached so long as the right of ownership has not been transferred by this State to another State in virtue of an official act, in this case a treaty, or so long as its annexation by another State or its independence have not been officially recognised by the lawful owner of the territory." They added (correctly) that Persia has never renounced her sovereignty or ceded it to another State or ever recognised any of the Sheikhs of Bahrein as independent rulers.

The argument put forward by the Persian Government under this head is examined in detail in paragraphs 6 and 7 of the Note despatched by the Foreign Office on 18th February 1929 in reply to the Persian Note of 2nd August 1928 (Appendix B). His Majesty's Government expressed their inability to agree that any such principle, if alleged to be of universal application, formed part of international law. The deciding factor in the question of international title in cases in which territory has effectively established its independence of the former sovereign is the effective establishment by that territory of its independence, "and in the case of Bahrein His Majesty's Government regard as wholly untenable the proposition that effective possession and administration by the present ruling family for 145 years, during which these rulers have been independent of Persia and during which no Persian authority has been exercised in their dominions, can be affected by the mere consideration that the Persian Government have not set their signature to a document formally recognising the fact of their independence." In paragraph 7 of the same Note His Majesty's Government cite historical precedents to show that the theory of the necessity for the formal consent of the dispossessed State is not one which has ever obtained international acceptance.

(3) *The Unratified Treaty of 1822.*

The circumstances in which the Treaty of 1822 was concluded by Captain Bruce with the representative of the Prince Governor of Shiraz are set out in paragraphs 20-21 above. As will be seen, Captain Bruce concluded it without

the authority of or reference to Government. The treaty into which he had entered was immediately officially disavowed, and the Persian Government so informed, and Captain Bruce, as a sign of disapproval of his action, was removed from his appointment. The Persian Government on their side equally disapproved the action of the Prince Governor of Fars in entering into any treaty discussions without the prior approval of the Shah. [The Persian Government were reminded of this in 1825, 1845, 1866, 1907, 1928 and 1929.] It appears impossible in these circumstances to base any legitimate claim to Persian sovereignty over Bahrein on the provisions of the Treaty of 1822.

(4) *The Gold Coin alleged to have been struck at Bahrein in 1817.*

Please see paragraph 47 above.

A Persian Mission appears to have visited Bahrein in 1816 or 1817 (paragraph 9 above) and it is conceivable that a coin might have been struck on that occasion. On the other hand, it would probably be extremely difficult to prove that the coin had not in fact been struck elsewhere, though with an indication that it had been minted at Bahrein. The incident is in itself of relatively small importance, and it would, it is suggested, be impossible for Persia to use such an incident, even if it could be proved, save in support of arguments of much more substantial character.

(5) *Payment of Pecshkesh, Offerings or Tribute at various Stages by Bahrein to Persia.*

From paragraph 6 above it will be seen that tribute appears to have been paid by Bahrein to Persia in 1799. The rulers of Bahrein may also have offered to pay tribute in 1839 (paragraph 32) and appear to have offered to do so in 1860 (paragraph 67). In assessing the importance of the payment of tribute in 1799, or, if it then took place, in 1839 or 1860, it is relevant that such payment or promise of payment was immediately followed by the submission of the rulers of Bahrein, in 1800 to Muscat, in 1839 to the Egyptians, and in 1860 to the Turks. In estimating the importance of such payments as evidence of a recognition of Persian suzerainty, the arguments advanced by Her Majesty's Minister at Tehran in his Despatch No. 28 of March 1845, in which Colonel Sheil remarks that the Chiefs of Bahrein "had in all probability from time to time given peeshkesh, offerings, or tribute to Persia as a mark of superiority, as Kandahar and Herat still continue to do, *without an acknowledgment of subjection*"; and the comment thereon of the Secret Committee of the East India Company that "presents and complimentary messages do not imply an acknowledgment of sovereignty, and they have not been confined to Persia" are also relevant.

(6) *Flying of the Persian Flag by the Sheikh of Bahrein.*

(a) The Persian flag was hoisted by the Sheikh of Bahrein in 1860. But as will be seen from paragraph 67 above, hardly had it been hoisted when, on the arrival of a Turkish emissary, it was lowered and the Turkish flag hoisted in its place. At a later stage in 1860-61 the Persian and Turkish flags were apparently flown side by side by the Sheikh. It appears difficult in these circumstances to base any substantial argument on the incident.

(b) The Notes addressed by the Persian envoy in London to the Foreign Office in February 1869 alleged that the Persian flag had been hoisted by Sheikh Md. bin Khalifah and that the Resident had in September 1868 bombarded the

Sheikh's palace on which the flag was flying. There appears to be no foundation for the suggestion that the Persian flag was flying when the Resident reached Bahrein or that it was fired on (see paragraph 80). If previously hoisted it had, by the time of the Resident's arrival, been hauled down.

(c) In the undated letters from Sheikh Md. bin Khalifah communicated to the Foreign Office by the Persian envoy in April 1869, the Sheikh stated that he was hoisting the flag of the Lion and Sun over Bahrein. If, as seems probable from internal evidence, these letters date from the period of the abortive Persian Mission to Bahrein of 1860-61, it is relevant in assessing their importance that immediately after the reception of the Persian envoy, a Turkish envoy was received, the Persian flag hauled down and the Turkish flag substituted, and that in the early part of 1861 the flags of Persia and Turkey appear to have been flying side by side on the forts at Bahrein. There is nothing to show that either flag flew in Bahrein between the conclusion of the Convention of 1861 (paragraph 70) and 1868.

(d) In September 1869 the ex-Sheikh Md. bin Khalifah attacked the islands, and with the assistance of Sheikh Md. bin Abdulla killed the ruling Sheikh Ali. The Persian flag may have been hoisted on this occasion. But there is no reference to this in the detailed reports of the capture of the islands by Sheikh Md. bin Khalifah and Sheikh Md. bin Abdullah, or of the operations as the result of which those Sheikhs were reduced at the end of 1869. (Enclosure to Government of India's Despatch No. 7 of 25th January 1870; Resident's Despatches of 11th September, 25th September, and 5th October 1869.)

(7) *Letters from past Rulers of Bahrein admitting Persian Suzerainty.*

It is by no means improbable that in 1799, 1816-17, and 1839 the rulers of Bahrein addressed letters to the Persian Government acknowledging Persian suzerainty over the island, and they appear certainly to have done so in 1860. But the only letters the text of which has ever been communicated to Her Majesty's Government are the two letters communicated by the Persian envoy in London in 1869. Those letters indeed categorically acknowledge Persian suzerainty over Bahrein and state that it has been uninterruptedly exercised in the past. But they appear to date from 1860, and the submission of Bahrein to Turkey and the hauling down of the Persian flag in the same year are, it is suggested, material in assessing the weight to be attached to them.

(8) *Declarations made by Her Majesty's Government to the Persian Minister in London, April 1869.*

(a) These declarations are examined in paragraph 98 above. The text of the Note addressed by the Secretary of State for Foreign Affairs to the Persian envoy on 29th April 1869, on which the subsequent Persian claims have to a considerable extent been based, is given in paragraph 85 above. The wording of that Note, and the general attitude adopted by Her Majesty's Government, as evidenced by their acquiescence in the despatch of a mission to Bahrein by Persia, undoubtedly afforded Persia justification for the inferences she appears to have drawn. But, as pointed out in paragraph 10 of the Note addressed to the Persian Minister on 18th February 1929 and reproduced in Appendix B, the Note in question, while very loosely expressed, was

never intended to bear the interpretation now placed upon it by the Persian Government (cp. in this connection, paragraphs 102 and 110 above), and in stating that due consideration had been given in the past by Her Majesty's Government to the Persian claim it did not in any way admit that that claim was valid. The Note, indeed, confirmed the intention of the British Government to continue to hold the Sheikhs to the treaty engagements which had been entered into with them as independent rulers.

(b) The undertaking given by Her Majesty's Government in the same correspondence to communicate in future with Persia before undertaking punitive action against the rulers of Bahrein is *prima facie* consistent with a recognition by Her Majesty's Government of Persian claims to that island. But it appears, however, in fact to have been no more than a courteous indication by His Majesty's Government of their desire to pay the fullest possible attention to any Persian claims. It will be observed that the first (and apparently the only) communication made to the Persian Government in discharge of this understanding, intimated to that Government the intention of Her Majesty's Government to proceed at once against the "Chief now in possession of Bahrein" consequent on his breach of the maritime peace and his attack on the Sheikh who had been placed in power at Bahrein by the British Government.

(9) *Closeness of Relations at the present Day between Persia and Bahrein.*

The Sheikhs of Bahrein are strongly opposed to any recognition of Persian suzerainty (cp. paragraph 139). The Persian suggestion that relations are at the present time closer between Persia and Bahrein than between Bahrein and any other independent civilised State is without foundation. Relations are at least equally close with Saudi Arabia, and the closest relations are maintained in addition with Great Britain and with British India.

The Terms of the Treaties of 1809, 1814 and 1857 between the British Government and Persia.

148. In addition to the nine arguments examined above, Persia has on more than one occasion appealed to the provisions of her treaties of 1809, 1814 and 1857 with the British Government in connection with her claim to Bahrein. Her appeal is based substantially on the fact that those treaties provide in certain circumstances for the evacuation of Persian territory occupied by British troops. The relevant passages of the treaties are as follows:—

Aitch. XIII,
No. v, 53.

(i) By the *preliminary Treaty of 1809* between His Majesty's Government and Persia, the Persian Government undertook not to "permit any European force whatever to pass through Persia either towards India or towards the ports of that country"; while His Majesty's Government undertook "in case any European forces have invaded or shall invade the territories of His Majesty the King of Persia" to "afford to His Majesty the King of Persia a force, or in lieu of it a subsidy, with warlike ammunition . . . and officers. . . ."

Article 5 of the same treaty provided: "If a detachment of British troops has arrived from India in the Gulf of Persia and, by the consent of His Persian Majesty, landed on the island of Karak or any of the Persian ports, they shall not in any manner possess themselves of such places, and from the date of these preliminary articles the said detachment shall

be at the disposal of His Majesty the King of Persia, the amount of which shall be settled in the definitive treaty."

Article 6 provided that "If the said troops remain by the desire of His Majesty the King of Persia either at Karak or at any other port in the Gulf of Persia" they shall be treated in a friendly manner by the Governor and arrangements made for the supply to them of provisions, &c. at fair prices.

(ii) *Treaty of 1814*.—Article (2) provides that "His Britannic Majesty further engages not to interfere in any dispute which may hereafter arise between the Princes, noblemen and great chiefs of Persia, and if one of the contending parties should even offer a Province of Persia with a view to obtaining assistance, the English Government shall not agree to such proposal, nor by adopting it possess themselves of such part of Persia." Aitch. XIII, No. vii, 60.

Article 11 provided that "Should His Persian Majesty require assistance from the English Government in the Persian Gulf, they shall, if convenient and practicable, assist him with ships of war and troops. The expenses of such expedition shall be accounted for and defrayed by the Persian Government, and the above ships shall anchor in such ports as shall be pointed out by the Persian Government and not at other harbours without permission, except from absolute necessity." Aitch. XIII, No. xviii, 81.

(iii) *The Treaty of Peace of 4th March 1857*, drawn up on the conclusion of the war between Persia and Great Britain, provided that "Peace being happily concluded between Their said Majesties, it is hereby agreed that the forces of H.M. the Queen shall evacuate Persian territory, subject to the conditions and stipulations hereafter specified" (Art. 2), and that "immediately on the exchange of the ratifications of this treaty the British troops will desist from all acts of hostility against Persia, and the British Government engages further that as soon as the stipulations in regard to evacuation by the Persian troops of the Herat and Afghan territories as well as in regard to the reception of the British Mission at Tehran shall have been carried into full effect, the British troops shall without delay be withdrawn from all ports, places and islands belonging to Persia. . . ."

If Bahrein were Persian territory and if it had been occupied by British forces at the times envisaged by the treaty provisions to which appeal is made by Persia, there might be some force in the Persian argument, though even then His Majesty's Government might claim that the fact that their actual relations with Bahrein had in no way been affected by the provisions of those treaties, and that Persia had made no protest at the time against any failure to implement those provisions clearly showed that Persia had accepted in the past the fact that Bahrein fell outside her territorial limits. In fact, neither in 1809, 1814 nor in 1857 was there any British occupation of Bahrein; while His Majesty's Government, never having admitted Persian sovereignty over Bahrein or regarded Bahrein as an integral part of Persia, have in the past adopted the attitude that the terms of the treaties referred to above are irrelevant for the present purpose. As stated by His Majesty's Government in 1906 in reply to a Persian Note which based the Persian claim upon the provisions of those treaties, "the treaties of 1809, 1814 and 1857 on this subject have always been scrupulously observed by His Majesty's Government, but have no bearing on the present question. His Majesty's

Government have never admitted the ownership or sovereignty of Persia over Bahrein. Such a claim is in their view entirely inadmissible."

Review of the Persian Claim.

149. It is relevant in the first place that from 1847 to 1913 the Turkish claim to Bahrein was pressed with at least equal vigour to the Persian claim, and that through much of that period the *Turkish* claim had a stronger practical justification than can be claimed by Persia since a period long prior to 1783, in that Turkey was the suzerain of the adjoining continental littoral of Arabia and held or preferred claims to both sides of the Gulf by which Bahrein is enfolded. Moreover, *Muscat*, which in the early part of the 19th century on more than one occasion established a temporary control over Bahrein and drew tribute from it, was deterred from urging its claims by force from 1829 onwards only by the attitude of His Majesty's Government, while the *Wahabi* Amirs brought effective pressure to bear on Bahrein and drew tribute from it, though latterly probably in respect only of Bahreini possessions on the mainland, at frequent intervals through the early part of the 19th century, and desisted only with their subjugation by Turkey in 1870. Persia, in other words, was up to 1913 one only of the claimants to Bahrein, and through much of the period 1847 to 1913 if anything a less insistent and to some extent a less plausible claimant than Turkey.

150. These considerations, however, apart, the general effect of a review of the history of Bahrein over the last 150 years and of an examination of the specific arguments put forward by Persia and referred to in paragraphs 147-8 above is to suggest that there is no solid basis for a Persian claim to suzerainty or sovereignty over the islands. The geographical remoteness of the islands from Persia and the fact that their population is Arab are admittedly not decisive arguments. The real weakness in the Persian claim appears to be that there has been no effective exercise of Persian authority in the islands since the expulsion of Persia by the ancestors of the present ruling house in 1783. Such incidents as the momentary hoisting of the Persian flag in 1860, its flying side by side with the Turkish flag in 1860-61, or the temporary tender of allegiance to Persia in 1799, 1816-17 and 1839 must be considered in relation to the history of the islands as a whole, in the period now under consideration, and in particular to the consistent claim of Turkey between 1847 and 1913 and to the absence of any sequel to such momentary acknowledgment of or appeals to Persian power; and they cannot carry the weight of a long dealing extending over a course of years. The remarks of the Government of India in 1870, quoted in paragraph 97 above, are relevant in this connection, as are the observations in paragraph 8 of the British Note to Persia of 18th February 1929.

It may be added, too, that during the period from 1783 Bahrein has at various dates been in a position to enter into treaty engagements or discussions with neighbouring States such as Muscat (paragraph 26), Turkey (paragraph 103), the Egyptian Viceroy, Mehemet Ali (paragraph 34) and His Majesty's Government on a basis inconsistent with her being at the time subject to Persian jurisdiction. A further point of some importance is the absence, so far as available records show, of any reference to Persia by the Sheikhs of Bahrein, at any date since the conquest of Bahrein by the ancestors of the present rulers in 1783, on the occasion of

their accession, or of any formal acknowledgment by Bahrein on such occasions of sovereignty or suzerainty such as might be expected from a Sheikh who regarded himself as a vassal of Persia. Nor does any protest at the absence of any such formal acknowledgment appear at any time to have been made by Persia.

151. The correspondence of 1869-70, to which particular attention has been paid by Persia in the past, and which may be thought the strongest contention that Persia is in a position to put forward, may indeed be quoted as evidence of the view taken by Her Majesty's Government at that period of the relation of Persia to Bahrein. But it cannot be valid as against the Sheikhs, and while it is sufficiently loosely expressed to afford some justification for the construction which has been placed on it by Persia, it is relevant that the construction placed on it by Her Majesty's Ambassador at Constantinople, and supported by the Government of India, passed without challenge in 1871 (paragraph 102); that a similar interpretation was placed on it, with a minimum of preliminary discussion, in 1886 (paragraph 110); that at frequent intervals between 1870 and 1880 His Majesty's Government maintained the independence of Bahrein against Turkey (paragraphs 99-107 above); that so early as January 1870 they drew the attention of the Turkish Government to the British Note of 1851 (paragraph 61 above); and that His Majesty's Government have uninterruptedly maintained the independence of Bahrein against Persia and Turkey alike since the date of the correspondence in question.

152. The Sheikhs themselves appear, particularly in the early part of the past century, before their relations with Her Majesty's Government were placed on a more definite footing by the Agreements of 1880 and 1892, to have been guided by a consideration of their own immediate interests in deciding on the line of policy to be adopted towards the stronger rulers by whom they were surrounded. But not only is it now almost three-quarters of a century since any appeal, however flimsy, appears to have been made to Persia by Bahrein, but the present Sheikh (like his predecessor) is keenly apprehensive of any recognition of the Persian claim, to which he is most strongly opposed.

C.—Attitude of British Government, 1820-1934.

153. From 1820 onwards His Majesty's Government consistently dealt with the Sheikhs as independent rulers. They concluded treaties with them on that basis in 1820, 1847, 1861, 1868, 1880 and 1892, and they have been prepared to maintain their independence by diplomatic, or on occasion by forcible methods against challenge from outside, whether from Persia, Turkey, Egypt or the Wahabis. They originally entered into relations with the Sheikhs and promised them a measure of protection (paragraph 16) in the interests of securing the peace of the Persian Gulf. In the early stages of those relations they appear to have been solely concerned to achieve this object (in 1820 they even offered their mediation, which was, however, not accepted by Persia, to secure the payment of tribute to Persia by the Sheikhs), and they restricted their interference with the internal affairs of the Sheikhdom to the minimum required to secure the interests of British subjects. They were consistently reluctant to establish a protectorate over Bahrein in view of the probable local embarrassments in regulating the succession, &c., in which this might

involve them, and in 1849 they formally declined a request by the Sheikh that he and the islands should be taken under British protection. In 1861 (paragraph 70) they gave the Sheikhs more categorical guarantees of protection in return for more binding undertakings. Their correspondence with the Persian Minister in London in 1869-70 shows the Home Government, however, still ready at that date to adopt the attitude that if any other Power would discharge the objects which had led Great Britain to undertake certain responsibilities in relation to Bahrein, she would gladly see them do so. Closer relations with the Sheikh and closer control over his freedom of action were established for the first time by the Exclusive Agreement of 1880. Relations became closer still with the conclusion of the Exclusive Agreement of 1892. Since that date the position of Bahrein, though His Majesty's Government make no claim to sovereignty, though the Sheikhdom continues to be regarded as independent from the international standpoint, and though the Sheikhs enjoy a very large measure of internal autonomy, has tended increasingly to approximate to that of a State under British protection.

J. G. LAITHWAITE.

India Office,
14th July 1934.

1934

CONFIDENTIAL.

Paper B.

NOTES EXCHANGED WITH THE PERSIAN GOVERNMENT, 1927-29, RESPECTING THE PERSIAN CLAIM TO BAHREIN.

[E 5063/184/91]

(A)

M. Khan Mossaed to Sir Austen Chamberlain.—(Received November 28.)

Persian Legation, London,

November 26, 1927.

Your Excellency,

I HAVE the honour to state that the Acting Minister for Foreign Affairs has recently addressed a note to His Britannic Majesty's Minister at Tehran, of which the following is a translation:—

"1. According to information received by the Persian Government, a treaty was concluded between His Britannic Majesty and Ibn Saud and signed at Jeddah on the 20th May last, of which article 6 is as follows:—

"His Majesty the King of the Hejaz and of Nejd and its dependencies undertakes to maintain friendly and peaceful relations with the territories of Kuwait and Bahrain, and with the Sheikhs of Qatar and the Oman Coast, who are in special treaty relations with His Britannic Majesty's Government."

"2. The sovereignty of Persia over the Island of Bahrain being well founded, the Imperial Persian Government, at the time a special treaty was concluded between the British Government and the Sheikh of Bahrain, right-fully protested, and Lord Clarendon, in a letter dated the 29th April, 1869, addressed to the then Persian Minister in London, formally acknowledged the justice of that protest.

"3. You will realise that the insertion of article 6 in the above-mentioned treaty, in so far as it relates to Bahrain, is averse to the territorial integrity of Persia, and, consequently, incompatible with the friendly relations subsisting between two neighbouring countries.

"4. I therefore earnestly protest against the insertion of the above article in the treaty, and shall look forward to suitable measures being taken, as soon as practicable, by His Britannic Majesty's Government, with a view to its elimination.

"5. I have to add further that, Persia being a member of the League of Nations, the Imperial Persian Government, conformably to article 10 of the Covenant, which guarantees the territorial integrity of its members, have forwarded a copy of their note to the League of Nations, with the request that their protest may receive due consideration."

I beg leave to bring this matter to the notice of your Excellency for your kind consideration.

I have, &c.

HOVHANNES KHAN MOSSAED,
Persian Minister.

[E 220/51/91]

(B)

Sir Austen Chamberlain to Hovhannès Khan Mossaed.

Foreign Office, January 18, 1928.

Sir,

I HAVE the honour to acknowledge the receipt of your note of the 26th November, containing the formal protest which the Persian Government have seen fit to make against the terms of article 6 of the Treaty of Jeddah, concluded on the 20th May, 1927, between His Britannic Majesty and His Majesty the King

[11921]



of the Hejaz and Nejd and its dependencies, on the ground that the reference in that article to the Islands of Bahrein is contrary to the territorial integrity of Persia.

2. In reply, I shall be grateful if you will inform your Government that His Majesty's Government are not aware of any valid grounds upon which the claim of the Persian Government to sovereignty over these islands is or can be based. Geographically, the islands are not a part of Persia, nor are the inhabitants of Persian race. His Majesty's Government are aware that during part of the 17th century and for some years during the latter part of the 18th century Bahrein was overrun and occupied by Persian troops, or by the followers of certain chiefs from the eastern shores of the Persian Gulf; but it appears to be established that in or about the year 1783 the Government of the Shah were dispossessed of the islands by an invasion of Arab tribes under the leadership of the direct lineal ancestor of the present sheikh, and that since that date the islands have never at any time been under the effective control of Persia.

3. The Persian Government have on various occasions alleged that their claim to sovereignty over Bahrein has been recognised by His Majesty's Government. While it is not evident that, even if this assertion were justified, it would confer on Persia the right of ownership which on other grounds appears so difficult to establish, His Majesty's Government feel that they must once and for all declare this statement to be entirely inadmissible.

4. The special treaty relations between His Majesty's Government and the successive Sheikhs of Bahrein, to which reference is made in the Treaty of Jeddah, have now been in existence for more than a century, the first in the series of undertakings by which those relations are regulated having been signed in the year 1820. The agreements have throughout been concluded on the basis that the Sheikh of Bahrein is an independent ruler. His Majesty's Government do not deny that the claim to independence of the sheikh is one which has from time to time been contested by the Government of the Shah, and in particular in the discussions which took place in 1869, to which reference is made in your note. I desire, however, to point out that your Government are under a complete misunderstanding in inferring from the terms of the communication made by the late Earl of Clarendon to the Persian Minister on the 29th April, 1869, that any recognition of the validity of the Persian claims to sovereignty in Bahrein was at that time intended. In that note it was stated that Her Majesty's Government had given due consideration to the protest of the Persian Government "against the Persian right of sovereignty over Bahrein being ignored by the British authorities," but it in no way admitted any such right. On the contrary, the whole tenor of the note should have made it clear that Her Majesty's Government maintained their right to enter into direct treaty relations with the Sheikhs of Bahrein as independent rulers; and while at the same time it indicated that Her Majesty's Government would gladly transfer to Persia, if she were able and willing to perform them, certain duties in the Persian Gulf towards the performance of which the treaty relations in question contributed, and offered, in view of the friendly feelings entertained by Her Majesty's Government towards Persia, to cause the Persian Government to be informed beforehand, when practicable, of any measure of coercion which the conduct of the sheikhs might have rendered necessary, it is evident that no recognition of the validity of the Persian protest, or of the Persian claim to suzerainty, was thereby intended or implied. The note, in fact, as the Persian Legation at Constantinople was reminded in December 1871 by Sir Henry Elliott, then Her Majesty's Ambassador in Turkey, contains nothing more than an acknowledgment that the Persian claim to suzerainty had previously been made. The numerous supplementary agreements entered into between the British Government and the rulers of Bahrein between 1869 and the present day have equally proceeded on the assumption that a claim to sovereignty in Bahrein on the part either of the Government of the Shah or of the Turkish Government could not possibly be admitted by His Majesty's Government.

5. The attitude of His Majesty's Government towards this question was still more clearly defined when in the year 1906 His Majesty's Minister at Tehran, on my predecessor's instructions, addressed to the Persian Government a note stating that "His Majesty's Government have never admitted the ownership or sovereignty of Persia over Bahrein, and such a claim is, in their view, entirely inadmissible. His Majesty's Government consider the Island of Bahrein and its

inhabitants to be under British protection, and must decline to entertain any further representations on the subject." The note added that this reply had invariably been made to the Ottoman Government, which had on several occasions advanced a claim to Bahrein. In reply to this note, a formal protest was received from the Persian Government, in which their claim to sovereignty over Bahrein was based on an agreement, dated the 30th August, 1822, between Captain William Bruce, "the special commissioner of the British Government," and the Prince Governor of Shiraz. This agreement, however, as was pointed out in a reply from His Majesty's Minister on the 2nd January, 1907, and again on the 23rd February, 1907, was promptly disavowed at the time by the proper representatives of His Britannic Majesty, as having been entered into without authority, and His Majesty Fath Ali Shah also refused to recognise its stipulations, and expressed his displeasure that the Prince of Shiraz should have entered into any engagements with the British Government without his knowledge or instructions. In these circumstances, having regard to international law and custom, the agreement cannot be regarded as ever having possessed any binding force.

6. From the foregoing remarks you will observe that the Persian Government are not justified in supposing that His Majesty's Government, either in 1869 or at any other time, intended to recognise that Bahrein was a part of Persia, and that, while they have, indeed, admitted that a claim on the subject has from time to time been put forward by the Persian Government, they have never admitted the validity of the claims which either the Turkish or Persian Governments have frequently put forward in the past. Their consistent endeavour in the matter of Bahrein has been to secure that the peaceful development of the islands and the welfare of the Arab inhabitants shall not be disturbed by unjustified attempts on the part of their neighbours to subject them to a foreign domination. They are not prepared to contemplate any departure from this policy.

I have, &c.

AUSTEN CHAMBERLAIN

[E 4249/51/91]

(C)

Mr. Parr to Sir Austen Chamberlain.—(Received August 27.)

(No. 363.)

HIS Majesty's representative presents his compliments to His Majesty's Principal Secretary of State for Foreign Affairs, and has the honour to transmit herewith copy of a note from the Acting Persian Minister for Foreign Affairs, dated the 2nd August, on the subject of Bahrein.

Tehran, August 6, 1928.

Enclosure in (C).

M. Pakrevan to Mr. Parr.

M. le Chargé d'Affaires,

Téhéran, le 2 août 1928.

D'ORDRE de mon Gouvernement, j'ai l'honneur de vous faire connaître sa réponse à la lettre du 18 janvier 1928, relative aux îles de Bahrein, que son Excellence le Secrétaire d'Etat Sir Austen Chamberlain a adressée au Ministre de Perse à Londres.

Les motifs invoqués par l'honorable Secrétaire d'Etat pour opposer une fin de non-recevoir à la juste protestation du Gouvernement impérial, formulée dans sa lettre du 22 novembre 1927, contre la clause relative aux îles de Bahrein contenue à l'article 6 du Traité de Djeddah du 20 mai 1927, entre Sa Majesté britannique et le Sultan Abdol Aziz-Ebn-Séoud, ne sauraient en rien convaincre le Gouvernement impérial et le détourner un instant de la voie dans laquelle il s'est engagé pour la légitime défense de son incontestable droit de souveraineté sur les îles de Bahrein.

[11921]



2. Mais, avant d'en venir à l'étude et au sujet des postulats sur lesquels s'appuie le Secrétaire d'Etat pour repousser la protestation persane et affirmer la légitimité de la politique britannique, je tiens à attirer l'attention de votre Gouvernement sur ce principe juridique d'ordre international :

Un territoire appartenant à un Etat souverain ne peut en être légitimement détaché tant que le droit de propriété n'a pas été transféré par cet Etat à un autre Etat, par un acte officiel, en l'espèce un traité, ou que son annexion à un autre Etat ou que son indépendance propre n'ont pas été reconnues officiellement par le légitime propriétaire de ce territoire.

Or, comme toute vérité historique, c'est l'évidence même que les îles de Bahrein appartiennent à la Perse. Jamais il n'a existé un Etat indépendant connu sous le nom de Bahrein. La Perse n'a jamais renoncé à sa souveraineté sur ces îles, comme elle ne l'a jamais cédée à un autre Etat, ni jamais reconnu aucun des cheikhs de ces îles comme des chefs indépendants.

Nous sommes loin de disconvenir qu'il est souvent arrivé dans l'histoire de la Perse que des khans, gouverneurs, cheikhs ou autres chefs locaux se sont soulevés contre l'autorité du pouvoir central, se soumettant sitôt après ou vivant un temps plus ou moins long en état de rébellion, fréquemment se battant entre eux, le plus fort s'emparant du pouvoir local, mais restant, comme ses adversaires, soumis et subordonné au Gouvernement central : il va de soi que ces rivalités, ces querelles intestines n'ont jamais pu porter atteinte au droit de souveraineté ni à l'intégrité du pays.

Cela posé, je déclare, au nom de mon Gouvernement et de la façon la plus catégorique, que les îles de Bahrein font partie intégrante de la Perse et qu'il ne peut, par conséquent, admettre que l'insoumission momentanée ou plus ou moins prolongée d'un cheikh quelconque puisse aucunement porter atteinte au droit souverain de la Perse sur Bahrein.

Dans l'état actuel des usages internationaux, il ne peut jamais être question de demander à un Etat, en temps de paix, de renoncer à ses droits de souveraineté sur une partie quelconque de son territoire, sous le prétexte que les habitants de ce territoire ne parlent pas la langue nationale de l'Etat souverain ou que ce territoire est, par sa position géographique, en fait détaché de la mère-patrie par la mer. Cette vérité, le Gouvernement britannique, moins que tout autre pays, ne peut la méconnaître. Les considérations d'ordre ethnique et géographique ne peuvent à la rigueur se poser que pour justifier les prétentions d'un Etat d'annexer un territoire nouveau.

En outre des droits de la Perse sur Bahrein, il est notoire que les rapports de ces îles avec elle, tant ethniques qu'économiques, sont beaucoup plus développés qu'avec n'importe quel autre pays indépendant et civilisé du monde.

Bahrein a constamment et sans interruption fait partie de la Perse dans les siècles passés, sauf cependant durant l'occupation portugaise de 1507 à 1622, date à laquelle le Gouvernement persan en a repris possession.

Jamais les Cheikhs-Gouverneurs de Bahrein n'ont, même dans les siècles passés, exercé leurs fonctions à titre de chefs indépendants, mais bien plutôt comme chefs de tribu, à l'exemple de khans locaux de certaines parties de la Perse, qui, il y a à peine quelques années encore, exerçaient leurs fonctions de gouverneurs à titre permanent et parfois même héréditaire, mais toujours sous la dépendance et le contrôle du pouvoir central.

Les Cheikhs de Bahrein ont toujours reconnu la souveraineté persane et cela non pas seulement jusqu'à la fin du 18^e siècle. Des documents postérieurs et authentiques existent, où ils déclarent leur entière soumission et leur fidélité au Gouvernement central ; sans omettre d'ajouter, ce qui est une preuve incontestable de dépendance, qu'ils payaient l'impôt qu'ils devaient à l'Etat.

Il est manifeste que cet état de choses n'a cessé qu'à partir du moment où les cheikhs ont été incités à l'insoumission, à l'instigation d'un Etat étranger, sous forme de contrainte, de menaces ou d'ingérence directe.

3. S'il est constant que la Perse n'a jamais douté de son droit de souveraineté et de propriété sur Bahrein, il est avéré qu'il fut un temps où le Gouvernement britannique n'en doutait pas non plus. Nous en trouvons la preuve dans la correspondance échangée avec le Secrétaire d'Etat, feu le Comte de Clarendon. Après avoir pris connaissance des documents communiqués par la Légation de Perse à Londres et après en avoir conféré avec son collègue, le

Secrétaire d'Etat des Indes, le Comte de Clarendon dans sa lettre du 29 avril 1869 déclare :

"The British Government readily admit that the Government of the Shah has protested against the Persian right of sovereignty over Bahrein being ignored by the British authorities, and they have given due consideration to that protest."

Ainsi après avoir pris connaissance des faits et documents, il déclare prendre en due considération la protestation par laquelle le Gouvernement impérial affirme son droit de souveraineté.

Nous prétendons qu'il est impossible de découvrir dans les termes dont se sert le Secrétaire d'Etat de l'époque un sens autre et de leur donner une interprétation autre que celle qui tombe sous le sens.

Cela est si vrai que le noble Lord se voit obligé de justifier la nature des relations entretenues par son Gouvernement avec les Cheikhs de Bahrein, ce qui ne peut s'expliquer que vis-à-vis du Souverain légitime, et de restreindre la politique britannique à leur égard à un simple contrôle sur la piraterie, la traite des esclaves et le maintien de l'ordre dans le Golfe. Il convient de citer, à cet effet, la partie de sa lettre qui s'y rapporte :

"I beg to assure you that the British Government hold the Sheikh to these engagements *solely* for the purpose of preventing piracy and slave trade and of maintaining the police of the Gulf."

Il n'est ici nullement question d'un droit pour l'Angleterre sur ces îles, ni de l'indépendance de Bahrein et de ces cheikhs.

Et la reconnaissance de la souveraineté persane sur Bahrein est ensuite affirmée de la façon la plus éclatante :

"If the Persian Government are prepared to keep a sufficient force in the Gulf for these purposes, this country would be relieved of a troublesome and costly duty, but if the Shah is not prepared to undertake these duties, Her Majesty's Government cannot suppose His Majesty would wish that in those waters disorder and crimes should be encouraged by impunity."

Ce qui revient à dire que, si le Gouvernement persan est en état de faire la police du Golfe, le Gouvernement britannique se considérera libéré "de la lourde et coûteuse tâche" qu'il s'est imposée à cet effet et que, par conséquent, il se retirera pour laisser le Souverain légitime exercer ces devoirs, qui donc lui reviennent réellement.

Lord Clarendon ajoute :

"and in regard to this question, I have the honour to state to you, whenever it is practicable to do so Her Majesty's Government will cause the Persian Government to be informed beforehand of any measures of coercion against himself which the conduct of the Sheikh of Bahrein may have rendered necessary."

Ce qui ne peut s'expliquer que par la nécessité de rendre compte au Souverain légitime.

Les déclarations très explicites de Lord Clarendon et l'engagement formel du Gouvernement britannique en 1869 sont une preuve éclatante tant de la fragilité des droits que s'est arrogés le Gouvernement britannique que de la souveraineté de la Perse sur les îles de Bahrein.

Cela étant le passage du paragraphe 3 de la lettre de l'honorable Secrétaire d'Etat britannique, dans lequel il prétend que même au cas où la Perse aurait raison d'affirmer que le Gouvernement britannique a admis sa revendication sur Bahrein, cela ne conférerait pas à la Perse un droit de propriété sur ces îles, nous demeure inintelligible.

Nous n'avons jamais prétendu que la reconnaissance par le Gouvernement britannique de notre droit sur Bahrein créait ce droit, pas plus que nous ne pouvons accepter que sa méconnaissance de ce droit nous l'enlève. Il est demeuré, indépendamment de toute opinion étrangère, pour les raisons que nous avons établies. Il n'est tout de même pas sans intérêt de relever que le Gouvernement britannique, qui nous conteste aujourd'hui ce droit, l'a lui-même, au cours de l'histoire, plus d'une fois reconnu.



4. Le seul argument invoqué, à plusieurs reprises, par le Gouvernement britannique, pour refuser de reconnaître la souveraineté de la Perse sur Bahreïn, se base sur le fait qu'il est entré en relations directes contractuelles avec les Cheikhs-Gouverneurs de Bahreïn.

A cet aveu, le Gouvernement répond en posant les questions suivantes :

Le fait d'avoir enfreint les règles élémentaires du droit international crée-t-il un droit et autorise-t-il son auteur à s'en prévaloir pour en tirer les conclusions qui conviennent à sa politique ?

En effet, si un gouverneur ou un chef local d'une partie quelconque du territoire d'un Etat souverain entre en relations directes avec un Etat étranger, sans l'autorisation expresse du Gouvernement central, cela a-t-il une valeur juridique en droit des gens ?

Un Etat étranger a-t-il le droit de conclure des accords avec des gouverneurs ou des chefs locaux, à l'insu du Gouvernement dont ses chefs ou gouverneurs dépendent ?

Mais si, néanmoins, ce principe incontesté du droit international se trouve avoir été transgressé par un gouverneur ou chef local, volontairement ou par contrainte, ou si l'Etat étranger, passant outre aux règles communes du droit des gens, est entré en relations contractuelles avec ces gouverneurs ou ces chefs rebelles, le droit de l'Etat souverain sur ces parties de son territoire où ces accords illégaux ont eu lieu sera-t-il prescrit ?

Le gouverneur ou le chef rebelle pourra-t-il légitimement se prévaloir de ces accords avec l'étranger pour prétendre à une autonomie ou une indépendance quelconque ?

Le Gouvernement impérial, chaque fois qu'il a eu connaissance de semblables accords, n'a jamais manqué d'élever à leur rencontre une énergique protestation officielle.

5. Les déclarations du Ministre d'Angleterre à Téhéran en 1906, auxquelles il est fait allusion dans la lettre de l'honorable Secrétaire d'Etat—déclarations tendant à rejeter l'affirmation par la Perse de sa souveraineté sur Bahreïn et à prétendre au protectorat britannique sur ces îles—ne donnent aucune force nouvelle à la thèse anglaise.

A ces déclarations, le Gouvernement impérial a répondu par une protestation catégorique, appuyée, entre autres, sur cet argument que ses droits sur Bahreïn étaient corroborés dans l'accord, en date du 30 août 1822, conclu entre le Capitaine William Bruce et le Prince Gouverneur de Chiraz.

Cet accord aurait été "immédiatement désavoué, à l'époque, par les représentants compétents de Sa Majesté britannique comme ayant été conclu sans les autorisations nécessaires."

Mais, même désavoué, il reste un document historique d'une inappréciable valeur. Il permet, en effet, de fixer, telles qu'elles étaient, les situations respectives du Gouvernement persan et du Gouvernement britannique par rapport à Bahreïn et à ses cheikhs. La vérité historique qui ressort de cet accord, c'est l'affirmation et la confirmation de la main même du Capitaine Bruce que les îles de Bahreïn faisaient partie de notre Province de Fars.

Aucun désaveu n'infirmera jamais ce point d'histoire définitivement élucidé dès 1832 par une autorité britannique, bien placée pour en connaître.

On peut supposer à ce désaveu tous les motifs qu'on voudra, sauf évidemment le fait que le Capitaine Bruce avait reconnu que Bahreïn faisait partie de la Perse, puisque la susdite lettre de Lord Clarendon, postérieure de 47 ans, corrobore et même renforce, comme nous l'avons ci-dessus établi, la reconnaissance de l'état de fait émanant du Capitaine Bruce.

D'autre part, quand on dit que Fath Ali Chah lui-même a désavoué cet accord, ce n'est certes pas parce qu'on y reconnaissait que les îles de Bahreïn dépendaient de son Gouvernement.

Sans répit, ni trêve, la Perse ne s'est pas lassée de proclamer sa souveraineté et cela même aux temps les plus troubles de son histoire.

En effet, le Gouvernement persan, dans sa réponse du 10 août 1907 aux notes du 2 janvier 1907 du Ministre britannique à Téhéran, relatives au désaveu de l'accord du 30 août 1822, déclare :

"L'accord de 1822, même non exécuté, comme vous le prétendez, ne peut aller à l'encontre des conséquences qui s'en déduisent. Les autorités officielles britanniques, à ce moment-là, ont constaté, tels qu'ils étaient, l'état et la

situation juridique des îles de Bahreïn. Elles les ont certifiées d'après ce qu'elles ont vu et reconnu. Si, par la suite, l'accord intervenu n'a pas été exécuté, cela ne peut nullement porter atteinte au principe de la reconnaissance du droit de la Perse sur les îles par les autorités britanniques, et c'est au sujet de ce principe que le Gouvernement persan ne peut s'attendre que le Gouvernement britannique méconnaisse le droit traditionnel de la Perse sur ces îles."

6. De l'accord de 1822 jusqu'à ce jour, aucun titre valable n'a été acquis par le Gouvernement britannique. Il n'avait donc pas le droit d'empiéter sur le droit de souveraineté de la Perse sur Bahreïn par le traité qu'il a conclu avec le Sultan Abdol Aziz-Ebn-Séoud en mai 1927.

C'est pour ces considérations que le Gouvernement impérial a protesté et qu'il maintient sa protestation contre l'article 6 du Traité de Djeddah du 20 mai 1927, relatif aux îles de Bahreïn.

Mon Gouvernement espère que le Gouvernement de Sa Majesté britannique se rendra aux considérations historiques et juridiques ci-dessus invoquées et qu'il reconnaîtra volontiers qu'une telle disposition ne peut avoir d'effet que si elle a été conclue avec l'Etat persan, Souverain légitime des îles de Bahreïn.

Veuillez, &c.

F. PAKREVAN.

[E 853/33/91]

(D)

Sir Austen Chamberlain to Hovhannès Khan Mossadé.

Sir,

Foreign Office, February 18, 1929.

IN a note dated the 18th January, 1928, I had the honour to inform you, in reply to your note of the 26th November, 1927, respecting the claim advanced by your Government to the islands of Bahrein, that His Majesty's Government in the United Kingdom were not aware of any valid grounds upon which the claim of the Persian Government to sovereignty over those islands was or could be based. Some months later, on the 2nd August, 1928, the Persian Acting Minister for Foreign Affairs addressed to His Majesty's Chargé d'Affaires at Tehran a further note explaining in detail the reasons which have led his Government to consider themselves justified in advancing such a claim. I now have the honour to request that you will convey to your Government the following reply :—

2. His Majesty's Government in the United Kingdom have examined with the greatest care the views set forth in the Persian Government's note of the 2nd August, and have endeavoured to extract from the many unsupported declarations that Bahrein forms an integral part of Persia (a statement which, as I have already indicated in my note under reference, bears no relation to geographical facts), the essential arguments on which this claim is based. They note that the Persian Government do not in any way base their claim on the alleged recognition of their rights in the past by His Majesty's Government. So far as can be deduced from their note under reply, their claim is, in fact, founded on three main arguments: Firstly, on uninterrupted possession except for the period of Portuguese occupation between 1507 and 1622; secondly, on an alleged principle of international law that a territory belonging to a sovereign State cannot be lawfully detached so long as its annexation by another State or its independence have not been officially recognised by the lawful owner of the territory; and thirdly, on documents of a date later than the end of the 18th century, in which the sheikhs of the islands are alleged to have declared their submission to the Persian Government, and on the alleged payment by them of tribute to the Persian Government. After full examination of these arguments His Majesty's Government have reached the conclusion, for the reasons given below, that they entirely fail to substantiate a Persian claim to sovereignty over the islands at the present day.

3. In the first place, the statement that "Bahrein has always and uninterruptedly formed part of Persia in past centuries, except during the Portuguese occupation from 1507 to 1622" is not one which can be allowed to pass unquestioned. I have already drawn attention to the evident fact that geographically this assertion is misleading. Historically it is almost equally

misleading. The earlier history of the islands before 1507 is obscure, but it cannot seriously be maintained that they were subject to Persian sovereignty all through the Arab, Mongol and Tartar invasions and the anarchy of the Middle Ages. On the contrary, modern historians have expressed the opinion that from the 11th to the beginning of the 16th century the inhabitants of Bahrein were subject to chiefs of their own race; and, among contemporary writers, the Arabian geographer, Idrisi, writing in the latter half of the 12th century, stated categorically that the island was then governed by an independent chief. It is, therefore, impossible to accept the view that the island was continuously subject to Persia before 1507. Between the years 1507 and 1622 the islands were occupied by the Portuguese, as the Persian Government themselves admit. The period of Persian rule began in 1622 and ended in 1783, when the Persian troops were finally driven out of the islands by the ancestors of the present Sheikh of Bahrein, but it is not to be supposed that even during this period of Persian ascendancy, Persian rule was continuous and unchallenged, or that it brought peace and prosperity to the inhabitants. The Persian occupation after the expulsion of the Portuguese was of uncertain duration, but it seems to be established that about the year 1718 a descent was made upon the island by the Omani Arabs, who then occupied it for a short period. In the middle of the 18th century control appears to have passed into the hands of the once powerful Huwala Arabs, who even at the present day are strongly represented there, though in 1753 Persia was again able to assert her ascendancy by conquest. In 1783, however, the troops of His Majesty the Shah were finally driven out by the Utubi Arabs, and the authority of Persia ceased, never to be re-established.

4. It will be evident from the brief historical summary contained in the preceding paragraph that such historical evidence as can be adduced in favour of the Persian claim must rest mainly upon intermittent occupation between the years 1622 and 1783, a period which comprises at least two periods of Arab rule. On the other hand, a period of approximately equal length between 1783 and the present day has elapsed during which no dominion has been exercised in the islands by Persia, and Arab rule has been uninterrupted. In these circumstances His Majesty's Government cannot but regard the claim of Bahrein to independence from Persia as abundantly established.

5. It is in the light of the historical events summarised above that the second argument of the Persian Government must be examined, viz., that part of their note now under reply in which they affirm as an alleged principle of international law the statement that "a territory belonging to a sovereign State cannot be lawfully detached so long as the right of ownership has not been transferred by this State to another State in virtue of an official act, in this case a treaty, or so long as its annexation by another State or its independence have not been officially recognised by the lawful owner of the territory." Even if this statement could be accepted as valid, it would still be necessary for Persia to prove that she is, or ever has been, the lawful owner of Bahrein, and that such rights as she may have acquired in former ages by conquest and the exercise of force outweigh those not only of the Portuguese, but of the Arab inhabitants themselves.

6. His Majesty's Government, however, deny without hesitation that any such principle, if alleged to be of universal application, forms part of international law. The assertion that the consent of the dispossessed State is invariably required to validate a change of sovereignty is contradicted both by international practice and the facts of history. Moreover, it would, if it existed, seriously prejudice the maintenance of peace and international order. It would be open to any State to advance a claim to territory, of which it has not for centuries been in effective possession, on the ground that its loss of possession in distant ages had not been confirmed by a subsequent treaty. To assert such a legal principle would be to assert that on a disputed question of territory the one factor that is decisive is the expressed will of one of the disputants. On the contrary, in cases where a territory has effectively established its independence of the former sovereign, a treaty by which the disposed owner recognises its independence is in effect chiefly valuable as conclusive evidence that, in the view of the former sovereign, such independence has been effectively established. In such cases the effective establishment by the territory of its independence is the deciding factor in the question of international title, and in the case of Bahrein His Majesty's Government regard as wholly untenable the proposition that effective possession and administration by the present ruling family for 145 years,

during which these rulers have been independent of Persia, and during which no Persian authority has been exercised in their dominions, can be affected by the mere consideration that the Persian Government have not set their signature to a document formally recognising the fact of their independence.

7. It is, moreover, abundantly clear from historical precedents that the theory of the necessity for the formal consent of the dispossessed State is not one which has ever obtained international acceptance. The revolted Spanish colonies in South America were diplomatically recognised as independent States by the United States Government in 1822 and by the British Government in 1824, many years before their independence was formally admitted by Spain. The independence of Texas in 1837 and that of Panamá in 1903 were recognised by the United States, and subsequently by Great Britain and other European Powers, long before Mexico and Colombia had ceased to look upon those territories as revolted provinces. In these instances, to which others could, if necessary, be added, the effective establishment of independence was clearly regarded by the Powers as the ruling factor in the situation, and the consent of the dispossessed State was not held to be a condition *sine qua non* of a valid transfer or acquisition of territory. In the case of Bahrein, whose sheikhs have now been in treaty relations with His Majesty's Government for more than a century as independent rulers, it was thus not necessary for His Majesty's Government to await the consent of Persia before such recognition could be accorded.

8. The only other argument advanced by the Persian Government in support of their claim is the statement that the sheikhs of Bahrein at some time later than the end of the 18th century declared in writing their entire submission and fidelity to the Persian Government, and that they paid tribute to the Persian Government. Although the Persian Government do not give any details in corroboration of this assertion, and although it would probably be difficult at the present day to prove the authenticity of any documents which may be in their possession, His Majesty's Government are perfectly prepared to admit the possibility that such documents may exist. They do not, however, consider that the existence of such documents, or even evidence, were this forthcoming, of payments by the Rulers of Bahrein to the Government of the Shah can be regarded as establishing the validity of Persia's claim. They have always been well aware that the unfortunate rulers of the islands, surrounded by warlike and more powerful States which menaced their independence, professed on various occasions during the first sixty or seventy years of the 19th century an unwilling allegiance to Muscat, to Persia, to Turkey, to the rulers of the mainland of Arabia, even to Egypt—to any Power, in short, who would agree to offer them protection and seemed at the time in a strong enough position to do so; and that at different times for short periods they paid tribute to Muscat, Egypt, or the Wahabi Arabs of the mainland. Any argument based on payment of tribute would, therefore, be available in support of a claim to sovereignty over Bahrein by any of the States to which tribute was, in fact, paid, and, in any case, it is evident that this timid and vacillating policy pursued on occasion by his predecessors cannot be held to affect the position of the present sheikh, who is firm in his determination to resist the Persian Government's claims, and has empowered His Majesty's Government to refute them on his behalf, in virtue of the treaties which give them the right of defending Bahrein from external aggression.

9. In view of the fact that the Persian Government do not base any part of their claim on the alleged recognition of that claim by His Majesty's Government in the past, it seems unnecessary here to reply in detail to the various arguments by which the Persian Government endeavour to show that their claims have received British recognition in the past. I have already, in my note of the 18th January, 1928, explained that it has never on any occasion been the intention of His Majesty's Government to admit the validity of Persia's claims, and I must now ask the Persian Government to believe that a further full and careful examination of the contemporary records confirms that statement in its entirety. Ever since the year 1820, when His Majesty's Government first entered into special treaty relations with the Sheikh of Bahrein without any reference to the Government of the Shah, they have acted on the assumption that the sheikh is an independent ruler. In 1822, when Captain William Bruce was recalled for having negotiated the terms of an agreement with the



1934

Prince Governor of Shiraz without their authority, the main reason recorded for his recall and for the prompt disavowal of this tentative agreement is that "it acknowledges the King of Persia's title to Bahrein, of which there is not the least proof." No clearer statement could possibly have been made of the views held by His Majesty's Government at that date, more than a century ago; they have never since seen any reason to alter their opinion.

10. The Earl of Clarendon's note of the 29th April, 1869, to which the Persian Government devote so large a part of their note now under reply, was certainly never intended to bear the interpretation now placed upon it by the Persian Government. As was pointed out in my note of the 18th January, 1928, it admitted that the Persian Government had advanced a claim to Bahrein, it stated that due consideration had been given to their claim, but it did not admit that their claim was valid. It even affirms the intention of the British Government to continue to hold the sheikhs to the treaty engagements which had been entered into with them as independent rulers. His Majesty's Government are entirely unable to admit that an implicit acknowledgment of the validity of the Persian claims is constituted by the reference in that note to the considerations which led to the establishment and the maintenance of those treaty relations; nor can they agree that the dependence or otherwise of Bahrein on Persia can in any way be affected by the fact that in entering upon and maintaining their treaties with the sheikhs they were principally moved by a desire to suppress piracy and the slave trade and to maintain the police of the Gulf, duties which the Persian Government themselves were not in a position effectively to perform. It is true that at that time Her Majesty's Government were mainly influenced by the consideration that they, like Persia, were interested in the safety of the Persian Gulf for commerce, and that they would gladly have accepted Persia's co-operation in maintaining order had her naval position admitted of it; but, although they did not consider Persia's claims to ownership to be valid, they were not at that time directly concerned in refuting them. The special treaties by which they eventually agreed to accept the control of the sheikh's foreign relations were concluded at a later date.

11. I must in this connexion invite the Persian Government to take note of the fact that there is no conceivable ground for the suggestion in the last paragraph of the second section of your Government's note under reply that the independent status enjoyed by the rulers of Bahrein can in any sense be represented as the result of "rebellion at a foreign State's instigation." This suggestion is one which His Majesty's Government repudiate as entirely unjustifiable. When in 1820, consequent on their suppression of the piratical activities of the independent rulers of the crucial coast of Oman, they found it necessary to consider the position in regard to Bahrein, nearly forty years had elapsed since the conquest of this island by the ancestor of the present sheikh, and during those years Persia had exercised no dominion in the islands and appeared to have taken no measures to re-establish her position. They had accordingly no hesitation in entering into negotiations and concluding a treaty with the independent ruler without prior reference to the Government of the Shah. Their object, as stated by Lord Clarendon in 1869, was the suppression of piracy and the maintenance of peace in the Gulf; they strictly confined themselves to the measures necessary to attain that object, and while it might have been open to them to establish their dominion over the sheikh, they did not choose to do so, but contented themselves with an arrangement to secure the safety of international shipping without imposing on themselves the burden of administration. They maintained this position not only in 1820 but on other occasions in subsequent years, and notably in 1848, when they declined to accede to the sheikh's request that his dominions should be incorporated in those of Her Majesty the Queen. The treaty of 1820, by which the Sheikh of Bahrein bound himself to abstain from plunder and piracy by land and sea, from the slave traffic and from inter-tribal war was followed in 1847, in 1856, and 1861 by further treaties designed to secure the same objects—the suppression of slavery, and the general pacification of the Gulf in the interests of international shipping. The British Government concluded all these treaties with the sheikh as an independent ruler, and consistently refused throughout to admit the Turkish, Persian and other claims to sovereignty over his dominions. It was not until the treaty of 1861 that Her Majesty's Government, in return for the sheikh's undertaking to abstain from maritime aggression, war and piracy,

assured him in return of their support against similar aggression, nor till a still later period in 1880 and 1892, that they took upon themselves the unqualified liability for the foreign relations of that ruler, under which he has now invoked their assistance in repelling what he not unnaturally regards as a wholly unprovoked attempt on his independence by a foreign Government.

12. In conclusion, His Majesty's Government cannot refrain from expressing their surprise that the Persian Government should have referred in this correspondence to article 10 of the Covenant of the League of Nations, under which the members of the League undertake to respect and preserve as against external aggression, the territorial integrity and existing political independence of all members of the League; and that they should seemingly imagine that the terms of this article lay an obligation on members of the League to support Persian pretensions to an island which is separated from Persia by the whole width of the Persian Gulf, and over which Persia has exercised no authority for 145 years.

13. It will be evident to the Persian Government that His Majesty's Government in the United Kingdom have carefully weighed the arguments advanced in the note now under reply, and that although they have found no reason to modify their previous opinions, their attitude is dictated by their genuine conviction that those arguments are untenable, and is in no way inspired by a policy hostile to Persia's legitimate aspirations. They cannot believe that the true interests of Persia can be served by a continued refusal to recognise the long-standing independence of the State of Bahrein. They are, indeed, hopeful that the Government of the Shah, whose enlightened domestic policy they have long followed with friendly interest, will acknowledge the desirability of establishing good relations with Persia's neighbours, and, realising that their present antiquated claim cannot properly be sustained and is an insurmountable obstacle to the establishment of such good relations with the Government and people of Bahrein, will on further consideration desist from its pursuit.

14. A copy of this note has been sent to the Secretary-General of the League of Nations.

I have, &c.

AUSTEN CHAMBERLAIN.

Paper C.

[E 975/33/91]

SOCIÉTÉ DES NATIONS.

*Communiqué au Conseil et aux Etats
membres de la Société.*

[C. 39.M.23.1929.VII.]

Genève, le 13 février 1929.

Les Iles Bahrein.

Note du Secrétaire général.

LE Secrétaire général a l'honneur de communiquer au Conseil et aux Etats membres de la Société des Nations la lettre en date du 13 janvier 1929, de M. F. Pakrevan, Gérant du Ministère des Affaires étrangères de Perse, ainsi que le document y annexé.

M. le Secrétaire général,

Téhéran, le 13 janvier 1929.

En rapport avec ma lettre datée du 2 août 1928⁽¹⁾, relative aux îles de Bahrein, j'ai l'honneur de vous envoyer à titre d'information pour les membres de la Société des Nations copie de la lettre adressée à son Excellence Sir Robert Henry Clive, Ministre de Sa Majesté britannique à Téhéran, le 5 janvier 1929.

F. PAKREVAN,

*Gérant du Ministère des Affaires
étrangères de Perse.*

⁽¹⁾ Voir document C. 413.M.131.1928.VII.



1934

98

PERSIA

Copie de la Lettre adressée par le Gérant du Ministère des Affaires étrangères de Perse à son Excellence Sir Robert Clive, Ministre de Sa Majesté britannique à Téhéran.

M. le Ministre,

Téhéran, le 5 janvier 1929.

J'ai l'honneur d'attirer l'attention de votre Excellence sur ce qui suit :

Jusqu'à présent, les Persans qui se rendaient à Bahreïn n'étaient munis que du permis nécessaire pour se rendre d'un port persan à un autre, et aucune difficulté ne leur était apportée à l'accomplissement de leur voyage.

Mon Gouvernement vient d'apprendre que des ordres auraient été donnés d'exiger des Persans se rendant à Bahreïn un passeport, comme si Bahreïn était hors de la Perse.

Le changement ainsi apporté à une pratique ancienne, qui constituait la reconnaissance par les autorités britanniques mêmes des droits incontestables de la Perse sur Bahreïn, ne saurait affaiblir la portée de cette reconnaissance, surtout qu'il coïncide avec le moment où la question entière pourrait être résolue par la Société des Nations. Il semble qu'en tout état de cause il eût été préférable d'attendre, avant de rien modifier au *statu quo*, jusqu'à ce que cette question ait été réglée par la décision de la Société des Nations ou par un accord amiable entre les deux Gouvernements.

En conséquence, le Gouvernement impérial se voit obligé de protester énergiquement contre la tentative faite pour porter atteinte aux droits du pays et entraver le libre passage des Persans d'un point à un autre du territoire national.

J'ai l'honneur d'informer votre Excellence qu'aucun passeport ne sera accordé à un Persan pour se rendre à Bahreïn et que la responsabilité des dommages causés aux ressortissants persans, au cas où les autorités britanniques maintiendraient une exigence injustifiée, sera à la charge de ces autorités mêmes, sans préjudice de toutes autres sanctions utiles que le Gouvernement impérial se réserve de prendre, comme par exemple la défense d'entrer dans les ports persans aux bateaux ayant à leur bord des passagers qui ne seraient pas en règle avec les prescriptions et le point de vue du Gouvernement impérial.

J'ai l'honneur de vous informer en outre que le Gouvernement impérial se voit obligé d'adresser copie de la présente note au Secrétariat de la Société des Nations.

F. PAKREVAN,
Gérant du Ministère des Affaires étrangères.

Paper D.

[E 690/193/91]

Persian Minister for Foreign Affairs to Secretary-General, League of Nations.

Ministère des Affaires étrangères,
Téhéran, le 17 janvier 1930.

M. le Secrétaire général,

A PLUSIEURS reprises, notamment par des communications qui vous ont été adressées le 23 novembre 1927 et le 2 août 1928, le Gouvernement impérial a informé le Secrétariat de la Société des Nations et l'a prié de porter à la connaissance des Etats membres que les îles de Bahreïn étaient partie intégrante de l'Empire de Perse et que les prétentions du Gouvernement britannique à leur propos restaient infondées.

Mon Gouvernement a le regret de devoir une fois de plus faire entendre une protestation formelle, du fait que, dans le texte de la deuxième partie de l'Annexe 1 à la Convention internationale concernant les Statistiques économiques, les îles Bahreïn sont indiquées comme territoire statistique distinct, rangé sous la rubrique : "Dominions, Colonies, &c. . . . britanniques" (G. 505.M.167.1929.11., page 25, No. 59). Il doit être entendu que l'indication fournie dans le document officiel émanant de la Société des Nations, et intitulé

PERSIA

99

"Conférence internationale économique concernant les Statistiques économiques" (Genève, 1^{er} octobre 1929), n'a aucune valeur réelle et ne préjuge en rien de l'attribution des îles en question, lesquelles sont et demeurent persanes.

Veuillez agréer, &c.

Le Ministre des Affaires étrangères :
M. FARZINE.

Paper E.

[E 4460/193/91/1930]

Persian Minister for Foreign Affairs to Secretary-General, League of Nations.

Ministère des Affaires étrangères,
Téhéran, le 24 juillet 1930.

M. le Secrétaire général,

J'AI l'honneur de communiquer au Secrétariat, afin qu'il en soit donné connaissance par ses soins à tous les Etats membres de la Société des Nations, copie de la traduction d'une lettre que je viens d'adresser à la Légation britannique pour protester contre une nouvelle infraction aux droits souverains de la Perse sur Bahreïn.

Je vous prie, &c.

Le Ministre des Affaires étrangères :
M. O. FOROUGHÍ.

Enclosure in Paper E.

Persian Minister for Foreign Affairs to Sir R. Clive (Tehran).

Ministère des Affaires étrangères,

Téhéran, le 23 juillet 1930.

M. le Ministre,

D'APRES une nouvelle parue dans divers journaux, notamment dans le *Near East and India* et le *Bagdad Times* des 5 et 18 juin dernier, un syndicat anglais aurait obtenu du Cheik de Bahreïn une concession pour l'exploitation des pétroles de l'île et, le Major Holmes, représentant dudit syndicat, y aurait commencé les travaux.

Or, les îles de Bahreïn étant partie intégrante de la Perse et le droit de souveraineté de la Perse sur ces îles étant hors de conteste—ainsi qu'il a été prouvé au Gouvernement de votre Excellence et à la Société des Nations dans nos lettres du 26 novembre 1927 et du 2 août 1928 rappelant la reconnaissance expresse de votre Gouvernement en 1869 des droits de souveraineté de la Perse sur ces îles—mon Gouvernement proteste énergiquement contre la concession en question et toute autre concession qui ne serait pas accordée directement par le Gouvernement persan dans les îles de Bahreïn et déclare les considérer comme nulles et non avenues.

J'éprouve du regret à me trouver contraint, en dépit de l'esprit d'équité que je me plais à reconnaître à votre Gouvernement, de renouveler à ce sujet de temps en temps nos protestations.

Il va sans dire que pareils actes et la méconnaissance des droits incontestables de la Perse sur ces îles de Bahreïn ne sauraient en rien affaiblir ces droits et que mon Gouvernement se réserve de réclamer et demander la restitution de tout profit résultant éventuellement de la concession en cause, sans préjudice de tous dommages-intérêts y relatifs.

Veuillez agréer, &c.

FOROUGHÍ,
Ministre des Affaires étrangères de Perse.



1934

100

PERSIA

Paper F.

[E 5768/782/91]

*M. Sepahbody to Secretary-General, League of Nations.**Délégation persane auprès de la Société
des Nations, le 14 octobre 1932.*

M. le Secrétaire général,

J'AI l'honneur de vous faire connaître que l'Administration postale des Indes va incessamment mettre en circulation un certain nombre de timbres portant la surcharge des îles de Bahreïn pour les besoins du service postal desdites îles. Cette mesure étant une nouvelle atteinte à la souveraineté de la Perse sur les îles de Bahreïn, le Gouvernement impérial s'est empressé de protester officiellement contre cette mesure auprès de la Légation de Sa Majesté britannique à Téhéran.

En portant ce qui précède à la connaissance de votre Excellence, je la prie de vouloir bien communiquer cette lettre aux membres de la Société des Nations.

Veuillez agréer, &c.

A. SEPAHBODY.

Paper G.

[E 3945/2369/91]

*M. Avenol to Sir John Simon.—(Received June 15.)**League of Nations,
Geneva, June 12, 1934.*

Sir,

I HAVE the honour to forward to you herewith copy of a communication dated the 22nd May, 1934, from the Minister for Foreign Affairs of Persia relative to the Bahrein Islands. This communication, in conformity with the request of the Minister for Foreign Affairs, will be transmitted to the members of the League of Nations.

I have, &c.

J. AVENOL, *Secretary-General.*

Enclosure 1.

M. Kazémi to M. Avenol.

M. le Secrétaire général,

Téhéran, le 22 mai 1934.

FAISANT suite à la lettre que son Altesse Mirza Mohammad Ali Khan Foroughi, mon prédécesseur, avait adressée en date du 24 juillet 1930 à l'honorable Sir Eric Drummond, ex-Secrétaire général de la Société des Nations, j'ai l'honneur de communiquer au secrétariat, afin qu'il en soit donné connaissance à tous les Etats membres de la Société des Nations, la traduction d'une lettre que je viens d'adresser à la Légation des Etats-Unis d'Amérique à Téhéran au sujet des îles Bahreïn.

Je vous prie, &c.

Le Ministre des Affaires étrangères,
B. KAZEMI.

Enclosure 2.

M. Kazémi to Mr. Hornibrook.

(Traduction.)

M. le Ministre,

Téhéran, le 22 mai 1934.

IL y a bientôt quatre ans, mon Gouvernement a appris pour la première fois, par la voie de la presse étrangère, qu'un syndicat anglais a obtenu la concession de l'exploitation des gisements pétrolifères de Bahreïn et a commencé certains travaux dans ladite région. Etant donné que Bahreïn fait partie intégrante du territoire persan et que les droits de souveraineté du Gouvernement

PERSIA

101

impérial sur les îles susmentionnées sont indéniables, une protestation énergique a été faite en cette occasion auprès de la Légation de Sa Majesté britannique à Téhéran contre la façon d'agir dudit syndicat, qui avait illégalement obtenu cette concession et avait procédé à l'exploitation des richesses de ce territoire et par là avait violé les droits de souveraineté de la Perse.

Copie de cette lettre de protestation a été communiquée au Secrétaire général de la Société des Nations, qui, selon la demande du Gouvernement persan, l'a portée à la connaissance de tous les Etats membres.

Conformément aux informations reçues tout récemment par le Gouvernement impérial, la concession des pétroles de Bahreïn vient d'être obtenue par la Standard Oil Company of California, laquelle s'est livrée à des opérations d'exploitation et a déjà extrait de grandes quantités de pétrole.

J'ai l'honneur d'attirer la sérieuse attention de votre Excellence sur ce qui précède et de lui faire savoir qu'une telle concession ou toute autre acquise par la Standard Oil Company ou une autre compagnie quelconque n'ayant pas été obtenue du Gouvernement persan, dont les droits de souveraineté sur les îles Bahreïn sont incontestables, mais des autorités légalement incompétentes et n'ayant aucun droit d'accorder de pareilles concessions, est considérée comme nulle et non avenue et est l'objet de vives protestations de mon Gouvernement, qui se réserve tous ses droits quant à la réclamation et à la restitution de tout profit réalisé du chef desdites concessions ainsi que pour les réparations de tout dommage qui en résulterait.

En conséquence, je prie votre Excellence de bien vouloir porter le contenu de la présente lettre à la connaissance du Gouvernement de la République des Etats-Unis d'Amérique et de lui demander d'en communiquer la teneur à la Standard Oil Company of California.

Veuillez, &c.

B. KAZEMI.

Paper H.

[E 2304/728/91]

No. 653/25.

Objet: Convention.

Perse: Correspondance du Bureau
indo-britannique de Bahreïn.*Bureau international de l'Union postale universelle,
Berne, le 26 janvier 1933.*

Monsieur,

J'AI l'honneur, à la demande de l'Office de Perse, de vous communiquer la lettre reproduite ci-après que je viens de recevoir de cet office:

"Me référant à votre circulaire No. 5787/229 du 24 août 1932, relative à l'émission prochaine de timbres-poste indo-britanniques portant en surcharge le mot 'Bahreïn', j'ai l'honneur de vous faire savoir que, les îles de Bahreïn appartenant à la Perse, les correspondances reçues desdites localités munies de timbres-poste non persans seront traitées comme des correspondances non affranchies et ne seront remises aux destinataires que contre perception de la double taxe d'affranchissement selon le tarif intérieur. Je vous prie de vouloir bien porter ce qui précède, par la voie de circulaire, à la connaissance des offices de l'union."

La circulaire mentionnée par l'Office persan annonçait, de la part de l'Office indo-britannique, l'émission prochaine d'une série de timbres-poste indo-britanniques portant en surcharge le mot "Bahreïn," valables seulement pour l'affranchissement des envois mis à la poste au bureau indo-britannique de Bahreïn.

Ce bureau est indiqué à la page 72, 2^e colonne, du dictionnaire des bureaux de poste (édition de novembre 1926) publié par le Bureau international.

Veuillez agréer, &c.

Le Directeur,

GARBANI-NERINI.



1934

102

PERSIA

No. 3341/124.

Objet : Convention.

Inde britannique : Usage de timbres-poste
surchargés "Bahrein" au bureau de
poste de Bahrein.

*Bureau international de l'Union postale universelle,
Berne, le 20 avril 1933.*

Monsieur,

J'AI l'honneur, à la demande de l'Office de l'Inde britannique, de vous
communiquer, en traduction, la lettre ci-après que je viens de recevoir de cet
office :

" Me référant à votre circulaire du 26 janvier 1933, No. 653/25, relative
à l'émission envisagée de timbres-poste indo-britanniques surchargés
'Bahrein', j'ai l'honneur de vous informer que les îles de Bahrein ne sont
pas territoire persan et que, par conséquent, le Gouvernement persan n'a
aucun droit d'ordonner quels timbres le Cheik de Bahrein doit émettre. Le
Cheik, à la demande duquel un bureau de poste indo-britannique a été
entretenu pendant plusieurs années à Bahrein, est dans ses droits souverains
lorsqu'il demande au Gouvernement de l'Inde britannique de pourvoir à
l'émission de timbres-poste surchargés ainsi qu'il est prévu présentement.
Je vous prie de vouloir bien porter ces faits à la connaissance de tous les
membres de l'union."

Veuillez agréer, &c.
Le Directeur,
GARBANI-NERINI.



1935

THIS DOCUMENT IS THE PROPERTY OF HIS BRITANNIC MAJESTY'S GOVERNMENT

Printed for the use of the Foreign Office

CONFIDENTIAL.

(14928)

**REPORTS BY THE
LAW OFFICERS OF THE CROWN, &c.**

1935

(ii)

LIST OF REPORTS

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 1^A, &c.

AFRICA.

No.		Date.	SUBJECT.	Page.
1	Law Officers...	July 19, 1935	Possibility of denouncing the Congo Basin Treaties, or, alternatively, of introducing quota systems in British Territories to which they apply	1
2	Law Officers...	July 19, 1935	Possibility of limiting by means of quotas the importation of Japanese goods into certain British mandated territories in Africa in view of the terms of the relevant mandates	28
2A	Law Officers...	Dec. 6, 1935	Closer Union between Kenya, Uganda and Tanganyika: compatibility of proposals with Article 22 of Covenant of the League of Nations and Article 10 of the Tanganyika Mandate	32

GENERAL.

3	Law Officers...	Sept. 5, 1935	Possible application to Italy of sanctions provided in article 16 of Covenant of League of Nations: Prohibition of import into United Kingdom of Italian goods, &c., and position as regards British colonies, protectorates and mandated territories	52
---	-----------------	---------------	---	----

GUATEMALA.

4	Law Officers...	Oct. 28, 1935	Guatemala—British Honduras boundary: extent to which boundary set up by Anglo-Guatemalan Convention of 1859 depends on fulfilment of article VII; obligations of His Majesty's Government under that article	61
---	-----------------	---------------	--	----

LEAGUE OF NATIONS.

5	Law Officers...	Feb. 20, 1935	Diplomatic privilege and immunity for officials of International Labour Office	78
---	-----------------	---------------	--	----

(iii)

ALPHABETICAL INDEX

(NAMES AND SUBJECTS)

1935

The figures refer to the numbers of the pages.
Cases cited are indicated by italics.

ACT—DUT.

A.

Act—

See British Settlements Act.
See Treaty of Peace Act, 1919.
Operation of Statutes beyond territorial limits of the United Kingdom, 53.
Africa, East—Proposals for closer union between Kenya, Uganda and Tanganyika, 32–51.

B.

Belize—Settlement of, 62.
Belligerent Rights—Non-application in exercise of financial and economic sanctions under article 16 of League Covenant, 52.
Boundary—Guatemala and British Honduras; His Majesty's Government's obligations under article VII of Anglo-Guatemalan Convention, 1859, 61–77.
British Settlements Act—Position of Kenya Colony under, in connexion with proposed closer union in East Africa, 33–34.

C.

Certificates of Origin—see Origin, Certificates of.
Chinn, Oscar—Case of, before Permanent Court of International Justice, 16–22.
Colonies—Extension to British colonies of economic and financial sanctions contemplated in article 16 of League Covenant, 52–55.
Commerce—see Trade.
Congo Basin—
See also Treaties; Congo Basin.
Possibility of introducing quota systems in British territories, 1–28.
Ditto; Special position of Tanganyika in view of terms of mandate, 28–32.
Courts—see Permanent Court of International Justice.

D.

Diplomatic Privilege—
For officials of International Labour Office, 78–86.
For officials of League of Nations, 78–86.
For officials of Permanent Court of International Justice, 83–84.
Duties—Provisions of Congo Basin treaties regarding import duties, 2–3, 12–13.

8699 [13464]

IMP—MAN.

I.

Imperial Preference—Application to British territories in Congo Conventional Basin precluded by treaties, 5–6.
Importation—
Quota system for territories in Africa—see Trade.
Restrictions under article 16 of League Covenant—see Sanctions.
International Labour Office—
Diplomatic privilege for officials, 78–86.
Status in relation to League of Nations, 79–82, 85–86.
Membership of non-members of League of Nations, 80.
Italy—Application to, of sanctions contemplated in article 16 of League Covenant, 52–60.

K.

Kenya—Proposals for closer union with Uganda and Tanganyika, 32–51.

L.

League of Nations—
Article 7 of Covenant (diplomatic privileges for officials), 78–86.
Article 16 of Covenant—see Sanctions.
Article 22 of Covenant in relation to article 10 of mandate for Tanganyika, 34, 36.
Article 22 of Covenant in relation to proposals for closer union between Tanganyika, Kenya and Uganda, 34–36.
Article 23 (a) of Covenant, 79, 85.

M.

Mandates—
Introduction of quotas for imports into British mandated territories in Africa, 28–32.
Proposals for closer union between Tanganyika, Kenya and Uganda; effect of article 10 of mandate for Tanganyika, 33.
Question whether article 10 of mandate for Tanganyika is in conformity with article 22 of Covenant of the League, 34–36.
Extension to British mandated territories of economic and financial sanctions, 53, 55.

a

(iv)

ORI—TRA.

O.

Origin, Certificates of—Power to require, during exercise of sanctions under Treaty of Peace Act, 1919, 53–55.

P.

Permanent Court of International Justice—Decisions in Oscar Chinn case, 16–22.
Diplomatic privilege for members, 83–84.
Status in relation to League of Nations, 83–84.
Privilege—*see* Diplomatic Privilege.
Protectorates—Extension to British protectorates of sanctions contemplated in article 16 of League Covenant, 53–55.

Q.

Quotas—*see* Trade.

R.

Reprisals—Justification for, in International Law, 71.
Retaliation—*see* Reprisals.

S.

Sanctions—
Application to Italy of sanctions provided in article 16 of Covenant of the League, 52–60.
Interpretation of article 16 of Covenant, 56–60.
League Assembly resolutions, 1921, 52–53, 56–60.
Power of His Majesty's Government to impose economic and financial sanctions by Order in Council under Treaty of Peace Act, 1919, 52–55.

T.

Tanganyika—
Inclusion in Congo Conventional Basin, 1.
Mandate provision against trade discrimination; position of Japan, 6, 28–32.
Proposals for closer union with Kenya and Uganda, 32–51.

Trade—
Restrictions contemplated in article 16 of League Covenant—*see* Sanctions.
In Congo Basin; treaty position, 1–28.
Ditto; possibility of introducing quota system, 18–16, 21–22.
Ditto; effect of terms of Tanganyika mandate, 28–32.

TRE—UGA.

Treaties—

Claiming of benefits by countries not parties, 5.
Unilateral denunciation; doctrine of *rebus sic stantibus*, 7, 24–28.
Unilateral denunciation necessitates denunciation of whole instrument, 11.
Interpretation in light of surrounding circumstances and preparatory documents, 73.
Interpretation as a whole, 83.
Congo Basin; possibility of denouncing unilaterally, 1–28.
Ditto; parties to various treaties, 4.
Ditto; continuance in force of Berlin and Brussels Acts, as affected by non-accession to Saint-Germain Convention or by its termination, 4, 5, 15.
Ditto; possibility of Japan claiming benefits of earlier treaties, 5, 20–21, 23.
Ditto; permanency of régime set up by, 8–10, 11, 22–23.
Ditto; meaning of "free access" in article 2 of Saint-Germain Convention, 14.
Ditto; question whether Saint-Germain Convention is legally invalid *ab initio*, 16–19, 22.
Ditto; application to eastern zone of principle of complete commercial equality, 20.
Anglo-Guatemalan Convention, 1859; boundary between Guatemala and British Honduras, 61–77.
Ditto; interpretation of article VII, 61–75.
Ditto; His Majesty's Government's obligations under article VII, 61–75.
Anglo-Japanese Commercial Treaty, 1911; entitles Japan to most-favoured-nation treatment in British territories in Congo Conventional Basin, 6.
Anglo-Venezuelan treaty of 1825; denunciation, 7.
General Act of Berlin, 1885—*see* Treaties, Congo Basin.
General Act and Declaration of Brussels, 1890—*see* Treaties, Congo Basin.
Convention of Saint-Germain-en-Laye, 1919—*see* Treaties, Congo Basin.
Treaty of Versailles; articles 387–427 (International Labour Office) 78–86.
Treaty of Peace Act, 1919—
Power to impose by Order in Council economic and financial sanctions under article 16 of League Covenant, 52–55.
Ditto; extension by Order in Council to colonies, protectorates and mandated territories, 52–55.
Power to require certificates of origin during sanctions period, 54–55.

U.

Uganda—Proposals for closer union with Kenya and Tanganyika, 32–51.

Printed for the use of the Foreign Office.

CONFIDENTIAL.

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.: 1935

AFRICA

[J 3014/98/60/1935]

No. 1.

[July 19, 1935]

(1)

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 8, 1935.

I HAVE the honour, by direction of Secretary Sir John Simon, to transmit to you herewith two references concerning points upon which he would be grateful to have your opinion.

2. The first of these references relates to the question whether it is possible to denounce the treaties commonly known as the Congo Basin Treaties regulating trade and commerce in Central Africa, and also to the question whether (if denunciation is not practicable) it would be possible, under the terms of these treaties, to introduce quota systems in the British territories to which they apply.

3. The other⁽¹⁾ reference relates to one aspect of the question whether it is possible to introduce a quota system in certain British mandated territories in Africa in view of the terms of the relevant mandates.

4. There is one territory, Tanganyika, which is affected by the questions put in both references, since it is both a mandated territory and also a territory forming part of the conventional basin of the Congo. It is for this reason that these references are submitted to you together (though the points of principle involved in each are quite distinct); and it would be much appreciated if you could furnish your reports on them concurrently.

5. Since the references were drafted, and at the moment of sending them to you, the Permanent Court of International Justice at The Hague has given a decision in the claim brought on behalf of Mr. Oscar Chinn by His Majesty's Government in the United Kingdom against the Belgian Government. The decision of the court, together with certain passages in some of the dissenting judgments, may have a bearing on portions of the reference regarding the Congo Basin Treaties. It is proposed, therefore, to send you a separate memorandum on this subject as soon as the judgments have been digested in this Department.

I have, &c.

RONALD CAMPBELL.

Possibility of denouncing the Congo Basin Treaties, or, alternatively, of introducing quota systems in British territories to which they apply.

⁽¹⁾ See Report No. 2.



1935

2

AFRICA

(2)

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 8, 1935.

I HAVE the honour, by direction of Secretary Sir John Simon, to transmit to you the papers noted in the accompanying list and to request your opinion on certain questions connected with the series of international instruments commonly known as the Congo Basin Treaties. The treaties in question, of which copies are attached, are the General Act of Berlin, of the 26th February, 1885 (C.-4739 of 1886, Paper A), the General Act and Declaration of Brussels, of the 2nd July, 1890 (C.-6049-1 of 1890, Paper B), and the Convention of Saint-Germain-en-Laye, of the 10th September, 1919, revising the former treaties (Cmd. 477 of 1919, Paper C). None of these instruments was concluded for any specified period, and none of them contains any specific provision whereby it may be denounced or terminated, and the principal question on which your views are desired is whether His Majesty's Government can, notwithstanding this fact, free themselves from the obligations in regard to trade imposed by the treaties. Your opinion is also desired on certain other questions, *inter alia*, whether the introduction of a quota system in the British territories affected would be consistent with the terms of the treaties.

2. The historical background of the treaties is to be found in the fact that tropical Africa was, at the time of the original Berlin Conference in 1885, largely unexplored and entirely undeveloped. In view of the fact that the Great Powers were evincing interest in this region, it was desirable that some agreement providing equal opportunities for all, and at the same time safeguarding the rights of the native populations, should be reached. With these objects, the Berlin Conference was held, and its outcome was the General Act of Berlin of 1885, of which the principal provisions relevant to the present issues were as follows: Article 1 defined the area (maintained in all subsequent instruments) covered by the Act. This area (see map attached, Paper D) includes Kenya, Uganda, Tanganyika, Nyasaland, part of Northern Rhodesia and part of the Sudan; it does not include any British territories in West Africa except in so far as these may indirectly be affected by the provisions in the various Congo Basin Treaties concerning the free navigation of the River Niger, and consequently the provisions regarding freedom and equality of trade do not apply to any West African British territories, as such. Article 1 provided that in this area—

"The trade of all nations shall enjoy complete freedom."

Article 3 provided that—

"Wares, of whatever origin, imported into these regions, under whatsoever flag, shall be subject to no other taxes than such as may be levied as fair compensation for expenditure in the interests of trade."

Article 4 laid down that—

"Merchandise imported into those regions shall remain free from import and transit dues. The Powers reserve to themselves to determine, after the lapse of twenty years, whether this freedom of import shall be retained or not."

Article 5 provided (*inter alia*) that—

"No Power . . . shall be allowed to grant (in the regions affected) a monopoly or favour of any kind in matters of trade."

The remaining articles, other than article 2, which provided for freedom of navigation, dealt with other topics, such as the protection of natives, the slave trade, riverine rights, &c.

3. It will be observed that article 4 specifically contemplated that at some later date it might be found necessary to allow the introduction of import duties, and, in fact, provision for duties not exceeding 10 per cent. *ad valorem* was made five years later in the declaration attached to the Brussels Act of 1890 (the Act itself dealt exclusively with the slave trade, and is not relevant to the present

AFRICA

3

issues). This declaration modified the position regarding import duties as follows:—

"The signatories or acceding Powers who have possessions or protectorates in the said Conventional Basin . . . shall be able, so far as authority is required to this end, to establish duties upon imported goods, the scale of which shall not exceed a rate equivalent to 10 per cent. *ad valorem* at the port of entry, always excepting spirituous liquors.

"Nevertheless, it is understood . . . that no differential treatment or transit duty shall be established."

These concluding words make it clear that the faculty to impose import duties was not to affect the principle of non-discrimination. As will be seen, however, it is the existence of this obligation of non-discrimination in this and the other instruments which has caused His Majesty's Government to consider the possibility of withdrawal from the treaties concerned.

4. The declaration attached to the Brussels Act also provided that the duties introduced as a result of it should remain in force for fifteen years, thus completing, with the five years which had elapsed since the Berlin Act, the period of twenty years mentioned in article 4 of the latter instrument. The Brussels Declaration went on to provide that at the expiration of this period, and failing agreement on new duties—

"the contracting Powers will return to the conditions provided for by article 4 of the General Act of Berlin, retaining the power of imposing duties up to a maximum of 10 per cent."

The effect of this latter provision was that, failing agreement on new duties in 1905, the existing duties (being duties up to a maximum of 10 per cent.) should continue. Whether this state of affairs was to continue only for a further period of twenty years (see article 4 of the Berlin Act) is uncertain. In fact, no new agreement was reached in 1905, and the existing duties did continue unchanged. During the last ten years, however, duties above 10 per cent. have, under article 2 of the Convention of Saint-Germain (see paragraph 6 below), been imposed, and it may in consequence be possible, for the reasons given in paragraph 22 below, to argue that by tacit agreement article 4 of the Berlin Act has lapsed. But this lapse, if it has taken place, probably only confers a right to impose duties up to any amount by unilateral action, and does not prejudice the principle that such duties as are imposed must be the same *vis-à-vis* all countries. This principle of non-discrimination, while perhaps not stated in so many words in the other provisions of the Berlin Act, is almost certainly implicit therein.

5. Besides the provisions of the Berlin Act already mentioned, it is necessary to notice article 36, which provided that the parties—

"reserve to themselves to introduce into (the Act) subsequently, and by common accord, such modifications and improvements as experience may show to be expedient."

There was no provision for the unilateral denunciation of the Act by individual parties.

6. The last instrument of the Congo Basin Series, the Convention of Saint-Germain of 1919, was drawn up at the Peace Conference to revise the Berlin and Brussels Acts, and was intended to replace these instruments as between the parties to the Saint-Germain Convention. The substantive provisions of this convention are as follows: Article 1 provides that—

"The signatory Powers undertake to maintain between their respective nationals and those of States members of the League of Nations, which may adhere to the present convention, a complete commercial equality in the territories under their authority within the area defined by article 1 of the General Act of Berlin."

This latter article is then annexed textually to the first article of Saint-Germain. Article 2 provides that—

"Merchandise belonging to the nationals of the signatory Powers, &c. . . . shall have free access (to the conventional zone). No differential treatment shall be imposed upon the said merchandise on importation or exportation, the transit remaining free from all duties, taxes or dues other than those collected for services rendered.

[13464]

B 2



AFRICA

"Vessels shall also have access to all the coast and to all maritime ports (in the defined area); . . . they shall be subject to no differential treatment.

"Subject to these provisions, the States concerned reserve to themselves complete liberty of action as to the customs and navigation regulations and tariffs to be applied in their territories."

7. The Saint-Germain Convention also provided (article 15) that—

"The signatory Powers will reassemble at the expiration of ten years from the coming into force of the present convention, in order to introduce into it such modifications as experience may have shown to be necessary."

Again, there was no provision for denunciation; and the projected reassembly of the parties in 1930 was not held, nor has any fresh conference taken place (see paragraph 21 below). At present, therefore, the convention is treated as being still in force as originally drafted, and there can be little doubt that this is the legal position.

8. Not all the parties to Berlin and Brussels were original signatories of or became parties to Saint-Germain. The intention, indeed, was that they should all become parties in due course, and article 14 of Saint-Germain provided that—

"States . . . parties either to the Act of Berlin or to the Act of Brussels or the declaration annexed thereto may adhere to the present convention. The signatory Powers will use their best endeavours to obtain the adhesion of these States."

This intention has never been realised. The parties to Berlin (and Brussels) were Germany, Austria-Hungary, Belgium, Denmark, Spain, the Congo Free State, France, Great Britain, Italy, Holland, Persia, Portugal, Russia, Sweden, Norway, Turkey and Zanzibar. The United States signed, but did not ratify. The parties to Saint-Germain are the United Kingdom (whose signature also covers Zanzibar), Canada, Australia, New Zealand, South Africa, India, Belgium, France, Italy, Portugal, Japan and the United States (on the 29th October last). In addition, Germany, Austria, Hungary and Bulgaria are parties by the operation of the peace treaties (by article 126 of Versailles, 373 of the Peace Treaty of Saint-Germain, 356 of Trianon and 290 of Neuilly, these Powers agreed to accept any conventions modifying the former Congo treaties). The position of certain countries such as Czechoslovakia (formerly part of Austria-Hungary), Soviet Russia and Turkey is anomalous and need not be gone into for present purposes. The position seems to be, therefore, that the older Congo instruments continued to be in force (and they have so been treated) as between those parties to them who did not become parties to Saint-Germain, and also as between these and the parties to Saint-Germain who were parties to Berlin and Brussels. But as between the Saint-Germain Powers themselves, that instrument replaced the earlier ones (see article 13 thereof, cited in the following paragraph).

9. Article 13 of Saint-Germain reads as follows:—

"Except in so far as the stipulations contained in article 1 of the present convention are concerned, the General Act of Berlin . . . and the General Act of Brussels . . . with the accompanying declaration . . . shall be considered as abrogated, in so far as they are binding between the Powers which are parties to the present convention."

The stipulations "contained in article 1" were those of article 1 of Berlin (see paragraph 2 above), and it is a question whether this latter article, which, as already stated, was textually annexed to article 1 of Saint-Germain, was so annexed merely or mainly in order to provide an identical definition of the geographical area involved, or whether it was also intended to maintain it as an independent substantive provision, to remain operative as between the Saint-Germain Powers in addition to Saint-Germain itself, and even in the event of Saint-Germain being terminated. If the latter was the intention then, on the termination of Saint-Germain as regards one or more of the parties thereto, article 1 of Berlin would none the less continue to operate (or revive) as between those parties, or as between them and any parties to Saint-Germain which had not denounced that convention, though the rest of Berlin would, as between the same Powers, remain abrogated. In view of the wording of article 13 of Saint-Germain, this interpretation cannot entirely be ruled out. It is, however,

AFRICA

militated against by the fact that the substantive retention of article 1 of Berlin (by far the most important provision of that instrument) would go far to render nugatory the abrogation of Berlin, which, as between the Saint-Germain Powers, was apparently intended; such retention would also introduce confusion inasmuch as the substantive parts of article 1 of Berlin and the substantive parts of article 1 of Saint-Germain, while analogous, are not identical in effect (*cf., inter alia*, the difference between "freedom" and "equality" of trade); finally, it is evident from article 14 of Saint-Germain (see paragraph 8 above) that the intention (not, however, realised—see *ibidem*) was that the parties to the older instruments should all become parties to the new one, and in that event the retention, as a substantive provision, of article 1 of Berlin would have been both unnecessary and confusing. Nor was it necessary specifically to retain it for operation as between the Saint-Germain Powers and the Berlin Powers not parties to Saint-Germain, since the whole of Berlin was in any event retained for this purpose, and was not, as it could not be, affected for this purpose by article 13 of Saint-Germain. Another possible explanation of this matter may, of course, be that the intention was neither merely to obtain an identical geographical definition, nor to maintain article 1 of Berlin *in toto* qua article continuing or reviving if Saint-Germain should terminate, but that it was intended (in addition to geography) to restate and incorporate in Saint-Germain the principle of "freedom" of trade for "all" nations, *qua* principle, but not in the sense that this principle (*i.e.*, article 1 itself, as a substantive provision) would survive or revive as between the Saint-Germain Powers if Saint-Germain were terminated. It may be thought, therefore, that if Saint-Germain were to be terminated as regards any party to it, Berlin and Brussels could not (or any part of them) revive as between that party and the remaining Saint-Germain Powers.

10. It will have been observed (paragraph 8 above) that Japan, who became a party to Saint-Germain, was not a party to Berlin or Brussels, and this fact gives rise to the following observations. It would seem, in the first place, that Japan (not being a party to Berlin or Brussels) can only claim rights under Saint-Germain, except, of course, in so far as she may be able indirectly to claim Berlin and Brussels treatment by means of any most-favoured-nation clauses in her bilateral commercial treaties. On the other hand, it must be noticed that Berlin (see articles 1 and 3) provides for freedom and equality for the trade of "all nations" and not merely of the actual parties. Under international law, it is arguable that, in certain cases, countries can claim the benefit of treaties to which they are not actual parties (alternatively, such treatment might be claimed on behalf of Japan by a party to Berlin). Any such claims *vis-à-vis* a Saint-Germain Power are, however, probably ruled out by article 13 of Saint-Germain (to which Japan, of course, subscribed) abrogating Berlin and Brussels as between the Saint-Germain Powers (except in so far as expressly maintained by article 1 of Saint-Germain—see previous paragraph). It would seem, therefore, that, having regard to her consent to article 13 of Saint-Germain, neither Japan, nor any other Power on her behalf, could claim the benefit of Berlin, or any part of it, in the event of Saint-Germain terminating.

11. If, however, article 13 does not, *per se*, have the effect of precluding any claim by or on behalf of Japan (or of any other Saint-Germain Power) under Berlin (or part of it), then it would be necessary to consider whether any such claim could, under any such general rule of international law as is alluded to in the preceding paragraph, be made good. It does not seem necessary to discuss this problem, which is a very difficult and extensive one, in detail. If information on it is desired, however, the main authorities are Roxburgh, *International Conventions and Third States*, McNair on "So-Called State Servitudes" in the *British Year Book of International Law* for 1925 (in which most of the authorities are reviewed) and the decisions of the Permanent Court of International Justice in the cases of *The Wimbledon* (Publications of the Court, Series A, No. 1, at pp. 21-28 and 43-45), *German Interests in Polish Upper Silesia* (Series A, No. 7, at pp. 28, 84) and *The Free Zones of Savoy and Gex* (Series A, Nos. 22 and 24, and Series A/B, No. 46, at pp. 115-185).

12. It will be observed that the terms of the Congo Basin treaties are so wide as to preclude the introduction, not merely of discrimination as between foreign countries, but even of a policy of Imperial Preference in the British territories affected. In consequence, the question has recently been discussed



1935

whether any modification or denunciation⁽²⁾ of the relevant instruments is possible, in order to enable local British administrations to grant a preferential tariff to British Empire goods. (It will be noted, however, that such a grant would not in any event be possible in Tanganyika, since that territory is administered by His Majesty's Government under a League mandate, which provides that all members of the League must be treated equally; and, in consequence, non-members of the League also, who, under any relevant treaties, enjoy most-favoured-nation rights, are also entitled to such treatment.) The question of a modification or denunciation of the Congo treaties was last considered in 1932, but while it was thought that, on the whole the Convention of Saint-Germain could, failing agreement on modification, be denounced, no action was taken because the legal difficulties and complications seemed too great. A new economic factor has, however, now rendered it desirable that the possibilities of modification or denunciation should again be considered. Japan has been Britain's chief competitor in the Congo Basin markets for some years, but, since 1932, Japanese competition throughout the world has developed to such an extent that, as you will be aware, the question of dealing with it has come to be a major problem of policy.

13. Although Japan (see paragraphs 8 and 10 above) is not a party either to the Berlin Act or to the Brussels Declaration, but only to Saint-Germain, it would not, in order to recover complete liberty of action against her, be sufficient merely to denounce Saint-Germain. One reason is that, under the Anglo-Japanese Commercial Treaty of 1911, Japan is still entitled to most-favoured-nation treatment in the British territories included in the Conventional Basin of the Congo, and she would therefore be able to claim the benefit of any treatment granted in those territories to parties to the Berlin Act who had not become parties to Saint-Germain. The Anglo-Japanese Commercial Treaty has been terminated as regards British West African territories, but not as regards the East African and other British territories in the Congo Basin area. In order to recover freedom of action against Japan, therefore, it would be necessary to denounce Saint-Germain, and to supplement this denunciation either (1) by terminating the application of the Anglo-Japanese Commercial Treaty to all the British territories concerned, or (2) by denouncing Berlin and withdrawing only Tanganyika (where the position is complicated by the mandate) from the scope of the Anglo-Japanese Commercial Treaty. A denunciation of Berlin would enable the other British territories to discriminate in favour of British countries not only against Japan, but against all foreign countries alike. (As regards Tanganyika, Japan will, on the 27th March next, cease to be a member of the League of Nations, and from that date, therefore, the mandate, apart from certain questions dealt with in the separate reference on quotas in mandated territories accompanying this one, and not relevant in the present context, will no longer constitute in itself a bar to Tanganyika discriminating against Japan.) So far as Japan is concerned freedom of action could be regained by adopting either of courses (1) and (2) above; unless, indeed, it were considered (see *supra* paragraph 10) that Japan, though not a party to Berlin, was entitled to claim, or have claimed on her behalf, the benefit of certain of the provisions of that instrument, in which case, even if Japan alone were in question, a denunciation of both Saint-Germain and Berlin would be needed. But Japan is not the only foreign competitor in these markets, and, if possible, it would be desirable in any case to recover complete freedom (apart from the obligations imposed in Tanganyika by the mandate) by denouncing both Saint-Germain and Berlin.

14. Since it is almost hopeless to expect that in existing circumstances any modification of the Congo treaties in the sense desired by His Majesty's Government, or even any termination by general agreement, could be obtained, the first question to be decided is how far it is legally possible to obtain freedom unilaterally by giving reasonable notice of termination, seeing that the treaties contain no provision for unilateral denunciation. Do treaties of this kind continue for ever unless modified or terminated by common accord or until they lapse from desuetude, or is it, on the contrary, possible for the parties to free

⁽²⁾ In this reference the term "denunciation" is used in relation to possible action in connexion with the Congo Basin Treaties, as meaning unilateral action by His Majesty's Government by which they would cease to be a party to the treaty in question; such action would not, of course, by itself have the effect of terminating the treaty altogether, and it would continue to operate as between the other parties except to the extent to which they denounced it too.

themselves unilaterally by giving reasonable notice to that effect? A copy of a memorandum prepared in the library of the Foreign Office on this subject is enclosed (paper E). As regards the doctrine of *rebus sic stantibus* therein discussed, i.e., the doctrine whereby a party may withdraw from a treaty which does not provide for denunciation, on the ground that there has been a vital or material change of circumstances since the treaty was entered into, it seems unnecessary to try and determine whether this doctrine is legally sound or not, as there seem in any event to be strong objections to attempting to make use of it in the present case. In the first place, the doctrine is one which, if applied in the present case, could be used by other countries as a means of escaping from treaty obligations which it is in the interest of His Majesty's Government to maintain. Secondly, it is by no means clear that the necessary "change of circumstances" has really occurred in the present case. It is true that Japanese competition has vastly increased, and it might possibly be argued that the parties to the Congo Basin Treaties, when they provided for a régime of equality and freedom of trade, never contemplated a state of affairs in which one country would be able so drastically to undersell all others, and that they based themselves on the assumption that the price levels of all countries would, within limits, bear a reasonable ratio to one another. On the other hand, at least part of the reason why His Majesty's Government desire to free themselves from the Congo treaties lies not in any outside factor, such as Japanese competition, but in a change of commercial policy on the part of His Majesty's Government themselves, in pursuance of which they have substituted protection for free trade, and now desire to be able to accord Imperial Preference in the East African territories to other parts of the Empire. It seems very necessary that a country wishing to terminate a treaty obligation on the ground that circumstances have changed should not itself be the author or part-author of the change rendering the termination desirable to that country.

15. The doctrine of *rebus sic stantibus* being the only ground based on general principles of international law on which it might be possible to seek to terminate the Congo Basin Treaties, it follows that the right so to terminate them, if it exists at all, must be found in or under the treaties themselves. If it is clear that a given treaty, when negotiated, was intended to set up a permanent state of affairs, then evidently no termination, except by agreement or obsolescence, is possible. If, on the other hand, it is possible to infer from the treaty, or the surrounding circumstances, that such was not the intention, then it would seem that, notwithstanding the absence of any provision for unilateral denunciation, individual parties may nevertheless denounce the treaty by giving "reasonable" notice. This is the view taken by Oppenheim (*International Law*, vol. 1, § 538) in the following passage:—

"Section 538. Treaties, provided they are not such as are concluded for ever, may also be dissolved by withdrawal, after notice by one of the parties. Many treaties stipulate expressly the possibility of such withdrawal, and as a rule contain details in regard to form, and period, in which notice is to be given for the purpose of withdrawal. But there are other treaties which, although they do not expressly stipulate the possibility of withdrawal, can nevertheless be dissolved after notice by one of the contracting parties. To that class belong all such treaties as are either not expressly concluded for ever, or apparently not intended to set up an everlasting condition of things. Thus, for instance, a commercial treaty, or a treaty of alliance not concluded for a fixed period only, can always be dissolved after notice, although such notice be not expressly stipulated. Treaties, however, which are apparently intended, or expressly concluded, for the purpose of setting up an everlasting condition of things, and, further, treaties concluded for a certain period of time only, are as a rule not notifiable, although they can be dissolved by mutual consent of the contracting parties."

Similarly, the Law Officers (the 28th May, 1909) advised in connexion with the Anglo-Venezuelan Treaty of 1825, which contains no provision for termination, that—

"on the whole, we think that the main object of the treaty is commercial, and that it would be held to be temporary in character and terminable by the withdrawal of either party on reasonable notice."



AFRICA

It seems evident that the Congo treaties were largely commercial in character (see below).

16. It becomes necessary, therefore, to examine the relevant treaties in order to determine whether or not they purported to set up a permanent state of affairs, and the arguments for and against may be summarised as follows (these arguments are directed mainly to Saint-Germain, but apply also generally to the other instruments unless the contrary is indicated):—

(i) The treaties are mainly commercial in character, and judging from the passages above cited, it may be thought that there is a species of presumption that commercial treaties are not normally intended necessarily to be permanent. Of the fifteen articles of the Saint-Germain Convention, articles 1 to 10 are such as might figure in an ordinary commercial treaty, and articles 12 to 15 are purely formal; only article 11, dealing with native rights, is of an entirely non-commercial character. In the Berlin Act, on the other hand, the number of non-commercial provisions is greater, though, even so, the Act remains predominantly commercial in character.

(ii) In concluding the Saint-Germain Convention, the parties were revising for the second time an instrument (the Berlin Act) not yet 35 years old. Even if the original instrument had been intended to be permanent, it may be thought unlikely that, two revisions having been found necessary, the framers of the second one would have intended to set up, or supposed that they were setting up, a final régime. Put differently, this argument is that, if the treaties be regarded as a whole, it may be that, by the time Saint-Germain was reached, they had lost any permanent character they may once have had. As against this, it may be said that, if it appears (as for special reasons to be given later—see paragraph 19—it probably does) that Berlin was intended to set up a régime of indefinite duration, there may be a presumption that the same is the case with any revising instrument.

(iii) The view that no permanent régime was intended by Saint-Germain may be regarded as being reinforced by article 15 of the convention (see paragraph 7 above), which not only specifically contemplated the possibility that revision might be necessary, but even made provision for a reassembly of the parties at the end of ten years, in order that any necessary modifications might be introduced. The recognition of this possibility and the fixing of a predetermined date for revision may be thought scarcely consistent with an intention to create a permanent régime. On the other hand, it can also be argued that the fact that an agreed revision was envisaged in no way precludes the possibility of an intention that failing such revision the convention was to continue indefinitely as it was. But again, it may be doubtful whether there is any definite evidence of such an intention, while there is at least some evidence (see this and succeeding paragraphs, *passim*) against it. It is worth observing that the analogous article 36 of Berlin (see paragraph 5 above), while also recognising the possibility of revision, did not oblige the parties to reassemble at all, still less did it specify any fixed date for reassembly. As has already been observed (paragraph 7), the reassembly contemplated by article 15 of Saint-Germain has never taken place. This fact is discussed further below (paragraph 21).

(iv) For what it is worth, it may be noted that, whereas article 36 of Berlin specifically provided that any modification must be "by common accord," article 15 of Saint-Germain does not contain this phrase. It is evident, however, that in neither case could any modifications, *qua* modifications, have been introduced except by the consent of all concerned. On the other hand, it may be argued that both articles 36 of Berlin and 15 of Saint-Germain were only intended to regularise actual *modification*, as such, and not to exclude the possibility of *denunciation*, which is a different thing, and terminates the convention altogether as regards the party or parties making it.

(v) It seems necessary to develop the last sub-paragraph a little, because (apart from such material as is to be drawn from the minutes of the discussions of the various conferences—as to which see below paragraphs 17–19) this question is the central one on this point. The question, put briefly, is whether the fact that the parties included a provision about modification, while failing to include one on denunciation, is evidence that they contemplated the possibility of an agreed revision, but intended to exclude any right of unilateral denunciation. It is clear that this question is perfectly capable of being answered in the affirmative. The argument would be that it is self-evident that parties have a right, by mutual

AFRICA

consent, to modify an agreement if they choose, and that any such modification *must* be by mutual consent; hence if the sole intention of articles 36 of Berlin and 15 of Saint-Germain was to confer this right, these articles were, as regards this matter, superfluous; consequently, these articles must have had some further purpose, and this purpose (apart from the obligation to reassemble on a fixed date contained in Saint-Germain and the implied indication that no modifications would be necessary or need be agreed to sooner) can only have been to make it clear by implication that unilateral denunciation was excluded. The contrary argument would be that this is the wrong way to look at the point. According to the general principles quoted in paragraph 15 above, the question would be, did the parties or did they not intend to set up a permanent régime? If not, then notwithstanding the absence of a specific provision for denunciation, the treaty can be unilaterally denounced. On this view, the inclusion of specific provisions about modification by agreement would be evidence that the parties did not contemplate the indefinite duration of the convention in its original form, and hence some evidence that they did not intend to set up a permanent régime. Consequently, on this view, the main effect of the modification articles, apart from laying down dates and procedure, would be to make it clear by implication that any party dissatisfied with the treaty must, in the first place, and before taking any unilateral action, seek to obtain agreed modifications or an agreed termination. But these articles would not prejudice the right to denounce if the attempt to obtain agreement had been made and had failed.

(vi) Another argument tending to support the latter view would be as follows. If the effect of the modification articles is indeed to exclude the possibility of the total termination of the treaty, then logically, since those articles only contemplate revision, they should exclude *any* possibility of total termination even by the consent of all concerned. But (so the argument would run) such a conclusion would be manifestly absurd. If, however, the modification articles do not exclude termination by mutual consent, then, since they deal in terms only with *revision*, is there any sufficient ground for supposing that they exclude termination in *any* form, agreed or unilateral? Modification, as everyone knows, can only be by common accord and any words to that effect in the relevant articles may be presumed to be there *ex abundanti cautela*; termination, as everyone knows, may, in the absence of any contrary indication, be agreed or unilateral, and if the modification articles do not exclude the former is there sufficient ground for assuming that they exclude the latter?

(vii) One possible (though far from certain) explanation of the presence of the phrase "by common accord" in article 36 of Berlin, whereas this phrase is absent in Saint-Germain, may be found in the terms of article 4 of Berlin (see paragraph 2 above). This article, while providing for the possibility of imposing duties after twenty years, does not speak in terms of doing so by agreement, and is capable of being interpreted in the sense that at the expiry of that period the Powers would have a right of unilateral decision in the matter. It is very far from certain that this interpretation would be correct; and the minutes of the conference, while not definitely against it, do not support it. The main argument in favour of it is that article 36 (see paragraph 5 above) specifies common accord, and article 4 does not. Hence it may be argued that common accord was not intended under article 4, or it would have been mentioned there too. On this view the phrase "by common accord" in article 36 would serve only to make it clear that, with the exception of revision of article 4 after twenty years, any *revision* must be by agreement; and these words would not in consequence have any bearing on the possibility or otherwise of *denunciation* by unilateral action. Subsequent events (though not strictly relevant to the intention of the parties at the time) have served both to throw doubt on and to support the above interpretation of article 4. Import duties were, in fact, subsequently allowed up to 10 per cent. in 1890 (see paragraph 3 above), but this was done by mutual agreement (*i.e.*, by the Brussels Declaration) and as twenty years had not elapsed since the conclusion of Berlin it could not have been done otherwise. After 1905, however, when the period imposed by the Brussels Declaration expired, and article 4 of Berlin revived, there was no agreement on new duties, and the fact that, in these circumstances, the existing duties continued might be held to support the view that any revision must be an agreed one. On the other hand, it is possible (see paragraph 4 above) that these duties were intended to continue until 1925, but, before this date was reached, duties of over 10 per cent. were, nevertheless, being



1935

imposed under article 2 of Saint-Germain. These duties were imposed not only as against the Saint-Germain Powers, but also *vis-à-vis* the Berlin Powers not parties to Saint-Germain, and without any protest from the latter, so far at all events as the British territories covered by the treaties are concerned.

(viii) The question discussed in paragraph 9 above as to whether it was intended in Saint-Germain to retain article 1 of Berlin as an independent substantive provision (and not merely to recite it for purposes of geographical definition) so that it would remain in force as between the Saint-Germain Powers (with the exception perhaps of Japan), even if Saint-Germain were terminated, may have some relevance on the question of the intention of the parties as regards the permanence or otherwise of Saint-Germain, inasmuch as if the intention indeed was to maintain article 1 of Berlin for this purpose this might be some evidence that the parties contemplated the possibility of Saint-Germain being terminated.

17. On account of the obscurity of the question of terminating these instruments, it is almost certain that an international court would have recourse to the minutes of the conferences at which the treaties were drawn up, in order to ascertain, if possible, what were the intentions of the parties. A reference to p. 117 of the *procès-verbaux* of Saint-Germain (copy attached, Paper G) shows that the question was raised, as to what would be the position at the end of the period of ten years contemplated by article 15 if the Powers were unable to agree upon modifications. The President stated, in the course of the meeting, that the position would be the same as under the régime of the Berlin and Brussels Acts:—

“chaque Puissance restera libre de déclarer qu'elle ne se considère plus comme liée par la Convention.”

He evidently considered that the Berlin and Brussels Acts were terminable unilaterally, but, of course, this is no evidence that they in fact were. The United States delegate urged that the convention should remain in force if an agreement for its revision could not be arrived at. The Belgian delegate was against the idea of imposing on the African Powers a kind of perpetual contract. The discussion on this point was concluded by the Belgian delegation stating that they would accept—

“une formule marquant qu'une réunion en vue de la revision sera obligatoire.”

As a result, article 15 was adopted stating that the contracting parties were to meet on the expiry of a period of ten years to introduce into the convention such modifications as experience had showed to be necessary. The opinion was also expressed during the discussions of the drafting commission that if the Powers were unable to agree on a revision at the expiry of ten years, each Power would be free to declare that it was no longer bound by the convention. However, there was evidently no definite agreement on the subject and the discussions seem consistent with either view, and do not appear to be conclusive.

18. The delegates to Saint-Germain also discussed the question of the duration of the Berlin and Brussels instruments; and although their views are not evidence as to the intention of the parties to the former instruments, it may be of interest to give the gist of the discussions. The matter came up in regard to the text of the second paragraph of the preamble to the Saint-Germain Convention, which reads as follows:—

“Considérant que le régime de la franchise d'entrée instauré pour vingt ans par l'article 4 dudit Acte [*i.e.*, the Berlin Act] a dû être modifié pour une période provisoire de quinze ans par la Déclaration de Bruxelles du 2 juillet 1890 et que, depuis lors, aucun accord n'est intervenu, contrairement aux dispositions desdits Actes.”

This text appears to be consistent with the view that the obligations with regard to freedom of commerce of the Berlin and Brussels Acts were still in force and equally consistent with the view that they had lapsed. A study of the relevant passage on pp. 91 and 92 of the *procès-verbaux* of the conference (Paper G) will show that this very point was argued between the delegates. Since a text was adopted which was consistent with either view, it would seem that neither side convinced the other as to what the legal position was.

19. As has already been observed, it is not possible to rely on the Saint-Germain discussions as showing what the intention of the parties was in framing the Berlin Act more than thirty years before; and, in any case, the discussions in question could be in no way binding on those parties to the Berlin Act who did not take part in the Saint-Germain discussions or become parties to that convention. If reference is made to the minutes of the Berlin Conference itself, however, it becomes quite plain that, apart from article 4, the intention was that the treaty should continue indefinitely. Protocol No. 8 of the *procès-verbal* of the Berlin Conference (Paper F, pp. 210 and 211) records the words of the British delegate, Sir Edward Malet, as follows:—

“the régime of freedom of commerce in the Congo Conventional Basin, as laid down by the Act, was without limit as to duration, and that article 4 solely aims at deciding afresh after twenty years whether or no import duties ought to be still prohibited.”

He went on to ask for the assent of the conference to this proposition, and this was unanimously given after a discussion in which several delegates expressed their agreement with this view, the French delegate laying stress on the fact that—

“the prohibition of differential duties . . . and of all inequality of treatment . . . is affected by no limit of time.”

20. These pronouncements obviously present considerable difficulties in the way of deciding that there is any unilateral right to denounce Berlin. As regards Saint-Germain, the position is evidently more in favour of the possibility of denunciation, whether the matter be considered on the basis of the *procès-verbaux* or on that of the actual terms of the instrument itself.

21. Two further factors must be noticed. Such arguments as exist in favour of supposing that there is a right of unilateral denunciation, *i.e.*, in effect, of supposing that there was no intention to set up a permanent régime, obviously apply much more forcibly to the commercial provisions of the treaties; there really is very little, if any, reason to suppose that the non-commercial provisions, *e.g.*, those respecting the slave trade and native rights, were not intended to be absolutely permanent unless changed by common accord. Yet if a treaty is denounced, it must be denounced as a whole; it is not normally possible to denounce part while continuing to be bound by another part. The other factor applies particularly in the case of Saint-Germain. It has already been observed (paragraph 8) that the parties to that instrument intended, or hoped (see article 14), that all the other parties to Berlin would accede to Saint-Germain. They did not, in fact, do so. If, therefore, Saint-Germain were terminated by one of the parties thereto, then, on the assumption (see paragraph 9 above) that Berlin would not revive as between that party and the other parties to Saint-Germain, the withdrawing party, while no longer bound to accord the conventional treatment to the other parties to Saint-Germain, would continue (under Berlin) to have to accord much the same treatment to the Berlin Powers *not* parties to Saint-Germain; in other words, that party would be at liberty to treat the other Saint-Germain Powers less favourably than these Berlin Powers. It is somewhat difficult to suppose that the framers of Saint-Germain really intended to create a situation in which they might, as against such a withdrawing party, be placed in a worse position than if they had remained parties to Berlin pure and simple. This, for what it is worth, may be evidence that they did not intend Saint-Germain to be subject to unilateral denunciation. On the other hand, it is to be noted that, on such withdrawal by one of the parties to Saint-Germain, not only the rights of the other Saint-Germain Powers, but also their obligations *vis-à-vis* that party would terminate. This fact might, to a large extent, outweigh the disadvantage mentioned above.

22. Before leaving the question of the denunciation of Berlin and Saint-Germain, and on the assumption that these instruments or either of them can be denounced, the question of procedure must be discussed. The first question is what amount of notice would be “reasonable.” It is suggested not less than six months and not more than one year. The second question is as to the necessity for holding conferences in order to attempt to obtain general consent either to the changes desired by His Majesty's Government or to termination by agreement. It is clear that such general consent or agreement would never be obtained, but it is possible that the attempt ought to be made. In view of the terms of



articles 36 of Berlin and 15 of Saint-Germain, there is much to be said for this conclusion (and please see the penultimate sentence of paragraph 16 (v) above). Berlin, of course, laid no specific obligation on the Powers to meet again; but Saint-Germain did (see paragraph 16 (iii) above). As already observed, however (paragraph 7), no further conference has ever been held. His Majesty's Government did, indeed, in July 1930, write to the other Powers stating that in their view the convention came up for revision on the 31st July, 1930, but that the amendments which this country might want to introduce were not of such importance as to oblige His Majesty's Government to press for their adoption, and that they proposed in consequence that the convention should remain in force unaltered until 1935. Only the Portuguese and Japanese Governments definitely agreed to this proposal. The Belgian Government agreed in principle, but suggested that the proposal should be embodied in a protocol to be signed by the Saint-Germain Powers. Replies were not received from the other Governments and the proposed protocol was never signed. The terms of the proposed protocol as settled between His Majesty's Government and the Belgian Government, although it came to nothing, may be of interest, and copies of two versions of it are attached (Papers H and J). Paper H contains the version originally proposed by the Belgians, and it will be seen that it includes a clause specifically providing that, in the event of the parties not being able to agree at the proposed conference as to the conditions in which the convention should continue in force, any party might afterwards denounce the convention on giving notice of its intention to do so. For reasons which are not very clear, the Belgian Government subsequently withdrew the suggestion for this clause, and Paper J contains the version of the protocol which was finally agreed upon between the two Governments. Either in consequence or in spite of the failure on the part of certain of the parties to agree to the proposals of His Majesty's Government, and the failure to sign the protocol, the convention has continued to be treated as being in force, and it would scarcely seem possible to argue now that it has in any way lapsed. It is unnecessary to consider whether in these circumstances a conference could be called by His Majesty's Government prior to 1935, since no such conference could in any event now be held before that date. The question still remains, however, whether the holding of a conference (or the attempt to hold it) is, or is not, an indispensable preliminary to any unilateral denunciation of the treaties by His Majesty's Government, and in this connexion it seems clear that the *attempt* to hold a conference, coupled with a refusal on the part of the other interested Powers to attend, would be equivalent to holding it and failing to agree on modification or termination.

23. There remains the question of the necessity and possibility of denouncing the declaration attached to the Brussels Act (see paragraphs 3 and 4 above). It may be considered that no denunciation is here called for, since it is possible to maintain that the declaration has already lapsed. It will be recollected that its object was to amend article 4 of the Berlin Act (for the position in regard to this article, see paragraphs 16 (vii) and 19 above). It seems clear (see paragraph 4) that, as no new duties were agreed upon in 1905, the Brussels Declaration lost its force except in so far as it operated to restore the régime of article 4 of Berlin, subject to the continuance of any existing duties (being duties up to 10 per cent.). The restoration of the régime of article 4 may have meant (the position is very obscure—see paragraph 4 above) that these existing duties were to continue unchanged for a further period of twenty years, *i.e.*, until 1925, when they might be altered (though whether by agreement or unilaterally is not clear—see paragraphs 16 (vii) and 19 above). However, even before 1925 duties above 10 per cent. were being imposed without protest and have since continued to be. It may be argued, therefore, that article 4 of Berlin has tacitly lapsed, and, if so, it would seem that the Brussels Declaration is now entirely spent and has lost its force, even if it did not do so in 1905, when article 4 of Berlin revived. In this connexion, it may be noted that, in 1922, in a note to the Belgian Ambassador in London, Lord Curzon expressed a reserve against any thesis that the territorially interested Powers were bound to continue the régime of a maximum import duty of 10 per cent. until all the signatories of the Berlin and Brussels Acts should have agreed to a new régime:—

"It is evident, in the view of His Majesty's Government, that the effect of section 3 of the 1890 declaration, taken in conjunction with article 4 of

the General Act of Berlin, was that, on and after the 2nd July, 1905, the Powers were free to redetermine what customs régime should be applied in the conventional basin of the Congo. It is true that no redetermination of the régime was suggested at that time, but it is for that reason that His Majesty's Government consider that the general position as regards the customs régime was subsequently an undetermined one."

24. If the Brussels Declaration has not already lapsed, the question of its denunciation arises, since it only operates to permit the imposition of certain duties and does not affect (indeed, specifically maintains—see paragraph 3 above) the principle of non-discrimination. As regards the possibility of denunciation, it would seem that, of all the relevant instruments, the Brussels Declaration is the one in regard to which it is most easy to maintain that it was not intended to be permanent. Here also the question of holding a preliminary conference arises.

25. The final question on which your opinion is desired is how far it would be consistent with the terms of the Congo Basin Treaties to introduce in the British territories affected a system of quotas, *i.e.*, a system whereby the goods to be imported annually from any given country would be limited to a fixed quantity. If it were possible to institute such a system, this might afford an adequate means of protection against Japanese competition without going to the length of denouncing the relevant treaties. It must be premised, of course, that any such system would be (or purport to be) (as under the terms of the treaties it would have to be) entirely non-discriminatory in character; *i.e.*, the quotas allocated to the different countries, including Japan, would all be allocated on the same basis (*e.g.*, the average of each country's imports during a given number of years previous to the imposition of the quota). The result of this would be that certain countries would, in fact, receive, owing to their having during previous years had a greater share of the trade, a larger quota than other countries, though the basis of allocation would be the same for all. It is further evident that this basis itself could so be chosen, as in fact, though not in form, to favour or penalise certain countries, and this has been a frequent ground of complaint by countries against given quotas allocated to them in other countries. There are several other ways in which quotas apparently fair on paper may operate inequitably in practice. Hitherto the view taken by Sir John Simon's advisers has been that even a non-discriminatory system of quotas (if such a thing is really possible) would not be consistent with the terms of the treaty. The French Government have, however, expressed a different view, at any rate so far as Saint-Germain is concerned. In a recent note addressed to His Majesty's Ambassador at Paris they observed that—

"Touchant les territoires du bassin conventionnel du Congo, le Gouvernement français considère que ni l'égalité commerciale, ni le libre accès des marchandises dans les territoires placés sous l'autorité des Puissances contractantes, que sanctionne la convention de Saint-Germain, ne s'opposent à l'institution de contingents applicables sans exception à toutes les Puissances signataires, y compris la Grande-Bretagne, et établis sur la base de la plus stricte équité, notamment pour le choix des années de référence. Il se plaint à penser qu'il est d'accord à cet égard avec le Gouvernement de Sa Majesté britannique."

It will be observed that the French note refers to "commercial equality" (article 1 of Saint-Germain) and to "free access" (article 2), but that it does not mention any principle of "freedom" of trade (see article 1 of Berlin). In this connexion (see paragraph 9 above) it will be remembered that article 1 of Saint-Germain reproduces textually article 1 of Berlin (which article is also maintained by article 13 of Saint-Germain) and that the latter does mention "freedom" of trade. It is, of course, as already observed (paragraph 9), open to doubt whether the Saint-Germain Convention, by reproducing article 1 of Berlin, really intended to restate the principle of freedom of trade. It may rather be that the intention was merely to reproduce the article for the purpose of defining the geographical limits of the conventional area. However this may be, and notwithstanding the French view, it seems open to question whether quota restrictions, however equitably fixed, can be said to be consistent with any of the three principles enunciated in the relevant treaties. These treaties abound



with provisions forbidding discrimination against trade, and it seems therefore that it might be difficult to maintain that a quota imposed with a view to limiting the influx of foreign goods, particularly if aimed in substance (though not in form) against the goods of one particular country, would be consistent with, *e.g.*, "complete commercial equality" (article 1 of Saint-Germain) or that it would not be "differential treatment" (article 2), or that it would be compatible with the prohibition against "a monopoly or favour of any kind in matters of trade" (article 5 of Berlin). The matter has also been considered by the Departments of His Majesty's Government with reference to the meaning of the words "free access" in article 2 of Saint-Germain, and in a semi-official letter from the Board of Trade to the Foreign Office of the 14th November last the following views were expressed:—

"So far as we can see the possible justification for the view that quotas are permissible would be that the words 'shall have free access' (in article 2 of Saint-Germain) have a purely general meaning which is qualified and explained in the following sentence of the same paragraph. As against such an interpretation there seem to us to be the following indications that on the contrary the two sentences of article 2 contain two separate and distinct ideas:—

"(1) The sentence does not appear so far as we know in any other modern instrument in this form and in particular it is not included in the mandates drawn up at the same time.

"(2) It cannot be argued that the treaty dates back to a time when the modern system of regulation by quota could not have been contemplated. Although quotas in their present form might not have been in the minds of the parties in 1919 they were of course quite conversant with the idea of prohibitions.

"(3) The two sentences are quite distinct and there is no indication in the text that they are intended to qualify or be qualified by each other. Indeed, in the version of the article which, according to the *procès-verbal*, was finally adopted at the Peace Conference at its session of the 30th July, 1919 (p. 97 of the printed *procès-verbaux* of the conference), the first and second sentences of the article formed separate paragraphs. Unless this is merely a typing error it is hardly consistent with the view that the first sentence was intended only to be a statement of the second in more general terms.

"According to the *procès-verbaux* the word 'access' does appear in the first (Anglo-French) draft of the convention, linked with ships as well as merchandise and as the expression 'shall have free access' is used with regard to shipping in article 2 of the Berlin Act of 1885, it might perhaps be argued that there is direct parentage here (especially as the word 'free' was added in the second draft), the parties only wishing to keep as much of the spirit of the previous instrument as possible. Unless, however, it is to be maintained that the old Berlin Act, article 1 of which begins with the words 'The trade of all nations shall enjoy complete freedom . . . allowed the restriction of imports by prohibition while disallowing import duties and providing for free access and transit for shipping, &c., in the widest sense, we do not see that this assists the view that free access does not mean absence of restriction.

"As against these arguments it is at least surprising that the negotiators of the Saint-Germain Convention should have wished to provide for a freer régime in Africa than they provided for the mandated territories, and further that if prohibitions and restrictions were in their minds they did not refer to them specifically instead of reverting to the special words 'free access'; the word 'prohibition' was far from being unknown at that time. On the latter point, however, the argument in the preceding paragraph as to the desire of the parties to retain as much as possible of the old Acts is probably a sufficient reply."

26. It will be appreciated that, as regards Tanganyika, since that territory (alone amongst the British territories concerned) is subject to mandate as well as covered by the Congo Basin Treaties, the question of introducing quotas there has to be considered in the light not only of those treaties, but also of the terms of

the mandate. One question concerning the effect of the mandates on the possibility of introducing quotas in certain mandated territories is, however, being separately referred to you.

27. Sir John Simon would accordingly be glad if you would take the matters discussed in paragraphs 1-25 above into your consideration, and if you would be so good as to furnish him with your opinion on the following questions:—

(1)—(a) Can His Majesty's Government denounce by unilateral action the Convention of Saint-Germain of 1919 relative to the Congo Basin?

(b) If so, (i) what period of notice ought to be given?

(ii) Would it be necessary first to hold or seek to hold a conference in order to try and obtain agreement as to modifying or terminating the convention, and can it be assumed that, so far as this point is concerned, freedom of action would be regained if the other interested Powers refused or failed to attend any conference which it was sought to hold? Can it also be assumed that the failure to hold the conference envisaged by article 15 of Saint-Germain in 1929 did not, in the circumstances described in paragraph 21 above, affect the continued force and operation of the convention?

(2) In the event of the Convention of Saint-Germain being denounced or terminated, would the General Act of Berlin of 1885, as modified by the declaration attached to the Brussels Act of 1890, or any part of the Berlin Act (and in particular article 1—see paragraph 9 above), revive or continue to operate as between the denouncing or terminating parties? It will be appreciated that if the answer to this is in the affirmative, the same will also be the case as between such a party or parties and any party or parties who had not denounced the convention; and also as between all the parties, if they had all terminated it without agreeing on any specific provision as to their future relationship in the matter of the Congo Basin.

(3) If the answer to the last question is in the affirmative, could Japan, though not a party to the Berlin Act or to the Brussels Declaration, claim (or have claimed on her behalf by a party thereto) the benefit of any of the provisions of these instruments (see paragraphs 10 and 11 above)?

(4) Can it be assumed that, notwithstanding the conclusion of the Saint-Germain Convention, the relations between the parties to that instrument and those parties to the Berlin Act and Brussels Declaration who did not become parties to Saint-Germain continued, and still continue, to be governed by the Act and by the declaration so far as the latter has not lapsed?

(5)—(a) Can His Majesty's Government denounce by unilateral action the General Act of Berlin of 1885?

(b) If so, (i) what period of notice ought to be given?

(ii) Would it be necessary first to hold or seek to hold a conference in order to try and obtain agreement as to modifying or terminating the convention, and can it be assumed that, so far as this point is concerned, freedom of action would be regained if the other interested Powers refused or failed to attend any conference which it was sought to hold?

(6) Can (a) article 4 of the Berlin Act, (b) the declaration attached to the Brussels Act of 1890, be regarded as having lapsed by tacit agreement or as having lost its force?

(7)—(a) If the answer to (6) (b) is in the negative, can His Majesty's Government denounce by unilateral action the Brussels Declaration?

(b) If so, (i) what period of notice ought to be given?

(ii) Would it be necessary first to hold or seek to hold a conference in order to try and obtain agreement as to modifying or terminating the convention, and can it be assumed that, so far as this point is concerned, freedom of action would be regained if the other interested Powers refused or failed to attend any conference which it was sought to hold?

(8) Would the introduction of a quota system in the British territories in the Congo Basin area be consistent with the terms of (a) the Convention of Saint-Germain, (b) the Berlin Act and Brussels Declaration? If the answer to (b) is in the negative, could Japan (see questions (2) and (3)) avail herself of any provisions of the Berlin Act and Brussels Declaration which might operate to prevent a quota system? In this connexion would you indicate, in so far as the point is not already covered by your answer to questions (2) and (3), whether, in



1935

your view, the textual quotation of article 1 of the Berlin Act in article 1 of the Saint-Germain Convention, coupled with the terms of article 13 of the latter, had the effect either (i) of maintaining article 1 of Berlin as a substantive provision, or (ii) of restating and incorporating in Saint-Germain the principle of "freedom" of trade for "all" nations, or whether the effect was merely to provide a definition of the geographical area affected by Saint-Germain identical with that contained in Berlin.

28. Sir John Simon would also be glad of any further observations which you may feel disposed to make, and if you would, in particular, raise and answer any other questions which may occur to you as having an important bearing in connexion with the matters discussed above.

I have, &c.

RONALD CAMPBELL.

List of Papers.

- Paper A.—Berlin Act. ["Africa, No. 3" (1886): C. 4739.]
 Paper B.—Brussels Declaration. ["Africa, No. 8 A" (1890): C. 6049-1.]
 Paper C.—Saint-Germain Convention. ["Treaty Series, 1919, No. 18": Cmd. 477.]
 Paper D.—Map of Congo Basin Area. [J 2741/470/60/1934.]
 Paper E.—Foreign Office Library Memorandum on Termination of Treaties. [J 1157/147/60/1932] (Annex A.)
 Paper F.—*Procès-verbal*, Berlin. ["Africa, No. 4" (1885).]
 Paper G.—*Procès-verbal*, Saint-Germain. [Confidential 11939*.]
 Papers H and J.—Two Versions of Proposed Protocol Continuing Saint-Germain until 1935. [J 4035/106/60/1930 and J 3139/21/60/1931.]

(3)

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 4, 1935.

I HAVE the honour, by direction of Secretary Sir John Simon, to refer to the letter from this Department of the 8th January, 1935, transmitting two references concerning questions on which your opinion was desired in regard to the interpretation of the Congo Basin Treaties, and the possibility of introducing a quota system in certain territories under British mandate in Africa. In paragraph 5 of that letter it was stated that a decision of the Permanent Court of International Justice had just been received, parts of which had a bearing on some of the questions raised in one of the above-mentioned references, namely, that regarding the Congo Basin Treaties, and that a separate memorandum on the subject would be addressed to you as soon as possible.

2 The decision in question, of which I now have the honour to enclose a copy,^(*) is that given in the case of Mr. Oscar Chinn, a British subject, which was submitted to the Court by special agreement between the Governments of the United Kingdom and Belgium. The point at issue was whether certain measures introduced in the Belgian Congo in regard to fluvial transport, and which were alleged to have caused damage to Mr. Chinn's business, were contrary to the Convention of Saint-Germain or not. The Court, by a majority of six to five, decided in favour of the Belgian contention that no infraction of Saint-Germain was involved. The facts of the case and some of the grounds on which the decision was based are not material in the present connexion, but there appear to be three points in the decision which have a bearing on parts of the main reference.

(i) The first of these is the question whether the Convention of Saint-Germain can be regarded as having any validity *at all*. The argument against its validity is that Saint-Germain is in effect a variation of the Berlin Act; but the Berlin Act could only be revised by the consent of all concerned; hence it was not open to certain of the parties to the Act to agree (even for application purely as between themselves) on a different régime.

(*) Confidential 14348*.

(ii) The second relevant point in the Court's decision is the question whether the principle of "freedom" of trade provided for by the Berlin Act (especially in article 1) was also incorporated in the Saint-Germain Convention. It will be remembered that article 1 of Saint-Germain only provides for "equality" of commerce as between the parties, but that the annex to the article reproduces article 1 of Berlin with the passages about "freedom" of trade for "all" nations (see paragraph 6 below).

(iii) The third point is, on the assumption that the principle of freedom of trade is incorporated in the Saint-Germain Convention (as the Court in fact decided that it was), what is the exact meaning and effect of that principle as embodied in Saint-Germain. It will be convenient to deal with these points in the above order.

3. The first point was not considered by the majority of the Court (whose views are, of course, embodied in the decision itself) because they took the view that both parties, *i.e.*, the United Kingdom and Belgium, having founded their respective cases on Saint-Germain, the Court must, for the purposes of the dispute, regard the validity of that convention as not being in question. On this point the decision of the Court (see p. 19) was as follows:—

"No matter what interest may in other respects attach to these Acts—the Berlin Act and the Act and Declaration of Brussels—in the present case the Convention of Saint-Germain of 1919, which both parties have relied on as the immediate source of their respective contractual rights and obligations, must be regarded by the Court as the Act which it is asked to apply; the validity of this Act has not so far, to the knowledge of the Court, been challenged by any Government."

The question of the validity of Saint-Germain in the light of Berlin was, however, discussed in certain of the dissenting judgments. The matter was raised by Sir Cecil Hurst, the United Kingdom Member of the Court, in the following passage (p. 61):—

"I do not propose to express any opinion as to a question which, it is true, was not raised by the parties in this case, but which must strike anyone who studies the published *procès-verbaux* of the Berlin Conference of 1885. That question is whether both Belgium and the United Kingdom had not already pledged themselves by the terms of the Berlin Act not to terminate or to modify, even as between themselves, the provisions of that instrument except in agreement with all the other States which were parties to it. Nor do I propose to express any opinion as to what would be the effect of such a pledge, if it had been given, that is to say whether a new treaty made in violation of such a pledge would be devoid of juridical effect, or whether it would merely be a wrongful act entitling a State which was not a party to the Convention of Saint-Germain, but was a party to the Berlin Act, to demand reparation."

The Dutch member, Judge van Eysinga (p. 70 *et seq.*) stated that under the Berlin Act thirteen Powers instituted a highly internationalised régime for Central Africa, in a convention which contained no clause for denunciation, or for the conclusion of further conventions *inter se* between some only of the parties. Article 36 of the Act provided for revision, but only with the consent of all the original thirteen contracting parties. He therefore considered that a limited number of parties could not legally revise the Berlin Act by an agreement *inter se*, and that any instrument between them attempting to do so was invalid, even as between themselves. His view was (pp. 72-73) that—

"The General Act of Berlin does not create a number of contractual relations between a number of States, relations which may be replaced as regards some of these States by other contractual relations; it does not constitute a *jus dispositivum*, but it provides the Congo Basin with a régime, a statute, a Constitution."

He added (p. 73) that the parties to the Convention of Saint-Germain in proceeding as they did

"acted contrary not only to an essential principle of international law, but also to article 36 of the General Act of Berlin. . . . This is a legal situation of such importance that a tribunal should reckon with it *ex officio*. The only convention which the Court could apply is the Act of Berlin,"

[13464]

D



1935

and that it was immaterial whether any Government had or had not actually disputed the validity of Saint-Germain. The German member of the Court, Judge Schücking (p. 87), also agreed with this view, stating that—

“Once it is recognised that the intention was to create a statute of the Congo which should not be liable to be altered by some only of its authors, the will of the Powers must be interpreted as being that no convention can acquire valid existence that is contracted in disregard of the rule forbidding a limited group of signatories of the Act to modify its terms. The antecedents of the Berlin Conference show that the intention was to set aside all treaties concluded between certain Powers only in regard to their interests in the Congo Basin; indeed, two States (the United Kingdom of Great Britain and Portugal) had to discard a commercial treaty concluded prior to the Berlin Act (the 26th February, 1885), and that particular treaty was the real cause of the Berlin Act. It is beyond doubt that the signatory States of the Congo Act desired to make it absolutely impossible, in the future, for some of their number only to amend the Congo Act, seeing that any modifications thus introduced would have been a danger to their vested rights in that vast region. Accordingly, in my view, the nullity contemplated by the Congo Act is an absolute nullity, that is to say, a nullity *ex tunc*, which the signatory States may invoke at any moment, and the convention concluded in violation of the prohibition is automatically null and void. The fact that, up to the present time, those signatories of the Berlin Act who did not participate in the Convention of Saint-Germain have not impugned the latter instrument, cannot, therefore, in any way remedy the absolute illegality of its conclusion. It remains null and void, because it transgresses the bounds which the authors of the Berlin Act established for themselves when they subscribed to that Act.”

4. Since the majority, *i.e.*, the Court itself, considered that, as between the parties to the dispute, it was correct to apply the convention on which they were both content to take their stand and found their respective cases, it is not possible to say whether, had this not been the case, the Court would or would not have agreed with the opinions just noticed, to which, of course, no operative effect attaches. They are of interest, however, as showing a tendency on the part of international judges of the highest class to take a strict view of the situation created by the Berlin Act, and to regard that Act as having been intended to create a more or less permanent “statute” for the Congo Basin; and they appear to indicate that, if the question of the possibility of denouncing Berlin by unilateral action were to come before an international court, the view that such denunciation is possible is one which would not prevail at all easily. Judge van Eysinga, for instance, specifically referred (p. 72) to the fact that “the General Act of Berlin contains no clause providing for its denunciation,” and seemed clearly to imply that it could not be denounced except by common agreement.

5. These views do not, however, appear to have any relevance in the present connexion as regards the particular question of law they deal with, *i.e.*, whether Saint-Germain is, in fact, invalid *ab initio* on the ground suggested. It may, of course, be argued that if Saint-Germain were, indeed, as a matter of law, invalid *ab initio*, there would be no necessity to denounce it, and any party to it would be justified in simply disregarding it. Whether or not this argument would be sound in law, it is in any event clear that it would be *politically* impossible for a party to Saint-Germain to deny its validity as between the Saint-Germain Powers on the grounds reviewed above. Whatever the legal position, a party to Saint-Germain would be politically “estopped” from using such an argument *vis-à-vis* another such party. It would seem, therefore, that if a party to Saint-Germain desires to free itself from the obligations of that convention, otherwise than by agreement with the other parties, a resort to unilateral denunciation would be necessary. The question whether such unilateral denunciation is practicable remains in consequence one which it is necessary to determine, and in considering it the possibility that Saint-Germain may perhaps be totally invalid *ab initio* can, it would seem, be left out of account. It is, of course, conceivable that, in the event of a dispute as to whether unilateral denunciation of Saint-Germain was possible, the Court might spontaneously pronounce the convention to be totally invalid; but, even so, the Court might, at the instance of the party or

parties objecting to unilateral denunciation, be prepared to determine whether such denunciation would be possible if Saint-Germain were valid. It is therefore necessary to assume that the question of the legality of a unilateral denunciation may in any event be material.

6. The next point dealt with by the Court, and relevant in the present connexion, is whether the principle of “freedom” as well as of “equality” of trade is incorporated in Saint-Germain. This question, it will be recollected, was discussed in paragraph 9 of the main reference (and also arose in connexion with paragraphs 10, 11, 13, 16 (viii) and 21, together with questions 2, 3 and 8 in paragraph 27). It was pointed out in paragraph 9 that article 13 of Saint-Germain abrogated, as between the Saint-Germain Powers, the Berlin Act and the Brussels Act, “except in so far as the stipulations contained in article 1 of the present convention are concerned.” These stipulations were as follows:—

Article 1.

The signatory Powers undertake to maintain between their respective nationals and those of States members of the League of Nations, which may adhere to the present convention, a complete commercial equality in the territories under their authority within the area defined by article 1 of the General Act of Berlin of the 26th February, 1885, set out in the annex hereto, but subject to the reservation specified in the final paragraph of that article.

Annex.

Article 1 of the General Act of Berlin of the 26th February, 1885.
The trade of all nations shall enjoy complete freedom:—

- (1) In all the regions forming the basin of the Congo [here follows geographical definition of the regions involved].
- (2) In the maritime zone extending along the Atlantic Ocean [here follows geographical description of regions involved].
- (3) In the zone stretching eastwards from the Congo Basin [here follows geographical description of the regions involved].

It is expressly recognised that, in extending the principle of free trade to this eastern zone, the conference Powers only undertake engagements for themselves, and that in the territories belonging to an independent sovereign State this principle shall only be applicable in so far as it is approved by such State. But the Powers agree to use their good offices with the Governments established on the African shore of the Indian Ocean for the purpose of obtaining such approval, and in any case of securing the most favourable conditions to the transit (traffic) of all nations.

It will be seen that in the above annex to article 1 of Saint-Germain (consisting of a textual repetition of article 1 of Berlin) the principle of freedom of trade is mentioned twice, first, at the very beginning in the passage “the trade of all nations shall enjoy complete freedom,” and, secondly, in the concluding paragraph.

7. It was suggested in paragraph 9 of the main reference that the effect of this reproduction of article 1 of Berlin in article 1 of Saint-Germain, combined with the provisions of article 13 of Saint-Germain, might be of three different kinds:—

- (i) It was suggested in the first place that the effect might be merely geographical, the sole intention being to provide an identical definition of the area involved.
- (ii) Secondly, it was suggested that (especially in view of the terms of article 13 of Saint-Germain) the intention may have been to except article 1 of Berlin from the general abrogation of Berlin as between the Saint-Germain Powers provided by article 13, in such a way that, if Saint-Germain were terminated, then, although Berlin as a whole would not revive, article 1 thereof would revive or continue to operate as between the Saint-Germain Powers.

[13464]



(iii) In the third place, it appeared possible that the intention was to produce an effect covering, but going beyond, the first alternative, yet falling short of the second, namely, while securing an identical geographical definition, also to incorporate the *principle* of "freedom" of trade in Saint-Germain, in addition to that of "equality" mentioned in the opening and substantive part of article 1 of Saint-Germain. On this view, article 1 of Berlin would not revive on the termination of Saint-Germain. On the other hand, Saint-Germain, so long as it continued to operate, would involve "freedom" as well as "equality" of trade.

8. On this question the Court decided (see pp. 19, 20 and 22-23) that the phrase "The trade of all nations shall enjoy complete freedom," which appears at the beginning of the annex to article 1 of Saint-Germain (being repeated from article 1 of Berlin), does not embody a provision intended to be reproduced with operative force in Saint-Germain, but that, nevertheless, Saint-Germain has maintained the general principle of freedom of trade with obligatory force, because this principle appears in the last paragraph of the annex to article 1. Whereas (so the Court seems to have thought) the opening paragraphs of this annex only maintained in force the territorial definitions contained in article 1 of Berlin, the last paragraph was maintained with substantive effect because of the words in article 1 proper of Saint-Germain (*i.e.*, that part of the article other than the annex) which run "but subject to the reservation specified in the final paragraph of that article." (The above appears to be a correct description of the effect of the Court's decision as given at the bottom of p. 19.) The court also considered that the same principle of "freedom" of trade was to be found in articles 2, 5 and 10 of Saint-Germain (pp. 20 and 22-23).

9. Only one dissenting opinion, that of Judge Altamir, was given in regard to the question of "freedom" of trade. His view (p. 35) was that "equality" only was imported by Saint-Germain. Sir Cecil Hurst, who agreed with the view of the majority on this point, stated his opinion as follows (pp. 62-63):—

"In the Convention of Saint-Germain there is no specific provision in favour of freedom of trade. In this respect it differs from the Berlin Act, article 1 of which provides that in the Congo the trade of all nations shall enjoy complete freedom. All that the Convention of Saint-Germain provides for in article 1 is 'complete commercial equality,' and yet there is a provision in this same article which looks as if it must have been intended by the new convention to keep alive the principle of freedom of trade laid down in the first article of the Berlin Act. This provision consists of the words at the end of the article, 'but subject to the reservation specified in the final paragraph of that article.' The final paragraph of article 1 of the Berlin Act is that, 'in extending the principle of free trade to the eastern zone, the conference Powers only undertake engagement for themselves,' &c. If the authors of the Convention of Saint-Germain deliberately kept alive that reservation in the Berlin Act as to freedom of trade instead of making a corresponding reservation as to the application of the principle of complete commercial equality to the eastern zone, it seems difficult to escape the conclusion that they intended to maintain, after the Convention of Saint-Germain came into force, this principle of liberty of trade. It is equally difficult to believe that they intended the principle to apply only in the eastern zone and not throughout the Conventional Basin. I conclude, therefore, that this principle operates in the Belgian part of the Congo, and that the Belgian Government is still under obligation to the Government of the United Kingdom to see that the trade of all nations enjoys complete freedom."

10. The opinion of the Court as to "freedom" of trade in Saint-Germain has a bearing on two questions discussed in the main reference (*a*) the position of Japan, and (*b*) the possibility of introducing a quota system in territories subject to the Congo régime. The position of Japan was discussed in paragraphs 10 and 11 of the main reference. It was there pointed out that although Japan was not a party to Berlin, she might be able to claim the benefit of it by reason of the provision in article 1 thereof "The trade of *all* nations shall enjoy complete freedom" (which might mean all nations whether parties or not). If

this were so, then, if the position were that article 1 of Berlin had been kept alive by article 1 of Saint-Germain in the sense that it would revive or continue to operate as between the Saint-Germain Powers if Saint-Germain were terminated (view (ii) in paragraph 7 above), Japan might, even on termination of Saint-Germain, still be entitled to freedom of trade.

11. The decision of the Permanent Court, it would appear, weakens this possibility without actually excluding it. On the one hand the Court decided that the phrase "The trade of all nations shall enjoy complete freedom" at the beginning of the annex to article 1 of Saint-Germain was not reproduced with operative force. On the other hand the Court decided that the last paragraph of the annex *was* reproduced with operative force, and this paragraph, besides referring to "free trade" also obliges the parties to use, in certain regions of Africa, "their good offices for the purpose of . . . securing the most favourable conditions to the transit (traffic) of *all* nations." Sir Cecil Hurst it will be remembered (see above paragraph 9) considered that the effect of this was to oblige the parties to allow freedom of trade for all nations throughout the conventional area.

12. The Court did not consider the further point (which was not in question in the case) whether article 1 of Berlin (or rather the principle of freedom for the trade of all nations) was, by reason of article 13 of Saint-Germain, excepted from the general abrogation of Berlin in such a way as to survive even the termination of Saint-Germain itself. There is therefore nothing in the Court's decision to affect the conclusion suggested in the last sentence of paragraph 9 of the main reference. The probability seems to be that the exception in article 13 of Saint-Germain to the general abrogation of Berlin was introduced in order to avoid any apparent contradiction between that abrogation and the repetition of part of the provisions of Berlin in the first article of Saint-Germain. On this view the effect of the exception would be (as between the Saint-Germain Powers) to maintain article 1 of Berlin (or rather the principle of freedom of trade for all nations embodied in it) only so long as Saint-Germain remained in force, and not in the sense of having any existence independently of Saint-Germain.

13. It has been mentioned (paragraph 10 above) that the decision of the Court that the principle of "freedom" of trade is incorporated in Saint-Germain also has a bearing on the question discussed in paragraph 25 of the main reference concerning the possibility of introducing a system of quotas in the British Congo Basin territories, as an alternative to denouncing the Congo Basin treaties. In that paragraph the view was expressed that it was very doubtful whether a quota system would be compatible either with Berlin or Saint-Germain. It seems evident that a quota system, however equally its incidence may fall on the various countries involved, must involve a restriction on the complete "freedom" of trade. Again, even on the view that Saint-Germain only involves "equality" of trade, there was some doubt as to whether a quota system could be consistent with real equality, or with the "free access" mentioned in article 2 of Saint-Germain. From the Court's decision, however, which (p. 22) specifically mentions article 2 (*inter alia*), it now appears that the principle of "freedom" of trade should be regarded as being incorporated in Saint-Germain as well as in Berlin, and therefore it becomes more than ever doubtful whether a quota system would be possible.

14. The third point decided by the Court and relevant in the present connexion (see paragraph 2 (iii) above) also affects the quota question. After deciding that the principle of "freedom" of trade is incorporated in Saint-Germain, the Court went on to elucidate the meaning of that principle in connexion with Saint-Germain. The Court's view was that "freedom" of trade has not quite the same meaning in Saint-Germain as in Berlin. The relevant passage from the decision of the Court is as follows (p. 23):—

"Whilst therefore it is certain that the Convention of Saint-Germain is also based on the idea of commercial freedom, it is however to be observed that this idea has not the same import in the convention as in the Act of Berlin. This Act really meant by free trade the régime of the open door. By abolishing—as has already been stated—the prohibition to levy customs duties found in article 4 of the Act, the convention has abandoned this régime; in this connexion it should also be observed that article 5 of the



1935

Act, the second paragraph of which corresponds to article 3 of the convention, contained a first paragraph which does not reappear in the convention and which prohibited the granting of a monopoly or privilege in matters of trade.

"It cannot be supposed that the contracting parties adopted new provisions with the idea that they might lend themselves to a broad interpretation going beyond what was expressly laid down.

"Freedom of trade, as established by the convention, consists in the right—in principle unrestricted—to engage in any commercial activity, whether it be concerned with trading properly so-called, that is the purchase and sale of goods, or whether it be concerned with industry, and, in particular, the transport business; or, finally, whether it is carried on inside the country or, by the exchange of imports and exports, with other countries."

The concluding phrases of this passage give ground for thinking that the Court considered that the expression "freedom of trade" in Saint-Germain includes the right, in principle unrestricted, to engage in the exchange of imports and exports with other countries; and this would seem to indicate that the legality of quota restrictions in the conventional area must be doubtful.

15. Sir John Simon would be glad if you would take the above matters into consideration in giving your opinion on the questions raised by the main reference; and if you would treat both the references enclosed in the letter of the 8th January from this Department as being urgent.

I have, &c.

RONALD CAMPBELL.

Report.

1.—(a) The Convention of Saint-Germain appears from its general heading or title to have been regarded by the signatories as a revision of the Berlin Act and the Brussels Act and Declaration. These Acts were treated as laying down general principles for the action of the signatory Powers in the Congo Basin. A possible view of the convention is that by article 15 the revision was intended to be of a temporary character, affecting only the signatories to the convention, and that the convention is now at an end by effluxion of time. This view presents many difficulties, and we reject it. There are also, in our view, serious grounds for doubting the validity of the convention. In the first place, it is difficult to see on what principle the Berlin Act could be revised except with the consent of all its signatories, and section 36 seems relevant on this point. It might be argued that the signatories of the Berlin Act who were not signatories to the convention had now lost their rights by not objecting promptly, but there are always difficulties in the way of an argument of this kind. Secondly, the Berlin Act by its terms conferred certain rights on all nations. Whether nations who were not signatories could claim rights under these provisions is a difficult question which arises to some extent under Question 3. We are on both these grounds of opinion that the convention is of doubtful validity. If, however, we are to assume that the convention was valid as between the signatories, we are of opinion that His Majesty's Government cannot by unilateral action denounce it. The convention purported to be in substitution for the Berlin Act and Brussels Act and Declaration, and it provided for modification of its terms, however futile the means provided may now appear. As appears from our answer to Question 5 (a), the Berlin Act appears to us to have been intended to be a permanent settlement, and the same reasoning, in our opinion, applies to the Saint-Germain Convention. We have given full consideration to the arguments to be drawn from the commercial character of many of the articles in these treaties. We are, however, of opinion that, reading the treaties as a whole, they were intended to be permanent. We rely not only on the non-commercial clauses, but also on the fact that the commercial clauses themselves do not merely, as in the ordinary commercial treaty, provide for an exchange of privileges or rights *inter se*, but create or purport to create rights for the benefit of all nations.

1.—(b) These questions do not arise.

2. The obvious difficulty of this question is an additional reason for the answer we have given to the first question. Assuming, however, the denunciation

or termination of the Saint-Germain Convention, we are of opinion that the preferable view is that the Berlin Act as modified by the Brussels Declaration would revive or continue to operate as between the denouncing or terminating parties.

3. The intention of the Berlin Act and of the Brussels Declaration seems to us clearly to have been the establishment of certain principles of government and administration for the benefit of all nations. In these circumstances, we have come to the conclusion that Japan could establish a right to the benefit of any of the provisions of the treaties coming within the above description. The admission of Japan to the convention as a State interested in the subject-matter of the convention might, we think, strengthen Japan's case on this point.

There is the further point that Japan could presumably adhere to the Berlin Act under article 37.

4. In our opinion, this assumption can be properly made.

5.—(a) His Majesty's Government, in our opinion, cannot denounce by unilateral action the Berlin Act, which we think was intended to be, and is, a permanent settlement not terminable by denunciation on reasonable notice.

(b) These questions do not arise.

6. Article 4 of the Berlin Act seems to us to have been a provision binding the signatories primarily for twenty years only. In the event of there being no determination one way or the other after twenty years, we incline to the view that its provisions would continue in force, though there is ample scope for argument on the other side. Further, the Brussels Declaration expressly says that in the absence of fresh agreement the contracting parties will, after the twenty years, return to the "conditions" of article 4 subject to the power to impose 10 per cent. duties. As, however, duties higher than 10 per cent. have, in fact, been imposed without protest, we think that both article 4 and the Brussels Declaration can be regarded as having lapsed by the tacit consent of all concerned.

7. These questions do not arise.

8.—(a) and (b) We are of opinion that a quota system would not be consistent either with the Saint-Germain Convention or with the Berlin Act and Brussels Declaration. The essence of a quota system is prohibition, and it is fallacious, in our opinion, to point to the method of fixing the quota as in any way affecting its real nature. We find it impossible to reconcile a system which prohibits entry on any terms with the various provisions in the treaties in question prescribing freedom of trade. So far as Japan is concerned, our answer to Question 3 covers this case.

The form of article 1 of the Saint-Germain Convention, especially when read in the light of the explicit provisions of article 2 and of article 13, is puzzling. We are clearly of opinion that something more than a mere definition of a geographical area for the purpose of the convention was intended; otherwise there was no sense in the last few words of article 1 referring to the reservation contained in the final paragraph of article 1 of the Berlin Act. Our doubt is whether article 1 of the convention was concerned with anything more than "commercial equality," which is plainly not the same thing as freedom of trade. On the whole, our opinion is that article 1 read alone has this limited effect. When it is coupled with the terms of article 13 and also of article 2, we think the effect is to restate and incorporate in the convention the principle of freedom of trade without differentiation for the benefit of all nations.

T. W. H. INSKIP.

D. B. SOMERVELL.

Law Officers' Department,
July 19, 1935.



1935

Possibility of Denouncing Saint-Germain Convention of 1919 and Berlin Act of 1885.

THERE is a general rule that treaty instruments which are intended to set up a permanent state of things are not subject to unilateral denunciation without the consent of the other parties. Thus, at the London Conference of 1871, which followed Russia's declaration of her withdrawal from the stipulations of the Treaty of Paris of 1856 relative to the neutralisation of the Black Sea, the Powers, in an annex to one of the protocols, "reconnaissent que c'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties Contractantes, au moyen d'une entente amicale."

2. There are, however, cases where a Power has claimed and exercised the right to withdraw from a treaty, which does not provide for denunciation, on the ground that there has been a vital or material change of circumstances since the obligations were entered into. This doctrine of *rebus sic stantibus* is not considered by some writers to be a recognised rule of international law, but the majority of authorities admit that as a principle at least of international morals and public policy it is well established (Garner, *American Journal of International Law*, vol. 21, p. 511). The principle has been invoked in quite recent times, by China and Persia, for example, and was even used by France, in regard to certain treaties with Great Britain, in the course of oral statements during the proceedings before the Permanent Court of International Justice concerning the dispute with Great Britain over the Tunis-Morocco nationality decrees.

3. The interpretation of the rule *rebus sic stantibus* is not free from doubt, but the following expressions of opinion may be quoted.

4. Garner writes (*American Journal*, vol. 21, pp. 513-516) :—

"It is not to be understood that the rule may be invoked in every case where the change of circumstances has resulted merely in the disturbance of the equilibrium of burdens and benefits so that the obligation has become more onerous for one than for the other; the change must be such as to make the continued performance of the obligations flagrantly inequitable, unjust, oppressive, difficult of performance, or derogatory to the dignity or sovereignty of one of the parties."

* * * * *

"... each party must be its own judge, but unless the dissatisfied party repudiates by its own unilateral act the treaty, the right of the other party to judge for itself whether the changed situation is such as to justify the claim for a release from the obligations of the treaty must be admitted. Both parties being judges, therefore, a mutual agreement between them becomes necessary."

Garner quotes cases, such as the Russian denunciation of the Black Sea clauses of the treaty of 1856 and the Austro-Hungarian annexation of Bosnia and Herzegovina in violation of the Treaty of Berlin, where the withdrawing Powers have themselves acted as sole judges of the existence of conditions justifying the application of the rule. But, he says :—

"The most authoritative recent and contemporary writers on international law maintain, more correctly it is submitted, that the rule merely gives the dissatisfied party a right to demand a revision or termination of the treaty, or its replacement by another. It should first approach the other party or parties, lay before them a statement of the reasons why in its opinion the treaty ought to be revised or terminated, and ask for a full consideration by them of the merits of the case."

* * * * *

"It is submitted that a dissatisfied party is justified in repudiating or denouncing a treaty which it has freely entered into only in case the other party or parties refuse to consider a request for its revision, termination or replacement by another treaty, or if after considering the request, it is refused, and it is established that in consequence of changed conditions not

foreseen or contemplated by the parties at the time of the conclusion of the treaty, it has become so grossly unequal in its operation that the obligations are largely on one side while the benefits are on the other, or that the continued performance of the obligations has become difficult for one party, or interferes with the normal growth of the State or involves a substantial impairment of its dignity and sovereignty."

5. Sir John Fischer Williams also reaches somewhat the same conclusion : "It is not a doctrine that one State may by unilateral declaration rescind or modify its obligations. If it is to be put into force, the proposition that the essential conditions have changed needs either the assent of all the parties interested in the obligation or the decision of a tribunal."

6. If treaties which purport to set up a permanent state of things may, in certain circumstances, be denounced by the application of the principle *rebus sic stantibus*, so a fortiori may treaties which do not intend to set up a permanent state of things, although containing no provision for denunciation. Commercial treaties are of this nature. In connexion with the Anglo-Venezuelan Treaty of 1825, which contains no provision for termination, the Law Officers of the Crown advised (the 28th May, 1909) that, "on the whole, we think that the main object of the treaty is commercial, and that it would be held to be temporary in character and terminable by the withdrawal of either party on reasonable notice."

7. The question of the duration of the Act of Berlin and Act of Brussels, with declaration, and of the Saint-Germain Convention, revising those instruments, was raised during the discussions of the commission that drafted the Saint-Germain Convention. One of the paragraphs of the draft preamble of the convention runs as follows :—

Considérant que le régime commercial instauré pour vingt ans par l'article 4 dudit Acte [i.e., Berlin Act] a dû être modifié par la Déclaration de Bruxelles du 2 Juillet 1890; que ce régime est aujourd'hui périmé et que, depuis lors, aucun accord n'est intervenu, contrairement aux dispositions dudit article.

The following discussion (*Procès-verbal* No. 10) took place :—

M. Beer (Etats-Unis d'Amérique) estime que le deuxième considérant ne concorde, ni avec les faits historiques, ni avec les principes de droit international. C'est ainsi que le régime commercial instauré par l'Acte de Berlin ne s'appliquait qu'à la franchise d'entrée; il est inexact d'autre part de dire que ce régime soit aujourd'hui périmé.

M. Duchêne (France) reconnaît la justesse de la première observation, mais il combat la seconde.

Les rédacteurs du projet ont voulu montrer que les échéances résultant de l'Acte de Berlin (20 ans) et de l'Acte de Bruxelles (15 ans) étaient depuis longtemps dépassées. Il importe de montrer que les Actes de 1885 et de 1890 ne lient plus que provisoirement les Puissances possessionnées en Afrique. Le mot "périmé" employé dans le projet n'est peut-être pas le mot propre, mais on ne peut pas le supprimer purement et simplement.

Le Président ajoute que le régime de l'Acte de Berlin ne se prolonge que par tacite reconduction.

M. Dell'Abbadessa (Italie) réplique que, par tacite reconduction, on est retombé en 1905 sous le régime institué en 1885; sauf en ce qui concerne les droits d'entrée, on est donc toujours sous le régime de l'Acte de Berlin. L'Acte de Berlin n'était pas institué pour une période déterminée: il ne pouvait avoir de terme que par la volonté des Parties Contractantes.

M. Duchêne (France) fait remarquer que l'Acte de Berlin avait prévu une revision au bout de 20 ans; 5 ans plus tard, l'Acte de Bruxelles prévoit une revision au bout de 15 ans. Cette coïncidence n'est pas un effet du hasard: les Puissances instituaient une expérience pour une période déterminée.

Le Président ajoute qu'une Puissance signataire aurait eu le droit, à l'expiration du délai, de se considérer comme déliée si les Actes n'avaient pas été révisés.

M. Anzilotti (Italie) répond que les autres Puissances auraient pu ne pas se refuser à une revision mais déclarer en même temps qu'elles entendaient que les conventions demeuraient en vigueur.



1935

M. Louwers (Belgique) relève que l'Acte général de Berlin n'est pas un acte contractuel : c'est un ensemble de déclarations auxquelles des Puissances ont adhéré, chacune pour son compte. Sans doute, les Puissances avaient convenu que ces déclarations ne pouvaient être modifiées que de l'accord des parties; mais cela n'impliquait pas pour chacune d'elles l'obligation de continuer indéfiniment son adhésion à l'ensemble des déclarations.

8. The impression conveyed by the discussion is that, after 1905, a contracting Power had the right to withdraw from the Berlin Act, no revision having taken place.

9. At a later meeting of the same commission, a delegate raised the question what would be the position at the end of the period of ten years contemplated by the revising convention of Saint-Germain if the Powers were unable to agree upon modifications. The president of the commission stated that the position would be the same as under the régime of the Berlin and Brussels Acts: "Chaque Puissance restera libre de déclarer qu'elle ne se considère plus comme liée par la convention." In the discussion that followed, the United States delegate urged that the convention should remain in force if an agreement for its revision could not be arrived at. The Belgian delegate was against the idea of imposing on the African Powers a kind of perpetual contract. The discussion on this point was concluded by the Belgian delegation stating that they would accept "une formule marquant qu'une réunion en vue de la revision sera obligatoire." As a result, the provision was adopted which stated that the contracting parties should meet on the expiry of a period of ten years to introduce into the convention such modifications as experience showed to be necessary.

10. It is clear that the Saint-Germain Convention of 1919 revising the Berlin and Brussels Acts, providing, as it did, for a conference at the end of ten years, was not intended to set up a permanent state of things. It seems also that the conference provided for on the expiry of the ten-year period was intended to be of an obligatory nature. Moreover, the opinion was expressed during the discussions of the drafting commission (see preceding paragraph) that, if the Powers were unable to agree on revision at the expiry of the ten years, each Power would be free to declare that it was no longer bound by the convention.

11. If, then, a conference had been held at the expiry of the ten years' period as contemplated by the Saint-Germain Convention, it may well have been found that circumstances had so changed that the position of one or more of the territories affected by the convention was no longer met by the provisions of the convention. It would then have been the right of the country or countries affected to request that the convention of 1919 should be revised so as to meet the changed circumstances and to withdraw from the convention in the event of the request not being met.

12. The conference for the revision of the Saint-Germain Convention, which should have been held in 1930, has not, however, taken place. It was in the power of any one of the contracting parties to propose the convening of such a conference, and from the fact that no such step has been taken, the assumption may be drawn that the convention, by tacit agreement, continues in force unmodified.

13. His Majesty's Government in the United Kingdom have, indeed, made a proposal to the other Powers for the signature of a protocol by which the Saint-Germain Convention should remain in force until 1935. The French and Italian Governments have never replied to the proposal, but the mere fact that it has been made may be considered to constitute an added difficulty in the way of His Majesty's Government announcing withdrawal from the convention as a whole, without a preliminary conference with the other parties.

14. To sum up, it is suggested that there would be strong objections to a unilateral denunciation by His Majesty's Government of the Saint-Germain Convention without a preliminary conference between the contracting Powers. The period contemplated by the convention for such a conference has, however, elapsed, and it seems possible to contend, having regard to the intentions of the parties as evidenced in the *procès-verbaux* of their discussions at the time of the drafting of the convention, that each party is now free to request that a conference should be convoked. At such a conference, His Majesty's Government would be able to draw attention to such modifications as they considered desirable, and even to point out that circumstances have so changed that the interests of their

territories affected are not now met by the existing convention. If an agreement by which the interests of His Majesty's Government would be met is not possible, it would then seem possible to give notice of withdrawal. It appears desirable that some period of notice should be given—say, six months—in order that other Powers may accommodate themselves to the changed conditions created by such withdrawal.

15. It does not appear necessary, from a theoretical point of view, to wait until 1935 before taking action. The year 1935 was mentioned in the proposal to the Powers as the period for which the convention should continue to remain in force. The proposal, however, has not been accepted by all the Powers, and it would seem possible to contend that the general position has not been affected thereby, and that a conference could be called now at any time.

16. As regards the Berlin Act, the position appears to be somewhat as follows: The Saint-Germain Convention abrogates the Berlin Act and the Brussels Act and declaration, so far as they are binding between the parties to the Saint-Germain Convention. In theory, therefore, parties to the Saint-Germain Convention remain bound by those Acts so far as regards the parties who have not become parties to the Saint-Germain Convention. In this connexion, it should perhaps be noted that, in 1922, in a note to the Belgian Ambassador in London, Lord Curzon expressed a reserve against any thesis that the territorially interested Powers are bound to continue the régime of a maximum import duty of 10 per cent. until all the signatories of the Berlin and Brussels Acts have agreed to a new régime. "It is evident, in the view of His Majesty's Government, that the effect of section 3 of the 1890 declaration, taken in conjunction with article 4 of the General Act of Berlin, was that, on and after the 2nd July, 1905, the Powers were free to redetermine what customs régime should be applied in the conventional basin of the Congo. It is true that no redetermination of the régime was suggested at that time, but it is for that reason that His Majesty's Government consider that the general position as regards the customs régime was subsequently an undetermined one."

17. If the Saint-Germain Convention is denounced, His Majesty's Government would apparently be bound, as now, by the Berlin Act as regards those parties to the Act who are not parties to the revising convention of Saint-Germain. Those parties are Denmark, Norway, Sweden, Netherlands, Spain and Russia. His Majesty's Government could not, of course, claim the benefits of the Berlin Act *vis-à-vis* the Powers who remain parties to the Saint-Germain Convention.

18. Parties to the Berlin Act, but not to the Saint-Germain Convention, possess somewhat different rights, although the conventional area is the same in both cases. As regards customs tariffs, after the expiry in 1905 of the fifteen years' period of the Declaration of Brussels, the parties to the Berlin Act retained the power of imposing duties up to 10 per cent. In 1922, however, as already mentioned, His Majesty's Government held that after 1905 the customs régime was an indeterminate one and claimed *vis-à-vis* parties to the Berlin Act the right to redetermine what customs régime should be applied. The Berlin Act also prohibits monopolies in matters of trade, but it is open to doubt whether the Saint-Germain Convention contains the same prohibition, according to the intentions of the parties. The Berlin Act applied the principles of the Vienna Congress to both the Congo and the Niger. The Saint-Germain Convention provides that as regards rivers not necessarily utilised by more than one riverain State, the Government concerned shall be free to establish such systems as may be required for the maintenance of public order and safety and for other necessities of the work of civilisation and colonisation. As regards freedom of worship, and protection of missionaries, the Berlin Act makes no reservations, whereas the Saint-Germain makes the application of the provisions subject to the enforcement of constitutional law. The declarations in the Berlin Act relating to neutrality and to the procedure to be followed in cases of future occupations on the coast of Africa are not contained in the Saint-German Convention.

19. If this country withdrew from the Saint-German Convention and the provisions of the Berlin Act revived, the most-favoured-nation clauses in treaties with countries who are not parties to the Berlin Act—providing such treaties apply to British territories in the Congo conventional area—could also be invoked.

20. The countries—other than parties to the Berlin Act—with whom treaties which contain a most-favoured-nation clause as regards customs duties



1935

have been concluded and whose provisions apply to some or all British territories in the Congo conventional area are: Albania, Argentine Republic, Austria, Bolivia, Bulgaria, China, Colombia, Costa Rica, Czechoslovakia, Egypt, Estonia, Finland, Germany, Greece, Guatemala, Hungary, Latvia, Liberia, Lithuania, Panamá, Persia, Poland (and Danzig), Roumania, Siam, Spain, Switzerland, Turkey, Venezuela and Yugoslavia. There are also treaties with a few countries—Ethiopia, Morocco, Muscat—where the most-favoured-nation clause is of a unilateral character and contains no definite stipulation as to the treatment to be accorded to imports from those countries into British territories, but it might be difficult to adhere, with fairness, to the unilateral character of this arrangement.

21. As regards the countries remaining parties to the Saint-Germain Convention, France, Italy and Japan have commercial treaties with this country which contain most-favoured-nation provisions as regards customs duties, and which apply to certain British territories in the Congo conventional area.

22. If the United Kingdom were to withdraw from the Berlin Act, a circular notification would presumably have to be addressed to the other parties and it would seem desirable in this case, as in the case of the Saint-Germain Convention, to give a reasonable notice—say, three or six months—of the proposed action.

23. So far as Tanganyika Territory is concerned, His Majesty's Government are, of course, bound by the terms of the mandate.

24. No attempt has been made in this memorandum to comment on the possible reaction of foreign Powers to the denunciation of the Berlin Act and the Saint-Germain Convention, on the possibility, for example, of the French denunciation of the Anglo-French Convention of 1898 regarding the trade, &c., of possessions east and west of the Niger, and on the possible effect on Zanzibar's treaty position. But it would seem necessary to bear such matters in mind.

Foreign Office, May 10, 1932.

[J 3015/98/60/1935]

No. 2.

[July 19, 1935]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 8, 1935.

Possibility of limiting by means of quotas the importation of Japanese goods into certain British mandated territories in Africa in view of the terms of the relevant mandates.

I HAVE the honour, by direction of Secretary Sir John Simon, to request your opinion as to the interpretation, in connexion with the question of introducing a system of quotas on the importation of goods into certain mandated territories, of the clauses in the mandates providing that the mandatory is to promote the moral and material well-being and social progress of the inhabitants.

2. The immediate occasion of this question consists in the possibility, which has been engaging the attention of His Majesty's Government, of introducing quotas in Tanganyika with a view to limiting the import of cheap Japanese goods. A similar possibility may, however, arise in the future as regards the other mandated territories in Africa administered by His Majesty's Government in the United Kingdom, viz., the Cameroons and Togoland.

3. It is not proposed in this reference to raise the question of the introduction of a general system of quotas in mandated territories; that question depends upon the discriminatory articles in the mandates and upon other factors. All that is being raised is the question whether, if Japan ceases to be a member of the League, and if the Anglo-Japanese Commercial Treaty is denounced in respect of these territories, it would be possible, so far as the mandates are concerned, to limit the import of Japanese goods only by means of quotas; and upon that

question the only relevant articles in the mandates are those set out in paragraph 5 below.

4. As regards Tanganyika, the position is further complicated by the fact that this territory, in addition to being subject to the mandate for East Africa, also forms part of the Conventional Basin of the Congo. The question of the compatibility of quotas with the terms of the Congo Basin treaties has, together with certain other questions relative to those treaties, been referred to you separately. Even if, however, it should be decided, as regards Tanganyika, that the Congo Basin treaties can be denounced, or if not denounced place no obstacle in the way of quotas, and even if, as regards Tanganyika, the Cameroons and Togoland, one obstacle to quotas is removed by Japan leaving the League and by the denunciation of the Anglo-Japanese Commercial Treaty in respect of those territories, the question posed in the present reference would still remain, namely, how far a quota designed to keep out cheap Japanese goods would be consistent with the terms of the mandates providing for the welfare of the inhabitants.

5. The relevant clauses in the mandates concerned (viz., Tanganyika, the Cameroons and Togoland) are as follows:—

Tanganyika. Article 3.

"The mandatory shall be responsible for the peace, order and good government of the territory, and shall undertake to promote to the utmost the material and moral well-being and the social progress of its inhabitants. The mandatory shall have full powers of legislation and administration."

Cameroons and Togoland. Article 2.

"The mandatory shall be responsible for the peace, order and good government of the territory, and for the promotion to the utmost of the material and moral well-being and the social progress of its inhabitants."

It will be seen that in the case of the Cameroons and Togoland the clauses are identical. The Tanganyika clause is also substantially the same, though differing slightly in wording.

6. The facts of the case, as they exist at present, are that Japan is able to import into the territories concerned certain classes of goods at far lower prices than any other country. In those territories there exists a considerable native population at a level of subsistence very low by European standards. Owing to the low price of Japanese goods this native population is enabled, by purchasing these goods, to obtain articles which might otherwise be beyond their means. Some of these, e.g., shoes,⁽¹⁾ are articles which in more advanced countries would be regarded as necessities. It appears probable, therefore, that a quota which resulted in a serious limitation of the supplies of such goods available to the native population, and which did not confer any countervailing benefit on the territory, but was imposed merely to assist United Kingdom imports, would, in the African territories concerned, be inconsistent with the terms of the mandates above quoted. (It is, of course, not certain that a quota system would, in fact, seriously curtail the supply of cheap goods available. Enough might enter under the quota to meet reasonable needs.)

7. The principles which His Majesty's Government have regarded as being applicable to this matter are as follows:—

(i) Any measure in the shape of a quota introduced in a mandated territory must be justified primarily with reference to the interests and needs, present and future, of the territory itself.

(ii) The question whether any particular measure can be so justified is one to be decided on a consideration of all the factors involved. If, on balance, the measure can properly be regarded as being in the interests of the territory, then the fact that it may cause detriment, loss, inconvenience or hardship to certain sections of the community will not constitute any bar. Certain *caveats* appear relevant, however, in this connexion: (a) It would seem that a substantial balance on the right side would be necessary; (b) the interests and needs of the indigenous native population must be regarded as having especial weight; and (c) it may be that particular words in the

⁽¹⁾ Hookworm, a disease very common to native peoples, is caused by going barefoot.



1935

relevant clause in the mandates (*e.g.*, "promote social progress") will operate *per se* in certain cases to prevent given measures or encourage others. Further, it may be a question how far a disadvantage caused to one section of the community (*e.g.*, the native section, or the consuming section), can be outweighed at all by any benefit, however great, conferred on a different section (*e.g.*, the European section, or the producing or manufacturing section); but on the whole it seems reasonable to have regard to the territory as a whole. Another point is that the detriment caused by a measure limiting imports of necessities will presumably be greater than if mere luxuries are involved, and may need a correspondingly large advantage to outweigh it. Subject to these special considerations, it would appear that, for instance, a measure limiting the available supply of particularly cheap goods might, on balance, be in the interests of the territory if it also had the effect of encouraging and developing the production or manufacture of the same articles, or perhaps in some cases of other articles, in the territory itself; or to encourage exports from the territory. In this latter connexion it is to be noticed that a quota system, by a redistribution of imports into the territory amongst outside countries, might open up to the exports from that territory markets not previously available. In the case of the African mandated territories concerned, the United Kingdom already grants preference on those products which are not allowed into the United Kingdom free of duty from both Empire and foreign sources, and the retention of preference (with perhaps an extension of the field of preference if such is in fact practicable) might form a *quid pro quo* of sufficient value to outweigh any detriment caused to the native population by the quota. Again, a quota, while limiting the imports of certain classes of goods, may enable other classes, which it is in the interests of the territory to have, to be imported, whereas otherwise competition would have kept them out. A general argument is that any measure which would (*e.g.*, by leading to an increase in exports) indirectly cause an increase in the purchasing power of the population, so that they would no longer be dependent on ultra-cheap goods, may be of more permanent benefit than merely continuing to ensure the supply of such goods to the inhabitants.

(iii) If, on balance, it appears that a given measure will be in the best interests of the territory, then the fact that it will also serve to assist United Kingdom manufactures will not involve any inconsistency with the clauses of the mandates quoted in paragraph 5 above.

(iv) If, on the other hand, the measure will, on balance, be prejudicial to the interests of the territory, then it cannot be justified on the ground that it will be of benefit to the United Kingdom.

It is, of course, obvious that the exact appreciation of the various factors involved, and the weight to be attached to them in any given case, can only be determined with reference to the facts of that case as they arise.

8. Sir John Simon will be glad if you will take the above matters into your consideration, and if you will be so good as to furnish him with your opinion on the following questions:—

I.—(i) Would it be consistent with the clauses in the relevant mandates, as quoted in paragraph 5 above, to impose quotas on the entry into Tanganyika, the Cameroons or Togoland of cheap Japanese goods where such quotas would have the effect of seriously curtailing the availability of those goods to the native population, and assuming (a) that if deprived of cheap Japanese goods the native population would be unable to afford to buy similar, but more expensive goods coming from other sources, and would thus, after the quota had been exhausted, be deprived of such goods altogether; and (b) that the quota would not confer, result in or be accompanied by any countervailing benefit sufficient to outweigh the above disadvantage?

(ii) Would the fact that the quotas might result in benefit to United Kingdom exports constitute in itself a sufficient justification for introducing them, notwithstanding any detriment they might cause to the territory concerned or its inhabitants?

(iii) How far, if at all, is the answer to either part of this question affected by the nature of the goods involved, *i.e.*, necessities or luxuries?

II.—(i) Assuming the answer to the first two parts of the last question to be in the negative, would such a quota be consistent with the mandates if it conferred, resulted in or were accompanied by benefits or advantages sufficient, *on balance*, to outweigh any loss, detriment, inconvenience or hardship caused to the native population by the curtailment of the supply of cheap goods?

(ii) If so, (a) must those countervailing benefits and advantages redound also specifically to the profit of the native consuming population, or would it suffice if the benefit were to another section of the community (*e.g.*, European immigrants; European or native manufacturers or producers in the territory) or to the territory as a whole; (b) would you indicate generally, so far as possible, what factors may properly be taken into consideration in estimating the balance of advantage or disadvantage, and the relative weight to be attached to the various factors and considerations involved?

III.—Assuming the answer to question II (i) to be in the affirmative, and that in point of fact the quotas could be justified on the balance of advantage and disadvantage, would the fact that they might also (either incidentally or even as a primary consideration of their introduction) enure to the benefit of United Kingdom exports involve any inconsistency with the clauses of the mandates quoted in paragraph 5 above?

IV.—In so far as not already covered by your answers to the preceding questions, would you state whether, in your view, the principles and considerations enunciated in paragraph 7 above are sound?

9. Sir John Simon would also be grateful for any observations of a general character which you may feel disposed to offer.

I have, &c.

RONALD CAMPBELL.

Report.

1.—(i) On the assumptions we are asked to make, we think a quota system for the territories mentioned would not be consistent with the relevant clauses in the mandates.

(ii) The possibility of benefit to United Kingdom trade would in our opinion be an irrelevant consideration.

(iii) Even assuming the possibility of dividing the goods in question into the two separate categories of necessities and of luxuries, the distinction is in our opinion irrelevant.

2.—(i) The proper and only consideration is the interest of the inhabitants. This must inevitably resolve itself into a question of the balance of advantage.

(ii)—(a) As far as possible we think the matter must be considered as one affecting the community as a whole. The fact that certain individuals or even sections of the community stand to gain is not enough to give rise to a balance of advantage. Their interest may be very material in considering the benefit or otherwise of the proposed measures to the territory and its inhabitants as a whole. Beyond this we are unable to go.

(b) The factors to be taken into consideration are those which would be taken into account by an enlightened Government of the territory if the territory had complete commercial autonomy. They are primarily economic as affecting the general well-being of the population and their standard of living and possibly also political and social. We feel a difficulty in further defining the factors as they cannot be tested by any legal principles.

3. Any question of benefit to United Kingdom exports is in our opinion irrelevant. Such a benefit may be incidental to some benefit which the population of the territory is going to reap, but, considered alone, it should be disregarded.



1935

32

AFRICA

4. Generally speaking, the principles appear to us to be sound apart from the reference to luxuries as contrasted with necessities. We would refer to our answers to Questions 2 (i) and 2 (ii) (b). Paragraph 7 is concerned for the most part with economic or trade policy and its results.

T. W. H. INSKIP.
D. B. SOMERVELL.

*Law Officers' Department,
July 19, 1935.*

[W 3973/1/98/1936]

No. 2^A.

[Colonial Office]

[December 6, 1935.]

Colonial Office to the Law Officers of the Crown.

Gentlemen,

Downing Street, April 18, 1935.

I AM directed by Secretary Sir Philip Cunliffe-Lister to inform you that your advice is desired on certain questions arising from proposals which have been made for establishing a closer union between the following three territories in East Africa:—

The Colony and Protectorate of Kenya.
The Protectorate of Uganda.
The Tanganyika Territory.

Closer
Union
between
Kenya,
Uganda
and Tan-
ganyika:
compati-
bility of
proposals
with
Article 22
of Coven-
ant of the
League of
Nations
and
Article 10
of the Tan-
ganyika
Mandate.

A copy of the Tanganyika mandate is enclosed.

2. The history previous to June 1930 of the proposals for closer union is conveniently summarised in the Historical Note on pp. 9-12 of Cmd. 3574. A copy of this paper is annexed, together with copies of the various earlier reports, &c., to which it refers. It will be observed from the foreword on p. 2 of Cmd. 3574 that His Majesty's Government had decided to refer the proposals to a Joint Committee of the two Houses of Parliament.

3. Shortly after the publication of Cmd. 3574 a memorandum (copy annexed) was received from the German Government expressing doubts as to the propriety of His Majesty's Government's proposals.

4. The Joint Select Committee of Parliament was appointed at the end of November 1930. In December the committee sent to the Foreign Office a memorandum (copy attached) by Lord Lugard, a member of the committee, and asked that the legal adviser to the Foreign Office might give evidence on certain points raised in the memorandum. Thereupon Sir William Malkin prepared a note, with which the legal adviser to the Secretary of State for the Colonies concurred, and embodied it in a reference to the Law Officers. Copies are appended of the reference and of the note.

5. No formal opinion was tendered by the Law Officers. Informal advice, however, was received from Sir Stafford Cripps (the Solicitor-General), as a result of which Sir William Malkin prepared a new memorandum and laid it in evidence before the Joint Select Committee; a copy is annexed.

6. The conclusions of the Joint Select Committee will be found in paragraph 34 of their report. The acceptance by His Majesty's Government of the committee's recommendation was notified to the Governors of the three territories in paragraph 3 of the Secretary of State's despatch of the 13th July 1932 (see p. 47 of Cmd. 4141 annexed). There the matter rested until recently.

AFRICA

33

7. During the past few months the question has again come to the fore. Local petitions are coming forward and will have to be answered. A British Parliamentary Delegation has recommended closer union in a published report. And German pretensions have stimulated those who are anxious as to the future of Tanganyika to advocate that union or federation which they understand the mandate to envisage. All these circumstances make it necessary that the Colonial Office should know precisely what are the legal powers of His Majesty's Government.

8. The Secretary of State desires that the matter should now be considered on a basis somewhat different from that discussed in 1930, on Cmd. 3574 and before the Joint Committee; he considers that a High Commissioner and a Legislature superimposed upon the existing Governors and Legislatures would be uneconomical and unsatisfactory, and if this project is to be proceeded with at any time, he would desire to consider the creation of one Governor and one Legislature for the three territories.

9. This is not meant to imply the amalgamation of the three territories into one entity. The idea would be to leave each territory in its present constitutional position, namely, a colony, a protectorate and a mandated territory, but to provide for one Legislature composed of representatives from each territory, with power to legislate for the peace, order and good government of the three territories.

10. Ordinances enacted by this Legislature would apply throughout the territories unless in terms restricted in their application to one or more of the territories. It would be necessary, of course, to ensure that no laws should be passed which in their application to Tanganyika, or in their application to the other territories in relation to Tanganyika, were contrary to the mandate. This could be secured by instructions to the Governor not to assent to any such law or by other effective means.

11. These considerations lead inevitably to a contemplation of the composition of the Legislative Council. If it is composed so that there is an official majority, or if there is reserved to the Governor power to "certify" or to pass by his order any Bill which he considers necessary or desirable in the interest of any of the territories, the Governor's control of legislation would be complete, and His Majesty's Government in the United Kingdom would consequently be able adequately to perform their function as Trustee for Tanganyika; but if there were to be an unofficial majority without a complete power of "certification" being reserved to the Governor, then, while the Governor would have the power to refuse his assent to Bills, and the Crown would have the power to disallow ordinances, there would not be any power to pass laws which might be necessary for the fulfilment of His Majesty's obligation as mandatory, except with the consent of the unofficial members.

12. It is not possible to envisage at the present moment the exact extent to which the creation of a single Legislature would lead to the unification of administration, but, as one of the chief objects of the scheme would be to ensure economy in the government of the territories, it may be assumed that there would be a substantial unification of administrative services.

13. The most convenient method of giving effect to the above scheme would be by means of one Order in Council made so far as Uganda, Tanganyika and the Kenya Protectorate are concerned, in virtue of the Foreign Jurisdiction Act, and so far as Kenya Colony is concerned, in virtue of the British Settlements Act.

14. But a difficulty arises in connexion with the wording of section 3 of the British Settlements Act. The section provides that His Majesty may delegate, by an instrument passed under the Great Seal of the United Kingdom, the powers conferred by the Act on His Majesty in Council, to three or more persons within the settlement.

15. The first question which arises is whether the suggested Order in Council would be an effective instrument so far as Kenya Colony is concerned, or whether there would have to be Letters Patent in relation to Kenya complementary to the Order in Council.

16. The second question is whether it is possible to delegate the power to legislate in Kenya to a Legislature sitting in Kenya but composed of representatives from Kenya, Uganda and Tanganyika, even assuming that the representatives of Kenya are not less than three; and, further, whether, so far as Kenya is concerned, any power could be conferred on the Governor to legislate personally.

[13464]



1935

34

AFRICA

In this connexion I am to refer to paragraph 16 of the reference to the Law Officers from the Dominions Office dated the 31st December, 1931, and to the opinion of the Law Officers dated the 29th July, 1932, with reference to the Administration of a part of the Antarctic Continent.⁽¹⁾

I am to enclose a copy of the existing constitutional instruments relating to Kenya, Uganda and Tanganyika.

17. In so far as the mandate and the Covenant of the League are concerned, the questions of law which are involved in a consideration of this matter are fully discussed in the note from the German Government and in Sir William Malkin's two memoranda, and it is not thought that it would serve any useful purpose to recapitulate them in the body of this reference.

18. I am to request, therefore, the favour of your opinion upon the following points:—

- (1) Whether the scheme outlined in paragraphs 8 to 12 is compatible with article 22 of the Covenant of the League and article 10 of the mandate for Tanganyika—
 - (a) If the Legislative Council is so composed that there is an official majority.
 - (b) If the Legislative Council is so composed that there is an unofficial majority.
 - (c) If the Legislative Council is so composed that there is an unofficial majority but there is reserved to the Governor the power to legislate independently of the Council.
- (2) If the answer to the first question is in the negative, whether the conclusions of His Majesty's Government as regards closer union in East Africa contained in Cmd. 3574 are compatible with article 22 of the Covenant of the League of Nations and article 10 of the mandate for Tanganyika.
- (3) Whether article 10 of the mandate for Tanganyika is in conformity with article 22 of the Covenant of the League.
- (4) If the answer to the third question is in the negative, whether and to what extent the validity of article 10 of the mandate and the use which can be made of it are affected.
- (5) Whether there are any, and if so what, constitutional or legal difficulties—
 - (a) In setting up the Joint Legislature referred to in paragraphs 8 to 12, and
 - (b) So far as Kenya Colony is concerned, in conferring on the Governor powers to legislate as suggested in paragraph 11, having regard especially to section 3 of the British Settlements Act.
- (6) Generally.

I am, &c.
W. C. BOTTOMLEY.

⁽¹⁾ Confidential 14251, No. 2c.

AFRICA

35

List of Papers.

- I.—Mandate for Tanganyika, Cmd. 1794.
- II.—Parliamentary Paper, Cmd. 3574.
- III.—Parliamentary Paper, Cmd. 1922.
- IV.—Parliamentary Paper, Cmd. 2904.
- V.—Parliamentary Paper, Cmd. 3234.
- VI.—Parliamentary Paper, Cmd. 3378.
- VII.—Parliamentary Paper, Cmd. 3573.
- VIII.—Memo. from German Embassy, September 4, 1930 (W. 9126/10/98/1930) [Annex A].
- IX.—Memo. by Lord Lugard, December 13, 1930 (W. 13562/10/98/1930) [Annex B].
- X.—Memo. by Sir W. Malkin, January 9, 1931 (W. 13562/10/98/1930) [Annex C].
- XI.—F.O. to Law Officers of the Crown, January 9, 1931 (W. 13562/10/98/1930) [Annex D].
- XII.—Précis of Sir W. Malkin's evidence before the joint Select Committee on East Africa (W. 1807/5/98/1931) [Annex E].
- XIII.—Report of Joint Select Committee (Parliamentary Paper, H.L. 184).
- XIV.—Correspondence (1931–32) arising from Report of Joint Select Committee (Parliamentary Paper, Cmd. 4141).
- XV.—Existing Constitutional Instruments relating to Kenya, Uganda and Tanganyika (see separate list in Annex F).

Report.

The statement of principles contained in the first two paragraphs of article 22 of the Covenant plainly envisages even in the case of "C" mandates a continuing trusteeship on the part of the mandatory for the people inhabiting the colonies and territories in question. Any scheme of government which either in point of form or in operation is inconsistent with that relationship must therefore be regarded as open to objection. The approbation in the case of "C" mandates of a system of administration which treats the mandated territory as an integral portion of the territory of the mandatory does not suggest to us that even in that case the mandated territory may be administered in such a way as to destroy the identity of the territory or the individuality of the people inhabiting it. Still more clearly is it proper to apply this guiding principle to a "B" mandate as in the case of Tanganyika. It follows that whatever form the machinery of government may take, the question may still arise as to whether it is so administered as to comply with the principles of article 22 of the Covenant. In the same way article 10 of the mandate is to be read not as authorising any and every "administrative union" whatever its effect, but an administrative union which satisfies both in its form and in its practical operation the conditions of article 22 of the Covenant. It might, for instance, be argued with some force that the words used in article 10, namely, "customs fiscal and administrative union or federation," contemplate a certain degree of governmental autonomy in the mandated territory as being essential to the validity of the scheme. The eighth paragraph of article 22, which it is right to regard as the authority for article 10 of the mandate, points to this conclusion.

The following answers to the first question must be understood in the light of the above observations:—

Under the scheme set out in paragraphs 8 to 12 of the case, there is to be a 1 (a) and single High Commissioner and a single Legislature for the three territories. The (c) three territories will have no subordinate Governments of their own, and according to paragraph 12 it is contemplated that there will be a substantial unification of administrative services. The question that arises, in our opinion, is whether this is such a complete union as to be contrary to article 22 of the Covenant and to the mandate. We have already indicated considerations which we think have to be kept in mind in answering this question. Clearly arguments of some force could be advanced for the view that the individuality of the mandated territory was not being sufficiently preserved. Political considerations

F 2

[13464]



1935

36

AFRICA

would also, we think, be bound to influence the decision. We do not, therefore, feel able to give an unqualified opinion on the information before us. In deciding what weight it should give to the arguments that might be raised under the Covenant and under article 10 of the mandate a tribunal would probably be influenced, and in our opinion rightly influenced, by the strength of the political and economic case for the proposed scheme, the advantage and progress of the mandated territory being clearly most important considerations in applying the general principles laid down in the Covenant and the mandate. Assuming a good case could be made on these points, this might well be accepted as overriding the objections referred to above which could be put forward to the scheme as we understand it.

- 1 (b). It would be wrong, in our view, to construe the Covenant so as to preclude for all time a degree of autonomy such as would be involved in the creation of an unofficial majority. On the other hand, we think there would be objection to any scheme of this kind unless and until the territory had developed to a stage which fitted it for self-government in the ordinary sense of the word. As we do not think it is suggested that this stage has been reached, we answer this question in the negative.
2. This does not arise.
3. We have already referred to this point in our general observations and for the reasons given we are of opinion that article 10 of the mandate is in conformity with article 22 of the Covenant.
4. This does not arise.
- 5 (a) and (b). The scheme may in our opinion be brought into effect by an Order in Council under the Foreign Jurisdiction Act so far as Uganda, Tanganyika and the Kenya Protectorate are concerned, and under section 2 of the British Settlement Act so far as Kenya Colony is concerned.
6. We have nothing to add.

T. W. H. INSKIP.
D. B. SOMERVELL.

Annex A (Paper No. VIII).

Aide-mémoire (communicated by the German Embassy in London).

(Translation.)

THE German Government have become acquainted with the British White Book (Cmd. 3574), which refers to the proposal to establish a closer connexion between the Mandated Territory of Tanganyika and the neighbouring British territories. From this they gather that His Majesty's Government attach particular importance to keeping the proposed innovations in harmony with the provisions of the mandate. In the opinion of the German Government, a realisation of the project in its present form would hardly be compatible with the principles of the mandate system.

As the representative of His Britannic Majesty's Government declared at the Council meeting of the League of Nations, it is the wish of that Government that, before their final decision, the Permanent Mandates Commission of the League of Nations should take an opportunity to express their opinion on the question. The German Government assume that the commission will do this at their forthcoming autumn meeting. In view of the great interest which German public opinion takes in the matter, the German Government could not, however, omit to communicate their misgivings to the British Government at once.

The far-reaching executive and legislative powers of the High Commissioner and his council, which extend directly and indirectly to the most important branches of economic life and administration as well as to questions of policy regarding natives and other matters (No. 5 1 (a) and (b) of the statement), would abrogate or considerably limit the independent status which was accorded to the territory by article 22 of the League of Nations Covenant. It would not only

AFRICA

37

establish an administrative union, but also a political and constitutional union of the three participating territories in which the mandated territory would scarcely possess the rank of a province. Article 10 of the Tanganyika mandate cannot, according to the German view, be applied, as a provision carrying into effect article 22 of the League of Nations Covenant, in such a manner that the principle of the independence of the mandated territory established in the latter article would be thereby impaired.

The German Government also doubt whether it is possible to realise the intention, announced in His Britannic Majesty's Government's statement, of advancing the interests of the population of the three territories concerned by a closer connexion. These territories exhibit striking differences with regard to their natural and economic needs, the development of their commerce and the character of the native population. Moreover, the fact that British sovereign interests exist in the neighbouring territories must, in the event of a closer connexion, contribute to render more difficult of fulfilment the intention that the mandated territory should be administered exclusively with regard to the needs of its population.

These dangers would not be avoided, in the opinion of Germany, by the provision in the proposal of the right of appeal of the High Commissioner or of three members of the Council.

London, September 4, 1930.

Annex B (Paper No. IX).

Memorandum on the Proposals for "Closer Union" in East Africa.

(With reference to the Treaty of Versailles and the Mandate for Tanganyika.)

BY articles 118 and 119 of the Treaty of Versailles Germany "renounced all rights, titles and privileges whatever" to her overseas possessions in favour of the Allies and Associated Powers, and undertook "to recognise and to conform to the measures which may be taken now or in the future by the Principal Allies and Associated Powers . . . to carry the above stipulations into effect,"⁽²⁾ and in particular to accept the articles which follow (*re* commercial relations, movable and immovable property, &c.).

2. By article 22 of the treaty it was decreed that the tutelage of the peoples of these colonies should be entrusted to "mandatories on behalf of the League of Nations," and the main provisions of the mandate were stated for three different categories of peoples. The treaty was signed on the 28th June, 1919. In reply to the German protest, the Allies declared, *inter alia*, that, for reasons given, "it is impossible for the Allied and Associated Powers to return (these colonies) to Germany" (Treaty, p. 244).

3. The Council of the League decided that "it was itself responsible in the last resort for approving and, if necessary, drawing up the mandates"; meanwhile, it called upon the Powers which had been selected as mandatories by the Allied and Associated Powers to submit draft mandates. A full report was presented (and adopted by the Council) by M. Hymans (161 of the 20th December, 1920). This document recognised the duty of the Council of the League "to notify the mandatory of the terms of the mandate after ascertaining whether they are in accord with article 22" (p. 14).

4. The approved mandate for German East Africa (Tanganyika) contains two articles, viz., 10 and 13 (copies attached—Enclosure 1), which merit consideration in reference to the proposals of His Majesty's Government for closer union between that territory and its neighbours, Kenya and Uganda.

⁽²⁾ Viz., "in order to carry the consequences of her renunciation into effect" (Hymans).



1935

Germany objects to these proposals. Her contention is—or may be—as I understand it—

- (a) That they are not in accord with the mandate and are in excess of the sanction given by article 10.
- (b) That article 10 is itself *ultra vires* as regards the Treaty of Versailles, by which alone she is bound.
- (c) That under article 13 of the mandate she can refer the matter for decision by the International Court of Justice.

5. Great Britain has declared her intention to submit the decisions she may arrive at to the C.P.M., and accordingly the White Paper containing the "conclusions," together with the reports of the commissions, has been transmitted to that body. I am the British member of it, but I was not present during their last session (a) because I desired to support the motion in the House of Lords on the 12th November to set up a joint committee, and (b) because the Secretary-General had raised the question of the propriety of my attending if I were a member of that committee (this objection has since been withdrawn). The report of the Permanent Mandates Commission is attached (Enclosure 2). In brief, it amounts to a decision not to deal with the matter until the mandatory has arrived at a final decision after the Joint Committee has reported.

6. It may be pertinent to note that an almost identical clause appears in the British mandates for Cameroons and Togo, and has been taken advantage of in the administration of those mandates, the former being for all practical purposes of administration a part of Nigeria, and the latter of the Gold Coast. Their separate identity is preserved as far as possible and they each send a separate report and an accredited representative to Geneva. In their case there can be no question that the arrangement is in the interest of the inhabitants of the territory because, owing to their small size and population, a separate administration would have been an intolerable burden upon the revenue, and they undoubtedly derive a greater advantage by their association with their neighbours. No protest has been raised by Germany.

7. Similar action was taken by Belgium as mandatory for Ruanda-Urundi, and a royal decree of the 21st August, 1925, stated that the territory "est uni administrativement à la Colonie du Congo belge dont il forme un vice-gouvernement général." A German protest was transmitted by the Secretary-General of the League to the German Government on the 29th September, 1925 (C. 593, VI), to the effect that Clause 10 of the mandate is contrary to the treaty and to the terms of article 22. The Belgian Government replied on the 20th October, 1925 (C.P.M. 301), that Germany could not intervene until she is a member of the League. Ruanda is a small country (about 20,500 square miles), smaller than the Cameroon Province, but it has an enormous population estimated at 3 to 5 million. The Belgian Congo does not, however, assume financial responsibility for Ruanda as Nigeria and the Gold Coast do for Cameroons and Togo, and unlike them a separate Administration has been set up. The union of Ruanda with the Congo is therefore on parallel lines with the proposed union of Tanganyika with its neighbours, and not with the West African mandates.

8. Germany is now a member of the League and has a representative on the Permanent Mandates Commission. It may, I presume, therefore be assumed that she accepts the mandate system as a legitimate corollary of the Versailles Treaty to which she is a party. Herr Stresemann and his successor Herr Curtius in the German Foreign Office have protested at Geneva against the proposed closer union of Tanganyika with Kenya and Uganda as being incompatible with the mandate. Under Clause 13 they can apparently demand that the question be referred to the International Court (see official report of Reichstag the 26th June, 1930, p. 5, 888, 5.889). Geheimrat Kastl, German member of the C.P.M., in a private letter to me maintains that Tanganyika would no longer be an entity in international law, since laws would be passed by a council on which it was in a minority. It may be noted that in the case of the "C" class of mandates (South-West Africa and the territories in the Western Pacific) article 22 of the Covenant specifically states that for the reasons cited they "can be best administered under the laws of the mandatory as integral portions of its territory" subject to the safeguards, &c., but that no such stipulation appears in the preceding paragraph upon which the "B" mandates (Central African) have been based.

9. There is the further contention that article 10 is itself contrary to the spirit and intention of article 22 of the treaty; that Germany is bound only by the treaty and not by the terms of the mandate to which she was no party, and that the certificate of the Council that it was in accord with article 22 has no binding force on her as she was not a member of the League, and that the mandate being based on article 22 of the treaty is not unilateral and the interpretation given to it by the mandatory is *ex parte* and without validity unless confirmed by the International Court to which she would demand reference under the treaty. M. van Rees of the C.P.M. expressed the view that Clause 10 is contrary to the spirit of the mandate system, but the C.P.M. has, of course, no competence to criticise the mandate. Its sole function is to record its view as to whether the mandate as it stands is being carried out or not.

10. The Joint Committee decided to ask the opinion of the Crown lawyers and I suggest that the points upon which we desire a legal opinion are:—

- (a) Is the form of closer union proposed by His Majesty's Government in accord with Clause 10 of the mandate? If not, in what respects is it repugnant?
- (b) Would the appointment of a High Commissioner with an Advisory instead of a Legislative Council be compatible, and what limitation must be placed on the legislative and executive powers of the High Commissioner?
- (c) Has Germany legal grounds for protest in view of the terms of articles 118 and 119?
- (d) Can she claim the right to refer it to the International Court under Clause 12 of the mandate?

N.B.—The public declarations by leading men in Kenya that a very potent reason for closer union is in order "to grapple Tanganyika more closely," and to "make it part of the Empire" are cited by Germany as evidence that the proposals for closer union are intended as a first step towards annexation. Her contention is, I believe, that the former German colonies were ceded by her to the Allies on the understanding that they remained international territory, to be administered as such on behalf of the League by mandatories who are merely agents of the League. Her avowed object in raising these protests is the hope of regaining possession. But neither the Treaty of Versailles nor the mandate contemplates or authorises the rendition or transfer of a mandate. Its expiry only takes place when its inhabitants are "able to stand alone." A transfer of the mandate would involve a breach of pledges made in a very formal and explicit way by His Majesty's Government to both Europeans and natives.

There is no need to emphasise the awkward position which would arise if Great Britain had decided on a scheme of closer union which was later adjudged to be incompatible either with the treaty or with the mandate.

LUGARD.

December 13, 1930.

NOTE.—If I may venture to submit a personal comment on the facts which I have endeavoured to state without bias, it is that the German contention appears to be based on a misapprehension of the status and powers of the High Commissioner and his council. Unless and until responsible Government is granted the mandatory Power alone remains responsible for the execution of the mandate. Responsible Government would involve a change of mandatory and would be inadmissible without the consent of the League, but so long as His Majesty's Government retains the final decision on every question affecting the mandated territory there is no violation of the mandate, if instead of a Governor local control is vested in a High Commissioner who exercises extended functions. The mandate is a measure "taken to carry into effect the consequences of her renunciation," and Germany is therefore pledged under article 118 to recognise it. On the other hand, if the P.M.C. considered that the step would prejudice native interests, or if Germany persists in her dissent, it is difficult to see how reference to the court could be refused under article 13, however weak her case might seem to us to be.



1935

Enclosure 1 to Annex B.

*Articles 10 and 13 of Tanganyika Mandate.**Article 10.*

THE mandatory shall be authorised to constitute the territory into a customs, fiscal and administrative union or federation with the adjacent territories under his own sovereignty or control; provided always that the measures adopted to that end do not infringe the provisions of this mandate.

Article 13.

The mandatory agrees that if any dispute whatever should arise between the mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by article 14 of the Covenant of the League of Nations.

States members of the League of Nations may likewise bring any claims on behalf of their nationals for infraction of their rights under this mandate before the said court for decision.

Enclosure 2 to Annex B.

Extract from Report of Permanent Mandates Commission to the Council on the Work of the 19th Session, November 1930.

(Confidential.)

(B) TANGANYIKA TERRITORY.

Scheme for Closer Administrative Union between the Mandated Territory of Tanganyika and Uganda and Kenya.

IN his comments on the commission's report on its 18th session, the accredited representative of the British Government for Tanganyika Territory remarked that the commission's observations on the British Government's proposals contained in the White Paper on the scheme for closer administrative union between Tanganyika, Uganda and Kenya, would be of great value to the Joint Committee of the two Houses of Parliament, before which the question would be laid. He expressed the hope that the Mandates Commission would find it possible to formulate its observations on the question in the course of its 19th session. Furthermore, in the report which he submitted to the Council on the 9th September, 1930, on the commission's 18th session, the *rapporteur*, the representative of Finland, alluded to the undertaking given by the British Government on the 6th September, 1929, to communicate its decision to the Mandates Commission before that decision was enforced, so that the latter should be in a position to submit its observations to the Council. He thought that the Council could leave it to the commission to decide to what extent it was expedient and possible to accede to the desire expressed by the mandatory Power, bearing in mind the significance of the declaration of which the Council had already taken note.

The commission carefully considered the suggestion of the accredited representative of the mandatory Power, but felt that to express an opinion at the present stage of the question would not release it from the obligation to examine, as contemplated by the Council, the final conclusions reached by the British Government on the advice of the Joint Parliamentary Committee, before which the question was to be laid.

Consequently, the commission thought it advisable again to defer consideration of the question until the British Government had communicated the terms of its decision in accordance with the undertaking noted by the Council on the 6th September, 1929.

Annex C (Paper No. X).

The Mandate for Tanganyika and the Proposals of His Majesty's Government in the United Kingdom as regards Closer Union in East Africa.

LORD LUGARD'S "Memorandum on the Proposals for 'Closer Union' in East Africa," dated the 13th December, 1930, sets out the following questions on which a legal opinion is desired:—

- (1) Is the form of closer union proposed by His Majesty's Government in accord with clause 10 of the mandate? If not, in what respects is it repugnant?
- (2) Would the appointment of a High Commissioner with an advisory instead of a legislative council be compatible, and what limitation must be placed on the legislative and executive powers of the High Commissioner?
- (3) Has Germany legal grounds for protest in view of the terms of articles 118 and 119?
- (4) Can she claim the right to refer it to the International Court under clause 12 of the mandate?

2. In addition, it is understood that the Joint Committee on East Africa desire to be advised whether the terms of article 10 of the mandate for East Africa are in conformity with article 22 of the Covenant, and it will obviously be convenient to consider this question first, as, if it were answered in the negative, the other questions put would fall to the ground.

3. Article 10 of the Tanganyika mandate runs as follows:—

"The mandatory shall be authorised to constitute the territory into a customs, fiscal and administrative union or federation with the adjacent territories under his own sovereignty or control, provided always that the measures adopted to that end do not infringe the provisions of this mandate."

The suggestion that this provision is inconsistent with article 22 of the Covenant, which established the mandatory system, does not appear to have been definitely formulated in any available document. The German protest of the 29th September, 1925 (referred to in paragraph 7 of Lord Lugard's memorandum), against the action taken by Belgium, as mandatory for Ruanda-Urundi, under the corresponding article of that mandate, does not, at any rate in terms, raise this contention, while it contains the following sentence in reference to the similar action taken by Great Britain in regard to the mandated areas of Cameroon and Togo (against which Germany has not protested—see paragraph 6 of Lord Lugard's memorandum), which would appear to be inconsistent with any suggestion that the terms of article 10 were in themselves incompatible with article 22 of the Covenant: "Belgium cannot appeal to the example of Great Britain in regard to Cameroon and Togo, for these mandatory districts were not actually amalgamated with the neighbouring British colonies; according to the wording of the decree in question, they are to be administered as if they were integral parts thereof." Nor is any such contention raised in the aide-mémoire addressed by the German Government to His Majesty's Government in the United Kingdom on the 4th September, 1930, a copy of which is attached to the present memorandum. The following sentence from the aide-mémoire seems to make it clear that the present German objection is not to article 10 itself, but to the manner in which it is proposed to apply it: "Article 10 of the Tanganyika mandate cannot, according to the German view, be applied as a provision carrying into effect article 22 of the League of Nations Covenant, in such a manner that the principle of the independence of the mandated territory established in the latter article would be thereby impaired." This view of the attitude of the German Government is supported by the following passage from the speech made by Dr. Stresemann, then German Foreign Minister, at the meeting of the Council

[13464]

G

of the League of Nations on the 6th September, 1929 (*League of Nations Official Journal*, Minutes of the Council, 56th Session, p. 1470) :—

"The whole mandates system was, indeed, based upon the fact that the mandated territories constituted international and independent units, for the administration of which the mandatory Powers were responsible to the League, which had conferred the mandates upon them. This guiding and all-important principle had been embodied in the Covenant itself, and it governed all the provisions of the mandates, none of which could be interpreted in a manner which could be invalidated.

"While admitting, therefore, that, under the Tanganyika mandate, a certain form of union between that territory and the neighbouring territories might be contemplated from the administrative point of view, there could be no question of any confusion arising which would call in question the existence of the territory under mandate as a politically independent unit, and which would consequently render doubtful the permanency of the League's control over the execution of the mandate. For the moment he would say no more."

4. It seems doubtful, therefore, whether the German Government really intended to challenge the present proposals of His Majesty's Government, on the ground that they are based on a provision in the mandate which is inconsistent with the instrument upon which the mandate itself is founded. In any case, apart from the inherent difficulty of establishing such a criticism of a provision which has been in force for ten years, and has been made use of in at least two cases without being challenged by the German Government, it does not appear that such a contention could be established. It appears to be suggested (paragraph 9 of Lord Lugard's memorandum) that Germany is bound only by article 22 and not by the terms of the mandate which was approved by the Council. This hardly seems to be an accurate statement of the position. Germany is bound by paragraph 8 of article 22, by which "the degree of authority, control or administration to be exercised by the mandatory shall . . . be explicitly defined in each case by the Council." The Council fulfilled its function under this provision by approving the terms of the Tanganyika Mandate, and therefore the terms of that mandate are binding on Germany, unless, indeed, she can establish that any provision of the mandate is definitely inconsistent with some specific and relevant provision in article 22. Inasmuch as the provisions of paragraph 5 of article 22 are reproduced in greater detail in the mandate itself, and are, therefore, expressly saved by article 10, the only provisions of article 22 with which article 10 could be in conflict are the general principles laid down in paragraphs 1 and 2. It seems impossible to find any inconsistency between those principles and article 10, unless it be suggested that the very idea of a customs, fiscal and administrative union or federation is inconsistent with the mandatory principle itself; and to this it seems a sufficient answer to point out that the general principles contained in paragraphs 1 and 2 are as applicable to the case of "C" mandates, which are dealt with in paragraph 6, as to that of "B" mandates, which are dealt with in paragraph 5, and that, in the former case, article 22 expressly provides for the administration of the territory "under the laws of the mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population." It is impossible to suppose that this provision is inconsistent with the first two paragraphs of the article in which it appears, and if it is not, *a fortiori* article 10, which only allows of union or federation and not practical incorporation (as in paragraph 6), and makes any such union or federation subject to the maintenance of all the provisions of the mandate, cannot be inconsistent with the principles in question. In this connexion it may be material to point out that it would be inaccurate to suggest that the effect of making use of article 10 is in practice to turn the mandate from the "B" into the "C" type; in the latter case the mandatory has a completely free hand, subject to the safeguards in the interests of the indigenous population, but in the former the arrangements for federation or union must leave intact all the provisions of the mandate, including those which do not appear in "C" mandates, of which the most important is that prescribing "equal opportunities for the trade and commerce of other members of the League."

5. It is also material to point out that it is stated in the preamble to the mandate that "His Britannic Majesty has agreed to accept the mandate in respect of the said territory, and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions." If article 10 were held to be void as being inconsistent with article 22 of the Covenant, the result would be a mandate whose terms did not correspond with those which His Britannic Majesty accepted and agreed to carry out.

6. For the above reasons it does not appear that it could be successfully contended that article 10 is inconsistent with the Covenant, and the specific questions put in Lord Lugard's memorandum can, therefore, be considered on that basis.

7.—(1) *Is the form of closer union, proposed by His Majesty's Government, in accord with clause 10 of the mandate? If not, in what respects is it repugnant?*

The scheme proposed by His Majesty's Government, as stated in paragraph 5 of Cmd. 3574, may be summarised as the establishment of a High Commissioner with duties of a twofold character: (a) As "chief adviser on native and other policy to the Secretary of State," he will perform functions which will be exclusively advisory and supervisory, except that he will have the power to suspend measures and to initiate legislation; (b) with the assistance of a council he is to administer and legislate in respect of certain important services which are of common interest to the three territories, and also in respect of any other matter which may be placed under his authority by Order in Council.

8. Under article 10 the measures adopted for the purpose of constituting the territory into a customs, fiscal and administrative union or federation must not "infringe the provisions of this mandate." The specific provisions of the mandate which must be taken into account in this connexion may be summarised as preventing the militarisation of the territory (article 4), laying down certain rules in the interest of the native population (articles 3, 5, 6 and 9), ensuring equality of commercial treatment for all members of the League of Nations (articles 7 and 9) and providing for religious freedom (article 8). There is nothing in the present proposals which is in itself inconsistent with these provisions. The essential requirement as regards the observance of provisions of this nature is that adequate powers of control should be retained by His Majesty's Government in the United Kingdom, who are responsible to the League for the administration of the mandate, and from this point of view the present proposals are likely to increase rather than diminish the powers retained by His Majesty's Government. It is obvious that any transfer of powers to bodies which are not under the ultimate control of the Colonial Office would require careful consideration from this point of view, but no such question appears to arise under the present proposals.

9. There are certain matters (such, for instance, as the military organisation of the natives and the commercial equality to be ensured for all members of the League) which will require special consideration in connexion with the proposed measures of union, but these are specifically mentioned in the passage (paragraph (d), pp. 16-17) of the "Statement of the Conclusions of His Majesty's Government in the United Kingdom as regards Closer Union in East Africa" (Cmd. 3574), which deals with the Tanganyika mandate, and there seems no reason to suppose that there should be difficulty in ensuring compliance with the relevant provisions of the mandate under the proposals in question.

10. Since the present proposals clearly do not go beyond what is contemplated by article 10 and do not infringe the other provisions of the mandate, it may be thought that from the legal point of view there is nothing more to be said as to their compatibility with the terms of the mandate, and this view was expressed by certain members of the Permanent Mandates Commission during their discussion of the Hilton Young report (minutes of the Fifteenth Session of the Permanent Mandates Commission, pp. 103-106, 167-170 and 200-204); but the recent criticism of these proposals appears to have been based on somewhat wider grounds which it is necessary to examine.

11. The observations of the German Government in their aide-mémoire of the 4th September, 1930 (see the annex to this memorandum), may be summarised



under two heads: (1) the proposals would "abrogate or considerably limit the independent status which was accorded to the territory by article 22 of the Covenant"; they would "not only establish an administrative union, but also a political and constitutional union of the three participating territories," and "the principle of the independence of the mandated territory" would be impaired; (2) the proposals are not in the interests of Tanganyika itself. The first of the above criticisms was developed by several members of the Permanent Mandates Commission during the discussion referred to in the preceding paragraph, which related, of course, to the Hilton Young report and not to the present proposals. The general attitude of these critics may perhaps be summarised as being that, even if the Hilton Young proposals were legally within the powers of the mandatory under article 10, they were inconsistent with the spirit of the mandatory system, in that they were incompatible with the idea of the eventual "independence" of the mandated territory, which ought to be the ultimate object of the mandatory administration, and tended to obliterate the distinction between the mandated territory, for the administration of which the mandatory is responsible to the League of Nations, and the adjoining territories under his own sovereignty or control.

12. It is difficult to appreciate the weight attaching to criticism of this nature, in view of the somewhat vague and general terms in which the mandatory system is described in article 22 of the Covenant. The ultimate future of the territories under "B" mandate is not specifically dealt with in that article. The expression "the rendering of administrative advice and assistance by a mandatory *until such time as they are able to stand alone*," which is used in paragraph 4 of the "A" mandates, is not employed in relation to the territories dealt with in paragraphs 5 and 6, but the same idea seems to be implicit in the phrase in paragraph 1: "colonies and territories . . . which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world," and some members at any rate of the Permanent Mandates Commission take the view that, in the words employed by M. van Rees in the course of the discussion referred to in paragraph 10, the mandatory is under an obligation "to prepare the population under its guardianship for the enjoyment of political autonomy, and, finally, for political independence." Whether such "autonomy" and "independence" would in the case of Tanganyika be compatible with some form of permanent union with the neighbouring territories, and possibly with some measure of association with the British Empire, are questions which are not likely to become actual for a considerable time, but might well form the subject of discussion by the Council of the League if any such proposals were made when the time comes to terminate the mandatory régime. For the moment it does not seem possible to say more than that (1) any attempt, during the continuance of the mandate, to make use of article 10 in such a manner as to effect the practical, even if not theoretical, incorporation of Tanganyika in the British Empire, and thereby to impair the powers of supervision possessed by the League, would doubtless be regarded as inconsistent with the mandatory system, and (2) that in any application of article 10, the essential distinction between the status of the mandatory territory, for the administration of which the mandatory is responsible to the League, and the adjoining territories, as to which the mandatory is master in his own house, must be carefully preserved.

13. In any case, it does not appear that the present proposals of His Majesty's Government are fairly open to criticism of this character. The contention of the German Government that they would establish "a political and constitutional union of the three participating territories" does not appear to be justified by the proposals themselves. While it may be admitted that the separate identity and special status of the mandated territory must be preserved in any application of article 10, any such application must of necessity involve some "limitation of the independent status" (to use the term employed by the German Government) of the territory. While it may well be difficult to decide what degree of such "limitation" is compatible with the mandatory principle, the present proposals do not seem to go beyond what is likely to be regarded as permissible, while to describe them, as the German Government do, as "abrogating" the "independent status" of the territory is surely an exaggeration. The necessity for preserving the essential distinction between the

status of Tanganyika and that of Kenya and Uganda is fully realised in the passages dealing with Tanganyika on pp. 15-17 of Cmd. 3574. An essential element in the status of Tanganyika is that it is not British territory and its inhabitants are, as such, not British subjects, and, as is pointed out in the passage referred to, the present proposals do not involve any change in this essential element in the situation.

14. The second criticism of the German Government, in their aide-mémoire of the 4th September last, is that the present proposals are not in the interests of Tanganyika itself, and similar preoccupations were expressed by several members of the Permanent Mandates Commission during their discussion of the Hilton Young proposals. It will not be disputed that the governing consideration in the administration of a mandated territory must be the interests of the territory and its inhabitants, and that any proposals for closer union between Tanganyika and her neighbours must be capable of justification on this ground. Whether this is so is a question of fact which is outside the scope of the present memorandum; attention is called to one particular point in paragraph 17 below.

15. The general conclusion appears to be (subject to what is said in paragraph 14) that the present proposals of His Majesty's Government are in accordance with article 10 of the mandate, and that they cannot fairly be regarded as inconsistent with the general principles of the mandatory system. At the same time, it should be realised that any further steps in the direction of closer union between the three territories will, no doubt, be carefully scrutinised by the Permanent Mandates Commission and the German Government, and that it may be possible to establish against such steps, from the point of view of their compatibility with the mandatory system, criticisms to which the present proposals are not fairly open. This point will require to be borne in mind in connexion with any proposals to increase the functions of the High Commissioner and Council in accordance with paragraph (i) on p. 6 of Cmd. 3574.

16. In this connexion, it may be material to observe that the wording of article 10 of the Tanganyika Mandate differs from that of the corresponding article in all the other "B" mandates. The wording of the latter provisions is as follows:—

"The mandatory shall have full powers of administration and legislation in the area subject to the mandate.^(*) This area shall be administered in accordance with the laws of the mandatory as an integral part of his territory and subject to the above provisions.

"The mandatory shall, therefore, be at liberty to apply his laws to the territory subject to the mandate with such modifications as may be required by local conditions, and to constitute the territory into a customs, fiscal or administrative union or federation with the adjacent territories under his sovereignty or control, provided always that the measures adopted to that end do not infringe the provisions of this mandate."

It will be seen that, while the wording of the provision relating to the establishment of a customs, fiscal or administrative union or federation is identical in the two cases, the article in the other mandates gives the mandatory somewhat wider powers than are conferred in the case of Tanganyika, in particular the right to administer the area "in accordance with the laws of the mandatory as an integral part of his territory." The difference is presumably due to the greater size and importance of Tanganyika in relation to the neighbouring territories as compared with the other areas subject to "B" mandate, but it would not be safe to assume that any measure involving a closer connexion with the neighbouring territories which may be legitimate in the case of the other countries under "B" mandate would necessarily be so in the case of Tanganyika.

17.—(2) *Would the appointment of a High Commissioner, with an Advisory instead of a Legislative Council, be compatible, and what limitation must be placed on the legislative and executive powers of the High Commissioner?*

From the point of view of the compatibility of the proposed measures with the mandate, the question whether the High Commissioner's Council is advisory

(*) This sentence corresponds to one in article 3 of the Tanganyika Mandate.

or legislative makes no difference. In either case there will be an outside authority with administrative and legislative powers over Tanganyika and the adjacent territories, and whether these powers are vested in the Governor alone or shared by him with a Legislative Council is immaterial, assuming that His Majesty's Government retain the power to ensure that the provisions of the mandate are complied with. The point has, however, already been taken that the representatives of Tanganyika will be in a minority on the proposed council, and the German Government have suggested (in the last paragraph of their aide-mémoire of the 4th September) that the power of the High Commissioner or three members of the council to refer any measure for the signification of His Majesty's pleasure is not sufficient to ensure that the interests of Tanganyika are not sacrificed to those of her neighbours. This is hardly a question of law, and the objection, if sound, would seem to be inherent in any scheme of union or federation, but the matter is one which seems to merit consideration by the Joint Committee.

18. As regards the limitation to be placed on the legislative and executive powers of the High Commissioner, there seems, as indicated above, and subject to what is said in paragraph 14, no objection to the proposals in paragraph 5 (pp. 4-6) of Cmd. 3574. As regards any suggested extension of those powers, it is only possible to refer to the general observations made in paragraphs 11-15 above.

19.—(3) *Has Germany legal grounds for protest in view of the terms of articles 118 and 119?*

(4) *Can she claim the right to refer it to the International Court under Clause 12 of the Mandate?*

It will be convenient to deal with these two questions together. Articles 118 and 119 give Germany no rights in the matter. The effect of those articles is to transfer the sovereignty over the German colonies to the Principal Allied and Associated Powers, and to bind Germany to accept whatever dispositions might be made in the matter by those Powers. But as this renunciation by Germany was effected by a treaty which also contained article 22 of the Covenant, Germany was entitled to require that the territories in question should be dealt with in accordance with the relevant provisions of that article. Moreover, as a permanent member of the Council, Germany has the right and power to discuss any mandatory question before that body, and she is entitled, as a member of the League, to bring before the Permanent Court of International Justice under article 13 of the mandate any dispute with His Majesty's Government in the United Kingdom "relating to the interpretation or the application of the provisions of the mandate." A dispute as to whether the present proposals of His Majesty's Government were consistent with the terms of the mandate would certainly be such a dispute. Strictly speaking, it would not seem that Germany is entitled under the provision in question to bring before the court the question whether article 10 of the mandate is consistent with article 22 of the Covenant, but if a dispute as to the compatibility of the present proposals with the mandate were brought before the court, it would not be safe to assume that the German Government could be prevented from raising this point in the course of the proceedings.

Foreign Office, January 9, 1931.

Annex D (Paper No. XI).

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, January 9, 1931.

I HAVE the honour, by direction of His Majesty's Principal Secretary of State for Foreign Affairs, to request the favour of your assistance in the following matter:—

2. The Joint Committee of both Houses of Parliament on East Africa have requested the Foreign Office to supply them with a considered opinion on the compatibility of the "Conclusions of His Majesty's Government in the United Kingdom as regards Closer Union in East Africa," contained in Command Paper 3574 (Paper A), with article 22 of the Covenant of the League of Nations (Paper B) and article 10 of the Mandate for Tanganyika (Paper C). The matters at issue are discussed and the specific questions on which an opinion is desired are formulated in a memorandum by Lord Lugard, a member of the Permanent Mandates Commission and of the Joint Committee, copies of which are enclosed (Paper D).

3. In view of the importance of the questions raised and the possibility of their being brought before the Permanent Court of International Justice under article 13 of the mandate, Mr. Henderson thinks it necessary that any statement made to the Joint Committee should be settled by yourselves. For this purpose the draft of a memorandum (Paper E) has been prepared by the legal adviser to this Department and is sent herewith for your consideration. Copies of a memorandum by the German Government, dated the 16th September, 1925, and communicated to the League of Nations on the 29th September, 1925, which is referred to in paragraph 7 of Lord Lugard's memorandum, are also enclosed (Paper F), together with the minutes of the 15th session of the Permanent Mandates Commission (Paper G). The German aide-mémoire of the 4th September, 1930, to which reference is made in paragraph 3 of the draft memorandum, is attached as an annex to that document.

4. I am accordingly to request that you will take the enclosed papers into your consideration and will be good enough to settle the terms of the memorandum to be forwarded to the Joint Committee.

5. Mr. Henderson is not aware whether the Joint Committee would normally wish the memorandum communicated to them to be published with their report, but he would be glad to receive your views as to whether such publication would be permissible. In this connexion it seems necessary to take into account not only the general principle that the reports of the Law Officers to this Department are regarded as specially confidential documents, but also the possibility of its becoming necessary to defend the proposals of His Majesty's Government before the Permanent Court of International Justice.

I am, &c.

A. W. A. LEEPER.

List of Papers submitted.

- Paper A.—"Conclusions of His Majesty's Government in the United Kingdom as regards Closer Union in East Africa" (Cmd. 3574).
 Paper B.—The Covenant of the League of Nations (Treaty Series No. 37 (1924), Cmd. 2300).
 Paper C.—The Mandate for Tanganyika (Cmd. 1794).
 Paper D.—Memorandum by Lord Lugard, dated December 13, 1930 [Annex B].
 Paper E.—Memorandum prepared by the Legal Adviser of the Foreign Office [Annex C].
 Paper F.—Memorandum by the German Government, dated September 16, 1925 [W. 9690/1246/4/1925—attached].
 Paper G.—Minutes of the 15th Session of the Permanent Mandates Commission, July 1929 [W. 8131/49/98/1929].

Enclosure to Annex D.

Memorandum by the German Government.

(Translation submitted by the German Government.)

ON the 12th February, 1925, and the 9th July, 1925, the Belgian Government introduced into the Chamber of Representatives a Bill concerning the government of Ruanda-Urundi, the Bill being passed by the Chamber on the 28th July and officially promulgated on the 9th September, 1925. Under this Act the said mandated territory, which till then had been administered by a Royal Commissioner, is to be amalgamated with the Belgian Congo in such a way that it will form a Vice-Government-General of that colony and that, with a few reservations, it will be subject to its laws. Consequently, this hitherto independent territory has ceased, as a State, to be a *persona* in the sense of international law, and has become a province of the Belgian colony with restricted fiscal powers. The inhabitants, being on the same footing as those of the Congo Colony in regard to rights and obligations, have become Belgian subjects, a mode of proceedings with which the Permanent Mandates Commission has repeatedly dealt. Besides this, the two native princes who heretofore represented their people in dealings with the Government are threatened with the loss of their rights; since under the Congo Decree concerning "chefferies indigènes," they can be degraded to police auxiliaries of the Belgian administration having no political significance.

According to article 22 of the Treaty of Versailles, the "B" mandatories undertake the administration of the territory. In this article the right to subject the mandated territory to the laws of the mandatory and to make it an integral part of the mandatory's territory is reserved to "C" mandatories. But even for the mandate of Ruanda-Urundi, although it is a "B" mandate, to incorporate the privileges of "C" mandates in contravention of the terms cited from the treaty and to permit an administrative federation with the Congo Colony does not justify the Act; since the idea of administrative federation presupposes parity of the parties; when one party is absorbed by the other it is not a case of federation, but of annexation.

The reservation made by article 6 in favour of the mandate terms has no great significance, for it is repugnant to the main tenor of the Act.

Belgium cannot appeal to the example of Great Britain in regard to Cameroon and Togo, for these mandatory districts were not actually amalgamated with the neighbouring British colonies; according to the wording of the decree in question, they are to be administered "as if" they "were" integral parts thereof (*cf.* the Proceedings of the Permanent Mandates Commission, the 25th October, 1924, League Documents C.617.M.216.1924, VI, p. 17 *et seq.*).

As a signatory of the Treaty of Versailles, the German Government may claim the proper application of article 22. They have lodged their protest with the Belgian Government; but the Belgian Government has declined to consider the protest, stating that it is a matter which mutually concerns all the mandatories, and leaving it to the German Government to apply to the League of Nations. The German Government, therefore, has the honour to direct the attention of the Council of the League of Nations to this matter. Doubtless they may anticipate that the principle of independence of the mandated territories—in particular of the "B" mandate territories—deducible from article 22 of the Treaty of Versailles will not be jeopardised by executive statutes which suggest covert annexation.

Berlin, September 16, 1925.

Annex E (Paper No. XII).

Précis of Sir W. Malkin's Evidence before the Joint Select Committee.

Lord Lugard's "Memorandum on the Proposals for 'Closer Union' in East Africa," dated the 13th December, 1930, sets out the following questions on which a legal opinion is desired:—

- (a) Is the form of closer union proposed by His Majesty's Government in accord with clause 10 of the mandate? If not, in what respects is it repugnant?
- (b) Would the appointment of a High Commissioner, with an Advisory instead of a Legislative Council, be compatible, and what limitation must be placed on the legislative and executive powers of the High Commissioner?
- (c) Has Germany legal grounds for protest in view of the terms of articles 118 and 119?
- (d) Can she claim the right to refer it to the International Court under clause 12 of the mandate?

It may be convenient to deal with questions (c) and (d) first. Articles 118 and 119 of the Treaty of Versailles give Germany no particular rights in the matter, but as article 22 of the Covenant occurs in the same treaty, she was entitled to require that her surrendered colonies should be dealt with in accordance with that article, and as a member of the League of Nations she is entitled under article 13 of the mandate to bring before the Permanent Court of International Justice any dispute with the mandatory relating to the interpretation or the application of the provisions of the mandate, if such dispute cannot be settled by negotiation. Any scheme for closer union between Tanganyika and the neighbouring territories must, therefore, be considered on the basis that, not only will it be subject to scrutiny and criticism by the Permanent Mandates Commission and the Council of the League, but also that any points in it to which Germany may take objection may have to be decided by the Permanent Court.

Article 10 of the Tanganyika mandate provides as follows:—

"The mandatory shall be authorised to constitute the territory into a customs, fiscal and administrative union or federation with the adjacent territories under his own sovereignty or control, provided always that the measures adopted to that end do not infringe the provisions of this mandate."

The suggestion has apparently been made that article 10 is itself inconsistent with article 22 of the Covenant, which established the mandatory system. Inasmuch as paragraph 8 of article 22 provides that "the degree of authority, control, or administration to be exercised by the mandatory shall, if not previously agreed upon by the members of the League, be explicitly defined in each case by the Council," the above suggestions could only be established if it were shown that article 10 were definitely inconsistent with some specific provision in article 22. I do not consider that this can be established. The position is rather that article 22 laid down certain general principles which constitute or characterise the mandatory system, and that any action which is taken under article 10 must not be inconsistent with those principles. For present purposes the general principles resulting from article 22 may perhaps be summarised as follows: A special status is conferred on the mandated territory; the mandatory, who acts "on behalf of the League" and is responsible thereto, is in the position of a trustee; the objects of the trust are the well-being and development of the people of the mandated territory.

It follows, therefore, that any action taken under article 10 must comply with the following conditions:—

- (1) It must be in the best interests of the mandated territory and its inhabitants;
- (2) The special status of the mandatory area must not be impaired either in law or in fact;
- (3) It must be within the terms of article 10 itself; and
- (4) The "measures adopted to that end" must not "infringe the provisions of this mandate."

[13464]



1935

The question whether the present proposals are in the interests of Tanganyika is one of fact and not of law, but has to be taken into consideration throughout.

As regards the other three conditions indicated above, the advisory duties to be conferred on the High Commissioner under Head A of His Majesty's Government's proposals seem to present no difficulty, provided it is made clear that, in tendering advice affecting Tanganyika, the High Commissioner should bear in mind always the special responsibilities attaching to it by reason of its being a mandated territory.

Subject to one point, the powers proposed to be conferred on the High Commissioner under Head B do not appear to be inconsistent with any of the principles (2), (3) and (4) set out above. The criticisms which have been made on the scheme seem to be mainly based on the idea that it goes beyond an administrative union and constitutes a political and constitutional union of the three territories, and is, therefore, to be regarded as going outside article 10 and also as infringing principle No. 2, in that the special status of the mandated area is impaired. While the question which arises is largely one of degree, the scheme does not seem fairly open to this objection, the force of which would be further diminished if the transferred services were limited to those which can be described as "economic." Among the proposed duties of the High Commissioner under Head B, there is, however, one which may be held not to be within the terms of article 10. The High Commissioner is to have power not only to administer but also to legislate in respect of the transferred services. Article 10, while authorising a customs, fiscal and administrative union or federation with the adjacent territories, does not mention a legislative union or federation, nor does it (thereby differing from the corresponding provision in the other "B" mandates) authorise the mandatory to administer the area "in accordance with the laws of the mandatory as an integral part of his territory," and "to apply his laws to the territory under mandate subject to the modifications required by local conditions." It may therefore be held that, in the case of Tanganyika, article 10 does not contemplate a central legislature, though it would not necessarily be inconsistent with a delegated power to make rules and regulations necessary for the working of the transferred services. There are arguments which can be adduced against this view, and I am not saying that it would necessarily be adopted by the Permanent Court; but in view of the considerations which can be adduced in support of it, I think that it might not be prudent to adopt a scheme involving a central legislature for the transferred services.

As regards the fourth condition, the provisions of the mandate, which under article 10 must not be infringed, are those providing for (1) freedom of conscience and religion; (2) the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and protecting the interests of the natives in regard to certain special matters; (3) the prohibition of the militarisation of the territory, and the organisation of "any native military force in the territory except for local police purposes and for the defence of the territory"; and (4) equality of commercial and economic treatment to all members of the League. There is nothing in the proposed scheme which is inconsistent with any of these provisions, but (3) and (4) may require special consideration in the actual working of the scheme.

The question of an advisory or legislative Council is covered by what has been said above as to the possibility of a central legislature being held not to be within article 10.

Annex F.

*List of Existing Constitutional Instruments relating to Kenya, Uganda and Tanganyika.**Kenya.*

- Statutory Rules and Orders, 1920, No. 2342. Kenya. The Kenya (Annexation) Order in Council, 1920. June 11, 1920.
- Statutory Rules and Orders, 1921, No. 1135. Kenya Colony. The Kenya Colony Order in Council, 1921. June 27, 1921.
- Instructions passed under the Royal Sign Manual and Signet to the Governor and Commander-in-chief of the Colony of Kenya. March 29, 1934.

Letters Patent passed under the Great Seal of the Realm amending Clause XVIII of the Letters Patent of September 11, 1920, constituting the Office of Governor and Commander-in-chief of the Colony of Kenya. Letters Patent passed under the Great Seal of the United Kingdom constituting the Office of Governor and Commander-in-chief of the Colony of Kenya and providing for the Government thereof. September 11, 1920.

Uganda.

- Statutory Rules and Orders, 1920, No. 884. The Uganda Order in Council, 1920. Foreign Jurisdiction. May 17, 1920.
- Statutory Rules and Orders, 1902, No. 662. The Uganda Order in Council, 1902. Foreign Jurisdiction. August 11, 1902.
- Additional Instructions passed under the Royal Sign Manual and Signet to the Governor and Commander-in-chief of the Uganda Protectorate. November 3, 1930.
- Additional Instructions passed under the Royal Sign Manual and Signet to the Governor and Commander-in-chief of the Uganda Protectorate. November 24, 1925.
- Instructions passed under the Royal Sign Manual and Signet to the Governor and Commander-in-chief of the Uganda Protectorate. June 5, 1920.

Tanganyika Territory.

- Tanganyika (Legislative Council) Amendment Order in Council, 1935. March 29, 1935.
- Tanganyika (Legislative Council) Order in Council, 1926. March 19, 1926.
- The Tanganyika Order in Council, 1920. July 22, 1920.



1935

52

GENERAL

[J 4577/G/1935]

No. 3.

[September 3, 1935]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, August 29, 1935.

Possible application to Italy of sanctions provided in article 16 of Covenant of League of Nations: Prohibition of import into United Kingdom of Italian goods, &c., and position as regards British colonies, protectorates and mandated territories.

I HAVE the honour by direction of the Secretary of State for Foreign Affairs to request your opinion on the following question: His Majesty's Government have at present under consideration the question of the application to Italy of the sanctions provided in article 16 of the Covenant of the League of Nations in view of the possible event of Italy being held to have brought herself within the terms of that article and of His Majesty's Government considering it necessary, in view of their obligations under the Covenant, to take, in co-operation with other members of the League of Nations, some action of this nature against Italy. In this connexion it has been found necessary to envisage a situation in which it would not be possible or even desirable to endeavour to take, or to persuade the other members of the League to take, all the measures contemplated by article 16, but in which it might be held proper to adopt some measure in the nature of a sanction, which would operate as a form of economic pressure against Italy, such measure being one which would neither render it necessary to make use of belligerent rights at sea nor be one of a character which would either render a declaration of war against Italy necessary or render it likely to provoke Italy into a declaration of war against His Majesty's Government or the other members of the League who adopted it. The measure which at the moment appears most likely to fulfil these conditions and at the same time (subject to further study into its practical aspects) to be likely, if sufficiently widely adopted, to produce a by no means negligible economic effect would be a prohibition against the import into the territory of any goods, consigned from or the produce or manufacture of Italy or her colonies.

2. It is, therefore, necessary to consider whether an Act of Parliament would be necessary to enable His Majesty's Government to impose and enforce such a prohibition against the entry of Italian exports into the United Kingdom or whether His Majesty's Government possess such powers under any existing Act of Parliament. The only existing Act of Parliament which it would appear to be possible to invoke as giving the requisite powers is the Treaty of Peace Act, 1919 (Paper No. 1), and in this connexion I am to invite your attention to an opinion given by your predecessors on the 29th October, 1920 (Paper No. 2), to the effect that this Act gives power to impose by Order in Council any prohibition on trade or financial relations and intercourse which might be necessary to give effect to article 16 of the Covenant of the League of Nations, this article being also article 16 of the Treaty of Peace with Germany (Paper No. 3). The prohibition against Italian exports would purport to be imposed in order to fulfil (or partially to fulfil) His Majesty's Government's obligations under article 16, paragraph 1. The measure would be a partial "severance of trade relations" with Italy, a Covenant-breaking State. It would therefore appear to come within the powers of His Majesty's Government under the Act of 1919 as interpreted by your predecessors, unless the fact that His Majesty's Government in taking this measure would be only fulfilling partially the obligations indicated in article 16 makes any difference from this point of view. It should be noted in this connexion, however, that resolutions of the Assembly passed in 1921 (Paper No. 4), in particular Nos. 8, 10 and 14, contemplate a procedure under which all the measures indicated by article 16 are not necessarily to be taken immediately and simultaneously, but that economic pressure should precede recourse to armed force, and the application of economic pressure might be by partial measures of (if necessary) gradually increasing severity. The legal effect

GENERAL

53

of these resolutions is discussed in the opinion of Sir W. Malkin, which is enclosed as Paper No. 5. It is suggested that they might be regarded as an interpretation or procedure for giving effect to article 16 adopted by the most authoritative constitutional organ of the League, and that a member who complies with them and takes partial measures can be regarded as acting under article 16.

3. The Secretary of State desires to know, in the first place, whether, in your opinion, it would be possible by an Order in Council under the Treaty of Peace Act, 1919, to prohibit the import into the United Kingdom of any goods, consigned from or the produce or manufacture of Italy or Italian colonies.

4. Secondly, if the answer to the first question is in the affirmative, Sir S. Hoare desires your opinion on the question whether the Treaty of Peace Act is sufficient authority for extending by Order in Council the prohibition (a) to the colonies (i.e., not including the Dominions),⁽¹⁾ and (b) to protectorates and mandated territories which are at present administered under Orders in Council made under the Foreign Jurisdiction Acts. It may be that in the case of some or all of the colonies it will be found preferable, as a matter of policy or convenience, to apply the prohibition by local legislation rather than by a (United Kingdom) Order in Council. It is, however, desired to know whether you consider it to be legally possible to proceed by United Kingdom Order in Council. The Treaty of Peace Act, 1919, contains no express terms stating that its provisions apply outside the United Kingdom. The general principle of interpretation of Statutes in this respect, is stated by *Maxwell on Statutes* (6th edition, p. 297) as follows:—

"In the absence of an intention clearly expressed or to be inferred either from its language or from the object or subject matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom."

It is suggested that such an intention can be inferred in the case of the Treaty of Peace Act from its object or subject matter. The Treaty of Peace applied to the colonies and other territories as well as to the United Kingdom and under article 16 of the Covenant, His Majesty's Government in the United Kingdom are responsible for fulfilling the requirements of that article in the colonies and other territories just as much as in the United Kingdom. As regards the protectorates and mandated territories, it will be recalled that they are administered under Acts of Parliament (namely, the Foreign Jurisdiction Act), and therefore, undoubtedly, Parliament can pass legislation operating there. Further, although in practice Acts of the United Kingdom are not passed directly applying to these territories, they frequently contain provisions under which the substance of the Act is to be applied to these territories by Order in Council. Moreover, Orders in Council under the Act of 1919 have, in fact, been made applying to the colonies and to the protectorates.

5. In order to make the measure effective, it would be necessary to prohibit not merely Italian exports coming direct from Italian territory, but also such exports when coming immediately from a third country, and it may also be necessary to have machinery under which goods, consigned from or the produce or manufacture of Italy, could be distinguished from similar goods produced or manufactured elsewhere. Whilst it may not be necessary to set up any elaborate system of certificates of origin for this purpose, it would probably be desirable at least to have the power to do so in reserve, and to be able to provide that goods imported from one or more countries, other than Italy, should only be permitted to be imported if accompanied by certificates of origin showing that their origin was not Italian. Sir S. Hoare consequently desires your opinion in the third place on whether it would be within the powers of His Majesty's Government, under the Treaty of Peace Act, to enact by Order in Council provisions prohibiting the imports from certain countries of all goods of certain classes unless accompanied by certificates of origin showing that their origin was not Italian. The countries to whose exports this procedure might have to be applied would be those which were unlikely to co-operate in the measures against Italy and which might become channels for Italian trade.

⁽¹⁾ It is thought that India, as a separate member of the League, would in any case take her own measures, and it is not desired to trouble you with the legal possibility of extending a United Kingdom Order in Council under the Act of 1919 to India.

[13464]

1



1935

6. I have the honour to enclose:—

- (1) A copy of the Treaty of Peace Act, 1919.
- (2) A copy of the Opinion of your predecessors given on the 29th October, 1920, and of the papers then laid before them.
- (3) A copy of the Treaty of Versailles including the Covenant of the League of Nations.
- (4) A copy of article 16 of the Covenant, together with certain resolutions of the Assembly which have been passed in relation thereto.
- (5) An opinion given by the Legal Adviser of the Foreign Office on the operation of article 16 of the Covenant in connexion with the possible application of this article to Italy, an opinion which was before the Cabinet and which raised the question which is the subject of the present reference.

7. I am therefore to request you to be good enough to take these papers into consideration and to furnish Sir S. Hoare with your opinion as to:—

- (1) Whether you concur in the opinion of your predecessors given on the 29th October, 1920, and consider that it could be followed by His Majesty's Government at the present date;
- (2) Whether the Treaty of Peace Act, 1919, gives power to impose by Order in Council a prohibition on the import into the United Kingdom of all goods, consigned from or the produce or manufacture of Italian territory, the said measure being adopted in fulfilment or partial fulfilment of the obligations of His Majesty's Government under article 16 of the Peace Treaty;
- (3) Whether in the circumstances aforesaid the Treaty of Peace Act, 1919, gives power by Order in Council to prohibit the import into (a) British colonies, (b) protectorates and mandates administered under Foreign Jurisdiction Acts of all goods, consigned from or the produce or manufacture of Italian territory;
- (4) Whether in the circumstances and for the purposes aforesaid, the Treaty of Peace Act, 1919, gives power by Order in Council to prohibit the import into the United Kingdom (and/or the colonies and other territories, as the case may be) of all goods of certain classes coming from certain countries unless accompanied by certificates of origin or other evidence, showing they are not consigned from or the produce or manufacture of Italian territory.

8. Sir S. Hoare would be grateful for any observations of a more general character which you may feel able to offer on the matter under consideration.

I have, &c.

RONALD I. CAMPBELL.

List of Papers.

- Paper No. 1.—Treaty of Peace Act, 1919.
 Paper No. 2.—Law Officers' Opinion, October 29, 1920. (Confidential 11810, pp. 51–52.)
 Paper No. 3.—Treaty of Versailles. (Treaty Series No. 4, 1919.)
 Paper No. 4.—Article 16 of the Covenant, together with certain resolutions of the Assembly passed in relation thereto. (W 7366/1209/98/1935.)
 Paper No. 5.—Opinion by Legal Adviser of the Foreign Office regarding the interpretation of article 16 of the Covenant. (Annex A.)

Report.

1. We answer this question in the affirmative, although we are of opinion that a formidable argument might be advanced against this view. The intention of section 1 (1) of the Treaty of Peace Act, 1919, it would be said, was only to enable all such things to be done as were necessary to bring the Treaty of Peace itself into effective operation within His Majesty's dominions in the circumstances as they were at the passing of the Act. The financial clauses, for instance, required statutory sanction in order to make them operative. So far, there can be no doubt as to the effect of the Act. It is by no means so plain that the powers

conferred by the Act extended to action rendered necessary or politic as the result of provisions in the treaty becoming operative at some future date in events which might or might not happen such as a breach of the Covenant or the conclusion of a convention on labour matters under article 405. In support of this narrow construction of the Treaty of Peace Act the opening words of section 1 (1) dealing with the making of appointments and the establishing of offices might be noticed. On the other hand, the later words are very wide, and, on the whole, we have come to the conclusion that as a matter of legal construction the wider view ought to prevail and that the necessary steps for putting into force article 16 are within the powers conferred by the Act.

2. We assume that the proposed action would be taken in pursuance of a resolution by the Council or other appropriate body of the League as action in fulfilment of article 16. In that case, we are of opinion that the Treaty of Peace Act gives power to impose by Order in Council the proposed prohibition. We should have formed this opinion without the guidance afforded by the resolutions of the 4th October, 1921, and the resolutions confirm our view. It seems to us just as unreasonable to suppose that article 16 can only be made effective by taking all the measures therein prescribed against a covenant-breaking member of the League, as it would be to hold that measures which were not taken "immediately" in the literal sense could not be in fulfilment of article 16. If it was proposed to take action limited in the way suggested without the authority of any such resolution as we assume, we should feel great doubt as to whether it was covered by the words of section 1 (1) of the Act.

3.—(a) With regard to British colonies we answer this question in the affirmative. The Treaty of Peace Act from its very nature requires, in our opinion, to be read as extending to the colonies as fully as to the United Kingdom.

(b) With regard to protectorates and mandated territories it is unnecessary in our opinion to resort to the Treaty of Peace Act in order to find powers to make Orders in Council to the proposed effect, nor would the Treaty of Peace Act afford justification for such Orders in Council, if the proposed prohibition was without the powers contained in any relevant treaty or convention or mandate. If, however, the terms of any such instruments confer on His Majesty the power to regulate trade or to conduct foreign relations on behalf of the territories, His Majesty may, in our opinion, under the Foreign Jurisdiction Acts, make the appropriate Orders in Council.

4. This power may in our opinion be regarded as a necessary incident of the exercise of the power to prohibit the import of the goods which it is desired to exclude, and we answer this question in the affirmative.

5. The question whether it is proper to rely on the strict legal construction of section 1 (1) of the Treaty of Peace Act at the present time as a justification for not asking Parliament to pass special legislation authorising the proposed prohibition does not arise for our consideration. We have suggested in our answer to the first question arguments which might be used against the view we take of the Act, but even on the assumption that our view is right, it must be doubtful whether the intention of Parliament in passing the 1919 Act was as far-reaching as the language of the Act must be taken to go. The defence, therefore, of an Order in Council made without fresh Parliamentary authority, if it is attacked on that ground, may not be entirely free from difficulty.

T. W. H. INSKIP.
 D. B. SOMERVELL.

Law Officers' Department,
 September 5, 1935.



1935

ANNEX A.

(Paper No. 5.)

Interpretation of Article 16 of the Covenant of the League.

The terms of article 16 are as follows:—

"1. Should any member of the League resort to war in disregard of its Covenants under articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the Covenant-breaking State and the nationals of any other State, whether a member of the League or not.

"2. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the members of the League shall severally contribute to the armed forces to be used to protect the Covenants of the League.

"3. The members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the Covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the members of the League which are co-operating to protect the Covenants of the League.

"4. Any member of the League, which has violated any Covenant of the League, may be declared to be no longer a member of the League by a vote of the Council concurred in by the representatives of all the other members of the League represented thereon."

Article 16 has never yet been applied, and consequently there are no precedents to guide us as to what is likely to happen in practice. The subject has, however, been studied to some extent in the past by various League bodies, and the results of these studies throw a certain amount of light on the problems before the committee, though any conclusions reached must be to some extent provisional. It will be appreciated, of course, that this note is not intended to be anything in the nature of a complete commentary on article 16.

In 1921 the Assembly adopted certain resolutions relating to article 16, which were intended to become amendments to the article; as such they have never come into force owing to the lack of the requisite number of ratifications. Of these resolutions, the most material for present purposes are as follows:—

"The second paragraph of article 16 shall read as follows:—

"It is for the Council to give an opinion whether or not a breach of the Covenant has taken place. In deliberations on this question in the Council, the votes of members of the League alleged to have resorted to war and of members against whom such action was directed shall not be counted."

"The third paragraph of article 16 shall read as follows:—

"The Council will notify to all members of the League the date which it recommends for the application of the economic pressure under this article."

"The fourth paragraph of article 16 shall read as follows:—

"Nevertheless, the Council may, in the case of particular members, postpone the coming into force of any of these measures for a specified period where it is satisfied that such a postponement will facilitate the attainment of the object of the measures referred to in the preceding paragraph, or that it is necessary in order to minimise the loss and inconvenience which will be caused to such members."

The Assembly at the same time adopted a set of resolutions dealing with the application of article 16. The most important of these for present purposes are as follows: it will be seen that the first deals with the position both of the resolutions themselves and of the proposed amendments to article 16 so long as the latter had not come into force:—

"The Assembly adopts the following resolutions:—

"1. The resolutions and the proposals for amendments to article 16 which have been adopted by the Assembly shall, so long as the amendments have not been put in force in the form required by the Covenant, constitute rules for guidance which the Assembly recommends, as a provisional measure, to the Council and to the members of the League in connexion with the application of article 16.

"2.

"3. The unilateral action of the defaulting State cannot create a state of war: it merely entitles the other members of the League to resort to acts of war or to declare themselves in a state of war with the Covenant-breaking State; but it is in accordance with the spirit of the Covenant that the League of Nations should attempt, at least at the outset, to avoid war, and to restore peace by economic pressure.

"4. It is the duty of each member of the League to decide for itself whether a breach of the Covenant has been committed. The fulfilment of their duties under article 16 is required from members of the League by the express terms of the Covenant, and they cannot neglect them without breach of their treaty obligations.

"5. All cases of breach of Covenant under article 16 shall be referred to the Council as a matter of urgency at the request of any member of the League. Further, if a breach of Covenant be committed, or if there arise a danger of such breach being committed, the Secretary-General shall at once give notice thereof to all the members of the Council. Upon receipt of such a request by a member of the League, or of such a notice by the Secretary-General, the Council will meet as soon as possible. The Council shall summon representatives of the parties to the conflict and of all States which are neighbours of the defaulting States, or which normally maintain close economic relations with it, or whose co-operation would be especially valuable for the application of article 16.

"6. If the Council is of opinion that a State has been guilty of a breach of the Covenant, the minutes of the meeting at which that opinion is arrived at shall be immediately sent to all members of the League, accompanied by a statement of reasons and by an invitation to take action accordingly. The fullest publicity shall be given to this decision.

"7.

"8. The Council shall recommend the date on which the enforcement of economic pressure, under article 16, is to be begun, and shall give notice of that date to all the members of the League.

"9. All States must be treated alike as regards the application of the measures of economic pressure, with the following reservations:—

"(a) It may be necessary to recommend the execution of special measures by certain States.

"(b) If it is thought desirable to postpone, wholly or partially, in the case of certain States, the effective application of the economic sanctions laid down in article 16, such postponement shall not be permitted, except in so far as it is desirable for the success of the common plan of action, or reduces to a minimum the losses and embarrassments which may be entailed in the case of certain members of the League by the application of the sanctions.

"10.

"11.

"12.

"13.



"14. In cases of prolonged application of economic pressure, measures of increasing stringency may be taken. The cutting-off of the food supplies of the civil population of the defaulting State shall be regarded as an extremely drastic measure, which shall only be applied if the other measures available are clearly inadequate.

"15.

"16.

"17.

"18. In special circumstances and in support of economic measures to be taken, it may become advisable: (a) To establish an effective blockade of the seaboard of the Covenant-breaking State; (b) to entrust to some members of the League the execution of the blockade operations."

The precise legal position of these resolutions is perhaps somewhat uncertain. But in so far as they are not inconsistent with the terms of article 16 as it stands (and they are so only to a limited extent), there seems no reason to suppose that they would not be treated in accordance with Resolution No. 1, as rules for guidance recommended to the Council and to the members of the League. The Council intimated in 1922 that it would "s'inspirer des recommandations de l'Assemblée."

It is accordingly contemplated that the Council should give an opinion as to whether a breach of the Covenant has taken place which brings article 16 into application. In view of the fact that the unratified amendment of 1921 provides expressly for excluding the votes of the parties to the dispute, it would seem (though the contrary is arguable) that the adverse vote of the State alleged to have violated the Covenant would prevent the Council from adopting a resolution stating that in its opinion such a breach of the Covenant had taken place. But a resolution adopted by all the members of the Council except the guilty State would have, from the point of view of its effect upon the members of the League, practically the same result as a resolution which had been formally adopted by unanimity.

In any case, what the Council gives is only an opinion, and it is for each member of the League to decide for itself whether article 16 has become applicable. Consequently, a resolution by the Council is not essential in order that article 16 should be applied. If a member of the League is satisfied that the article has become applicable, it is entitled to act accordingly, even though the Council has given no opinion on the point.⁽¹⁾ But the result of the discussions before the Council would naturally have a considerable effect upon the opinions of members of the League, and in the case now before the committee, it seems unlikely that any action would be taken under article 16, except in consequence of a recommendation by the Council. For this purpose unanimity on the Council, apart from the vote of the State concerned, would, as indicated above, probably suffice in practice; while the difficulty might, of course, have been solved by the previous withdrawal from the Council of the State concerned, or (if it were not a member of the Council) by its refusing to accept an invitation to sit under article 4 (5).

Should article 16 have become applicable, the obligation on the members of the League is to take the economic and financial measures mentioned in paragraph 1. There is no obligation to resort to warlike measures. According to resolution No. 3, the act of the defaulting State does not automatically create a state of war between itself and the other members of the League, but it entitles those members to "resort to acts of war or to declare themselves in a state of war" with it. It is, moreover, contemplated that, in the first instance at any rate, an attempt should be made to restore peace by economic pressure. It was also contemplated that the application of such pressure might be gradual, and might, in the case of certain members of the League, be postponed wholly or partially. Moreover, the application of such pressure may be hampered by the necessity of respecting the rights of States who are not members of the League.

The action in this respect of the members of the League may be described as being in the nature of a prohibition of "trading with the enemy"; the members of the League would take the necessary steps to prevent persons subject to their jurisdiction from financial or commercial intercourse with the defaulting

⁽¹⁾ This point would be particularly important if the Council had been prevented from giving an opinion by the vote of the delinquent State.

State. These steps would be taken by means of their own domestic legislation.⁽²⁾ The question of what effect could be given in existing circumstances to the undertaking to prevent intercourse "between the nationals of the Covenant-breaking State and the nationals of any other State, whether a member of the League or not," is obscure; but it is not likely to be interpreted as involving any obligation to take measures, such as the imposition of a blockade, which could not be taken within the jurisdiction of the members of the League. The original idea of the article was, no doubt, that the League would, in time, become universal, and consequently measures taken by the members within their own jurisdiction would be effective to produce the desired result, though the possibility of more forcible measures becoming necessary was not excluded.

But in existing circumstances the situation of States which are not members of the League and have no obligations under article 16 has to be taken into serious account. In so far as such States were prepared to co-operate in the measures taken by the League, their position would be, in practice, the same as that of the members. But in the case of States who refused to co-operate, the mere application of the economic and financial measures contemplated would not enable the members of the League to prevent trade, &c., between those States and the Covenant-breaking State, except in so far as action could effectively be taken within the jurisdiction of members of the League.

The measures so far contemplated could be taken without the members of the League making use of their right to declare themselves in a state of war with the delinquent State, though, as was once pointed out in a report by the Secretary-General, that the State might make those measures the occasion of a recourse to war against the States which applied them.

Article 16, however, also contemplates the possibility of war-like action being taken against the delinquent State. Under paragraph 2, the Council can recommend to the Governments concerned what forces they should "contribute to the armed forces to be used to protect the covenants of the League." Moreover, any member of the League may, even if no such recommendation has been made by the Council, make use of its right to go to war with a Covenant-breaking State.

In this connexion it should be pointed out that the 1921 resolutions contemplated the advisability of blockading the sea-board of the Covenant-breaking State and entrusting the execution of the blockade to certain members of the League. It is possible that what was contemplated was the imposition of a blockade in consequence of a decision of the Council and without the States who conducted it necessarily declaring themselves to be in a state of war with the delinquent State. This situation might be possible as regards the application of the blockade measures to the ships of the members of the League (or at any rate those who agreed that article 16 was applicable), since in the circumstances the members of the League could not object to the blockade being enforced against their own shipping, even though the blockading State did not formally possess belligerent rights. But as regards ships of non-members of the League (failing acquiescence on their part in the measures executed by the League), it does not appear that a blockade could be enforced unless the blockading Powers were at war with the delinquent State, and therefore possessed belligerent rights.⁽³⁾ The same observation would apply to other measures at sea, such as the interception of vessels carrying goods regarded as contraband. If the measures contemplated went beyond the mere turning back of vessels proceeding to or from the blockaded area or carrying contraband, &c., and it were proposed that such vessels should be captured and treated as prize, it would seem that it would be necessary for the country conducting these operations to declare itself to be in a state of war, since otherwise it would not seem possible to set up prize courts and to institute the necessary proceedings therein against the ships concerned. Moreover, the actual operations of blockade might well lead to hostilities with the navy of the blockaded country, and thus produce a state of war.

⁽²⁾ In this connexion the question arises whether an Act of Parliament would be required to confer the necessary powers upon His Majesty's Government. The Law Officers advised in 1920 that any prohibition of trade and financial relations and intercourse which may be necessary to give effect to article 16 could be imposed by Order in Council under the Treaty of Peace Act, 1919; but the question whether at the present date this course of action, even though legally possible, would be a satisfactory method of dealing with the situation may well require consideration.

⁽³⁾ The question whether a so-called "pacific blockade" can be enforced against ships other than those of the blockaded State is extremely doubtful.



1935

60

GENERAL

As regards action against the shipping of the delinquent State itself, if it were possible to enforce a blockade of its coasts against the shipping of other nations without the blockading Power possessing belligerent rights, it would seem equally possible to enforce the blockade against the shipping of the delinquent State itself without those rights being necessary. For the reasons given in the preceding paragraph, however, this situation appears to be unlikely. Apart from this, operations at sea against enemy shipping are essentially a form of military action, and, although the delinquent State would hardly be in a position to claim that such action was illegitimate because the States concerned did not possess belligerent rights, it is difficult to see how in practice such operations could be carried on without the States concerned declaring themselves to be in a state of war against the Covenant-breaking country. Moreover, in the case of a country which possesses a navy, operations of this nature seem almost bound in practice to lead to actual hostilities.

The conclusions which seem to result from the above considerations are as follows:—

- (1) The economic and financial measures contemplated in the first paragraph of article 16 do not involve the use of belligerent rights; they could (subject to any question as to the rights of non-members of the League) be applied by steps taken within our own jurisdiction, and would not necessarily involve our declaring ourselves to be in a state of war.
- (2) If it became necessary to take action at sea to prevent commercial intercourse between the delinquent State and non-members of the League who declined to co-operate or acquiesce in the economic and financial measures taken, this could not be done without the possession of belligerent rights, which would involve our declaring ourselves to be in a state of war with the delinquent State.
- (3) Action against shipping of the delinquent State, though perhaps theoretically possible without our declaring ourselves to be at war, would, if the State concerned possessed a navy, almost inevitably lead to hostilities at sea, and thus involve us in a state of war.

H. W. MALKIN.

July 1935.

61

GUATEMALA

[A 9105/430/8/1935]

No. 4.

[October 28, 1935]

Foreign Office to Law Officers of the Crown.

Gentlemen,

Foreign Office, September 20, 1935.

I HAVE the honour, by direction of Secretary Sir Samuel Hoare, to transmit the accompanying papers and to request your opinion on certain matters arising out of the Anglo-Guatemalan Convention of 1859, relative to the boundary between Guatemala and British Honduras. A copy of the Convention will be found in the attached volume of correspondence (Paper A. No. 2). The matters in question have already formed the subject of reference to your predecessors in office in 1884 (see below, paragraph 9), but your opinion is being sought in view of further developments in the situation since that date, and of the possibility that the question of a reference to arbitration may arise.

2. The provisions of the Convention immediately relevant in the present connexion are the preamble and articles I, II and VII, which read as follows:—

“Whereas the boundary between Her Britannic Majesty's Settlement and Possessions in the Bay of Honduras, and the territories of the Republic of Guatemala, has not yet been ascertained and marked out; Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and the Republic of Guatemala, being desirous, with a view to improve and perpetuate the friendly relations which happily subsist between the two countries, to define the boundary aforesaid have resolved to conclude a convention for that purpose,

Guatemala-British Honduras boundary: extent to which boundary set up by Anglo-Guatemalan Convention of 1859 depends on fulfilment of article VII; obligations of His Majesty's Government under that article.

“ARTICLE I.

“It is agreed between Her Britannic Majesty and the Republic of Guatemala that the boundary between the Republic and the British Settlement and Possessions in the Bay of Honduras, as they existed previous to and on the 1st day of January, 1850, and have continued to exist up to the present time, was and is as follows:—

“Beginning at the mouth of the River Sarstoon in the Bay of Honduras, and proceeding up the mid-channel thereof to Gracias á Dios Falls; then turning to the right and continuing by a line drawn direct from Gracias á Dios Falls to Garbutt's Falls on the River Belize, and from Garbutt's Falls due north until it strikes the Mexican frontier.

“It is agreed and declared between the high contracting parties that all the territory to the north and east of the line of boundary above described belongs to Her Britannic Majesty, and that all the territory to the south and west of the same belongs to the Republic of Guatemala.

“ARTICLE II.

“Her Britannic Majesty and the Republic of Guatemala shall, within twelve months after the exchange of the ratifications of the present Convention, appoint each a commissioner for the purpose of designating and marking out the boundary described in the preceding article. Such commissioners shall ascertain the latitude and longitude of Gracias á Dios Falls and of Garbutt's Falls, and shall cause the line of boundary between Garbutt's Falls and the Mexican territory to be opened and marked where necessary as a protection against future trespass.

[13464]

K



1935

"ARTICLE VII.

"With the object of practically carrying out the views set forth in the preamble of the present Convention, for improving and perpetuating the friendly relations which at present so happily exist between the two high contracting parties, they mutually agree conjointly to use their best efforts, by taking adequate means for establishing the easiest communication (either by means of a cart-road, or employing the rivers, or both united, according to the opinion of the surveying engineers) between the fittest place on the Atlantic Coast, near the settlement of Belize,⁽¹⁾ and the capital of Guatemala, whereby the commerce of England on the one hand, and the material prosperity of the republic on the other, cannot fail to be sensibly increased, at the same time that the limits of the two countries being now clearly defined, all further encroachments by either party on the territory of the other will be effectually checked and prevented for the future."

A map is attached (Paper B) to facilitate understanding of the above provisions.

3. The principal questions on which your opinion is desired are (1) how far, if at all, the establishment of the boundary set up by the Convention was and is dependent on the due fulfilment of the provisions of article VII, which, it will be observed, is the only substantive article of the Convention not concerned with establishing the boundary; and (2) what, if any, are the present obligations of His Majesty's Government under article VII.

4. As regards the latter question, it may be noted at once that no road or waterway of the kind contemplated by article VII has, in fact, ever been constructed (or "established," in the words of the Convention), at any rate, not in pursuance of the provisions of the article. In 1908 a railway was opened between Guatemala City and Puerto Barrios on the Atlantic coast of Guatemala which, while it appears, in fact, to have achieved, so far as Guatemala is concerned, the purposes of article VII, was constructed on the sole initiative and responsibility of the Guatemalan Government, without previous consultation with His Majesty's Government and not (in the view of the latter) in pursuance of or in accordance with the terms of the article. The Guatemalan Government contend that, owing to the default of His Majesty's Government, article VII has never been implemented and that something is due in fulfilment thereof. The proposals which have been made on both sides for the purpose of carrying out the article will be mentioned in due course. It should be added, though this is a matter which is more conveniently discussed later, that the Guatemalan Government contend that the boundary as defined in the Convention of 1859 resulted in a cession of certain territory to the British Crown (though no express mention of this was made in the Convention), and that the real object of article VII (again not actually expressed) was to afford to Guatemala a compensation for this cession.

5. As regards the boundary, it will be observed that the Convention, while establishing the terminal and key points, left the major portion of the actual line to be demarcated by joint commissioners. The present position is that the Guatemalan Government have refused to agree to any final settlement of a large part of the boundary, and argue that they are under no obligation to do so until His Majesty's Government have fulfilled their alleged obligations in respect of article VII. They have refused to accept the contention of His Majesty's Government that the final establishment of the boundary ought not to be held up pending the settlement of the question of article VII.

6. Before considering the merits of the arguments on either side it will be necessary to trace briefly the history of the boundary question, and also of the action taken in regard to article VII. It will be convenient to begin with the boundary. It will be observed in the Convention of 1859 that the southern boundary of British Honduras with Guatemala is defined by article I as being, and as having at all material times been, the mid-channel of the Sarstoon River

⁽¹⁾ British Honduras was, at the time, known as the settlement of Belize, and the use of this term in article VII of the Convention did not denote simply the town of Belize, the capital of British Honduras. It would appear therefore that the contemplated road or waterway was to be wholly within Guatemalan territory, between the capital, Guatemala City and some point situated on the Atlantic coast of Guatemala, but close to the border of British Honduras (see map, Paper B).

from its mouth up to a point known as Gracias á Dios Falls, that is, a definitely ascertained line; but that the western boundary, on the other hand, is simply indicated as the line lying between Gracias á Dios Falls on the Sarstoon River and Garbutt's Falls on the River Belize, and thence due northwards to the Mexican border (see map, Paper B). The actual demarcation of this western boundary on the ground was, however, left to commissioners to be appointed in pursuance of other articles of the Convention. It is in connexion with the demarcation of this western boundary that the present questions have arisen. Commissioners on both sides were duly appointed shortly after the entry into force of the Convention, and the terminal points at Gracias á Dios and Garbutt's Falls⁽²⁾ were fixed and roughly marked with piles of stones. A start was also made with the survey of the line between these points. This survey was, however, presently discontinued, mainly, it appears, at the instance of the authorities of British Honduras, for reasons which are not clear. Subsequent attempts to resume the joint survey proved abortive. Many years later, in 1929, commissioners appointed by both parties again met, and concrete monuments were set up definitely marking the points at Gracias á Dios and Garbutt's Falls, and these points were accepted in an exchange of notes with the Guatemalan Government of August 1931 (Paper C). The actual line still remained undemarcated, however, and efforts to induce the Guatemalan Government to proceed to joint demarcation proved unavailing. In view of the inconvenience of an undemarcated frontier and of the possibility of Guatemala acquiring prescriptive rights by encroachment, it was decided in 1932 to inform the Guatemalan Government that the authorities of British Honduras must reluctantly proceed to unilateral demarcation. On being so informed, the Guatemalan Government replied that their engineers were engaged on work elsewhere, but that, if British engineers demarcated the line, the Guatemalan engineers would examine it as soon as possible, and if it was found to be satisfactory, Guatemala would accept the boundary thus established. The work of demarcation was accordingly proceeded with by the authorities of British Honduras and has now been completed. In the meantime, the Guatemalan Government in 1933 raised the question of article VII for the first time since the period 1859-1900 (the history of this latter question is given below), and, pending a settlement in regard to it, have refused either to agree to the plans of the now demarcated line or to enter into an exchange of notes proposed to them for the purpose of recording the final acceptance of the line by both parties.⁽³⁾ In addition, the Guatemalan Government have adopted an obstructionist attitude over a number of other, quite unconnected, questions, and apparently intend to subordinate their entire relations with this country to a satisfactory settlement in regard to article VII. A memorandum is attached (Paper D) setting out the history of the boundary question in greater detail.

7. It has been observed that until raised in 1933, in terms to be described, the question of article VII had not been mentioned by the Guatemalan Government since the end of the last century. It appears that immediately on the conclusion of the Convention of 1859, a British engineer was sent out to enquire into the question of constructing a road or waterway in pursuance of article VII. As a result of his investigations, a draft convention was drawn up and submitted to the Guatemalan Government, in which it was proposed on the British side to apply to Parliament for a grant of £50,000, and that this sum, if granted, should be paid to Guatemala in full discharge of British obligations under article VII of the Convention of 1859. In 1863 a supplementary convention on these lines was signed with the Guatemalan Government, but not ratified. A copy of this convention will be found in the attached volume of correspondence (Paper A, No. 6). The preamble contains a full statement of the circumstances leading to the signature. Briefly, the position was that the cost of the road, if constructed jointly by both parties, was estimated at nearly £150,000. This was felt to be more than had been contemplated under the Convention of 1859. On the other

⁽²⁾ For reasons which need not be entered into here, the terminal point on the Mexican border was not marked, and the subsequent history of the boundary northwards from Garbutt's Falls to the Mexican border is not material in the present connexion.

⁽³⁾ The plans were communicated to the Guatemalan Government with a statement that their signature by the Guatemalan boundary commissioners would not involve a formal acceptance of the boundary as demarcated in the plans, which would be reserved for the proposed exchange of notes.



hand, it was considered that if the work was carried out by Guatemala alone, it could be done more cheaply,^(*) and in that event that the obligations on the British side could be discharged by a payment of £50,000.

8. The supplementary convention was signed, but subject to ratification within six months, and it was not, in fact, ratified. It appears that on the British side ratification would have been effected, but that the Guatemalan Government were not then prepared to ratify. Subsequent to the expiry of the period of six months the latter asked for an extension of time. This was refused. The Guatemalan Government, who had decided too late that they wished to ratify, then (1866-69) suggested the signature of a fresh agreement in the same terms. This suggestion was rejected. The correspondence is attached (Paper A). It will be seen that at first (note of Lord Stanley to Sr. de Francisco Martin of the 29th August, 1866—No. 11 in Paper A), Her late Majesty's then Government took the view that article VII of the 1859 Convention was still in force, notwithstanding the failure of the Guatemalan Government to ratify the agreement signed in 1863, but that it was for the latter to suggest means "for the work being undertaken in an economical manner, for an equal share of the expense being borne by Guatemala, and for the commercial result being such as to justify the large outlay which . . . must be necessary." Later, however, the view was taken on the British side that the Guatemalan failure to ratify the agreement signed in 1863 altogether released Her Majesty's Government from their obligations under article VII. The British contention (see correspondence in Paper A) was that by sending out an engineer to make a survey and estimate costs, and by signing the agreement of 1863 and being ready to ratify the same and to ask Parliament for a grant of £50,000, Her Majesty's Government had, in the words of article VII of the 1859 Convention, "used their best efforts, by taking adequate means, &c.," in order to accomplish the objects in view. The Guatemalan Government, on the other hand, considered that as the agreement signed in 1863, which was intended to define the manner in which article VII of the 1859 Convention was to be carried out, had never come into force, article VII still stood, and that it remained undischarged. In this connexion they stated their view that the real intention of article VII had been solely to afford Guatemala compensation for an alleged cession of territory resulting from article I, and that anything in the wording of article VII which might appear inconsistent with this view was to be explained on grounds of "decorum." This view was uncompromisingly rejected by Her Majesty's Government for the reasons indicated in the notes from Lord Stanley and the Earl of Clarendon to the Guatemalan Minister in London, dated respectively the 3rd January, 1867 (No. 12 in Paper A), and the 15th November, 1869 (No. 13 in Paper A). But it would appear that there were other reasons, not disclosed; this question is discussed below (paragraph 20). Further desultory correspondence took place until, in 1884, the Guatemalan Minister in London sent in a note (No. 14 in Paper A), the effect of which appears to have been that the Guatemalan Government considered that the Convention of 1859 stood or fell as a whole, that the territorial articles were only part of a wider settlement which included article VII, and that, failing satisfaction of the latter, they could not recognise validity of the boundary definition.

9. As a result of the Guatemalan note of 1884 the matter was submitted in that year to the Law Officers of the Crown, who were asked to advise whether the territorial articles of the Convention of 1859 were invalidated by the non-fulfilment of article VII, and whether in the event of a parliamentary vote for the purpose of carrying out article VII being applied for and refused, this country would be released from all obligations under that article without prejudice to the other provisions of the Convention. The Law Officers gave two opinions (Nos. 15 and 16 in Paper A), the second arising out of an enquiry suggested in the first. In the first opinion the Law Officers advised that the territorial articles of the Convention were not invalidated by the non-fulfilment of article VII, the latter being an independent stipulation and the former articles explicit in their terms and unconditional; but that it would be open to the Guatemalan Government to refuse to observe the territorial articles by way of retaliation for a breach of article VII, if a breach had occurred and assuming the obligation created by the article to be still in force. On the second question

(*) Presumably because cheaper labour and materials were available on the Guatemalan side.

put to them the Law Officers in their first opinion advised that article VII only imposed on Her Majesty's Government the obligation to "use their best efforts," and that if they proposed and used all due efforts to carry a vote of money in Parliament this obligation would be discharged. In their second opinion the Law Officers dealt with the Guatemalan contention that article VII was intended as compensation for a cession of territory by Guatemala. As to this, they advised that there was little doubt that previous to the Convention of 1859 Guatemala claimed territory in British occupation, that but for some inducement Guatemala would not have consented to article I of the Convention, and that article VII "was, in fact, the fine paid to secure the consent of Guatemala." As to the British obligations under article VII, the Law Officers in their second opinion advised that there was "a moral obligation, if not something more, to take some steps to give effect to article VII of the Convention of 1859," but that "in measuring the extent of this obligation, the changed circumstances and the increased difficulties, due to the delay which has taken place, and which are the fruits of the non-ratification of the treaty of 1863, may well be taken into consideration."

10. In consequence of these opinions the question of asking Parliament for a grant of £50,000 was again considered, and, in putting the matter up to the Cabinet in 1885 the views of the Lord Chancellor were requested. They were as follows:—

"I agree with the view expressed in the report of the Law Officers of the 25th November, 1884, that there is a moral obligation, if not something more, to take steps to give some effect to article VII of the treaty of 1859.

"I cannot think that it is a sound view that Her Majesty's Government, by incurring expense for a preliminary survey, and signing and being ready to ratify the Convention of 1863, have used their best efforts by taking adequate means for establishing the easiest communication between the fittest place on the Atlantic coast and the capital of Guatemala.

"The delay which has taken place and the changed circumstances may no doubt require a modification of the original scheme; but as there seems to be no doubt that the recognition of British rights to certain disputed territory in article I of the treaty of 1859 was obtained in consideration of the understanding contained in article VII, it would appear to be only right that some substantial effect should be given to that article."

11. No further steps appear to have been taken, however, though in 1895 Mr. Gosling, Her Majesty's Minister at Guatemala, on leave in Europe, was instructed to sound the Guatemalan Minister in Paris unofficially as to whether his Government would consider the payment of a sum of £50,000 by Her Majesty's Government towards the construction of a railway from Belize to the frontier of the Province of Peten, as a discharge of Her Majesty's Government's moral obligations under article VII of the Convention of 1859, *i.e.*, not within Guatemalan territory (see footnote to paragraph 2 above), but from Belize across British Honduras to the Guatemala boundary (see map, Paper B). The Guatemalan Government, however, refused to accept this arrangement; but on returning to his post Mr. Gosling elicited a proposal from the President of the Republic to leave on one side the question of the £50,000, and to arrange to give a concession to a private company to construct a railway from Belize into Peten, on businesslike terms. The Colonial Office wished certain modifications to be made in these proposals, but the negotiations lapsed. The idea was taken up again in 1898 when the Colonial Office recommended, in the interests of British Honduras, that a subsidy should be granted towards the construction of the line. Careful consideration was given to the scheme, and complete surveys were made of the route, but it was clear that the Government of British Honduras were not in a position to construct it. It was, therefore, proposed to arrange with some private company for its construction and maintenance in consideration of certain subsidies and grants of land from the two countries. For this, however, it was necessary that Her Majesty's Government should give assistance, and it was proposed that the Treasury should be approached with a view to obtaining 50,000 as a loan to the Government of British Honduras, and to paying



1935

over that sum as a subsidy for the intended railway. But the Treasury declined to sanction the proposal on the grounds—

- (1) That by lapse of time and change of circumstances article VII of the Convention had become obsolete;
- (2) That in 1892 a line of railway was begun connecting the capital of Guatemala with San José on the Pacific and Livingston^(*) on the Atlantic and its completion had done, or would do, for Guatemala all that was aimed at in article VII and much besides;
- (3) That the republic thus lost the motive that might impel her to fulfil her own share of the obligation of 1859, and could have no right to require this country to contribute to an entirely different undertaking which would neither be a joint enterprise of the two Governments such as was contemplated by the Convention, nor promote the trade of Guatemala with the Atlantic coast;
- (4) That British Honduras interests would not be benefited to the extent predicted.

After this, the question of an Imperial grant was not further pressed on the Treasury, and although the matter continued up to about 1901 to be the subject of further desultory conversations, both with private contractors and, unofficially, with the Guatemalan Government, nothing came of it.

12. Nothing further about article VII was said on either side until, as already mentioned (paragraph 6 above), the Guatemalan Government raised it early in 1933, with an enquiry as to whether His Majesty's Government were prepared to fulfil their obligations under article VII. In reply, the Guatemalan Government were informed that the matter would be carefully examined, but that His Majesty's Government presumed that it was not the intention of the Guatemalan Government to defer the final recognition of the boundary on this score; and that His Majesty's Government must insist on the prompt conclusion of the necessary arrangements for demarcation "without regard, although equally without prejudice to the question of article VII." In a further note it was stated that—

"His Majesty's Government, in their desire to comply with the wishes of the Guatemalan Government, are prepared to give most careful study to any practical proposals which the latter may put forward for the execution of the bilateral stipulations contained in article VII of the Convention of the 30th April, 1859, notwithstanding that in the view of His Majesty's Government subsequent developments, such as the construction of a railway from Guatemala City to the Atlantic Coast of the Republic, have fulfilled for many years past the needs which article VII was intended to satisfy, and thus have rendered its stipulations inapplicable to present conditions. The means of communication contemplated by article VII would have to benefit both the Colony of British Honduras and the Republic of Guatemala; would have to be economically sound, and would have to be constructed at the joint expense of both parties.

"In thus giving proof of their anxiety to meet the wishes of the Guatemalan Government, His Majesty's Government confidently anticipate that your Excellency's Government, animated by similar friendly feelings, will proceed forthwith, without awaiting the outcome of the investigation referred to in the preceding paragraph of this note, to an exchange of notes to enable the demarcation of the frontier between the Colony of British Honduras and the Republic of Guatemala to be carried out without further delay."

In reply, the Guatemalan Government made it clear that the final recognition of the boundary would be made dependent on satisfaction over article VII, and that, in their view, such satisfaction ought to take the form of an equitable and proportionate contribution by His Majesty's Government towards the cost of the railway from Guatemala City to Puerto Barrios; and they referred by implication to the Guatemalan contention that article VII had been intended to afford

(*) The line appears in fact to have been taken to Puerto Barrios, not Livingston (see paragraph 4 above).

Guatemala compensation for a cession of territory. The relevant parts of the Guatemalan note read as follows:—

"You explain that the construction of the railway from the City of Guatemala to the Atlantic coast has fulfilled the requirements which article VII of the Convention of 1859 was called upon to satisfy, and you consider, therefore, that at the present time its stipulations are inapplicable. You state in continuation that [under those stipulations] the method of communication should reciprocally benefit Guatemala and British Honduras, and the costs of construction should be divided between both countries.

"The railway, constructed exclusively by the Government of Guatemala, did, in point of fact, satisfy the pressing and immediate need for communication between the City of Guatemala and the northern coast; but that construction was carried out by the unilateral efforts and sacrifices of the Guatemalan people without the co-operation which was due from His Majesty's Government as provided for in article VII of the Convention of 1859.

"The activity of the Government of Guatemala and the abstention of His Majesty's Government with regard to the construction of the railway cannot be considered as a cancellation of the mutual obligations of the contracting parties, but, on the contrary, makes evident the right of Guatemala to request from the Government of His Majesty the reimbursement of the portion of the cost for which they are liable to respond.

"His Majesty's Government are well aware of the antecedents and reasons which determined the incorporation of article VII in the text of the Convention; and, therefore, the Government of Guatemala believe that the best practical proposal which they can suggest for the fulfilment of the bilateral stipulations contained in article VII of the Convention of 1859, would be the proportionate and equitable co-operation of His Majesty's Government in the costs of the railway which Guatemala constructed alone, as it was not able at that time to count upon the quota which His Majesty's Government was liable to defray.

"You urgently request a prompt reply for the acceptance of an exchange of notes as a proof of mutual consent for the demarcation of the frontier, and I must point out that my Government are anxious to give such favourable answer, provided that, on the part of His Majesty's Government, the express statement is made that they are ready to fulfil, for their part, the obligation which lies upon them under article VII of the Convention of the 30th April, 1859."

The reply of His Majesty's Government to this note was to the following effect:—

"His Majesty's Government have given most careful and sympathetic consideration to the contention advanced by the Guatemalan Government that His Majesty's Government in the United Kingdom should, in fulfilment of their obligations under article VII of the Boundary Convention of 1859, contribute proportionately and equitably to the cost of construction of the existing railway from Guatemala City to the Atlantic coast.

"Whilst anxious to respect such obligations as may rest upon them, their examination of these obligations has led His Majesty's Government, to their regret, to the conclusion that they cannot accept this contention of the Guatemalan Government. Article VII of the Convention of 1859 provides that the high contracting parties shall mutually agree *conjointly* to use their 'best efforts, by taking adequate means for establishing the easiest communication,' and it is clear that only a means of communication established in pursuance of consultation and consequent mutual agreement between the two parties would fulfil the stipulations of the article. The existing railway, on the other hand, was constructed under the sole responsibility of the Guatemalan Government, and without any prior consultation or agreement with His Majesty's Government. Moreover, the means of communication contemplated by the article was 'either by means of a cart-road or employing the rivers, or both united,' and it does not appear to His Majesty's Government that a railway could be held to fall within the terms of the article, unless His Majesty's Government were willing to depart from the exact words of the treaty and accept a railway instead of a



1935

road. For these reasons His Majesty's Government do not feel that any obligation can be held to rest upon them to make any contribution towards the cost of construction of the existing railway, more particularly as it does not appear to them that it can be deemed to be specifically beneficial to the 'commerce of England' as contemplated by article VII of the Convention.

"His Majesty's Government, although unable for the reasons stated to accept the proposal of a contribution to the cost of constructing the existing railway, still remain ready to give the most careful study to any practical scheme which the Guatemalan Government may be able to devise, which would fulfil the conditions stipulated in article VII of the Convention."

The relevant parts of the Guatemalan rejoinder were as follows:—

"The Government of Guatemala entertain the most constant desire to co-operate with His Majesty's Government in the maintenance and development of the most cordial relations between both Governments, and it has been their constant preoccupation to reach a reciprocally convenient solution which may definitely put an end to the discussions which have continued since 1863, owing to the non-ratification by the British Government of the Wyke-Martin Convention of the 5th August of that year, and owing to the fact that article VII of the 1859 Convention, which was essentially compensatory, has remained unfulfilled. There is no doubt what was the reason for the inclusion of article VII in the Convention and what was the object of the said article. Guatemala recognised, in perpetuity, as the definite frontier between their territory and that of the Colony of British Honduras, the Sarstoon River in place of the Sibún River, which previously had been the boundary according to the Convention of London of the 14th July, 1786, thereby renouncing a considerable part of territory which until then they considered as theirs. In exchange, the text of article VII was stipulated, which previously did not appear in the draft of the treaty, as it was considered that thus a compensation was obtained for their goodwill in accepting the frontier claimed by the British Government, who expressly approved the said complementary article, and manifested their pleasure through the British consul, Mr. William Hall.

"You invoke article VII to remind the Government of Guatemala of the text of the said article, in the following words: 'they mutually agree conjointly to use their best efforts by taking adequate means for establishing the easiest communication,' referring to a cart-road or to the employment of rivers or both united. With this quotation from article VII, His Majesty's Government consider that they have proved that they have no obligation to compensate the Government of Guatemala equitably for the part of the cost of the railway which they constructed at their own expense, since the stipulated obligation referred to a cart-road and not to a railway.

"I must remind you that it was not this Ministry, but yourself, in the name of your Government, who alluded to the railway in the following terms in your communication of the 7th April last.

"His Majesty's Government being desirous of satisfying the aspirations of the Government of Guatemala, are prepared to study carefully any practical proposal destined to carry out the bilateral stipulations contained in article VII of the Convention of the 30th April, 1859, although His Majesty's Government consider that, owing to subsequent events such as the construction of a railway from the city of Guatemala to the Atlantic coast of the republic, the necessity which article VII was called upon to satisfy, has been fulfilled for many years past, and, therefore, its stipulations are rendered inapplicable to existing conditions.

"You will perfectly understand that the construction of a commercial means of communication, such as that of the railway, was absolutely necessary for the Republic of Guatemala, and that, if on this occasion, they did not obtain British co-operation, it was because they had already exhausted their efforts that the Convention of 1859 should receive due fulfilment in so far as article VII was concerned, without having obtained any satisfactory result. It appears obvious that if Guatemala constructed a railway in place of the road which both Governments ought to have constructed seventy years ago, the proportional part of the cost of the road should be paid to them to be applied to the cost of the railway.

"It is regrettable that the existing railway does not appear satisfactory to His Majesty's Government as a commercial route, and that they should have preferred a road for carts and other similar vehicles; but, even in that case, Guatemala would be agreeable to the construction of such a road between a point near the colony of British Honduras and the capital of the republic, provided that His Majesty's Government were to agree to it; and even so, if there were objection on the part of the British Government, the republic would be ready to accept any other just compensation.

"If His Majesty's Government should not desire to construct the part of the road for which they are liable in the opinion of the Government of Guatemala, this Government would be prepared to effect the work alone provided that His Majesty's Government defray the sums corresponding to the section which they themselves would have had to construct.

"In any event, my Government would be ready to agree to any other arrangement which might be substituted for that agreed upon in article VII of the Convention of 1859 in order that the said Convention may be faithfully complied with by both contracting parties."

A further note was then sent by His Majesty's Government to the following effect:—

"In the first place, His Majesty's Government in the United Kingdom cannot pass over in silence the implication that it was through their failure to ratify the Wyke-Martin Convention of the 5th August, 1863, that this instrument did not enter into force. The Guatemalan Government must surely be well aware that His Majesty's Government were ready and willing to ratify this Convention in due time, and that it was on the contrary through the failure of the Guatemalan Government to do so that the Convention lapsed.

"His Majesty's Government have already stated the reasons why they are unable to consider the existing railway from Puerto Barrios to Guatemala City as fulfilling the intentions of article VII of the Convention of 1859, and consequently to admit any obligation to contribute towards the cost of construction of this railway. One of these reasons was the fact that the railway was constructed under the sole responsibility of the Guatemalan Government, and without any prior consultation or agreement with His Majesty's Government, such as is obviously contemplated by article VII of the Convention. His Majesty's Government cannot accept the view now set forth by the Guatemalan Government that the failure in the past to reach any agreement in regard to the implementation of article VII of the Convention was sufficient justification for not attempting to secure the co-operation of His Majesty's Government in this new scheme, if the Guatemalan Government desired that His Majesty's Government should contribute towards its cost.

"Notwithstanding the fact that, for the reasons stated, His Majesty's Government cannot consider this railway as fulfilling the requirements of article VII of the Convention, its existence radically modifies the situation which obtained at the time of the conclusion of the Convention of 1859, and renders it extremely doubtful whether the construction of a means of communication of the nature specified in article VII of the Convention would at this date be economically sound or beneficial both to the colony of British Honduras and to the Republic of Guatemala, and so fulfil the purposes contemplated by that article. If, however, the Guatemalan Government are nevertheless able to show to the satisfaction of His Majesty's Government that the construction of such a means of communication would, in fact, redound to the mutual benefit of both parties, as evidently contemplated by the terms of article VII of the Convention, His Majesty's Government are still ready to give the most careful study to such a scheme.

"His Majesty's Government note that the Guatemalan Government would be ready to agree to any other arrangement which might be substituted for that contemplated by article VII of the Convention of 1859, in order that the Convention may be faithfully carried out by both the parties. Whilst, however, they remain, as already stated, prepared to entertain proposals by the Guatemalan Government for giving effect to the provisions of the article, they are not themselves in a position to offer any suggestion in this direction."



13. From this correspondence it will be observed that His Majesty's Government did not in terms maintain that article VII was obsolete or no longer binding upon them, but took up the attitude that any scheme for carrying it out must be to the benefit of both countries; and they left it to the Guatemalan Government to propose such a scheme. The latter maintained in effect that the scheme need only benefit Guatemala, since the real intention of article VII was to compensate Guatemala for a cession of territory. The Guatemalan Government, therefore, saw no reason why His Majesty's Government should not contribute towards the cost of the Puerto Barrios railway, the construction of which, in their view, they had been compelled to undertake because of the British default. His Majesty's Government, while considering that the railway in fact achieved, so far as Guatemala was concerned, the objects of article VII, were unable to admit that its construction was in accordance with the terms of the article, or that they had any obligation to contribute towards its cost.

14. Matters having thus reached a complete *impasse*, and the Guatemalan Government not putting forward any further proposals (beyond a suggestion, which His Majesty's Government were not able to entertain, that certain neighbouring British banks and islets should be ceded), it was decided to propose that the Government of British Honduras should construct a road from Belize to the frontier of the Guatemalan Province of Peten, the Guatemalan Government to continue the construction of the road on the Guatemalan side. This scheme it was thought would open up the Province of Peten and prove mutually advantageous to both parties. The proposal was accordingly made in November 1934, but was rejected by the Guatemalan Government on the ground of inadequacy.

15. Matters can only be carried further now either by His Majesty's Government deciding to defer to the Guatemalan view and to make some monetary payment, the exact amount of which would presumably be a subject for negotiation; or else by seeking arbitration on the issues involved. As regards this latter possibility, it is necessary to consider the nature of the tribunal before which the arbitration might take place. If the matter were referred to a court for decision on a purely legal basis, there is a probability that the court, if it decided that His Majesty's Government still had some liability in regard to article VII, would, in view of the terms of the article, consider that it was not in a position to decide the further question of the exact nature and extent of that liability, and that this must be left to the parties to decide by mutual agreement. In that event, matters would not be advanced in any way, since the difficulties created by the present situation arise precisely from the fact that the parties are not able to agree as to the means for carrying out the article. Even if the court were to decide, as it might well do, that the Guatemalan Government was not justified in holding up the boundary settlement pending a settlement of article VII; and even if the Guatemalan Government were accordingly to recognise the boundary, the unsettled question of article VII would still remain as an irritant in Anglo-Guatemalan relations. Unless, therefore, it seems reasonably certain that a court deciding on a purely legal basis would decide that His Majesty's Government had no further liability at all in regard to article VII, it would seem preferable to refer the matter to a court having power to decide *ex aequo et bono*. Such a court, if it held that His Majesty's Government still had some liability, would be in a position to suggest means for discharging that liability. It is not unlikely that such a court would consider that the liability, if it existed, would in the circumstances be best discharged by some form of money payment, and, in that case, it could indicate what sum would be appropriate. If (assuming that in your view His Majesty's Government are, in fact, still under some liability, in respect of article VII) you consider that such a court would indicate a small sum as being sufficient to discharge it, then a reference to arbitration would probably be advantageous. If, on the other hand, you consider that a larger sum of, say, in the neighbourhood of £50,000 might be awarded, then it would probably be better to come to terms with the Guatemalan Government by direct negotiation.

16. The first question to be submitted to any arbitral tribunal would be whether the territorial articles of the Convention of 1859 are conditional or dependent on article VII, and whether the Guatemalan Government are justified in deferring the final recognition of the boundary until a settlement has been reached in regard to article VII. These two questions are not quite the same. When the Law Officers, in their first opinion of 1884 (see paragraph 9 above),

advised that the territorial articles were not dependent or conditional on the fulfilment of article VII, and would not be invalidated by the non-fulfilment of that article, they apparently meant that there was no necessary or inherent connexion between the two sets of provisions. Thus, if article VII failed to be fulfilled owing to impossibility or impracticability, or to a mutual agreement to let it lapse, there would be nothing to prevent the due carrying out of the boundary provisions, and it would not be open to either party to contend that the boundary settlement was thereby prejudiced. Similarly, the mere fact that article VII is not as yet fulfilled would afford no ground *per se* for refusing to carry out the boundary clauses or to recognise the line. On the other hand, the Law Officers evidently thought that, if the failure to fulfil article VII arose from the default of one of the parties amounting to a breach, it would be open to the other party by way of retaliation to refuse to observe the territorial articles. The doctrine of retaliation in international law is one which entitles one State to do something which would otherwise be illegal by way of retaliation for a definitely illegal act committed by another State. This doctrine has, however, always been held to be subject to certain limitations, the best recent statement of which occurred in an arbitration between Portugal and Germany concerning war damage committed by Germany in Portuguese territory in Africa, a note on which will be found in the British Year Book of International Law for 1932, volume XIII, p. 156. In the first place, reprisals are only justifiable if undertaken in reply to a definitely illegal act. In the present case, His Majesty's Government have not refused to carry out article VII, and the difficulties arise solely from the fact that the parties have not been able to agree as to the proper means of carrying it out. It would thus seem difficult in any event to establish an actual breach. Secondly, reprisals must be preceded by a request for redress which must have proved unavailing; and it would seem reasonable to say that, having regard to the developments which have occurred since the war regarding the pacific settlement of international disputes, it could be argued that definite reprisals would scarcely be justified at the present time without due attempt having first been made to obtain an arbitral decision in the matter. The Guatemalan Government have made no request for arbitration. Thirdly, the reprisals must be proportionate to the offence. In the present case, seeing that the main object of the Convention was the establishment of the boundary; that the boundary was, in fact, indicated as to its terminal and key points with definite certainty, its actual demarcation on the ground only being left for future determination; and having regard also to the vague and uncertain wording of article VII, it would seem at least questionable whether a refusal to agree the final demarcation of the boundary on the mere ground that article VII had not as yet been fulfilled, would be a reasonable and proportionate measure of retaliation (even if the failure to fulfil could be regarded as a definite breach). To a considerable extent, however, the question of the justifiability of the action of the Guatemalan Government is bound up with the merits of their contention that the boundary settlement involved a cession of territory on the part of Guatemala, for which article VII was intended as a compensation. This matter is discussed below.

17. Before leaving this part of the subject the fact may be recalled that, as mentioned in paragraph 6 above, the Guatemalan Government in 1931 entered into an exchange of notes with His Majesty's Government (Paper C) recognising the establishment of the terminal points on the boundary. By so doing it may be argued that they once and for all recognised the boundary itself and are precluded from refusing to do so now. In this connexion it will be appreciated that by the Convention of 1859 the boundary is defined as being a straight line between the terminals, and demarcation on the ground is really a technical formality. The line of the boundary was *in esse* from the start. It is true that in a subsequent note (see paragraph 6 above) the Guatemalan Government made their acceptance of the line as unilaterally demarcated on the ground by the British engineers conditional on its approval by their own engineers; and it is also true (see footnote (*) to paragraph 6) that, when the plans of the unilaterally demarcated line were communicated to the Guatemalan Government for signature by the Guatemalan boundary commissioners, they were informed that such signature would not involve a final acceptance of the line as demarcated, this being reserved for a subsequent exchange of notes. In spite of this, it may still be possible to take the view that, although the Guatemalan Government have not recognised the actual line indicated in the British plans as correctly marking



1935

the straight line between the terminals involved, yet they must be held, by virtue of the exchange of notes of 1931, to have recognised the boundary as in fact being the straight line between terminals, the correct positioning of which was definitely established by the notes. If this is so, it might be possible, if no settlement, arbitral or other, proves practicable, to treat the unilaterally demarcated line as being correct and to administer it as the boundary, it being left to the Guatemalan Government to allege an encroachment on Guatemalan territory, and in that event to discharge the burden of proving the British line to be incorrect.

18. Turning now to the question of the liability of His Majesty's Government in respect of article VII, the first point which arises is whether any liability at all remains at this day. Having regard to the past history of the subject, the changed circumstances (including the existence—though not an existence for which His Majesty's Government can accept any responsibility—of the Puerto Barrios Railway, which, it is believed, does all for Guatemala that article VII was intended to do); and having regard to the efforts which His Majesty's Government have made to discharge their liability, culminating in the recent offer made to the Guatemalan Government, which was rejected (see paragraph 14 above), it might be argued that the article is now obsolete and that no liability now remains. But in estimating this possibility it is necessary to keep in mind the nature of the correspondence which has taken place between the two Governments during the last two years. In view of this correspondence, it would probably be somewhat difficult for His Majesty's Government to take the line now that they could recognise no liability at all, unless, indeed, the rejection of their last offer places them in a position to do this, or unless, alternatively, they are able to substantiate the contention which they have hitherto put forward that any scheme for the carrying out of article VII must redound to the benefit of both parties and not to that of Guatemala alone. If this last contention were sound, the past history of the case would afford strong evidence that no scheme fulfilling this condition is, in fact, practicable at the present date unless, indeed, it were on the lines of the recent proposal of His Majesty's Government, which Guatemala rejected. This in its turn would affect the question (see paragraph 16 above) of the right of Guatemala to hold up the boundary settlement, for if it were established that any scheme for carrying out article VII must benefit both parties, there would be strong ground for arguing that, so long as His Majesty's Government do not refuse to carry out article VII and do not unreasonably reject suitable schemes for implementing it, Guatemala would have no right to refuse to recognise the boundary.

19. It would seem, therefore, that the whole case turns largely on the merits of the Guatemalan argument that, in spite of its wording, article VII was really intended only as compensation to Guatemala for a cession of territory, and that, in consequence, the mere fact that no scheme can be found which will be to the benefit of both parties is not necessarily conclusive as to the obligation of His Majesty's Government; that in return for the boundary settlement something is due from His Majesty's Government, so that, if circumstances make it impossible to devise a scheme coming within the strict terms of the article, then some alternative concession must be made by His Majesty's Government with a view to affording Guatemala the necessary *quid pro quo*, and that in the meantime the recognition of the boundary can properly be held up. If this contention were sound, it would presumably not be a sufficient reply to point to the Puerto Barrios Railway as, in fact, fulfilling the objects of article VII so far as Guatemala was concerned, since this railway was constructed by Guatemala alone and did not constitute any consideration moving from the British side.

20. A memorandum is attached (Paper E) in which the question is discussed whether or not the boundary settlement did, in fact, involve a disguised cession of territory to the Crown. From this it will be seen that British Honduras was undoubtedly in possession of territory claimed by Guatemala and once part of Guatemala or of the former Spanish Empire, but which, by the boundary settlement was declared to be (and at all material times to have been) British territory. The fact that Guatemala claimed the territory does not, of course, necessarily mean that the claim was a good one, or that a good British title thereto had not, in fact, been acquired by prescription, in such a manner as to be defensible even if no treaty settlement had supervened. There is, indeed, some ground for thinking that this may have been the case and that a good British title under international law may already have been in existence at the

time of the Convention of 1859. On the other hand, it is evident that this title was not certain, while it is, in any event, clear (and this was the opinion given by the Law Officers in their second report in 1884) that Guatemala did not recognise any such title and could not have been brought to agree to the boundary articles without something further which could be regarded as affording her the necessary compensation. A question arises here how far, having regard to the clear and unconditional wording of the Convention and the absence of any expressed connexion between the boundary settlement and article VII (indeed, the boundary articles expressly purported to define the *pre-existing* boundary), it would be open to the Guatemalan Government to give evidence of the circumstances in which the Convention was made so as, *e.g.*, to vary its apparently plain meaning. The Permanent Court of International Justice has held that where the meaning of a treaty is plain on the face of it, regard will not be had to surrounding circumstances or preparatory documents. This view is, however, much less likely to be taken by a tribunal deciding the matter *ex aequo et bono* (if it were decided to refer the case to such a tribunal). In any event, such evidence might in this case perhaps be held to be admissible under an exception analogous to those which obtain in English law and which permit evidence of, *e.g.*, collateral terms, or of surrounding circumstances in order to show the true nature of an agreement. A further point which would support the Guatemalan contention is the fact that the road or waterway which was to be constructed under article VII was to be wholly within Guatemalan territory. It is difficult to see how such a road or waterway could ever have been of any real benefit to British Honduras. (On the other hand, it does seem that the British negotiator, Mr. Wyke (see his despatch attached to Paper E) expected some reciprocal benefit.) The Guatemalan Government have also consistently and from the start put forward the view of article VII, as compensation for a cession of territory, and although the contention was, on the British side, strenuously rejected in the correspondence dealt with in paragraph 8 above (Paper A), this denial is probably to be accounted for on the same ground as the refusal of the British negotiator of the Convention of 1859 to allow any mention of a cession of territory to be inserted into the Convention (*i.e.*, pre-occupation about the possible effect on the United States in connexion with the Clayton-Bulwer Treaty—see Paper E).

21. If the court came to the conclusion that something was still due from His Majesty's Government, it seems very likely, having regard to all the circumstances, that it would consider that liability was best discharged by a payment of money. It is a matter of considerable difficulty to estimate what sum might be awarded. On the one hand, the court might take the view that His Majesty's Government had made considerable efforts in the face of great difficulties to carry out the article; and in view of the failure of the Guatemalan Government to ratify the abortive Convention of 1863 or to make any mention of the matter between the end of the last century and the present day, and of the changed circumstances generally (including the existence of the Puerto Barrios Railway), it might consider that the liability of His Majesty's Government could be discharged by a comparatively small payment. On the other hand, it is possible that the court might direct a substantial payment, and, in this connexion, that it might be guided by the sum of £50,000, mentioned in the Convention of 1863.

22. Sir Samuel Hoare would be grateful if you would take the above matters into your consideration, and if you would furnish him with your opinion on the following questions:—

- (1) Are the Guatemalan Government justified in refusing to agree the final demarcation of the boundary, pending a satisfactory settlement of the question of article VII of the Convention of 1859? (It is realised that the answers to this question may depend in part on the answer to question (2), particularly as regards point (2) (i)—and see end of paragraph 18 above.) Could it be argued that by reason of the exchange of notes of 1931 (Paper C) the Guatemalan Government have in fact already recognised the boundary and are precluded from refusing to do so now unless they are prepared to challenge the correctness of the British unilateral demarcation (see paragraph 17 above)?

(2) Are His Majesty's Government still under any liability in respect of article VII, and, if so, what is the nature and extent of that liability? In your reply to this question would you give your views on the following points:—

- (i) Are His Majesty's Government justified in the view they have hitherto advanced that any scheme to implement article VII must be to the benefit of both parties? Alternatively, is the Guatemalan contention correct that this article (at any rate at the present date) comports obligations on His Majesty's Government alone? (In this connexion, see paragraph 13 above.)
- (ii) Are His Majesty's Government correct in thinking that they are under no obligation to contribute towards the cost of the Puerto Barrios Railway, as such?
- (iii) Would it be possible for His Majesty's Government to contend that the Puerto Barrios Railway achieves the objects which article VII was intended to fulfil and that the article is, in consequence, discharged or obsolete and that His Majesty's Government no longer have any obligations thereunder (see paragraph 19 above)?
- (iv) Do you consider that an arbitral tribunal deciding the matter *ex aequo et bono*, if it came to the conclusion that His Majesty's Government were under some liability in respect of article VII, and that such liability was now unilateral in character, would direct it to be discharged by a money payment; and, if so, what sum might such a tribunal be expected to award having regard to all the circumstances of the case?

23. Sir Samuel Hoare would also be glad of any observations which you may feel disposed to offer generally on the case.

I have, &c.
J. M. TROUTBECK.

List of Papers.

Paper A.—Printed correspondence respecting the survey of the boundary line between Guatemala and British Honduras; and the construction of a road between Guatemala and the Atlantic coast. (1859-85.) (Confidential 5490.)

Paper B.—Map (not reproduced).

Paper C.—Exchange of notes between His Majesty's Government in the United Kingdom and the Government of Guatemala respecting the boundary between British Honduras and Guatemala. (Cmd. 4050.)

Paper D.—Memorandum on the efforts which have been made to fix the boundary between British Honduras and Guatemala. (A 2271/56/8/1933.)

Paper E.—Memorandum on the origins of the United Kingdom-Guatemalan Boundary Convention of 30th April, 1859. (Annex No. I.)

Report.

1. We are unable to read the Convention of 1859 as if it were composed of two independent and unrelated parts. The high contracting parties might by their conduct treat the obligations under one part of the Convention as satisfied, leaving the other part still to be performed, but failing such a treatment of the subject matter of the contract, the Convention must in our opinion be performed in its entirety by each party as a condition of the fulfilment of his obligations by the other party. Assuming, therefore, article VII still to be in force, we are of opinion that the Guatemalan Government are justified in refusing to agree the final demarcation of the boundary until His Majesty's Government are ready and willing to perform their obligation under article VII of the Convention. So far as concerns the contention that the Guatemalan Government have, in fact, already recognised the boundary and that, therefore, nothing under that part of the Convention remains to be done, we think the argument is unsound. The notes exchanged in 1931 only relate to the terminal points marked by the concrete monuments. The agreement then reached represents an important step in the

demarcation of the boundary, but the intermediate line still remains to be surveyed, and agreed by commissioners appointed by each party. The British unilateral demarcation of the boundary is not, in our opinion, binding *ipso facto* on the Guatemalan Government, though no doubt it may at any time be accepted by Guatemala as fixing the boundary.

2. We think it difficult to contend in view of the recent correspondence to which we are referred that His Majesty's Government are now under no liability in respect of article VII. The long lapse of time coupled with the change in circumstances is perhaps the strongest argument in support of such a contention. The correspondence, however, of 1933 is inconsistent with the view that either party regarded article VII as spent and no longer in force. We are satisfied that no tribunal would hold His Majesty's Government freed from all obligation under article VII. On the other hand, we think the right view would be to hold the Guatemalan Government under an obligation in terms of article VII, that is to say, to act conjointly with His Majesty's Government. The construction of the railway by the Guatemalan Government at their own expense may make them unwilling to incur further expense in constructing a road which would now be useless, or at any rate an extravagant liability so far as they are concerned. It is unlikely, however, that they will adopt this attitude as long as they are expecting or requiring His Majesty's Government to come to some arrangement, and in these circumstances while we think His Majesty's Government are under no obligation to contribute towards the cost of the railway as such, a money payment by His Majesty's Government on the footing of the railway already constructed being the easiest communication between the Atlantic seaboard and the Capital of Guatemala would, in effect, be a discharge of the contractual obligation. Such a solution would be in our opinion much more likely to emerge from a reference to an arbitral tribunal deciding the matter *ex aequo et bono*, than a decision that article VII had been satisfied by the construction of the railway by the Guatemalan Government alone. This last view, it may be observed, is not the view presented by His Majesty's Government in the notes passing in 1933.

It is the case that article VII refers to the benefit to the commerce of England which will result from the building of the road. Mr. Wyke's despatch of the 30th April, 1859, suggested that one benefit would be the diversion of trade from American vessels on the Pacific to British vessels on the Atlantic. So far as British Honduras is concerned, it is not clear what benefit he contemplated, and it is not right, in our opinion, to suggest that a benefit to British Honduras was an essential element in the proposal. The words in the Convention on this matter seem to us rather to recite a belief or hope than to state a condition of performance. The fact that it is conceived that no benefit would ensue to British commerce from the construction of a road, in our opinion affords no ground for releasing His Majesty's Government from their obligation under article VII.

We have no material on which to base an estimate of the amount of any payment which such an arbitral tribunal would be likely to fix. We find it difficult to think of arguments which would justify a less sum than was thought proper in 1863, and there is at least one argument, namely, the increase of cost of road works as compared with 1863, which would point to a larger sum than £50,000. An offer of £50,000 would probably be sufficiently tempting to the Guatemalan Government to bring about a settlement.

T. W. H. INSKIP.
D. B. SOMERVELL.

Law Officers' Department,
October 28, 1935.

Annex No. I.

[A 3991/430/8]

The Origins of the United Kingdom-Guatemalan Boundary Convention of April 30, 1859.

It appears that under a treaty between the United Kingdom and Spain of 1783 His Majesty's Government obtained certain rights of occupation for the purpose of cutting, loading and carrying away logwood in the territory between "the Rivers Wallis or Belize and the Rio Hondo." By a further treaty of 1786



1935

this territory was extended southward to the River Sibun, but still only for the purpose of cutting wood.

British occupation further south beyond the River Sibun as far as the River Sarstoon (*i.e.*, the boundary laid down in the Convention of 1859), did not take place until after the treaty of 1786, but there appears to be considerable doubt as to when the British claim was in practice extended to this further area. It can be safely assumed that the process was gradual and that any claim which may have arisen to sovereignty over the territory to the south of the River Sibun must have come into being after actual penetration by the logwood cutters had taken place. One thing is clear; that in 1859 Her Majesty's Government had no treaty claim to this territory.

A further complication was introduced into the negotiations by the Bulwer-Clayton Treaty of the 19th April, 1850, between the United Kingdom and the United States. One of the terms of this treaty was that neither party should occupy, or fortify, or colonise, or assume or exercise any dominion over any part of Central America. The United States Government apparently contended that the ancient kingdom of Guatemala formed part of Central America for the purpose of this treaty. The territory between the Sibun and Sarstoon Rivers, however, had been included in the ancient kingdom of Guatemala, and the United States Government accordingly claimed that Great Britain was by the terms of the Bulwer-Clayton Treaty bound to withdraw from the district in question, without reference to whether her title to it was good or bad.

Reference is made to the difficulties above referred to in the instructions sent to the British negotiator Mr. Wyke on the 16th February, 1859, with regard to the conclusion of the 1859 Convention (see first item in correspondence in Paper A). In the same despatch a draft convention was enclosed for the guidance of the United Kingdom negotiator. This contained a definition of the frontier, and an outline of the procedure which was to be adopted for its demarcation, but nothing whatever on the lines of article VII of the Convention as finally adopted.

The reasons for the inclusion of this article will be found in Mr. Wyke's report on the negotiations (attached hereto—Annex IA). It will be seen that Mr. Wyke explained that the Guatemalan Government, and more especially the President, maintained that they had definite rights to the greater portion of the territory at that time actually occupied by British wood-cutters. Mr. Wyke added that since Her Majesty's Government had no legal right beyond that of actual possession he was bound to offer some compensation to the Guatemalans. He had been instructed, however, in the despatch above referred to, not to accept any part of the proposed boundary as a cession from the Republic of Guatemala, since by so doing Her Majesty's Government would be violating the stipulations of the Bulwer-Clayton Treaty. In this circumstance Mr. Wyke explained that he hit on a plan for getting round the difficulty. This plan was the inclusion of the present article VII, and the Convention was thereupon at once accepted by the Guatemalans. Mr. Wyke expressed the hope that he had not culpably exceeded his instructions in obtaining what he considered was a double advantage (that is to say, a conclusion of the boundary question and trading advantages for the settlement of Belize) at the price of a comparatively trifling sacrifice. In a subsequent despatch his action was approved, with the concurrence of the Colonial Office, and the Convention was duly ratified in the form in which it now stands.

Annex No. IA.

(No. 27.)
My Lord,

Guatemala, April 30, 1859.

In my despatch No. 20 of the 31st ultimo I pointed out the difficulty I should have to overcome in negotiating with this Government the Convention for settling the limits between the settlement of Belize and this republic, and a draft of which was enclosed in your Lordship's despatch No. 5 of the 16th February last.

This difficulty has proved even greater than I anticipated, owing to the constant opposition of the President, General Carrera, who would not hear of unconditionally surrendering what he called his country's rights to the greater portion of the territory now actually occupied by our wood-cutters in the settlement.

As in point of fact we have no legal right, beyond that of actual possession, to the tract of country between the Rivers Sibun and Sarstun, which formerly belonged to the ancient Kingdom of Guatemala, this opposition was the more difficult to be overcome, without agreeing to give them some compensation, which, on the other hand, would have been contrary to your Lordship's instructions, whereby I was desired not to accept any part of the proposed boundary as a cession from the Republic of Guatemala, as by doing so we should be violating the stipulations of the Bulwer-Clayton Treaty.

Under these circumstances, it became evident that my negotiations must fail, unless I could hit on a plan whereby they would find some inducement for agreeing to my terms, and which should at the same time not be open to the objection above alluded to of receiving, as it were, a title to any part of the British occupation from this republic.

Now, as the commerce of this State with Belize and the Atlantic Coast generally has been falling off rapidly of late years, owing to the communication with the Pacific Coast being so much easier from the existence of a good carriage road between this city and the port of San José, it struck me that the compensation they claimed might in some sort be afforded if we aided them in the construction of a practicable cart road to the port of Izabal, on the Atlantic Coast, whereby the old commercial relations with Belize would be renewed, and both contracting parties mutually benefited without either appearing to receive a favour from the other.

As we are rapidly losing the carrying trade of this republic, which the American steamers on the Pacific and the Panamá Railway are depriving us of, it becomes, of course, important, if possible, to turn the course of trade again into its old channels, and when by so doing we could at the same time succeed in acquiring a good and legal title to our settlement of Belize, the want of which at present forms our weakest point in the whole Central American question, it appeared to me, I should be justified in somewhat exceeding my instructions if by so doing I could bring about so positive a good.

Such being the actual state of the case, I did not hesitate to accept this responsibility, and, by so doing, I at last succeeded in getting this Government to accept the Convention word for word and without a single alteration, on the condition that an additional article should be added to it, whereby both contracting parties agree conjointly to use their best efforts by the construction of a cart road for re-establishing the ancient communication between this capital and the Atlantic coast near Belize, whereby the commerce of England will benefit on the one hand, and the prosperity of that portion of this republic be materially increased on the other.

Thus modified, the Convention was this day signed by Don Pedro de Aycinena and myself, at the same time that its ratification by this Government was handed to me by him.

I have herewith the honour to enclose said Convention, and I trust in signing it as it stands, that I shall not have incurred your Lordship's displeasure for having so far exceeded my instructions, when by so doing I consider that I have obtained a double advantage at the price of, comparatively speaking, a trifling sacrifice.

As I come home by the same packet that brings this despatch, I shall have the honour of communicating personally to your Lordship all further details with reference to this matter which it is necessary that you should be informed of.

I have, &c.

(Signed) CHARLES LENNOX WYKE.

The Right Hon.
The Earl of Malmesbury, &c.,
Foreign Office.

LEAGUE OF NATIONS

[W 1563/1563/98/1935]

No. 5.

[February 20, 1935]

Foreign Office to the Law Officers of the Crown.

Diplomatic
privilege
and
immunity
for officials
of Inter-
national
Labour
Office.

Gentlemen,

Foreign Office, November 5, 1934.

I HAVE the honour, by direction of His Majesty's Principal Secretary of State for Foreign Affairs, to request that you will be so good as to favour him with your opinion on the question whether the officials of the International Labour Office, including its representatives in England, are entitled to diplomatic privilege and immunity. The consideration of this question may be prefaced by the general proposition that where diplomatic privileges and immunities (which include, of course, immunity from criminal proceedings) are dependent on the terms of a treaty or other international instrument, it is necessary that the language of the instrument, on its true construction, should extend without reasonable doubt to the persons in respect of whom the claim arises.

2. Article 7, paragraph 4, of the Covenant of the League of Nations (which formed Part I of the Treaty of Versailles) provides that "representatives of the members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities." The International Labour Office was also set up under the Treaty of Versailles, Part XIII, articles 387-427; but these articles contain no provision conferring any diplomatic status on the officials of the International Labour Office. Such status, if it exists at all, must, therefore, derive from the terms of article 7, paragraph 4, of the Covenant, and if officials of the International Labour Office, when engaged on the business of the International Labour Office can, for the purposes of article 7, paragraph 4, be regarded as "officials of the League engaged on the business of the League," they would appear to be entitled, in the territories of all the members of the League, to whatever privileges and immunities are conferred by this provision.

3. It should be mentioned that there has never been any question but that the members of the ordinary League Secretariat itself are entitled to these privileges and immunities, and the same applies to the representatives of the Secretariat in London and elsewhere. There has, it is true, been discussion as to what class of persons employed in or by the Secretariat can be regarded as actual "officials" and "engaged on the business of the League" within the meaning of article 7, paragraph 4, of the Covenant and as to whether, and if so to what extent, the fact (where it is the case) that the officials are British subjects affects the position. The point on which your opinion is requested, however, is whether, assuming that certain officials of the League Secretariat are entitled to diplomatic privileges and immunities, officials of the same standing in the International Labour Office can be regarded as being on a similar footing in this respect. The International Labour Office, it should be observed, is housed in a separate building from the League Secretariat, and has a secretariat of its own. Like the League Secretariat, it also has representatives in London. The position in regard to International Labour Office representatives in London is that it has never been decided how far they have any right to claim such diplomatic privileges as, e.g., freedom from arrest and from process in the courts, and relief from income-tax on their emoluments, foreign remittances, &c. So far as income-tax is concerned, it is understood that, in practice, the representatives of the office in London have not been asked to pay tax on their official salaries.

LEAGUE OF NATIONS

4. The question whether officials of the International Labour Office are to be regarded as entitled to diplomatic privileges under article 7, paragraph 4, of the Covenant seems to depend on the three following factors:—

(i) The first is whether officials of the International Labour Office can be regarded as being officials of the League at all. This question would, in its turn, appear to be dependent on whether the International Labour Office is an organ of the League or whether, on the other hand, it is an independent body analogous in its own sphere to the League Secretariat, but not actually an organ of the League of Nations. If it appears that the International Labour Office is, in fact, an organ of the League, it would seem to follow that its officials must, in a general sense, be officials of the League, even though the Labour Office may enjoy a considerable measure of autonomy with a machinery and procedure largely independent of the ordinary League Secretariat.

(ii) Nevertheless, although the officials of the Labour Office may, by reason of the fact that the Labour Office is an organisation of the League, be officials of the League, it may still be the case that they are not officials of the League within the meaning of article 7, paragraph 4. The validity of this contention would depend upon showing that the term "officials of the League" in that provision must be understood as applying to officials of the ordinary League Secretariat only.

(iii) Further, it may also be that the words "business of the League" in article 7, paragraph 4, are to be understood as applying only to the business discharged through the Secretariat and not to the business discharged through the Labour Office, as such. (Here it must be noticed that, since article 7, paragraph 4, contains no commas, the words "when engaged on the business of the League" qualify not only the phrase "officials of the League" but also the term "representatives of the members of the League" to whom diplomatic privileges are also accorded "when on the business of the League.") On the above basis it would follow that, although officials of the Labour Office may be officials of the League, they would not, even when discharging their official duties, be engaged on the business of the League within the meaning of article 7, paragraph 4, and would not, therefore, be entitled to any diplomatic privileges. It is proposed to begin by discussing the first of the above questions, after which the remaining two, which are largely interdependent, will be considered together.

5. The first question is whether officials of the Labour Office are officials of the League at all, and this depends on whether the Labour Office is a League organ or not. In this connexion it is to be noticed in the first place that article 23 (a) of the Covenant of the League, without setting up any specific labour organisation, provides that the members of the League "will endeavour to secure and maintain fair and humane conditions of labour for men, women and children both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations." The manner in which the members of the League of Nations fulfil this undertaking in the Covenant is through the Labour Organisation, which includes the International Labour Office, set up under Part XIII, articles 387-427, of the Treaty of Versailles. These articles are annexed hereto (Paper A). As a matter of history, it must be noticed that the Labour Organisation came into practical being before the ordinary Secretariat of the League, and that at its first session it was, as a result of a special resolution of the Supreme Council of the Peace Conference, attended by two States (Germany and Austria) which were not then members of the League, though they afterwards became such. This latter point is referred to further in paragraph 6 (v) below. In view of the provisions of article 425 of the Treaty of Versailles, however, the fact that the Labour Organisation came into being before the League Secretariat does not seem to be of much significance, seeing that article 425 specifically provides for this contingency and emphasises the intended connexion between the two bodies.

6. The provisions of Part XIII of the Treaty of Versailles principally to be noticed in connexion with the present question are as follows:—

(i) The Preamble to Part XIII begins by reciting "Whereas the League of Nations has for its object the establishment of universal peace, and such a peace can be established only if it is based upon social justice." It goes on to state that existing conditions of labour are a peril to the peace of the world and require improvement and that certain provisions have accordingly been agreed upon.

[13464]

N



(ii) The first of these provisions (article 387) states that—

“A permanent organisation is hereby established for the promotion of the objects set forth in the Preamble.

“The original members of the League of Nations shall be original members of this organisation, and hereafter membership of the League of Nations shall carry with it membership of the said organisation.”

(iii) The next article (article 388) states the nature of this organisation, which is to consist of (1) a General Conference of Representatives of the Members, and (2) an International Labour Office controlled by the Governing Body described in article 393.

(iv) From the foregoing provisions it would seem permissible to conclude that the organisation in question, including the International Labour Office, is an organisation established for the promotion of the objects set forth in the Preamble to Part XIII, which are there stated to be the objects of the League and which are in substance the same as those of article 23 (a) of the Covenant. In consequence, it would appear that the organisation is a League organisation. Any doubts on the matter would in any event appear to be set at rest by the wording of the next relevant article (article 392) which specifically states that—

“The International Labour Office shall be established at the seat of the League of Nations as part of the organisation of the League.”

(v) It seems nevertheless desirable to draw attention to certain features in the Constitution of the International Labour Office which, but for the clear wording of article 392, would tend to make it doubtful whether the Office can be regarded as “part of the organisation of the League.” For instance, the second paragraph of article 387 (quoted in sub-paragraph (ii) above) appears on one view to distinguish between membership of the League and membership of the Labour Organisation as though they were entirely distinct and separate bodies, having, however, similar membership; and it is to be noticed that, in point of fact, although all members of the League are members of the Labour Organisation set up under articles 387 and 388, there are or have been countries members of the latter but not of the League. For instance, the United States, though not a member of the League, has just announced her adhesion to the Labour Organisation.⁽¹⁾ This does not, however, seem to be of any conclusive significance. The fact that an institution is a League organ does not necessarily mean that its membership need be confined to members of the League, or that non-members may not be permitted to join it. The fact, therefore, that some members of the Labour Organisation are not members of the League may afford some evidence in favour of the view that the Labour Office is not a League organ; but the evidence is not conclusive, and is, indeed, weakened by the fact that at any rate all members of the League are members of the Labour Office. It may be, of course, that, even if, in the territories of members of the League, officials of the International Labour Office can claim diplomatic status, they could not do so in the territories of members of the Labour Organisation who are not also members of the League and are not, in consequence, bound by article 7, paragraph 4, of the Covenant. This result would not, however, affect this country, which is a member of the League. Moreover, it might well be argued that countries which become members of the Labour Organisation must in the circumstances be regarded as having tacitly assented to any special status attaching to the officials of the International Labour Office; and that if they choose to participate in and benefit from the activities of the organisation on the same terms as other members, they cannot at the same time expect to escape the burdens which the latter have to bear.

⁽¹⁾ It has never been decided how far this practice is strictly legal or consistent with the terms of article 387 of the Treaty of Versailles. A note on the subject, prepared in the Foreign Office, is attached as Paper B. A recent example of the same thing is Japan's declaration of her intention to remain a member of the Labour Organisation after her notice to secede from the League takes effect. On the other hand, Germany, in leaving the League of Nations, apparently also intends to cease being a member of the Labour Organisation.

See also the Advisory Opinion of the Permanent Court of International Justice in the case of the Free City of Danzig and the International Labour Organisation. Series B, No. 18. The majority of the court refrained from dealing with this question, but Judge Anzilotti deals with it in his dissenting opinion.

(vi) Again, articles 409, 411 and 420 all provide for direct dealings between Governments and the Governing Body of the International Labour Office and not communication through the Secretary-General of the League.

(vii) Similar doubts might also be raised by the wording of paragraph 1 of article 427 (section II of Part XIII) which states that—

“The high contracting parties, recognising that the well-being of industrial wage earners is of supreme international importance, have framed, in order to further this great end, the permanent machinery provided for in Section I and *associated*⁽²⁾ with that of the League of Nations.”

7. These points hardly seem, however, to afford sufficient ground for ignoring the clear words of article 392 (quoted in paragraph 6 (iv) above); and the statement therein made, that the International Labour Office is part of the organisation of the League, is confirmed by other articles of Part XIII, which, while indicating that the International Labour Office is to a great extent an organism separate from the League Secretariat, and broadly in control of its own policy, also show that it has a very definite connexion with the latter, especially in financial matters. Thus article 399, after providing that members of the Labour Organisation are to pay the expenses of their own delegates, goes on to state that—

“All the other expenses of the International Labour Office . . . shall be paid to the Director (of the International Labour Office) by the Secretary-General of the League of Nations out of the general funds of the League.

“The Director shall be responsible to the Secretary-General of the League for the proper expenditure of all monies paid to him in pursuance of this article.”

In this connexion, it is to be noticed that the Secretariat of the League and the International Labour Office have a common budget, in the sense (a) that members do not make separate payments in respect of each organisation, but one single payment, being their contribution to the League of Nations as a whole; and (b) that the payments to be made to the International Labour Office are appropriated each year out of this single fund by the Assembly of the League.

8. The following points may also be noticed:—

(i) Under article 393 the Council of the League of Nations is given the duty of deciding “any questions as to which are the members (of the Labour Organisation) of chief industrial importance.” The relevancy of this is that eight of the twelve persons representing Governments on the Governing Body of the International Labour Office are nominated by the members of the Labour Organisation which are of chief industrial importance.

(ii) A variety of functions are also allotted to the Secretary-General of the League, emphasising the latter's integral connexion with the International Labour Office. Under article 398 he is to give his assistance to the International Labour Office when required. Under articles 405 and 407 he is made responsible for circulating any convention or recommendation adopted by the General Conference of the Labour Organisation. Article 406 also provides that International Labour Office conventions are to be registered by the Secretary-General. Under article 412 he is charged with the duty of nominating, upon the application of the Governing Body, the Commissions of Enquiry, to which are to be referred any complaints that the provisions of any convention are not being effectively observed. (On the other hand, the panel from which such commissions are to be constituted is partly controlled by the Governing Body, which has a right of scrutiny and rejection in regard to all persons to serve on the panel.) The Secretary-General is also (under article 415) made the channel of communication between any such commission and the Governments concerned in the complaint.

(iii) The provisions of Part XIII, dealing with the settlement of disputes by reference to the Permanent Court of International Justice and the provisions of article 426 appear further to emphasise the connexion between the Labour Organisation and the League. The same may be said of article 422, which requires that any amendment of Part XIII shall be ratified by the States whose representatives compose the Council of the League.

9. Even if, however, the position were that the International Labour Office was completely unconnected with the ordinary League Secretariat and with the ordinary League machinery of Council and Assembly, the point would seem to be irrelevant, having regard to the explicit terms of article 392, constituting the

⁽²⁾ Not italics in original.



International Labour Office a part of the organisation of the League, and it would appear that the general conclusion to be drawn from all the relevant provisions is that the International Labour Office, though in many respects independent, is none the less a League organ.

10. Two arguments of a general character have been advanced against the adoption of this view, besides those founded on the doubts as to the true interpretation of certain articles of Part XIII of the Treaty of Versailles, referred to in paragraph 6 above. In the first place, it is urged that, whereas in the case of the officials of the League Secretariat itself the Council and Assembly of the League can exercise control and see that the privileges and immunities accorded are not abused, no such control can be exercised over the International Labour Office, which, except as regards financial matters and such other specific matters as have been noticed above, is virtually autonomous. In other words, it is said that, although, technically, the International Labour Office may be a League organ, it is not an organ over which the League, acting through its constituent bodies—the Council and Assembly—can exercise any control except in a very restricted sphere. This argument assumes that all the organs of the League must necessarily be under one and the same central and unified control, but it is not clear on what this assumption is based. In point of fact, there is due control in regard to the International Labour Office through its Governing Body, which, under article 393 of the Treaty of Versailles, consists of representatives of the Governments who are members of the Labour Organisation and of certain other persons. Further, under article 400, any such Government may make suggestions for placing any given matter on the agenda for the next conference: the agenda being settled by the Governing Body.

11. It has also been suggested that article 392 of the Treaty of Versailles (see paragraph 6 (iv) above) is not conclusive, inasmuch as the fact that an institution is "part of the organisation of the League" does not necessarily make it an organ of the League, and that in this connexion a distinction must be drawn between the League *stricto sensu*, i.e., the member States working through Assembly, Council and Secretariat, and the League *lato sensu*, as including connected but semi-independent bodies, such as the International Labour Office and the Permanent Court. There is ground for thinking, however, that the distinction sought to be drawn is an unreal one in this connexion, affecting only the machinery by which the institution works, and not its actual status and position. In theory there might have been created, all as organs of the League, a number of institutions totally unconnected in their ordinary everyday working, and related only in that they were all organs of the same basic institution.

12. On the assumption that the International Labour Office is in fact an organ of the League, and its officials in consequence officials of the League in the general sense of the term, the question still remains (see paragraph 4 (ii) and (iii) above) whether they are "officials of the League," and "engaged on the business of the League," within the actual meaning of article 7, paragraph 4, of the Covenant. The argument that they are not, may be developed as follows. Bearing in mind the principle enunciated in the opening paragraph of this reference that, where a right to diplomatic privilege depends on the terms of a treaty, that right must, on the true construction of the treaty, be shown to extend without reasonable doubt to the persons in respect of whom it is claimed, it may be said that in the present case a natural presumption arises that article 7, paragraph 4, was only intended to apply to officials of the ordinary League Secretariat engaged on the business of the Secretariat, i.e., the ordinary business of the League as popularly understood. This presumption, it may be argued, arises because article 7, paragraph 4, figures in the Covenant and the Covenant only, and the Covenant was, in this connexion, concerned with the creation of the League as ordinarily understood, the Labour Office coming into being under separate provisions, outside the Covenant. In consequence, it may be said, if it be found that two bodies are set up separately, under different provisions, having different (though in certain respects inter-related) constitutions, and called and known by different names (one of them the League and the other the International Labour Office); and if, further, the provisions creating the former contain a stipulation conferring the right to diplomatic privilege, and those creating the latter do not; then a presumption arises that such terms as "officials of the League," "business of the League" were intended to refer only to the League as set up by the instrument containing them—the Covenant.

13. The arguments against this view may be stated as follows:—

(i) According to the ordinary canons of construction, words are to be taken in their plain and literal sense unless a clear presumption to the contrary arises, and in this case it may be thought that no such presumption does arise. Although the League, as that term is popularly understood, and the Labour Office were set up under separate sets of provisions, those provisions (see paragraph 2 above) were all originally contained, and still are contained, in a common instrument, the Treaty of Versailles, of which the Covenant forms Part I, and the constitution of the Labour Organisation Part XIII. The connexion between the two sets of provisions is moreover emphasised by article 23 (a) of the Covenant (see paragraph 5 above), in pursuance of which the Labour Organisation was created; by the Preamble to Part XIII (see paragraph 6 (i) above), which specifically refers to the League; and by article 392 of the Treaty of Versailles constituting the Labour Office an organ of the League (see paragraph 6 (iv) above). Other points of contact are set out in paragraphs 6–8 above, particularly the end of paragraph 7 and the end of paragraph 8 (iii). Treaty instruments (in this case the Treaty of Versailles), like contracts, are normally to be interpreted as a whole, and in view of this principle, and of the above-mentioned interconnexions, it may be thought that no presumption can arise that article 7, paragraph 4, was intended to apply only to the officials of, and business discharged through, the Secretariat. In that case, the words of that provision must, it would seem, be read according to their plain literal meaning as including all persons who are in fact officials of the League, and as covering the ordinary business of any organ of the League. If, moreover, it be established (see above paragraphs 5–11) that the framers of the Treaty of Versailles did, indeed, intend to constitute, and did constitute, the Labour Office an organ of the League, it may be thought that, even though the Labour Office was given a name and constitution of its own, they would have regarded the terms of article 7, paragraph 4 (of Part I of the Treaty of Versailles, the Covenant), as necessarily covering the Labour Office, and would have considered it superfluous to insert any specific provision about diplomatic privilege into Part XIII of the treaty.

(ii) Some significance may also attach to the fact that article 7, paragraph 4, does not say "officials of the League engaged on the business of the League," but "officials of the League when engaged on the business of the League," and that the phrase "when engaged on the business of the League" qualifies (see paragraph 4 (iii) above) not only "officials of the League," but in addition "representatives of members of the League," who are also accorded diplomatic privilege "when engaged on the business of the League." These facts, particularly the use of the word "when" in connexion with "representatives of the members of the League," suggest that the real intention of the phrase "when engaged, &c.," was to limit the claim to privilege to those occasions on which the persons concerned are engaged generally on "League" business, in contradistinction to private business or business other than "League" business. It is, in fact, clear that this must certainly be one effect of the phrase "when engaged, &c." (though it may not be the only one), for it is evident that there could not have been any intention to grant under article 7, paragraph 4, any general immunity to, e.g., representatives of the members of the League. It is only when in or proceeding to and from Geneva or elsewhere on "League" business that they can claim immunity by reason of this particular provision. This consideration does not, of course, necessarily exclude the possibility that the framers of article 7, paragraph 4, intended the term "League" business to be understood *a priori* as applying only to the ordinary business of the League, as generally and popularly understood; so that in order to claim privilege it would be necessary to show both (a) that the business was League business in that sense, and (b) that the claimant was engaged on it.

14. One further argument of a general character must be noticed against the view that officials of the International Labour Office are entitled to diplomatic privileges. This argument is based on the fact that under article 19 of the Statute of the Permanent Court of International Justice the members of the court, when engaged on its business, are specifically stated to enjoy diplomatic privileges and immunities. It is argued that the Permanent Court is at least as much a League organisation as the International Labour Office, since it was set up in consequence of article 14 of the Covenant, is financed out of the ordinary



1935

League budget "in such a manner as shall be decided by the Assembly upon the proposal of the Council" (article 33 of the Statute of the Court), and has its judges appointed by the Assembly and the Council (article 4 of the statute). In spite of this, it is urged, it was evidently not considered sufficient to rely on the provisions of article 7, paragraph 4, of the Covenant as automatically applying to the court, and a specific provision concerning diplomatic privilege was inserted in the Statute of the Court; yet in the case of the International Labour Office (which, on this view, is not to any greater extent than the court an organisation of the League) no such specific provision is to be found in its statute (*i.e.*, in Part XIII of the Treaty of Versailles).

15. The inclusion of a special clause about diplomatic privilege in the Statute of the Court can, however, be explained on other grounds:—

(i) Article 7, paragraph 4, of the Covenant refers to "officials," and it may well have been doubted whether judges of the court could in any circumstances be regarded as "officials" at all, whereas there can be no doubt that the officials of the International Labour Office are "officials," whether they are officials of the League or not. An official is usually held to mean someone who acts under control and supervision, and receives instructions; this is not the case with the judges of the court who, in the exercise of their judicial functions, are completely independent.

(ii) Under article 392 of the Treaty of Versailles (see paragraph 6 (iv) above) it is specifically stated that the International Labour Office is an organisation of the League, and this may have been regarded as raising a necessary presumption that its officials must be officials of the League under article 7, paragraph 4, of the Covenant (see end of paragraph 13 (i) above). But no provision corresponding to article 392 exists in the Statute of the Court. In point of fact, in spite of its close connexion with the League, some doubt may well be felt as to the propriety of regarding as an organ of the League such an institution as the Permanent Court.

16. Turning to the practice of countries as regards according diplomatic privileges to officials of the International Labour Office, it is clear that by far the most important country in this respect is Switzerland, which has to bear almost the whole of the burden created by the grant of such privileges. In 1921 the Swiss Government entered into a provisional agreement with the Secretary-General of the League concerning diplomatic privilege, under which diplomatic privilege was recognised for the personnel both of the Secretariat and of the International Labour Office. This agreement is attached as Paper C. It was replaced in 1926 by a *modus vivendi*, which is still in force. This is attached as Paper D. It will be seen that under this agreement also no distinction is made between officials of the League Secretariat and the International Labour Office (there referred to as the B.I.T.—Bureau international du Travail), and in point of fact the officials of both organisations receive similar treatment in Switzerland. Both institutions are classed indiscriminately in the *modus vivendi* under the general heading of "Organismes de la Société des Nations à Genève." The only distinction drawn is between categories of officials, those of superior class receiving full privileges, while subordinate officials are accorded privileges of a limited character. This distinction applies equally to both institutions. At the time when the arrangement was entered into, there were about 150 persons in the League Secretariat enjoying full privileges, and about 190 in the International Labour Office. Of the subordinate class, the corresponding numbers were 225 and 115.

17. Enquiries were made by His Majesty's Government in 1923 of a number of governments, mainly in Central Europe, which, owing to the presence of League officials in their territory, might be expected to be especially interested in this matter. From the answers received it appeared that in France, Italy, Czechoslovakia, Yugoslavia, Austria, Greece, Bulgaria and Latvia, no distinction was made between officials of the League Secretariat and of the International Labour Office. Germany and Roumania replied that the matter had not yet been decided. The Polish Government, on the other hand, replied that officials of the International Labour Office were not regarded as being entitled to diplomatic privileges in Poland on the grounds (a) that Part XIII of the Treaty of Versailles contained no stipulation conferring diplomatic status on those officials, and (b) that they had no political mission to fulfil, their functions being purely

technical in character. It is not known whether the practice of any of the above countries has changed in the decade since these enquiries were made.

18. The question whether officials of the International Labour Office stand on the same footing as those of the League Secretariat has been considered by jurists and by the Institut de Droit international. The general conclusion has been that they do.^(*)

19. I am to request that you will be so good as to take the above matters into your consideration and to state whether in your opinion the officials of the International Labour Office are entitled in the matter of diplomatic privilege to rank with officials of the League Secretariat proper for the purposes of article 7, paragraph 4, of the Covenant. Sir John Simon would also be grateful for any observations of a general character which you may be good enough to make.

I have, &c.

P. LEIGH-SMITH.

(*) *E.g.*, Frei (*De la Situation juridique des Représentants des Membres de la Société des Nations et de ses Agents*, 1929, p. 34):

"Les Agents du Bureau international du Travail.—Pouvons-nous considérer les agents du B.I.T. (I.L.O.) comme des agents de la Société des Nations, et les mettre en cette qualité au bénéfice des immunités de l'article 7 du Pacte? Nous avons vu, à propos des représentants des membres de la Société, que l'on peut envisager l'Organisation internationale du Travail comme un organe de la Société des Nations. Le lien qui, en vertu du Traité de Versailles, unit l'Organisation du Travail à la Société est encore plus intime en ce qui concerne le B.I.T., puisque l'article 392 stipule expressément que le B.I.T. sera établi au siège de la Société des Nations et fera partie de l'ensemble des institutions de la Société. L'article 398 l'autorise à demander le concours de la Société des Nations dans toutes les questions à l'occasion desquelles ce concours pourra être demandé. Par conséquent, si nous avons admis que l'Organisation internationale du Travail est un organe de la Société des Nations, à plus forte raison le B.I.T. peut-il être considéré comme partie intégrante de cette dernière. Il est donc logique d'admettre, comme l'Institut de Droit international, que les agents du B.I.T., c'est-à-dire le directeur et ses collaborateurs immédiats, sont des agents de la Société, et qu'ils jouissent comme tels des privilèges et immunités diplomatiques de l'article 7 du Pacte, principe que la Suisse a admis sans difficulté dans les arrangements conclus en 1923 et 1926 avec le Secrétaire général."

The view taken by the Institut de Droit international at its Vienna session in August 1924 was as follows:—

(*Annuaire de l'Institut de Droit international*, vol. XXXI, pp. 107-8.)

"Sous le nom d'agents de la Société des Nations au sens de l'article 7, alinéa 4, du Pacte, il faut entendre:

"1. Les personnes qui, nommées par l'Assemblée, le Conseil, le Secrétaire général de la Société des Nations ou par ses délégués spécialement qualifiés, accomplissent, pour son compte ou sous son contrôle, des actes de fonctions de nature politique ou administrative;

"2. Le directeur du Bureau international du Travail et ses collaborateurs immédiats."

See also J. Secretan, *Les Immunités diplomatiques*, p. 44 et seq., *passim*; and Kauffman, *Die Immunität der Nicht-Diplomaten*.

List of Papers.

- A. Articles 387-427 of Treaty of Versailles. [Treaty Series, No. 4 (1919)]
- B. Foreign Office Library Memorandum of the 7th June, 1933 (with annex). [W 8594/38/98/1933]
- C. Agreement of 1921 between the Swiss Government and the Secretary-General of the League of Nations. [T 9384/5918/350/1923]
- D. League of Nations document of the 18th September, 1926. [W 1866/38/98/1933]

Report.

We have come to the conclusion that the officials of the International Labour Office are entitled in the matter of diplomatic privilege to rank with officials of the Secretariat of the League of Nations for the purposes of article 7, paragraph 4, of the Covenant of the League. Article 23 (a) of the Covenant imposes upon the members of the League the obligation to establish and maintain the necessary international organisations. Part XIII of the Treaty of Versailles is clearly, in our opinion, intended to provide for the establishment of one such international organisation in pursuance of the first recital in the preamble to Part XIII that the League of Nations has for its object the establishment of universal peace.



1935

When the whole of the articles contained in Part XIII of the Treaty, and particularly article 392, are read it is impossible, in our opinion, to come to any other conclusion than that the International Labour Office is a part of the League, with the result that officials of the Office are officials of the League. Inasmuch as under article 387 the International Labour Office is established for the promotion of that which is stated to be the object of the League of Nations, namely, the establishment of universal peace, the officials of the International Labour Office when engaged upon its business are, in our opinion, engaged on the business of the League.

T. W. H. INSKIP.
D. B. SOMERWELL.

*Law Officers' Department,
February 20, 1935.*



1936

THIS DOCUMENT IS THE PROPERTY OF H.M. BRITANNIC MAJESTY'S GOVERNMENT

Printed for the use of the Foreign Office

CONFIDENTIAL.

(15053)

REPORTS BY THE
LAW OFFICERS OF THE CROWN, &c.

1936

(ii)

LIST OF REPORTS

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 1^A, &c.

No.		Date.	SUBJECT.	Page.
GENERAL.				
1a	Law Officers... [Treasury Solicitor]	Jan. , 1936	Convention and Protocol relating to the Immunities of State-owned Ships: as to whether ratification by His Majesty's Government will necessarily involve legislation ...	1
1b	Law Officers for Scotland [Treasury Solicitor]	Feb. 26, 1936	Ditto ...	11
1c	Attorney-General ... [Colonial Office]	May 20, 1936	Laying before Parliament before submission to The King of Orders in Council under the Foreign Jurisdiction Act and British Settlements Act ...	12
MOROCCO.				
1	Law Officers...	Jan. 22, 1936	Application to British subjects of legislation imposing taxes in the Spanish Zone of Morocco ...	15
RUSSIA.				
2a	Law Officers and Mr. Andrewes- Uthwatt [Treasury Solicitor]	July 30, 1936	Recovery by the Crown, as <i>bona vacantia</i> , of assets of the Moscow Industrial Bank, a destroyed Russian corporation...	99
SPAIN.				
2	Attorney-General ...	Sept. 5, 1936	Applicability of the Foreign Jurisdiction Act to a civil war ...	105
3	Law Officers...	Sept. 15, 1936	Form of proclamation of neutrality to be issued in the event of decision by His Majesty's Government in the United Kingdom to recognise that state of war exists between parties to civil conflict in Spain ...	111

(iii)

ALPHABETICAL INDEX

(NAMES AND SUBJECTS)

1936

The figures refer to the numbers of the pages.

Cases cited are indicated by italics.

ACT—COM.

A.

Acts of Parliament—
Admiralty Suits Act, 1868, 12.
British Settlements Act; laying before Parliament of Orders in Council under, prior to submission to the King, 12–15.
Carriage by Air Act, 1932, 7.
Crown Suits (Scotland) Act, 1856, 12.
Foreign Enlistment Act; application to civil war, 105–110.
Ditto; reference to, in proclamations of neutrality, 112.
Foreign Jurisdiction Act; laying before Parliament of Orders in Council under, prior to submission to the King, 12–15.
Supreme Court of Judicature Act; proposed amendment as regards claims *v.* foreign States, 9–10, 12.

Attorney-General v. Great Southern and Western Railway Company of Ireland, 8.

B.

Banks—Destruction of banking corporations by Soviet law, 100–101.
Banque Internationale de Commerce de Petrograd v. Goussakov, 102.
Belligerency—*see* Insurrection.
Bona vacantia—Assets of Moscow Industrial Bank held by Midland Bank, Limited, 99–104.

C.

Capitulations—
In Egypt, 56–58.
British rights in Morocco, 16–17.
Rights of other Powers in Morocco, 17.
Claims—
In respect of collision, salvage, contract, &c., relating to State-owned ships; effect of Convention and Protocol relating to Immunities of State-owned ships, 1–12.
Enforcement in the United Kingdom Courts of claims *v.* Dominion Governments, 8.
British claims *v.* Soviet Union, 99–104.
Collisions—Claims against State-owned ships, 1–12.
Companies—*see also* Corporations.

9161 [14996]

COR—INS.

Corporations—Assets of dissolved corporations, 99.
Courts of Law—
Suits against the Crown in tort; position under Convention and Protocol relating to Immunities of State-owned Ships, 2–3, 5.
Courts of this country have no jurisdiction over foreign sovereign States, their ships, &c., 7–8.
Enforcement in United Kingdom Courts of claims *v.* Dominion Governments, 8.
Customs—
Consumption duties in Morocco; *see* Taxes.
Tariff autonomy for Egypt, 56–58.

D.

Dominions—Position under declarations of neutrality by His Majesty's Government, 111–113.
Duff Development Company, Limited, v. the Kelantan Government, 7.
Duties—*see* Taxes.

E.

Egypt—Capitulations and tariff autonomy, 56–58.
Enlistment—Application of Foreign Enlistment Act to civil war in Spain, 105–110.

F.

Fenton Textile Association, Limited, v. Krassin and Others, 7.

I.

Insurrection—
Application of Foreign Enlistment Act to civil war, 105–110.
Recognition of insurgents as belligerents, 107.
Form of proclamation of neutrality by His Majesty's Government, 111–113.

a

(iv)

JUR—PRO.

J.

Jurisdiction—
In cases of claims against State-owned ships, 1-12.
Courts of this country have no jurisdiction over foreign sovereign States, 7-8.
British extra-territorial rights in Morocco, 16-17.
Rights of other Powers in Morocco, 17.

L.

Lazard Brothers and Company, Limited, v. Midland Bank, Limited, 101, 102.
Limitation of Liability—Law does not apply to the Crown, 6.
Lord Nelson—Salvage claim, 4.

M.

Marquis of Huntly—Salvage claim, 4.
Midland Bank, Limited—Assets of Moscow Industrial Bank held by, 99-104.
Mighell v. the Sultan of Johore, 7.
Morocco—British treaty rights, 16-17.
Morocco (French Zone)—Application to British subjects of legislation imposing taxes, 18, 43-49, 53-55.
Morocco (Spanish Zone)—Application to British subjects of legislation imposing taxes (consumption duties and gate taxes), 15-97.
Moscow Industrial Bank—Destroyed by Soviet law; assets held by Midland Bank, Limited, 99-104.

N.

Neutrality—
Of His Majesty's Government in civil wars, 107.
Ditto; Form of proclamation of neutrality, 111-113.
Ditto; Position of Dominions, 111-113.
Newbattle, 7.

O.

Orders in Council—Laying before Parliament before submission to the King of Orders in Council under the Foreign Jurisdiction Act and British Settlements Act, 12-15.

P.

Palestine—Submission to Parliament of draft Order in Council establishing a Legislative Council of Palestine, 12-15.
Parliament—Laying before Parliament of draft Orders in Council before submission to the King, 12-15.
Porto Alexandre, 7.
Property—Recovery by the Crown, as *bona vacantia*, of assets of Moscow Industrial Bank held by Midland Bank, Limited, 99-104.

REC—WAR.

R.

Recognition—Of insurgents as belligerents; issue of proclamation of neutrality, 107, 111-113.
Regulations, King's—Application to British subjects in Morocco of local legislation, 17-19.
Russia—*see* Soviet Union.
Russian and English Bank v. Baring Brothers and Company, Limited, 99, 100, 102.
Russian Bank for Foreign Trade, 101, 102.
Russo-Asiatic Bank, 101.

S.

Salvage—Claims against State-owned ships, 1-12.
Sea—Sovereignty over land reclaimed from, 117-122.
Sovereignty—Over land reclaimed from the sea, 117-122.
Soviet Union—Destruction of corporations by Soviet law, 99-104.
Spain—
Civil War; prevention of enlistment of volunteers, 105-110.
Ditto; form of proclamation of neutrality should His Majesty's Government recognise state of war, 111-113.

T.

Tariffs—*see* Customs.
Taxes—
Application to British subjects of legislation imposing consumption duties and gate taxes in Morocco (Spanish Zone), 15-97.
Ditto; in Morocco (French Zone), 18, 43-49, 53-55.

Treaties—

Involving legislation, 7.
Affecting British rights in Morocco, 16-17, 21-43.
Franco-German Convention, 1911 (Morocco); effect of British accession upon British treaty rights, 19-20.
Convention and Protocol relating to Immunities of State-owned ships, 1-12.
Carriage of Goods by Air Convention, 7.

V.

Vessels—Immunities of State-owned ships, 1-12.
Vessels of War—Immunities, 1-12.

W.

War—Civil war; *see* Insurrection.

Printed for the use of the Foreign Office

CONFIDENTIAL

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.: 1936

GENERAL

[W 647/647/50/1936]

No. 1^A.

[Treasury Solicitor]

[January 1936]

Case for the Opinion of the Law Officers of the Crown.

A CONVENTION relating to the immunities of State-owned ships was signed at Brussels on the 10th April, 1926, on behalf of His Majesty's Government in the United Kingdom and some sixteen other countries. (The official text is in the French language, but a copy of a provisional English translation is also sent.) Certain aspects of the convention as so signed rendered it not acceptable to this country, and as a result of representations made in that regard, an additional protocol was signed at Brussels in May 1934, of which a copy (in French and with English translation) is also herewith. The opinion of the Law Officers is now desired on the question whether the ratification of the convention and protocol by His Majesty's Government in the United Kingdom will necessarily involve legislation.

By article 1 of the convention, ships belonging to or operated by States, cargoes belonging to them and cargoes and passengers carried on State-owned ships, as well as the States which own such ships, so far as concerns claims in respect of the operation of such ships or in respect of the carriage of such cargoes, are subject to and have the benefit of the same rules of liability and the same obligations as those applicable in the case of privately owned ships, cargoes and equipment; and by article 2, as regards such liabilities and obligations, the rules relating to the jurisdiction of the courts, actions at law and procedure shall be the same as for merchant ships and cargoes belonging to private owners.

By article 3, the provisions of articles 1 and 2 shall not apply to ships of war, State-owned yachts, survey vessels, hospital ships, auxiliary vessels, supply ships and other vessels belonging to or operated by a State and employed exclusively at the time when the claim arises on Government and non-commercial service, and such ships shall not be subject to seizure, arrest or detention by any legal process, nor in any proceedings *in rem*. Claimants shall, however, have the right to proceed before the appropriate court of the State, which owns or operates the ship, without that State being able to rely on its immunity, in the following cases:—

1. Actions in respect of collision or other accidents of navigation.
2. Actions in respect of salvage or in the nature of salvage, and in respect of general average.
3. Actions in respect of repairs, necessities or contracts relating to the ship.

9161 [14996]

B



The article applies the same rules to State-owned cargoes carried on board any of the above-mentioned ships, and further by its final paragraph provides that State-owned cargoes carried on board merchant ships, but for Government and non-commercial purposes shall not be subject to seizure, arrest or detention by legal process, nor to any proceedings *in rem*. Claims, however, relating to such cargoes in respect of collisions and perils of the sea, of salvage and of general average, as well as claims in respect of contracts, may be prosecuted before the court having jurisdiction under article 2.

By article 4, States are entitled to rely on all defences, prescriptions and limitations of liability available to private ships and their owners; any necessary adaptation or modification of the law relating to such defences, prescriptions and limitations of liability shall form the subject of a special convention, but, in the meantime, the necessary steps for the purpose may be effected by municipal legislation in conformity with the spirit and principles of the convention.

Under article 5, a diplomatic certificate is conclusive evidence that a ship or cargo falls within the terms of article 3, but only for the purpose of obtaining the discharge of any seizure, arrest or detention effected by judicial process. Article 6 provides that while the provisions of the convention are to be applied in each contracting State, there is no obligation to extend the benefit of it to non-contracting States and their subjects, and that any such extension may be made subject to a condition of reciprocity. The second paragraph of article 6, however, stipulates that nothing in the convention shall prohibit the contracting State from regulating by its own laws the rights given to its nationals before its own courts. Under article 7 in time of war a contracting State has the right to suspend the application of the convention, in which case neither ships belonging to or operated by that State, nor cargoes belonging to it, shall be subject to any arrest, seizure or detention by a foreign court of law, but claimants have the right to take proceedings before the tribunal having jurisdiction by virtue of articles 2 and 3.

Article 1 of the protocol of May 1934 provides that ships chartered by States, whether for time or voyage, provided that they are exclusively employed on governmental non-commercial service, as well as the cargoes which such ships may carry, may not be arrested or detained in any way, but this immunity in no way prejudices the other rights and remedies available to interested parties. Article 2 provides that article 3 of the convention may be relied upon by States in favour of ships belonging to or operated by them at the moment of seizure, arrest or detention, if they are employed exclusively in governmental non-commercial service. Article 3 confers upon a State the right itself to appear before the tribunal concerned to prove the status of ship or cargo by production of the diplomatic certificate referred to in article 5 of the convention. By article 5, it is agreed that nothing in article 2 of the convention limits or affects in any manner the application of the national rules of procedure in matters where the State is a party.

His Majesty's Government in the United Kingdom are desirous of ratifying the convention as interpreted by the additional protocol, but, before they do so, they require to be advised whether such ratification will necessitate any and, if so, what legislation.

In order to consider this question, it will be desirable to deal separately with—

- (1) Claims made in this country against vessels owned by His Majesty's Government.
- (2) Claims made in this country against vessels owned by foreign States parties to the convention.

Dealing, therefore, in the first place, with claims against vessels owned by the Crown, the Law Officers will appreciate that, if the obligations in that regard under the convention can only be carried out by giving to foreign subjects the right to take proceedings in respect of collisions, and salvage and other matters by exactly the same procedure as applies between subject and subject, the whole question of proceedings against the Crown is at once opened up. It will be remembered that, notwithstanding the report of the Committee on Proceedings against the Crown, a copy of which is herewith (Document 3), the Cabinet did not authorise the introduction of the Bill which the committee recommended, because of the dangers which would follow if statutory right were given to the

subject to sue the Crown in tort. If, in order to ratify this convention, it is necessary to legislate giving rights to foreign subjects to sue the Crown in tort and in contract in respect of claims against vessels owned by the Crown, it is inconceivable that such rights should not also be given to British subjects, with the result that the Government would find itself forced by what may be termed "a side wind" to introduce the Crown Proceedings Bill, although hitherto it has not deemed it advisable to do so. It is, therefore, necessary to see whether the convention can be fully implemented by His Majesty's Government in so far as claims against the Crown are concerned without legislation.

Turning now to the convention. The Law Officers will observe that, under the convention (article 1 and article 3), Government-owned vessels are divided into two classes, article 1 vessels being Government-owned ships engaged in ordinary commercial services and article 3 ships being ships of war, State-owned yachts, survey vessels, hospital ships, auxiliary ships, supply ships and other Government vessels employed on Government and non-commercial service.

It will also be observed that, under article 2, ships engaged on commercial services (*i.e.*, article 1 ships) are to be subject to the same rules as to jurisdiction, rights of action and procedure as apply to privately owned merchant ships, but this article does not apply to article 3 ships in the case of which special provision is made by that article that there shall be no seizure, arrest or detention by any legal process, nor to any proceedings *in rem*, but that claimants shall have the right to proceed before the appropriate court in this country in cases of:—

- (a) Collision;
- (b) Salvage and general average;
- (c) Repairs, necessities and other contractual obligations;

and that no claim for immunity can be made by the Crown with regard to any such claim.

The effect of article 3, therefore, would seem to be that, so long as a contracting State undertakes to accept liability in respect of the matters set out therein and provides a competent tribunal to decide any question as to such liability, the obligations under the article will be fulfilled. The exclusion from article 3 of the provisions of articles 1 and 2 must mean that the same procedure which applies in the case of claims in respect of privately owned ships and the same courts which deal with those claims need not be made available with regard to claims falling under article 3.

His Majesty's Government in the United Kingdom are mainly concerned with article 3 because practically all Government-owned ships fall within that article and it is not the policy of the Government to engage its ships in purely commercial undertakings which would bring them within the provisions of article 1. There are, however, isolated cases in which fleet auxiliaries owned by the Admiralty are occasionally chartered to private oil companies either for a voyage or for a time, and to these ships when so employed article 1 would apply; but these cases are rare, and, as has been stated above, the substantial question for consideration is whether it is necessary to legislate with regard to claims to be made against the Crown in respect of vessels falling within article 3, or whether the practice which at present exists with regard to claims against the Crown is not a sufficient compliance with the convention.

Article 3, as has been stated, deals with three kinds of claim:—

- (a) Collision.
- (b) Salvage and general average.
- (c) Contractual obligations.

(a) With regard to collision claims, as counsel are aware, the practice is for the Crown to supply the name of the officer in command of the vessel against whom proceedings may be taken in respect of damage caused by his ship. As a matter of law, the claimant has a right to sue the officer committing the tort, and it is and has for a long time been the practice of the Crown to supply the officer's name and to pay any damages which may be awarded against him, subject to the limitation of liability which would be available in respect of the ship if she were privately owned. This procedure, which is well known, has been invariably adopted by foreign claimants, and no suggestion has ever been made by a foreign Government that that procedure does not afford a satisfactory method of determining any claims which its subjects may have. Indeed, in some

instances, it has been treated by foreign States as a basis upon which to afford to British subjects reciprocal treatment by foreign Governments in respect of claims in respect of their Government-owned ships.

(b) So far as claims for salvage are concerned, the practice of the Crown when such a claim is made in respect of services to one of its ships is to refer the assessment of the award to the arbitration of one of the counsel practising in the Admiralty Court. This procedure follows the practice usually adopted in commercial circles at the present time, when, as is well known, most claims for salvage are dealt with on Lloyd's Form of Salvage Agreement, which contains a provision for arbitration before an arbitrator nominated by the Committee of Lloyds. It may be thought that theoretically such procedure does not give the claimant a right to pursue his claim before the appropriate court within the meaning of the article, but this procedure undoubtedly affords a machinery working on legal principles, just as much as does the machinery of a court of law. There have, however, been cases in the past where the immunity of the Crown has been waived, and claims for salvage against the Government have been allowed to proceed before the Admiralty Court (see the *Lord Nelson* in *Edwards' Reports of Cases in Admiralty*, p. 79, and the *Marquis of Huntley*, 3 Haggard 246), and in the unlikely event of a foreign State contending that its subjects were entitled to have a claim for salvage adjudicated upon in a court of law, it may be that the Crown could submit to the jurisdiction of the Admiralty Court so that the court could deal with the claim as an ordinary salvage action or at any rate as an arbitrator.

(c) With regard to claims of a contractual nature, the procedure by petition of right is available. It is true that this procedure involves a discretion in the matter of the grant of a "fiat," but since the refusal of a fiat in any case of contract falling within the convention would involve a breach of the convention, it is thought that the possibility of such a refusal may be disregarded.

For these reasons it is submitted that so far as claims falling within article 3 are concerned, there is no necessity to legislate, and that if the existing procedure is adopted with regard to claims falling within that article, no foreign State could successfully contend that His Majesty's Government were not carrying out their international obligations under the convention.

It is now necessary to deal with claims falling within articles 1 and 2 of the convention in respect of Government-owned ships engaged on commercial services. As has been previously stated, it is only in rare cases that any Government ship would be so engaged, having regard to the existing policy of the Government not to engage in State trading. It may therefore be that even if articles 1 and 2 impose an obligation on the Government to afford to foreign subjects exactly the same rights of action and rules of procedure, as in the case of claims against privately owned ships (a matter which is discussed below) the Government would be justified in leaving the matter where it is at any rate for the present, having regard to the extreme unlikelihood of any claim being made against any Government-owned ship within article 1.

It is true that upon the face of articles 1 and 2, it would appear that a contracting State is under an obligation to impose the same rules of liability in respect of vessels falling within article 1, as are imposed on privately owned ships, and under article 2, for the purposes of enforcing such liabilities, to apply the same rules of jurisdiction, rights of action and procedure as apply in the case of claims against privately owned vessels and cargoes.

It is, however, necessary in construing article 2 to refer to article 5 of the amending protocol (Document 2). This article expressly provides that nothing in article 2 of the convention is to be taken as in any way limiting or affecting the application of rules of procedure prescribed by the municipal law with regard to proceedings to which the State is a party. It will be remembered that the amending protocol was proposed by His Majesty's Government, and in submitting article 5 for the approval of the other contracting States it was pointed out that under the municipal law of most countries claims against the State were subject to a special code of procedure, and that under article 2 as it stood there was an obligation to apply the same procedure to claims against the State as applied to private claims.

It was further stated that such a proposal could not have been contemplated by the delegates who signed the original convention, and for that reason the

amending article 5 was proposed. This article was accepted by the contracting Governments. It is therefore clear that, by retaining the existing Crown procedure and not applying to claims against the Crown the same rules of procedure as apply between private parties, His Majesty's Government would not be contravening the convention.

It may, however, be said that article 2 deals not only with "procedure," but also with "rules of jurisdiction" and "rights of action" (French text, "compétence des tribunaux" and "actions en justice"), whereas article 5 of the amending protocol merely deals with procedure. It must be remembered, however, that this convention is an international document, which has to be interpreted in a number of systems of law, and that phrases such as those mentioned above are not by any means used exclusively and may be in our system of law redundant. A reference to the opening of the proceedings at the conference in 1926 shows that the original draft did not contain the expression "actions en justice," and that this term was only inserted because there was a difference of opinion on the part of members of the drafting committee as to whether that term or the term "procedure" should be used. It was ultimately decided to solve the problem by using both expressions.

With regard to the expression "jurisdiction of the courts," this, it is submitted, has no further purpose than to lay down the general principle that the tribunals determining questions of liability should be the same as in the case of private disputes. In truth, it would seem that, according to English canons, the expression "rules of procedure" covers everything that was intended to be covered by the three expressions used in article 2. The term "procedure" includes all legal remedies and everything connected with the enforcement of a right, which includes process, evidence, rules of limitation, remedies, methods of execution and the like (see Dicey, 4th edition, pp. 31, 798-9 and 801) and the determination of the particular tribunal before which a party can submit his claim (see Bar, (1), 2nd edition, p. 861).

The claims which can be made under article 1 must be either in respect of contracts, torts or salvage services. In so far as claims in contract are concerned, the existing procedure by Petition of Right would seem to fulfil the obligations contemplated by article 2. So, too, with regard to collision claims and other claims in tort, a legal right to sue the officer committing the tort exists, and so long as His Majesty's Government undertakes the burden of the proceedings and the implementing of any judgment, no complaint can, it is submitted, be made that the article is not being carried out.

With regard to salvage claims, the same questions arise as are dealt with earlier in this case relating to claims of that nature arising under article 3.

It is therefore submitted that, even in cases to which articles 1 and 2 apply, the maintenance of the existing practice and procedure would, particularly in view of article 5 of the protocol, justify ratification of the convention as modified by the amending protocol without the necessity for any further legislation.

It should also be borne in mind that if, contrary to expectations, any difficulty should arise in the future, it would be always open to His Majesty's Government to reconsider the question of legislation in the light of experience of the working of the convention.

It has, moreover, been suggested that an additional argument in support of this view may be gathered from the discussions which took place at Brussels in 1926, when the convention was under discussion. A copy of the report of the discussions upon article 2 extracted from the *procès-verbal* of the convention is sent herewith (Document 4). From this it will be seen that, in explaining the article and the obligation undertaken by the contracting Governments thereunder, the president says:—

"It is possible that in certain States which are determined to pay what they are acknowledged to be liable for, it may not be considered necessary to institute any special procedure if this does not exist. In other countries, in the case of debt due from the State, one imagines the inclusion of a credit in the budget or some other measures. We must leave this question to the good faith of the countries signing this convention, relying, in fact, on the feeling that they will respect their undertakings. We cannot meddle with their internal public law."

(1) Bar, L. Von, *Theory and Practice of Private International Law*: 2nd edition, Gillespie (1892).



It is true that this statement follows upon a reference particularly to execution, and no doubt the president had in mind the question as to how any judgment could be enforced against a State, but quite clearly the report of the discussions shows that the framers of the convention were not anticipating that it would be necessary to impose exactly the same practice and rules as apply in the case of private individuals.

Furthermore, at the end of the discussion the general feeling of the conference seems to have been summed up in the final statement of the president, a translation of which is as follows:—

“The article does not deal with the question of public law. There are two aspects in the practical application of this article. There is, first, the case of a commercial vessel belonging to a State which is the object of an action in a foreign State. In the foreign State the convention will be given its full and complete effect. The State ship will be treated as a private ship and the State interested in it will not be able to complain of that. But the situation will be different in the territory of the State which is a party to the suit. In that case, when the claimant wishes to enforce his rights, he will have to comply with the law of that State and rely on its good faith.”

The president was drawing the distinction between actions brought against a State-owned ship in a foreign court under the convention and actions brought against State-owned ships in the courts of the country to which the ship belongs, and although perhaps from the context it may be thought that he still had in mind the question of execution, the statement which he made is, in fact, wide enough to cover the general principle that where a State ship was being sued in the courts of its own country, the existing law and practice would be applied and the claimant would have to rely upon the good faith of the State in question to meet its obligation.

It may, however, be thought that if this construction is given to article 2, that article would be meaningless, but that is not so, because it would still have its full application with regard to proceedings against State ships in the courts of any country other than that to which the ship belongs.

At the same time it is not suggested that too much weight should be attached to the discussion referred to in the preceding paragraphs. It is true that, according to the principles of treaty interpretation laid down by the Permanent Court of International Justice, recourse may be had to “preparatory work” in cases where the meaning of a particular provision is not clear. But in the first place it is quite possible that the discussion in question was really confined to the sole question of execution, and that accordingly it is only in connection with that question that the discussion could be looked at for the purpose of interpreting the convention. In the second place, the court has laid down that “preparatory work should not be used for the purpose of changing the plain meaning (‘le sens naturel’) of a text,” and it may well be that an attempt to make use of the discussion in question for the purpose of interpreting the provisions of the convention in the sense suggested above might be regarded as inconsistent with this principle.

Before leaving the question of proceedings against the Crown in the courts of this country, it is perhaps desirable to consider the provisions of article 4, and, in particular, the question of the limitation of liability. Under the existing practice, the Crown effectively limits its liability by agreeing to accept the liability under a judgment against its officer up to, but only up to the extent to which it could limit its liability if the Merchant Shipping Act applied to it. It has been suggested that under the convention, the Crown would not be able to adopt this course in that the present law relating to limitation does not apply to the Crown and that, until that law is so applied, article 4 cannot be relied upon.

It is doubtful, however, whether there is very much risk in this point being taken and until it is, it is thought unnecessary to legislate upon it. The Crown is recognised by the Admiralty Court as entitled to share in a limitation fund, though not bound by the Merchant Shipping Act (see the *Zoe*, 1886, 11 P.B., p. 72, and the *Mineral*, 1919, 1 Lloyd's List Reports, p. 269). The court will also accept payment by the Admiralty in damage actions of the amount assessed as its limited liability—or rather that of its officer—and attend to the due distribution of the fund so paid in of those entitled to claim against it (see the *Cyrano*, 1918, folio 676).

Turning now to the question of the enforcement of the liabilities and obligations arising under the convention against foreign States and their vessels before the courts in this country, it seems clear from the dicta in such cases as *Mighell v. the Sultan of Johore* (1894, 1 Q.B., 149), the *Porto Alexandre* (1920, p. 30), and the *Duff Development Company (Limited) v. the Kelantan Government* (1924, A.C., 797), that as matters stand the courts in this country have no jurisdiction over foreign sovereign States, or the ships or other property owned by such States, whether engaged in commerce or not; a foreign Sovereign may submit to the jurisdiction, but the submission to be effective must take place at the time when the jurisdiction is invoked. Moreover, no process of execution or arrest can issue against a Sovereign litigant or his property (see, e.g., the *Newbattle*, 10 P.D., 33). But it must be noted that in those cases the submission under consideration has been in the nature of a private arrangement by agreement or otherwise between the foreign State and the individual, and the entirely different question of the effect of a formal acceptance of the jurisdiction by a treaty entered into with His Majesty has not been in debate.

It is understood that the present practice of the Office of the Supreme Court is to refuse to accept any writ presented for sealing which on the face of it is clearly directed against a foreign State; but that the authorities there would feel no difficulty in instructing the officers concerned that writs purporting to be in connexion with matters under the convention and directed against a State which had ratified the convention should be sealed in the ordinary course, and if, of course, the writ were merely directed against “the owners” of a particular ship, there would be no apparent ground for the responsible officials to refuse to issue it. It would then be for the State concerned, if it felt aggrieved, to take the appropriate step to set the writ and proceedings founded thereon aside. Any necessary rules as to the service of such writs could, it is thought, be made under the existing general rule-making powers (Supreme Court of Judicature Act, 1925, section 99; attention may be especially called to sub-section (3); “rules of court made under this section shall apply to all proceedings by or against the Crown”). On this understanding, it is submitted that this aspect of article 2 of the convention also does not necessarily involve legislation. Ratification of the convention would deprive the State concerned of any ground for diplomatic protest, and the situation being one which has not previously been considered in the cases which have come before the courts in regard to the position of foreign States, it is at the least very probable that on the attention of the court being called to the convention and to its ratification both by His Majesty's Government and by the Government of the foreign State, it could properly and would hold that it had jurisdiction to allow the case to proceed to judgment, and also (where that was desired by the plaintiff) to order the arrest of the ship or other property by way of security, through bail or otherwise, to meet judgment. “I see no reason why sovereign States should not come to an agreement as to the rights and duties of their respective envoys, ordinary or extraordinary, or why such agreement should not enlarge or restrict the immunities which otherwise would be due under the well-established usage of nations.” (Lord, then Lord Justice, Atkin in the *Fenton Textile Association (Limited) v. Krassin and Others* 38 T.L.R., 258, at p. 262.) This dictum seems equally applicable to all State immunities, as the immunities of envoys form but one class of such immunities. The convention does not restrict or defeat the existing rights of His Majesty's subjects, but enlarges those rights, and therefore is effective in law by virtue of the prerogative in regard to treaty making, and must be given effect by the courts without legislation. (As to the cases in which treaties involve legislation, reference may be made to the article by Professor A. D. McNair at p. 59 of the *British Year Book of International Law* for 1928).

It is true that in the case of the convention in regard to the carriage of goods by air special provision (see section 2 of the Carriage by Air Act, 1932) was made in respect of the jurisdiction of the courts of the United Kingdom, but it seems doubtful if any such provision was essential.

It is, however, by no means free from doubt whether, in the absence of legislation, the courts of this country would entertain claims against foreign States or would order the arrest or seizure of their ships. It may be said that the basic principle applicable in the case of proceedings against a foreign Sovereign or his property is that the courts have no jurisdiction, and that consequently they will only assume jurisdiction when it is clearly demonstrated

to them that the Sovereign has waived his privilege in the particular case submitted to them. It may not be possible, therefore, for any act or agreement by a foreign Sovereign to be construed as submission to the jurisdiction unless it be done or agreed with reference to a particular case which has arisen and in which the courts are being asked to exercise their jurisdiction. It is upon this principle that the courts have in terms stated that the submission must be made at the time when the courts are being asked to exercise jurisdiction (see *in re Suarez* (1918) L.J. 180), and that it has been held that, notwithstanding the submission by a foreign Sovereign to the jurisdiction, no execution in respect of a judgment then obtained can ensue against the Sovereign's property without his further submission. It is therefore submitted that, as one of the most important benefits conferred upon British subjects by the convention is the power to sue foreign States in this country with the right of arrest and seizure, legislation in this limited respect is desirable for the purpose of providing for the jurisdiction of the courts of the United Kingdom over foreign States and for execution against their property. As there are already two other conventions which have been signed by His Majesty's Government, and which it is understood are about to be ratified, entailing the acceptance of similar jurisdiction by the courts of the United Kingdom over foreign State-owned aircraft, and further conventions relating both to ships and aircraft are not unlikely to be entered into in the future, it is a matter for consideration whether, if such legislation is held to be desirable, it would not be better to proceed by way of a Bill amending the Supreme Court of Judicature Act, *e.g.*, by providing for the exercise of jurisdiction where His Majesty has by Order in Council or otherwise certified that specified foreign States have agreed to submit to it, rather than to follow the precedent of section 2 of the Carriage by Air Act, 1932, and legislate for each particular convention.

On the aspect of proceedings against foreign Government-owned ships and cargoes, legislation may perhaps be thought to be necessary to enable the courts to act in all the various cases which may arise upon the diplomatic certificate as to the particular interests of the State given conclusive evidential value by article 5 (on this point reference may be made to pp. 137-139 of the judgment of Mr. Justice Hill in the case of the *Jupiter* (No. 3), 1927, p. 122), and to secure the re-exemption from the jurisdiction of our courts of the ships and cargoes affected by a declaration of suspension under article 7.

There is one other difficult aspect of the matter, to which attention must be drawn, arising from the fact that Dominion ships and cargoes may be affected by the convention and protocol, and that machinery should be available accordingly to deal with claims by proceedings in this country in the appropriate cases against Dominion Governments who have ratified the convention. The position with regard to the enforcement in the courts of this country of claims against a Dominion Government is uncertain. In the case of *Attorney-General v. Great Southern and Western Railway Company of Ireland* (1925 A.C. 754, at p. 779), Lord Phillimore said that, in his opinion, a petition of right cannot properly be brought in the courts here if the liability sought to be enforced is one which would have to be made good by a Dominion Exchequer. In any event, difficult constitutional questions arise as to the presentation of a petition and the advice on which it should be based, and a petition could only be presented in respect of claims in contract. There have been precedents of cases in tort in Dominion courts brought against the responsible officer of one of His Majesty's ships, and no objection has been raised to the jurisdiction where the tort occurred in Dominion waters.

These difficulties would seem to emphasise the desirability of avoiding legislation so far as claims against the Crown are concerned.

The Law Officers are requested to advise—

1. Whether, so far as claims made in this country against vessels to which article 3 applies, the existing law and practice will justify His Majesty's Government in ratifying the convention without legislation.
2. Whether, so far as claims made in this country against vessels to which articles 1 and 2 apply, the existing law and practice will justify His Majesty's Government in ratifying the convention without legislation.
3. If the answer to questions 1 or 2 is in the negative, upon what matters is legislation necessary?

4. Whether legislation is necessary in the case of claims against foreign States, and, if so, whether it is, in the opinion of the Law Officers, preferable to proceed by way of general amendment to the Supreme Court of Judicature Act, rather than by way of a Bill limited to the purposes of the convention now under consideration.
5. Generally upon the case.

List of Papers.

- (1) Copy of the convention relating to the Immunities of State-owned Ships, with provisional English translation. (W 12981/559/50/1933.)
- (2) Copy of protocol additional to the convention, with provisional English translation. (W 12981/559/50/1933.)
- (3) Copy of report of the Crown Proceedings Committee.
- (4) Extract from *procès-verbaux* of the Conference on International Maritime Law held at Brussels in April 1926 (Annex A). (W 9405/85/50/1927.)

Opinion.

1. In considering first liability in tort the important words of article 3 are in our view "the claim to immunity shall not be open." So long as the Crown is, in law, not liable for the torts of its servants, we are of opinion that as a matter of construction the above words are not being complied with. It is suggested that the practice under which the appropriate officer is sued and the State, in fact, satisfies the judgment or order made by the court amounts to a fulfilment of the convention. If the convention had merely stated that claimants should get damages to the same extent as they would if the ships had been privately owned we should have accepted this argument. In the words which we have quoted above, however, the convention goes beyond this, and in our opinion the practice itself under which the officer is sued shows clearly that so far as the court proceedings are concerned the immunity which the convention says shall not be open is being recognised by the procedure adopted. We also think that the practice of referring salvage actions to arbitration would not be a compliance with that part of the convention which refers to the proper courts of the State. With regard to claims in contract for which procedure by Petition of Right is available we are of opinion that this is a compliance with the convention and no objection could be raised to it. On the other hand under the present practice as stated in the case, it would appear that claimants do, in effect, get the compensation contemplated by the convention. Whether in these circumstances His Majesty's Government would be "justified" in ratifying the convention without legislation is a question of policy as well as of law. On the whole, we think that such a course would be justified. It must, however, in our opinion, be realised that the Government may be pressed to comply fully and strictly with the terms of the convention, and in that event legislation would be necessary. It may well be that no such objection will be raised.

2. We answer this question in the same way. It is suggested that article 5 of the protocol can be construed as covering everything in article 2. We do not think article 5 could be so construed. It would be pointed out at once that if this had been intended it is difficult to explain why only one of the three matters dealt with in article 2 is embodied in article 5. Although it is no doubt right to say that the phrases in article 2 should not necessarily be given the same meaning as they have technically in English law, we think it is clear, reading articles 1 and 2 together, that the principles of liability, including the principle under which the owner or employer is responsible for the torts of his servants, should be the same in the case of State-owned as they are in the case of privately-owned ships.

3. If legislation should ever become necessary it would, in our opinion, have the effect that in all cases covered by the convention the claimant had the same right of action against the State as he has against a private owner where the ship is privately owned. Its general nature is, we think, clear from the terms of the convention and our answers to Questions (1) and (2). Article 5 of the protocol makes it clear that so far as articles 1 and 2 are concerned rules



1936

10

GENERAL

of procedure need not be identical, and, indeed, so far as execution is concerned they could not be. We think, although it is not expressly so stated, that the same principle would apply to article 3. The claim to immunity which article 3 negatives refers, in our opinion, to liability and not to the rules of procedure or the method of enforcing the liability as laid down by the court.

4. In our opinion legislation is necessary, and we think it would be preferable to proceed by way of amendment to the Supreme Court of Judicature Act on the lines suggested having regard to the fact that there are other conventions on which the same point may be raised.

5. We have nothing to add.

T. W. H. INSKIP.

D. B. SOMERVELL.

*Law Officers' Department,
January 1936.*

Annex A.

(Paper No. 4.)

Extract from Procès-verbaux of Conference on International Maritime Law held at Brussels in April 1926.

"ARTICLE 2.

"Pour ces responsabilités et obligations, les règles concernant la compétence des tribunaux, les actions en justice et la procédure sont les mêmes que pour les navires de commerce appartenant à des propriétaires privés et que pour les cargaisons privées et leurs propriétaires."

M. le Président: Il n'a été apporté à ce texte aucune modification de principe. Mais la Commission de rédaction s'est demandé si le texte primitif, qui parlait de règles de procédure, comprenait le droit de saisie et englobait tant la saisie conservatoire que la saisie-exécution. Telle était sans doute la pensée des rédacteurs et telle a été la nôtre à la commission. Mais une assez grande divergence de vues s'est produite quant aux termes à employer, étant donnée la diversité des conceptions de droit interne. Pour les uns, les mots "les actions en justice" suffisent; d'autres ont soutenu que mieux valait dire: "règles de procédure." Nous avons repris les deux expressions pour être certains de ne rien omettre. Il est bien entendu qu'en ce qui concerne les modalités de la procédure de saisie chaque Etat applique sa loi, mais le traité ne sera loyalement exécuté que si les mesures à prendre pour organiser cette procédure sont efficaces. Il est possible que dans certains Etats, bien décidés à payer ce dont ils seront reconnus redevables, il ne soit pas estimé nécessaire d'organiser une procédure spéciale, si elle n'existe pas. Dans d'autres pays, en cas de créance à charge de l'Etat, on envisage l'inscription d'un crédit au budget ou bien d'autres mesures encore. Nous devons abandonner cette question à la bonne foi des pays qui vont signer cette convention, confiants, en effet, dans le sentiment qu'ils ont du respect de leurs engagements. Nous ne pouvons toucher à leur droit public interne. A l'étranger, le texte sera d'une application générale, et les navires, quoique propriété d'un autre Etat, pourront être saisis comme les navires appartenant à un armateur privé. Mais à l'intérieur, c'est-à-dire dans le pays dont les navires seront en cause, nous nous en référons au droit de ce pays et à sa loyauté.

M. Ripert: Au sujet de l'article 2, j'ai à faire une déclaration au nom de la délégation française. Je ne demande pas une modification du texte de l'article 2, mais j'ai déjà eu l'honneur d'indiquer à la conférence pourquoi il est impossible, en France et sans doute aussi en d'autres pays, d'appliquer exactement à l'Etat la procédure et les voies d'exécution en vigueur à l'égard des armements privés. Notre président a indiqué dans son rapport que l'article 2 devrait être entendu en ce sens que si, dans un pays déterminé, la procédure ou une voie d'exécution contre l'Etat était soumise à des règles particulières, ce sont ces règles que l'on

GENERAL

11

suivrait dans ce pays. Toutefois, comme l'article 2 est conçu en termes absolus et porte que les règles concernant la compétence, les actions en justice et la procédure sont les mêmes que pour les navires de commerce appartenant à des propriétaires privés, je tiens à faire la déclaration suivante:

"La délégation française déclare que, les voies d'exécution ordinaires n'étant pas applicables en France contre l'Etat et les biens de l'Etat étant insaisissables, l'application de l'article 2 de la présente convention ne pourra être demandée en France que sous réserve des principes du droit public français concernant la procédure et les mesures d'exécution contre l'Etat et l'insaisissabilité des biens de l'Etat."

M. le Président: Je donne acte à la délégation française de cette déclaration. Elle rentre dans les réserves que je viens d'indiquer moi-même dans mon exposé et que tous les pays peuvent donc invoquer, même sans les formuler expressément. Je le répète: Il ne s'agit pas de toucher au droit public. Il y a deux aspects dans l'application pratique de cet article: il y a d'abord le cas d'un navire de commerce appartenant à un Etat et qui est l'objet d'une action à l'étranger. A l'étranger, la convention produira son plein et entier effet; le navire d'Etat sera traité comme un navire privé et l'Etat intéressé ne pourra s'en plaindre. Mais la situation sera différente sur le territoire de l'Etat en cause; ici, quand un créancier voudra faire valoir ses droits, il devra se soumettre au droit de cet Etat et s'en remettre à sa bonne foi.

M. Bals: La délégation roumaine s'associe à cette déclaration.

M. Berlingieir: La délégation italienne de même.

M. Kawai: La délégation japonaise également.

[W 1851/647/50/1936]

No. 1^B.

[Treasury Solicitor]

[February 26, 1936]

Opinion of the Law Officers of the Crown for Scotland.

IN considering the questions appended to the case,⁽¹⁾ we have had the advantage of perusing the opinion of the Law Officers in England. That opinion is, of course, based upon existing law and practice in England, and, in so far as the law and practice in Scotland does not differ, we have reached the same conclusions as are set forth in that opinion. In what follows we have had regard to the matters in which there are or may be differences in the Scottish law and practice, and from that point of view we answer the queries as follows, namely:—

1. So far as the law and practice of Scotland are concerned, we reach the same conclusion as that set out in the opinion of the Law Officers in England. The immunity of the Crown in Scotland from actions based on delict—which corresponds to tort in England—is, in substance and effect, the same as in England; and in practice, the action lies and is taken against the individual or officer by whom the delict was committed. Standing that immunity, it appears to us impossible to affirm with strict accuracy that in Scotland the existing law and practice conform to the requirements of the convention that "a claim to immunity shall not be open." The same view, in our opinion, falls to be expressed as regards salvage proceedings in Scotland, as to which we have ascertained that, although there appears to be no reported case in which the question has been raised, the procedure which would be followed would not differ from that which is followed in England, namely, by submission to arbitration. With regard to claims in contract, no difference arises in Scotland, where, although proceedings by way of petition of right are unknown, the procedure is regulated by statute. Actions against the Crown or Departments of State (other than the Admiralty)

⁽¹⁾ The case referred to is identical with that submitted to the Law Officers of the Crown in England—W 647/647/50/1936.]

[14996]

c 2

Convention and Protocol relating to the Immunities of State-owned Ships: as to whether ratification by His Majesty's Government will necessarily involve legislation.



1936

are brought against the Lord Advocate (Crown Suits (Scotland) Act, 1856), while actions by or against the Admiralty are subject to the provisions of the Admiralty Suits Act, 1868. Subject, accordingly, to these observations, we agree *mutatis mutandis* with the answer to this query contained in the opinion of the Law Officers in England.

2 and 3. We agree with and adopt the views expressed in the opinion of the Law Officers in England.

4. With regard to the enforcement of liabilities and obligations arising under the convention against foreign States and their vessels before the courts in Scotland, we are of opinion that those courts might, in obedience to the principles and *dicta* set forth in the case, decline *ex proprio motu* to entertain proceedings against a foreign State. The existing code which regulates for Scotland the jurisdiction and procedure in the Court of Session and Sheriff Courts is contained in a series of statutes extending from 1808 to 1933 inclusive. We agree with the view of the English Law Officers that legislation on this aspect of the matter is necessary, or at least advisable, and we are of opinion that it should preferably take the form of a general amendment to the provisions contained in the code above referred to.

5. We have nothing to add.

T. M. COOPER.

ALBERT RUSSELL.

Edinburgh, February 26, 1936.

[L 5007/13/405/1936]

No. 1^c.

[May 20, 1936]

Sir G. Bushe (Colonial Office) to the Attorney-General.

Dear Attorney,

Colonial Office, May 14, 1936.

THE Secretary of State has asked me to consult you in the following matter:—

Demands have recently been made in both the House of Commons and the House of Lords that the draft of an Order in Council which (if the project is proceeded with) will be submitted to The King in Council for the purpose of establishing a Legislative Council of Palestine should be laid before Parliament. Similar demands have also been made in respect of an Order in Council which it is proposed to submit to His Majesty in Council with reference to the occupancy of the highlands in Kenya. I enclose a copy of the various questions and answers on the subject, and also a copy of a motion in the House of Lords which has not yet been disposed of.

The first Order in Council to which I have referred would be made under the Foreign Jurisdiction Act, and the second would be made under the British Settlements Act.

Now there are certain instruments—Letters Patent and Orders in Council—such, for example, as those providing for the constitution of a conquered colony which are made under the prerogative and nothing else. I imagine that as to these it would be agreed that it would not be proper to lay them before Parliament or to publish them prior to their submission to The King. The question is whether the same principle obtains with reference to Orders under the Foreign Jurisdiction Act and the British Settlements Act.

As regards the former, the origin of The King's jurisdiction in foreign countries must, I think, have been derived from his prerogative power of making treaties. Doubts, however, arose as to whether he could exercise this jurisdiction by Orders made in this country, and the first general Foreign Jurisdiction Act of 1843 recites that whereas Her Majesty has power and jurisdiction within diverse countries and places out of Her Majesty's dominions, and whereas doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and custom of this realm, that it is expedient that

Laying
before
Parliament
before sub-
mission to
The King
of Orders
in Council
under the
Foreign
Jurisdiction
Act and
British
Settlements
Act.

such doubts should be removed; and then proceeds to enact "that it is and shall be lawful for Her Majesty to hold, exercise and enjoy the foreign jurisdiction so obtained."

In the Act of 1890, which consolidates the Foreign Jurisdiction Acts, the doubts are no longer expressed, but the phrase "it is and shall be lawful" is retained in section 1, which proceeds to provide that the jurisdiction should be exercised and enjoyed in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.

The effect, therefore, seems to be that The King's jurisdiction in foreign countries is to be exercised in the same way as similar jurisdiction is exercised in a conquered colony. Parliament, as you know, does not legislate directly for the protectorates or mandated territories, and where it is desired that an Act should be applicable to such places provision is inserted giving His Majesty power to apply it by Order in Council. The arrangement, therefore, by which under the Foreign Jurisdiction Act it was recognised, or established (whichever may be the true view), that The King possessed, and could exercise, jurisdiction in foreign countries by Order in Council as if they were conquered colonies has been scrupulously observed for forty-six years. I need scarcely add that there is no provision in the Foreign Jurisdiction Act for laying Orders in draft, but it is provided that Orders are to be laid before Parliament after they have been made.

Turning now to the British Settlements Act, 1887, the position was that, while there was undoubted right in the prerogative to legislate for a conquered colony, the position in relation to a settlement was uncertain. The 1887 Act, which consolidates some earlier Acts, was passed for the purpose of giving the Crown power to legislate for British territories although not acquired by cession or conquest, and to create dependent legislatures in those possessions. Here, again, I think that as a result the power to legislate was delegated to The King. There is no provision for the laying of Orders in Council before Parliament in draft, and I cannot help thinking that The King's powers under this Act, as under the Foreign Jurisdiction Act, are in the nature of prerogative powers.

The position, therefore, seems to be this:—

- (1) There is no obligation to lay Orders in draft either under the Foreign Jurisdiction Act or the British Settlements Act.
- (2) That if I am right in my suggestion that powers under these Acts are in the nature of prerogative powers, it would not be proper to lay the Orders in draft or to publish the text before they are submitted to The King in Council.
- (3) That the responsibility for advising The King to make these Orders rests upon His Ministers, and that the power of Parliament in the matter is to criticise or to correct the Government after the event if it disapproves of what has been done.

The Secretary of State, however, has always realised that there arise from time to time some proposals, such as the institution of a Legislative Council in Palestine, in which Parliament is keenly interested, and his policy in such a case has been to lay on the table of the House a paper containing a summary of the proposals which it is proposed to bring into force.

Apart from the principle involved, there is obvious inconvenience in laying in draft the actual text or Orders in Council where the procedure in the matter is not regulated by statute whether as to the powers of Parliament in relation to the draft, or to the time within which any action may be taken by Parliament on the draft, or as to the effect of any action if it is taken. I venture to think, therefore, that a compromise by which the substance of proposals is communicated in advance to Parliament so giving an opportunity to discuss the general principles involved is a reasonable one, and that it would be dangerous, and might be regarded as a breach of the prerogative, to commence at this date to lay before Parliament any draft Orders which it is proposed in due course to submit to His Majesty under the two Acts to which reference has been made. Moreover, it must be remembered that if these Orders are to be laid here in draft it would not be possible to prevent their discussion in the Legislature of the colony or territory concerned or, indeed, in the Legislature of any other part of the Empire which might regard itself as interested. The Indian Legislature,

for example, would certainly regard itself as interested in an Order in Council relating to the occupancy of the highlands of Kenya. Both of these possibilities envisage action which would be in the highest degree undesirable.

Would you be so good as to let me know whether you agree, or, if you do not, what you think is the correct position in the matter?

I am sending a copy of this letter to Wigram, who will naturally be interested in the discussion.

GRATTAN BUSHE.

List of Papers.

- No. 1.—Parliamentary Question and Answer, November 14, 1934 (Kenya). (Parliamentary Debates, Commons, vol. 293, columns 1941–1942.)
 No. 2.—Parliamentary Question and Answer, May 7, 1936 (Kenya). (Parliamentary Debates, Commons, vol. 311, column 1876.)
 No. 3.—Parliamentary Question and Answer, February 12, 1936 (Palestine). (Parliamentary Debates, Commons, vol. 308, columns 927–928.)
 No. 4.—House of Lords Debate on Palestine, March 5, 1936. (Parliamentary Debates, Lords, vol. 99, columns 925–940.)
 No. 5.—House of Lords Motion. (Annex I.)

Report.

The Attorney-General to Sir G. Bushe.

I agree entirely with your first two propositions, subject to a possible proviso to the last sentence of proposition 2, which will be clear from my remarks on your third proposition.

I agree, of course, that the responsibility for advising The King to make these Orders rests upon His Ministers. On the other hand, there appears to me nothing unconstitutional in Ministers obtaining the views of Parliament by any appropriate procedure on the subject-matter with regard to which they are proposing to advise His Majesty. I agree that it would not be proper to publish the text of an Order as a Draft Order, but I do not at the moment see any objection to Ministers placing before Parliament in the form of proposals for discussion what might later appear textually as provisions of the Order. Although, therefore, the "power" of Parliament may be, as you state, to criticise or correct the Government after the event, it is also, I think, true to say that it is within the power of Ministers to obtain the views of Parliament upon either principle or detail before they finally make up their minds as to the terms of the Draft Order they propose to lay before His Majesty. I do not think in effect there is any difference between us in principle, but it does not seem to me that the course I have suggested could in any way be regarded as a breach of the prerogative should Ministers in any particular case think it proper to adopt it. I have not gone into the question of the parliamentary procedure under which discussion could be raised, but it would not, of course, be a formal motion for approval of the proposals as such.

With regard to the last page of your letter, I am not sure that I appreciate why discussions in colonial Legislatures or the Indian Legislature might not equally take place where the procedure you refer to is adopted, under which the substance of proposals is communicated in advance to Parliament.

I suppose a case could be made for a reconsideration of the whole matter on the ground that under statute many Orders in Council of far less importance have, in fact, to be laid before and approved by Parliament. That, however, raises a very big issue, and if you care to have a talk with me about it at any time that could be arranged.

DONALD SOMERVELL.

*Law Officers' Department,
 May 20, 1936.*

ANNEX No. I.

(Paper No. 5.)

The Lord Ker (M. Lothian)—To move, to resolve, that this House considers that if an elected Council is established in Palestine it should at this stage be representative and not responsible in character, and that any Order in Council setting up a Legislative Council for Palestine should be laid on the table of both Houses of Parliament for one month in order that Parliament may have an opportunity of discussing it before it is promulgated.

MOROCCO

[W 664/261/28/1936]

No. 1.

[January 22, 1936.]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, July 22, 1935.

I HAVE the honour, by direction of Secretary Sir Samuel Hoare, to request your opinion on the following matter:—

2. His Majesty's Government in the United Kingdom are engaged in a dispute with the Spanish Government arising out of the enactment and application to British subjects of certain legislation imposing taxes in the Spanish Zone of Morocco. His Majesty's Government contend that the application of these taxes to British subjects is contrary to His Majesty's treaty rights in Morocco and your opinion is desired on the prospects of a favourable judgment if His Majesty's Government brought the dispute before the Permanent Court of International Justice. His Majesty's Government appear to have the right to do so by unilateral application seeing that both His Majesty's Government and the Spanish Government have accepted the jurisdiction of the court under the Optional Clause (article 36 (2) of the statute of the court).

3. The taxes in dispute fall into two classes:—

- (a) Consumption duties (*i.e.*, duties imposed on goods consumed in the zone). The duties to which exception has been taken by His Majesty's Government are contained in a number of dahirs, dated the 29th June, 1934, which create new, and increase existing, taxes (details of which are given in Tangier despatch No. 88 of the 23rd July, 1934, and enclosures thereto (Paper I (1)); and in a vizirial decree and dahir of the 20th September, 1934, imposing a consumption tax on imported wheat flour and its derivatives (details of which are given in Tangier despatch No. 128 of the 13th October, 1934, with enclosure (Paper I (2)).
- (b) Gate taxes (*i.e.*, taxes imposed on goods entering towns). A gate tax on local produce entering towns in the Spanish Zone and on goods imported into the zone by sea was imposed by a dahir and vizirial decree of the 1st September, 1931, modified, at the instance of His Majesty's Government by a vizirial decree of the 17th March, 1932. This tax was made applicable to British subjects by King's Regulation No. 2 of 1932 (Paper II). A dahir and vizirial decree of the 1st November, 1934 (details of which are given in Tangier despatch No. 23 of the 9th February, 1935, with enclosures—Paper III), has been issued, the effect of which is that the tax becomes leviable on imported goods only. It is this dahir and decree of 1934 which is in dispute with the Spanish Government.

Application to British subjects of legislation imposing taxes in the Spanish Zone of Morocco.



4. The contentions of His Majesty's Government are briefly set out with regard (a) to the consumption duties in the note and aide-mémoire of the 8th March, 1935, from His Majesty's Ambassador in Madrid to the Spanish Minister for Foreign Affairs (Annex 44 of Paper IV) and in the note and aide-mémoires of the 19th March, 1935, which were communicated by His Majesty's consul at Tetuan to the High Commissioner for Spain in Morocco (Paper V); and with regard (b) to the gate tax in the note of the 30th March, 1935, from His Majesty's Ambassador in Madrid to the Spanish Minister for Foreign Affairs (Annex 50 of Paper IV). These contentions, however, are not readily intelligible without an understanding of the whole treaty position in Morocco. Full information concerning this position and the various disputes which have arisen with regard to it is given in the Foreign Office memorandum which is submitted as Paper IV. It may, however, be convenient to outline the more important features.

5. In 1856 Her Majesty Queen Victoria concluded with the Sultan of Morocco (then an entirely independent State) two treaties: (i) a General Treaty (Paper VI (1)), and (ii) a Commercial Convention (Paper VI (2)). Neither of these treaties is made terminable, and it is common ground that they are in force except in so far as they have been modified by later instruments, though there may be some dispute as to the extent to which certain later instruments have affected their provisions. The essential features of these treaties for present purposes are:—

- (i) That they confer on His Majesty extra-territorial (or capitulatory) jurisdiction in respect of British subjects in Morocco (articles 8–14 of the General Treaty).
- (ii) That by article 7 of the Commercial Convention goods imported into Morocco by British subjects are not subject to any import duties higher than 10 per cent. (to which an additional special tax has been added by virtue of article 66 of the Act of Algeciras (see paragraph 8 below)).
- (iii) That by article 4 of the General Treaty British subjects are not to be obliged "to pay under any pretence whatever any taxes or impositions" (certain exceptions to this rule have been created by subsequent instruments).

In this connexion attention is invited to paragraphs 11–17 of Paper IV, where the effect of the provisions of these two treaties is explained.

6. A number of other Powers acquired similar treaty rights in Morocco, and also the right under most-favoured-nation provisions each to claim individually whatever had been granted by Morocco to any other. The result was that the Capitulations and privileges gave rise to a number of abuses, and the situation was such that grave prejudice was caused to the interests and administration of the country. In 1880 an international conference was held at Madrid to ameliorate the position by the introduction of certain reforms, and this conference resulted in the conclusion of the Madrid Convention (Paper VII (1)). In derogation from the general immunity from local taxation enjoyed by British subjects and other privileged foreigners, article 13 of this convention sanctioned under certain conditions the levying of gate taxes upon capitulatory foreigners, and detailed regulations with regard to such taxes were agreed by the Powers in 1881 (Paper VII (2)) and again in 1896 (Paper VII (3)). In this connexion attention is invited to paragraphs 22 and 23 of Paper IV. The gates taxes now under dispute, however, cannot be justified under these regulations.

7. As the result of a series of diplomatic instruments beginning in 1903 and ending in 1923, the present situation in Morocco was brought about, whereby, although the Sultan of Morocco retains a nominal sovereignty over the whole country, France exercises a protectorate over the greater portion of the country, a second portion known as the Spanish Zone is administered by Spain and a third smallest area known as the Tangier Zone is under an international administration. It is, however, not disputed that the older treaties remain in force in all three zones except in so far as they have been modified or replaced by provisions in the subsequent instruments, as has been the case to some extent; for example, in the Tangier Zone, an international tribunal has been set up, and all the Powers (except the United States) have renounced in that zone the exercise of their extra-territorial jurisdiction. His Majesty's Government have not surrendered their

extra-territorial jurisdiction either in the French Zone or in the Spanish Zone, though all the other Powers except the United States of America have now done so.

8. The above-mentioned series of instruments begins with the Anglo-French Declaration of the 8th April, 1904, with regard to Egypt and Morocco (see in particular articles 2 and 4, Paper VIII), and the Franco-Spanish Declaration and Convention of the 3rd October, 1904 (Paper IX, Nos. 1 and 2), and the Anglo-French Exchange of Notes of the 6th October, 1904 (Paper IX, Nos. 3 and 4).

The next instrument is the Act of Algeciras of 1906 (Paper X) to which all the Powers then enjoying substantial treaty rights in Morocco were parties and which introduced by agreement of the Powers certain changes and reforms in Morocco, of which some are relevant to the question of the taxation of British subjects (see paragraphs 31–49 of Paper IV). Under the Algeciras Act and subsequent regulations approved by the Powers, certain further taxes were made leviable on British subjects and other privileged foreigners (see paragraphs 51–54 of Paper IV).

There followed in 1909 a Franco-German Declaration (Paper IX, No. 5), and in 1911 a Franco-German Convention (Paper IX, No. 6), which was accompanied by an Exchange of Notes (Paper IX, Nos. 7 and 8). The Franco-German Convention of the 4th November, 1911, is important in connexion with the present question because His Majesty's Government acceded to it on the 14th November, 1911, and it is considered possible, in so far as the Spanish Government may endeavour to resist the contentions of His Majesty's Government in the present dispute on legal grounds, that the Spanish Government will rely on articles 1 and 4 of this Franco-German Convention. In this connexion attention is invited to Paper IV, paragraphs 62–71.

The series of instruments was completed by the Franco-Moroccan Protectorate Treaty of the 30th March, 1912, and the Franco-Spanish Convention of the 27th November, 1912 (see Paper IV, paragraphs 8–91, and also paragraphs 92–93, with regard to the recognition by His Majesty's Government of the French and Spanish protectorates), and by the Tangier Convention of 1923 creating the international régime in the Tangier Zone (Paper IV, paragraphs 100–113).

9. His Majesty's extra-territorial jurisdiction in the French and Spanish Zones of Morocco is exercised by British consular courts and by the Supreme Court for Gibraltar under the Morocco Orders in Council, 1889–1929, Consolidated (Paper XI). Proceedings can only be taken against British subjects in these courts, which according to the Order in Council apply English law, together with such local legislation as has been made applicable to British subjects by King's Regulations under article 143 of the Consolidated Order. Numerous King's Regulations covering local legislation, including legislation imposing taxation, have been made in both zones. Examples of early King's Regulations relating to taxation are given in paragraphs 51–54 of Paper IV, and Paper XII contains a series of recent King's Regulations enforcing on British subjects in the Spanish Zone various Spanish taxes. Payment of a tax by a British subject can only be enforced by proceedings in these courts, though in practice the local authorities in many cases can by one means or another bring pressure on British subjects to pay taxes otherwise than by legal proceedings. Apart from the special taxes covered by treaty provisions which have been already referred to, His Majesty's Government contend that the Spanish authorities are not entitled to demand from British subjects taxes not agreed to by His Majesty's Government and made applicable by King's Regulation, and the present dispute has arisen because the Spanish authorities are by indirect means enforcing payments of such taxes from British subjects.

10. The contention of His Majesty's Government in regard to consumption taxes in the Spanish Zone is briefly as follows: Each of the dahirs of the 29th June, 1934, relating to consumption taxes, provides that the tax will be collected on importation into the zone of the goods concerned. By article 7 of the United Kingdom Commercial Convention of 1856, goods imported into Morocco are subject to a maximum customs duty of 10 per cent., to which a special tax of 2½ per cent. has been added by article 66 of the Act of Algeciras; this maximum duty of 12½ per cent. is levied on all goods imported into the Spanish Zone. By article 4 of the United Kingdom–Morocco General Treaty of 1856 British subjects "shall not be obliged to pay, under any pretence whatever, any taxes or

impositions"; this exemption has been modified in regard to certain taxes by subsequent instruments, which do not, however, affect the present question of consumption taxes. Consequently, the new taxes may be held to constitute either an increase in the customs duties, contrary to article 7 of the Commercial Convention of 1856, as modified by article 66 of the Act of Algeciras, or an increase in the internal duties of the Spanish Zone, contrary to article 4 of the General Treaty of 1856. In either case, the taxes involve direct discrimination between goods imported and similar goods produced locally. The conditions on which His Majesty's Government would be prepared to issue, at the specific request of the Spanish Government, the necessary King's Regulations in respect of these consumption taxes are shown in the note and aide-mémoire of the 8th March, 1935, which were communicated to the Spanish Government by His Majesty's Embassy at Madrid, as reported in Sir George Grahame's despatch No. 150 of the 13th March last (Annex 44 of Paper IV).

11. As regards the gate tax in the Spanish Zone, His Majesty's Government contend that in virtue of the special arrangements governing the tax as laid down in article 13 of the Madrid Convention of 1880 (Paper VII (1)) and in the regulations thereunder of 1881 and 1896 (Papers VII (2) and (3)), and also of the provisions of article 4 of the General Treaty of 1856 (Paper VI (1)), no taxes of this nature can be applied to British subjects unless agreed to by His Majesty's Government and made binding on British subjects by King's Regulation. Representations on this basis have been addressed to the Spanish Government by His Majesty's Ambassador at Madrid (Annex 50 of Paper IV).

12. Having stated the contentions of His Majesty's Government it is necessary to consider what is the answer which the Spanish Government would be likely to endeavour to make to them if the case came before the Permanent Court. Up to the present the Spanish Government have not returned any answer to the notes which have been addressed to them setting out the claims of His Majesty's Government. They have confined themselves to requests for a general discussion about the situation in the Spanish Zone of Morocco. His Majesty's Ambassador at Madrid has now been instructed to make a final appeal to the Spanish Government to agree to the proposals of His Majesty's Government, and to state that, in view of the attitude adopted by the Spanish Government to their representations, His Majesty's Government in the United Kingdom feel compelled to take active steps to bring the question before the Permanent Court of International Justice (Paper XIII).

13. It is surmised that the Spanish Government would argue that, while the contentions of His Majesty's Government are in accordance with the law as it existed up to the time of the accession of His Majesty's Government to the Franco-German Convention of 1911, after that date a change was introduced by article 1 of that convention. This surmise is based partly upon certain vague references to this convention which have from time to time been made by the Spanish authorities, but more particularly upon the arguments which the French Government have made in the past when similar questions arose in the French Zone. It is to be noted, however, that the French Government, though they have never formally abandoned their arguments based on the Franco-German Convention, have not in practice insisted upon them. In practice the French Government have asked for the application to British subjects of legislation in the French Zone imposing taxes, and in general His Majesty's Government have acceded to such requests. In some cases, however, His Majesty's Government have first obtained alterations in the legislation in question in order to remove discriminatory features, or, alternatively, special assurances as to the manner in which such legislation should be applied.

14. Recently a similar question arose in the French Zone also with regard to gate taxes, and for the present at any rate the matter has been settled in a manner consistent with the claims of His Majesty's Government with regard to the treaty position by an exchange of notes of the 29th January, 1935 (Paper IV, Annex 1). This exchange of notes, however, contained a number of provisions and it has not yet been brought into force (Paper IV, paragraphs 116-122), and it is possible that it will never come into force owing to difficulties with regard to the arrangements contemplated in matters other than the gate tax. Consequently, it is not certain that His Majesty's Government will not be faced in the French Zone with the same question as has arisen in the Spanish Zone and which is the subject of the present reference.

15. The arguments which have been made in the past, based upon the Franco-German Convention of 1911, and the answers to these arguments and the situation in practice are fully discussed in Paper IV (see, in particular, paragraphs 72-79, 97-99 of Part I and the whole of Parts II and III of that memorandum). Some interesting comments on the treaty régime in Morocco have also been made recently by M. Basdevant, a legal adviser to the French Ministry for Foreign Affairs, and by M. de Saint-Quentin, of the French Ministry for Foreign Affairs, at a lecture given to the French Colonial Union in Paris in January 1934 (Paper XIV).

16. The contention of His Majesty's Government is that article 1 of the Franco-German Convention does not create any alteration in the legal position arising from the existing treaties, but is an obligation requiring His Majesty's Government to adopt a certain policy in connexion with reforms and legislation which the Protectorate Governments wish to put into operation, namely, that His Majesty's Government will be ready to accept, and, so far as is necessary, take the measures to implement any reasonable policy or legislation which the Protectorate Governments wish to put into force. His Majesty's Government must be consulted about the measures and appreciate them for themselves, but, provided on examination they are not found to conflict either in spirit or in letter with the most-favoured-nation principles and the freedom of trade which are so carefully safeguarded in the Franco-German Convention itself, they will accept the measures and take the steps necessary to apply them to British subjects. As indicated in Paper IV (Annex 44) and Paper V, and Paper IV (Annex 50), this is precisely the policy which His Majesty's Government are adopting with regard to the measures which have occasioned the dispute. They are ready to accept all of them, provided that their treaty rights are recognised and a minimum of modifications made in order to remove from the measures in question those features which constitute discrimination or are contrary to the freedom of trade.

17. The contention on the other side is that the Franco-German Treaty has the effect of rendering all consent by His Majesty's Government unnecessary for the legal application to British subjects of measures of taxation, though it is admitted that action by His Majesty's Government is necessary to render the taxes enforceable by legal proceedings, and it is presumed that the argument is that it is obligatory on His Majesty's Government automatically to make the necessary King's Regulations. As regards this contention, particular attention is invited to the following amongst the other points which are set out in the passages referred to above of Paper IV:—

- (i) The contention, if it is right, goes too far, since, if the Franco-German Convention has the effect which is stated, the capitulatory rights have also disappeared, but this is not contended.
- (ii) It is entirely inconsistent with the position in practice in both zones since the date of the Franco-German Convention. A particularly strong instance of this will be found in paragraphs 145 and 146 of Paper IV, where the Spanish Government went so far in admitting His Majesty's Government's point of view that they actually refunded taxes collected from British subjects previous to the date of the making of the King's Regulation.
- (iii) In the French Zone the official Règlement Douanier admits the limits created by the Commercial Convention of 1856 and the Act of Algeciras as regards the amounts of customs duties. It is accepted in Morocco that the customs duties in the French and Spanish Zones must be the same (see paragraph 78 of Paper IV).
- (iv) The contention is inconsistent with the draft treaty of 1919 mentioned in paragraph 97 of Paper IV.

18. Sir Samuel Hoare, therefore, requests the Law Officers to take the above-mentioned Papers into consideration and to advise him whether they concur in the opinion of the legal advisers to the Foreign Office, that, if the questions now in dispute with the Spanish Government were referred to the Permanent Court of International Justice, it should be expected that His Majesty's Government would be successful.

I have, &c.
P. LEIGH-SMITH.

List of Papers.

- I (1).—Tangier despatch No. 88 of July 23, 1934 (extracts only). [W 7075/4202/28/1934]
 I (2).—Tangier despatch No. 128 of October 13, 1934. [W 9273/4202/28/1934]
 II.—King's Regulation (Spanish Zone) No. 2 of 1932.
 III.—Tangier despatch No. 23 of February 9, 1935. [W 1402/976/28]
 IV.—Foreign Office memorandum on treaty rights respecting customs and taxation in Morocco, July 1, 1935 (Confidential 14630). (Annex A.)
 V.—Tetuan despatch No. 28 of March 19, 1935 (with enclosures) to His Majesty's Consul-General at Tangier. [W 2781/29/28/1935]
 VI (1).—United Kingdom-Morocco General Treaty, December 9, 1856. (Parliamentary Paper, 1857.)
 VI (2).—United Kingdom-Morocco Commercial Convention, December 9, 1856. (Parliamentary Paper, 1857.)
 VII (1).—Madrid Convention regarding the right of protection in Morocco, July 3, 1880. (Parliamentary Paper, C.-3053.)
 VII (2).—Regulations of 1881 under the Madrid Convention of 1880. (*State Papers*, Vol. 72, p. 636.)
 VII (3).—Regulations of 1896 under the Madrid Convention of 1880. (*Annuaire du Maroc*, 1905, p. 221.)
 VIII.—Anglo-French Declaration of April 8, 1904. (Parliamentary Paper, Cd. 5969.)
 IX.—Parliamentary Paper, Morocco No. 4 (1911) (Cd. 6010), containing—
 (1) Franco-Spanish Declaration, October 3, 1904.
 (2) Franco-Spanish Convention, October 3, 1904.
 (3) French Ambassador to Lord Lansdowne, October 6, 1904.
 (4) Lord Lansdowne to French Ambassador, October 6, 1904.
 (5) Franco-German Declaration, February 8, 1909.
 (6) Franco-German Convention, November 4, 1911.
 (7) German Foreign Secretary to French Ambassador at Berlin, November 4, 1911.
 (8) French Ambassador at Berlin to German Foreign Secretary, November 4, 1911.
 X.—Act of Algeciras, April 7, 1906. (Parliamentary Paper, Cd. 3302.)
 XI.—Morocco Orders-in-Council, 1889-1929, Consolidated.
 XII.—King's Regulations (Spanish Zone) respecting consumption duties.
 XIII.—Despatch to His Majesty's Ambassador at Madrid, No. 377, July 11, 1935. [W 5076/976/28/1935]
 XIV.—Tangier despatch No. 91 of June 18, 1935. [W 5615/29/28]

Report.

In so far as the Spanish Government rely upon the provisions of the Franco-German Convention of 1911 as justifying the application to British subjects of the legislation imposing the taxes in question in the Spanish Zone without the concurrence of His Majesty's Government, we are of opinion that the contentions of the Spanish Government are not well founded. We are not aware of any other ground upon which the Spanish Government rest their case, and we therefore concur in the opinion of the legal advisers to the Foreign Office that His Majesty's Government should be successful if the questions now in dispute with the Spanish Government were referred to the Permanent Court of International Justice.

T. W. H. INSKIP.
 D. B. SOMERVELL.

*Law Officers' Department,
 January 22, 1936.*

(14630)

ANNEX A.

(Paper No. IV.)

TREATY RIGHTS RESPECTING CUSTOMS AND TAXATION
IN MOROCCO.*I.—Review of Treaty Provisions.*

THE Portuguese were the first Europeans to obtain a foothold in Morocco, Ceuta being taken by them in 1415. The disastrous expedition of King Sebastian in 1578 brought about the downfall of Portuguese power in Morocco, and Mazagan, their last possession, was evacuated in 1579. At this period Spain had come into the possession of such towns as Ceuta, Melilla and Alhucemas, which, together with certain islets off the Mediterranean coast, formed the so-called "presidios," and were later extended so as to form the present Spanish Zone in Morocco.

2. Between 1760 and 1770 several treaties of peace and friendship were concluded with Morocco by Great Britain (1760 and 1765), Sweden (1763), Denmark, France and Spain (1767).

3. The Danish treaty provides (article 5) that "les négociants danois peuvent en toute assurance venir dans l'Empire de Maroc, voyager, vendre et acheter dans toutes les provinces . . . sans être obligés de payer aucun droit d'entrée et sortie plus sur ce que paient les autres négociants des nations chrétiennes; . . ."

4. The French treaty of 1767 contains in article 2 provision for freedom of commerce: "Les sujets respectifs des deux Empires pourront voyager, trafiquer et naviguer en toute assurance . . . par terre et par mer . . . sans craindre d'être molestés ni empêchés . . ." Article 5 states that "les marchands français pourront vendre et acheter dans toute l'étendue de l'Empire du Maroc, comme ceux des autres nations, sans payer aucun droit de plus," together with most-favoured-nation treatment as to import and export duties. Article 11 provides for the establishment of consuls, and also "ceux qui seront au service des consuls, secrétaire, interprète, courtier ou autres, tant au service des consuls que des marchands, ne seront empêchés dans leurs fonctions et ceux du pays seront libres de toute imposition et charge personnelle." Articles 12 and 13 regulate consular jurisdiction in civil and penal matters.

5. The Spanish treaty of 1767, together with the later treaties of 1780 and 1799, were abrogated by the treaty of 1861, but the treaty of 1799 is notable in that for the first time the import duty was fixed at a maximum of 10 per cent. *ad valorem*, while specific duties are laid down for articles exported.

6. In 1825 a treaty was concluded between Sardinia and Morocco. Article 2 provided for freedom of commerce by sea and land and for most-favoured-nation treatment. Articles 18 and 22 regulated consular jurisdiction.

7. In 1836 the United States concluded a treaty. Article 14 provides that commerce with the United States shall be on the same footing as is the commerce with Spain or as that with the most-favoured-nation for the time being, and their citizens "shall . . . have full liberty to pass and repass our country and seaports whenever they please, without interruption." Article 20 also provides that "whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them." Other articles regulate United States consular jurisdiction.

8. The establishment of the French in Algeria in 1830 was an important development in Morocco's external relations. The revolt of the Algerian chieftain Abd-el-Kader led to Franco-Moroccan hostilities (1843-44), which were terminated by a convention signed at Tangier the 20th September, 1844. This convention contemplated the conclusion of conventions to delimit the boundaries and to regulate the political and commercial relations of the two countries.

7871 [11543] [12684]

B

Meanwhile, the old treaties were to be scrupulously respected and observed and France was to enjoy in all things treatment of the most favoured nation. The Treaty of Lalla Marnia of the 18th March, 1845, defined the boundaries. Commercial relations, however, continued to be based on the treaty of 1767 until the commercial agreement of 1892.

9. Two years after the Treaty of Lalla Marnia the Spanish possessions in North Africa were consolidated into a Captain-Generalship. A chronic state of hostilities with the Riff tribes ensued, which ultimately culminated in 1859 in a war between Spain and Morocco. Peace was re-established by the Treaty of Tetuan of the 26th April, 1860, and the Treaty of Madrid of the 30th October, 1861, by which Spain obtained certain territorial adjustments and the promise of a commercial treaty.

10. During this period Great Britain enjoyed a predominating influence in Morocco and the terms of the treaties of Lalla Marnia and Tetuan were largely determined by British pressure. In 1856 Great Britain concluded a general treaty and a commercial convention with Morocco, which laid down a new basis for the economic status of foreigners in Morocco.

11. *General Treaty of 1856*.—Article 3, corresponding to article 11 of the French treaty of 1767, provides for the Chargé d'Affaires and the consuls or vice-consuls being at liberty to choose interpreters and servants, either from the Mussulmans or others, who shall not be compelled to pay any capitation tax, forced contribution or other charge.

12. Article 4 sets out the personal privileges to be enjoyed by British subjects in Morocco, and provides that "they shall not be obliged to pay, under any pretence whatever, any taxes or impositions."

13. By certain articles (mainly articles 8, 9, 14, 16, 18) British subjects, as defendants, are only amenable to the British consular courts and are immune from the local jurisdiction. Jurisdiction is exercised by British consular courts and by the Supreme Court of Gibraltar under the Morocco Orders in Council, 1889-1929, Consolidated. These extra-territorial rights possessed by the United Kingdom in Morocco have never been surrendered. Consequently, as British subjects are exempt from taxation by article 4, no new tax can legally be levied on British subjects unless His Majesty's Government have agreed to the tax and a King's Regulation, under article 143 of the Morocco Orders in Council, 1889-1929, Consolidated, has been issued making it applicable to British subjects. Payment of the tax can only be enforced by proceedings in a British consular court.

14. Article 20 extends the privileges granted by the treaty to British subjects and "those who are under her (*i.e.*, Her Majesty Queen Victoria) government or *protection*," and any subsequent privileges granted to any other Power are to be extended to all British subjects in every respect, as to the subjects of such other Power.

15. The treaty contains no provisions for termination.

16. The *Commercial Convention* of 1856 includes the following privileges:—

- (a) British subjects are to enjoy in Morocco the same protection and privileges as are or may be enjoyed by the nationals of the most favoured nation.
- (b) Further, they have the right to buy or sell in Morocco all articles except those specified by name as being subject to monopolies or prohibitions, *viz.*:—
 - (i) The following imported goods: tobacco pipes for smoking, opium, sulphur, powder, saltpetre, lead, arms of all kinds and ammunition of war; and
 - (ii) The following goods of domestic production: leeches, bark, tobacco and other herbs used for smoking (article (1) and (2)).

(c) As regards goods purchased for export and exported by British subjects—

- (i) Except the goods referred to in (b) (ii) above, British subjects can export Moroccan produce on any vessels on terms as favourable as the subjects of any foreign country or native subject (article 6 (2)).

- (ii) No tax or charge is to be levied except one export duty and no permit is to be required, and the goods may be conveyed to port and exported free of hindrance unless the goods belong to a class whose export from Morocco has been prohibited generally for some temporary purpose (see (iii) below) (article 3 and article 9).
- (iii) The export of grain or other articles from Morocco may be prohibited, but only if applied to subjects of every other nation. There are provisions under which British subjects must be allowed to dispose of stocks in their possession (article 5, and see also 7, paragraph 2).
- (iv) The export duty is limited according to a tariff laid down in the treaty and British subjects have most-favoured-nation rights (article 7).

(d) As regards imports into Morocco—

- (i) There is to be no prohibition of imports by British subjects except in the case of goods referred to in (b) (i) above (article 6).
- (ii) No import duty higher than 10 per cent. *ad valorem* is to be charged on goods imported by British subjects (article 7); and when once this duty has been paid, no further duty is to be paid on these goods even if they are conveyed by sea from one port to another in Morocco and embarked and disembarked more than once (article 8).
- (iii) The customs duties paid by British subjects shall not be higher than those paid on similar goods imported by the subjects of any foreign Power or native subjects (article 6).

(e) As regards British vessels—

The anchorage, tonnage, import or other duties levied on British vessels or on goods imported or exported in them shall not be greater than is levied on national vessels or goods carried by them, and, in any case, not exceed certain specified rates (article 10).

17. By article 14 the convention is subject to revision at the demand of either party, "but until such revision shall have been accomplished by common consent and a new convention shall have been concluded and ratified, the present convention shall continue and remain in full force and effect."

18. In 1858 a declaration was signed regulating commercial relations between the Netherlands and Morocco by the grant of most-favoured-nation treatment.

19. On the 20th November, 1861, Spain concluded the commercial treaty as provided for in the Treaty of Madrid of the 30th October, 1861. It is based on the United Kingdom-Morocco General Treaty and Commercial Convention of 1856, and thus provides for freedom of commerce (article 44), for exemption of Spanish subjects from taxes or impositions (article 5), for limitation of import duties to 10 per cent. *ad valorem*, and for specific duties on exports identical with those in the United Kingdom commercial convention (article 50). Spanish subjects are accorded most-favoured-nation treatment as regards persons and commerce (articles 15, 44, 49, 50). The rights of Spanish consular jurisdiction are laid down in articles 10, 11 and 16, the provisions being modelled on those in the United Kingdom General Treaty of 1856. Article 3 contains the same provisions as article 3 of the United Kingdom General Treaty of 1856 and article 11 of the French Treaty of 1767 as to interpreters and servants of the Chargé d'Affaires and consuls being exempt from personal taxes. The treaty abrogates previous commercial treaty instruments between Spain and Morocco.

20. In 1862 Belgium concluded a treaty of friendship and commerce with Morocco, by which the commercial relations of the two countries were based on most-favoured-nation treatment.

21. In 1863 France concluded an agreement with Morocco ("*Règlement*" Bécclard) dealing with the right of protection. It has already been stated that article 11 of the French Treaty of 1767, and articles 3 of the United Kingdom

General Treaty of 1856 and of the Spanish Treaty of 1861 dealt with this matter to a limited extent. The "règlement" of 1863 defined the categories of natives in Morocco that were to enjoy the protection of the representatives of France (a capitulatory Power), with the result that they became subject to capitulatory rights. The "règlement" became international by the accession of other Powers: Belgium, Sardinia, Sweden, United Kingdom, United States. This system of protection gave rise to difficulties and abuses, and it was with a view to remedy the unsatisfactory position that a conference was held in Madrid in 1880 which drew up the Madrid Convention of that year.

22. The convention confirmed the "règlement" of 1863 except as modified by the new convention. The contracting Powers are the United Kingdom, Austria, Belgium, Denmark, France, Germany, Hungary, Italy, Morocco, Netherlands, Norway, Portugal, Spain, Sweden and United States of America, *i.e.*, all the Powers possessing rights of consular jurisdiction in Morocco. Apart from the conditions laid down as to the manner in which protection may be granted, the following provisions should be mentioned. According to article 3, persons protected as employees of consuls, vice-consuls or consular agents "shall not be liable to any dues, imposts or taxes whatsoever, excepting as stipulated in articles 12 and 13." Article 11 gave foreigners the right to hold property in Morocco, purchase to be effected with the prior consent of the Sherrefian Government. Article 12 provided that foreigners and protected persons who are proprietors or renters of cultivated land, as well as brokers in agricultural matters shall pay an agrarian tax. The tax was to be fixed by a special regulation between the representatives of the Powers and the Moorish Minister for Foreign Affairs. Article 13 provided that foreigners, protected persons and brokers who own beasts of burden shall pay the gate tax, which was also to be fixed by special regulation as in the case of the agrarian tax. The gate tax was not to be augmented without a fresh agreement with the representatives of the Powers.

23. The agricultural tax remained inoperative as regards foreigners and protected persons until 1913. The gate tax, which was covered by the international regulations of 1881 and 1896 and a dahir of 1917, together with subsequent amending dahirs, will be dealt with in a later stage of this memorandum. The Madrid convention also provides (article 17) for the right of most-favoured-nation treatment in Morocco for all the contracting Powers. It seems to proceed on the basis that the rights acquired by the capitulatory Powers independently by their bilateral treaties are extended to all the others and, so to speak, codified, and not thenceforth to be modified save by the consent of all the Powers.

24. The Treaty of Commerce between Germany and Morocco of 1890 was abrogated by the Treaty of Versailles (similarly, the treaty between Austria and Morocco of 1830 was abrogated by the Treaty of Saint-Germain).

25. In 1892 a commercial agreement, as contemplated by the Tangier Treaty of 1844, was concluded between France and Morocco in the form of an exchange of letters between the French Minister at Tangier and the Moroccan Minister for Foreign Affairs. This agreement reduced to 5 per cent. the import duty, and also reduced the export duty, on certain specified articles. The concessions embodied in the agreement extend to other countries by virtue of most-favoured-nation treatment.

26. The importance attached by His Majesty's Government to their rights under the General Treaty and Commercial Convention of 1856, and under the Madrid Convention of 1880, is shown by an incident that occurred in 1893. In that year the French Legation at Tangier proposed the imposition of certain taxes on exports designed to raise a revenue for the Tangier Sanitary Commission, and contended that the Moorish Government would have the right to levy them on foreigners without the consent of the Powers. His Majesty's Government maintained that this contention was inadmissible. By article 4 of the General Treaty of 1856 British subjects shall not, under any pretence whatever, be obliged to pay any taxes or impositions, and the proposed impost, though made to take the form of an export duty, was in reality a municipal tax. Moreover, the imposition of a tax which would fall mainly upon British subjects would be at variance with the provision of most-favoured-nation treatment for British subjects in the commercial convention of 1856 and the Madrid Convention of 1880. Consequently, His Majesty's Minister at Tangier was

instructed to state that His Majesty's Government would not consent to any tax unless it was equitably levied and did not press unduly upon British subjects.

27. On the 8th April, 1904, was signed the important declaration between the United Kingdom and France regarding Egypt and Morocco. Article 2 runs:—

"The Government of the French Republic declare that they have no intention of altering the political status of Morocco.

"His Britannic Majesty's Government, for their part, recognise that it appertains to France, more particularly as a Power whose dominions are continuous for a great distance with those of Morocco, to preserve order in that country, and to provide assistance for the purpose of all administrative, economic, financial and military reforms which it may require.

"They declare that they will not obstruct the action taken by France for this purpose, provided that such action shall leave intact the rights which Great Britain, in virtue of treaties, conventions and usage, enjoys in Morocco, including the right of coasting trade between the ports of Morocco, enjoyed by British vessels since 1901."

Article 4 runs:—

"The two Governments, being equally attached to the principle of commercial liberty both in Egypt and Morocco, declare that they will not in those countries countenance any inequality, either in the imposition of customs duties or other taxes, or of railway transport charges."

"This mutual engagement shall be binding for a period of thirty years. Unless this stipulation is expressly denounced at least one year in advance, the period shall be extended for five years at a time."

There has been no notice of denunciation.

Article 7 runs:—

"In order to secure the free passage of the Straits of Gibraltar, the two Governments agree not to permit the erection of any fortifications or strategic works on that portion of the coast of Morocco comprised between, but not including, Melilla and the heights which command the right bank of the River Sebou.

"This condition does not, however, apply to the places at present in the occupation of Spain on the Moorish coast of the Mediterranean."

By article 8—

The two Governments, inspired by their feeling of sincere friendship for Spain, take into special consideration the interests which that country derives from her geographical position and from her territorial possessions on the Moorish coast of the Mediterranean. In regard to these interests the French Government will come to an understanding with the Spanish Government.

The agreement which may be come to on the subject between France and Spain shall be communicated to His Britannic Majesty's Government.

28. There were also certain secret articles attached to the declaration, of which the following may be quoted:—

Article 2.—His Britannic Majesty's Government have no present intention of proposing to the Powers any changes in the system of the Capitulations, or in the judicial organisation of Egypt.

In the event of their considering it desirable to introduce in Egypt reforms tending to assimilate the Egyptian legislative system to that in force in other civilised countries, the Government of the French Republic will not refuse to entertain any such proposals, on the understanding that His Britannic Majesty's Government will agree to entertain the suggestions that the Government of the French Republic may have to make to them with a view of introducing similar reforms in Morocco.

Article 3.—The two Governments agree that a certain extent of Moorish territory adjacent to Melilla, Ceuta, and other *présides* should, whenever the Sultan ceases to exercise authority over it, come within the sphere of influence of Spain, and that the administration of the coast of Melilla as far as, but

not including, the heights on the right bank of the Sebou shall be entrusted to Spain.

Nevertheless, Spain would previously have to give her formal assent to the provisions of articles 4 and 7 of the Declaration of to-day's date, and undertake to carry them out.

She would also have to undertake not to alienate the whole, or a part, of the territories placed under her authority or in her sphere of influence.

29. Spain gave her accession to the declaration, and on the 3rd October, 1904, signed with France another declaration in which both Powers expressed their firm attachment to the integrity of the Moroccan Empire under the sovereignty of the Sultan. A secret convention of the same date between France and Spain fixed (articles 2, 4 and 5) the boundaries of the sphere of influence which fell to Spain by virtue of her possessions on the Moorish coast of the Mediterranean. In that zone the same right of action was reserved to Spain as was reserved to France by the second paragraph of article 2 of the United Kingdom-France Declaration of 1904, which amounted to the right of preserving order and of providing assistance for the purpose of all administrative, economic, financial and military reforms that might be required. Spain agreed not to exercise this right of action during the first period—not to exceed fifteen years from the date of signature—that the convention was to be in force. France agreed that during the same period she would inform the Spanish Government previously of the advice she might tender to the Sultan of Morocco so far as the Spanish sphere of influence was concerned. After the expiry of the first period and as long as the *status quo* was maintained, France would not exercise her right of action with the Moroccan Government in respect of the Spanish sphere except in agreement with the Spanish Government. Article 3 of the secret convention laid down that in the event of the continuance of the political status of Morocco and of the Shereefian Government becoming impossible, or if for any cause the *status quo* could no longer be maintained, Spain might freely exercise her right of action in the territory which henceforward should constitute her sphere of influence. By article 9, "la ville de Tanger gardera le caractère spécial que lui donne la présence du corps diplomatique et ses institutions municipales et sanitaires." By article 11, "les Espagnols continueront de jouir au Maroc des droits que leur assurent les traités, conventions et usages en vigueur" By article 12, "les Français jouiront dans les régions désignées aux articles 2, 4 et 5, de la présente convention, des mêmes droits qui sont, par l'article précédent, reconnus aux Espagnols dans le reste du Maroc." By article 15, in the event of the denunciation of the United Kingdom-France Declaration of 1904, the French and Spanish Governments "se concerteront pour l'établissement d'un régime économique qui répond particulièrement à leurs intérêts réciproques."

30. A secret agreement between France and Spain of the 1st September, 1905, for the carrying out of the secret convention of the 3rd October, 1904, provided [III (2)] that "Les Espagnols et les Français . . . jouiront pour toujours au Maroc, dans l'exercice de leurs professions et la réalisation de leurs opérations commerciales et industrielles en cours ou projetées, des mêmes droits et privilèges, de manière que l'état juridique des sujets et ressortissants des deux nations soit constamment le même. Les marchandises des deux pays jouiront pour leur introduction, circulation et vente dans l'Empire, d'un traitement identique. Les deux hautes parties contractantes emploieront tous les moyens pacifiques en leur pouvoir et se prêteront mutuellement leur concours auprès du Sultan et du Makhzen en vue d'empêcher que, présentement comme dans l'avenir, cette clause ne vienne à être modifiée par l'autorité marocaine par suite de l'établissement de règles différentes en ce qui concerne l'état juridique des personnes et des conditions auxquelles seront soumises les marchandises des deux nations."

31. The Anglo-French and Franco-Spanish agreements of 1904 caused Germany to claim an interest in the Moroccan question, and the visit of the German Emperor to Tangier in 1905 brought about the first Moroccan crisis. This crisis led to the Franco-German agreements of the 8th July and the 28th September, 1905, which traced the programme of a future conference, the intention of which was that it should internationalise the Moroccan question. The conference took place at Algeciras in 1906, and an Act was drawn up, signed

by Austria, Belgium, France, Germany, Hungary, Italy, Morocco, Netherlands, Portugal, Russia, Spain, Sweden, United Kingdom and United States of America. The United States signature (and ratification) was made with a reservation declaring that in subscribing to the regulations and declarations of the Act and in consenting to their application to United States citizens and interests in Morocco the United States Government assumed no obligation or responsibility as to the measures which may be necessary for their enforcement.

32. The preamble embodies the principle of economic liberty and equality (which is referred to again in article 105): the signatory Powers "inspired by the interest which attaches to the reign of order . . . in Morocco, and having recognised that this desirable end could only be attained by means of the introduction of reforms based upon the threefold principle of . . . economic liberty without any inequality have resolved" &c.

33. The reforms provided for by the Act relate to various matters which are dealt with in six chapters.

34. Chapter I relates to the organisation of the police.

35. Chapter II deals with the suppression of the illicit traffic in arms. Article 13 provides that "throughout the whole extent of the Shereefian Empire the importation of, and trade in, warlike arms . . . and all materials destined exclusively for the manufacture of ammunition are prohibited," except in cases specified in articles 14 and 15. (This is of interest as showing that Morocco could not prohibit imports save by consent of the Powers.) Article 18 provided for the regulation of the trade in non-rifled sporting or high-priced arms of foreign make by a Shereefian order *made in conformity with the advice of the Diplomatic Body at Tangier*, whose decision shall be declared by a majority of votes. Article 24 provides that where a vessel anchored in a port open to commerce is suspected of carrying arms or other prohibited goods for importation into Morocco, the *Shereefian customs officers shall so inform the competent consular authority*, in order that the latter may, with the assistance of the Shereefian customs officer, proceed to such enquiries, inspection or search as may be necessary. By article 15, in cases of importation of prohibited goods by sea at a port not open to commerce, the Moorish customs authorities may take the vessel to the nearest port, *to be there handed over to the consular authority*, who shall have the right to seize and retain it until payment of the fines.

36. Chapter III deals with the creation of a State bank. Article 45 runs:—

"Actions instituted by the Bank in Morocco shall be tried before the consular court of the defendant or before the Moorish courts, in accordance with the rules of competence laid down in the treaties and Shereefian firmans.

"Actions brought against the Bank in Morocco shall be tried before a special court composed of three consular magistrates and two assessors. The Diplomatic Body shall draw up annually the list of magistrates and assessors and of their substitutes.

"This court shall in such actions apply the rules of law, procedure and competence laid down by French law in matters of commerce. Appeals from judgments pronounced by this court shall lie to the Federal Court at Lausanne, whose decision shall be final."

37. Chapter IV embodies a declaration concerning an improved yield of the taxes and the creation of new sources of revenue.

38. Article 59 deals with the "tertib." This comprises: "(i) l'impôt des cultures annuelles; (ii) l'impôt des arbres fruitiers; (iii) l'impôt sur le bétail." The article runs:—

"As soon as the "tertib" shall have been regularly enforced on Moorish subjects, the representatives of the Powers at Tangier shall impose it upon their nationals within the Empire. It is, however, understood that the said tax shall not be imposed on foreigners except—

"(a) Under the conditions prescribed by the regulations made by the Diplomatic Body at Tangier under date of the 23rd November, 1903.

"(b) In the localities where it shall be actually collected from Moorish subjects.

"The consular authorities shall retain a proportion of the amount levied upon their nationals in order to cover the expenses incurred in drawing up the lists and collecting the tax.

"The rate of such deduction shall be fixed by agreement between the Makhzen and the Diplomatic Body at Tangier."

39. Article 60 recognises, in accordance with article 11 of the Madrid Convention of 1880, the right of foreigners to acquire real property throughout the Shereefian Empire. At ports open to trade the Sultan's authorisation is to be general and not in respect of each purchase. At other places the general authorisation is to be limited to purchases within a radius of 2 kilom. around the towns.

40. Article 61 recognises in principle a tax on town buildings, a portion of the revenue to be set aside for municipal roads and hygiene, and generally for improvements and conservancy in towns. The article also states:—

"The tax shall be leviable on Moorish or foreign proprietors without any distinction; but the tenant or custodian of the key shall be responsible therefor to the Moorish Treasury.

"Regulations made by common agreement between the Shereefian Government and the Diplomatic Body at Tangier shall fix the rate of the tax, lay down the manner of collecting and applying it, and determine what proportion of the resources thus created shall be devoted to meeting the cost of improvements and of conservancy in the towns.

"At Tangier such proportion shall be paid to the International Sanitary Council, which shall determine the manner of its application until a municipal organisation shall have been created."

41. Article 64 runs:—

"The conference takes note of the proposals formulated by the Shereefian delegates respecting the establishment of new taxes on certain trades, industries and professions.

"If, as the result of the collection of such taxes from Moorish subjects, the Diplomatic Body at Tangier should consider that their levy should be extended to foreigners, it is hereby stipulated that the said taxes shall be exclusively municipal."

42. By article 65 the conference accepted a proposal for the introduction, with the co-operation of the Diplomatic Body, of a stamp duty on contracts; transfer tax on real estate; statistical and weighing dues on goods despatched coastwise; passport fee levied from Moorish subjects; and eventually quay and lighthouse dues.

43. Article 66 provided that—

"As a temporary measure, goods of foreign origin shall, on their entry into Morocco, pay a special tax of 2½ per cent. *ad valorem*. The total revenue derived from this tax shall form a special fund, which shall be devoted to meeting the expenditure on, and execution of, public works undertaken for the development of navigation and trade generally in the Shereefian Empire.

"The programme of the works and the order of their execution shall be settled by agreement between the Shereefian Government and the Diplomatic Body at Tangier."

The article further provided that the moneys belonging to the special fund shall be deposited in the Morocco State Bank, and that public contracts shall be awarded in the form and according to conditions laid down in regulations drawn up by the Diplomatic Body at Tangier conjointly with the Sultan's representative. In connexion with this special tax, article 33 provided that its proceeds should be paid into the State Bank, together with such revenues as it may eventually hypothecate as security for its loans, the bank being specially charged with their service (exception being made of the 1904 loan, which is governed by a special contract); while article 36 provided that the proceeds shall form a special fund, for which the bank shall keep a separate account, and which shall be employed in accordance with the rules laid down by the conference.

44. By article 67 the conference expressed the hope that the export duties would be reduced on chick-peas, maize, barley and wheat.

45. Article 70 deals with berthage or anchorage dues, which were fixed by treaties with certain Powers. According to the article, the Powers were prepared to consent to revision of the dues, and the Diplomatic Body at Tangier was charged with drawing up, in agreement with the Makhzen, the conditions of revision.

46. Chapter V embodies regulations respecting the customs and the suppression of fraud and smuggling. The various articles contain provisions for protecting the Moorish customs against illicit importing and exporting, by measures agreed on with the capitulatory Powers and involving the collaboration of the consular authorities. According to article 102, every confiscation, fine or penalty shall be pronounced, in the case of foreigners, by the consular courts, and in the case of Moorish subjects by the Shereefian courts.

47. Article 75 of the Algeciras Act provides that in the event of any modifications of the provisions of Chapter IV an understanding must be arrived at between the Makhzen and the Diplomatic Body.

48. Article 104 provides that the regulations in Chapter V concerning the customs and suppression of fraud and smuggling, shall, after two years, be open to revision by the Diplomatic Body at Tangier in agreement with the Makhzen.

49. The Algeciras Act contains no provision as to termination.

50. It may be convenient here to mention the steps that were taken for the execution of some of the more important taxes provided for in the Act of Algeciras.

51. The "tertib" remained inoperative as regards foreigners until 1913, when regulations were drawn up and approved by the Diplomatic Body, and applied to British subjects by a King's Regulation. The international regulations were modified and replaced by two dahirs of the 10th March and the 11th March, 1915, together with an "arrêté" of the 14th March, 1915, regulating its levy. The dahirs and "arrêté" were made applicable to British subjects by a King's Regulation. An "arrêté" of the 15th February, 1921, abrogated the "arrêté" of the 14th March, 1915, but it was not made the subject of a King's Regulation.

52. The urban tax or tax on town buildings was covered by international regulations drawn up on the 10th January, 1908, which provided for revision after a period of six years. Revision was effected by a dahir of the 24th July, 1918, modified by a dahir of the 22nd May, 1919, and these two dahirs, together with dahirs of the 23rd June, 1923, and the 16th February, 1924, were, at the request of the French Resident-General, applied to British subjects in the French Zone by King's Regulation No. 6 of 1924.

53. The stamp tax was regulated by a dahir of the 15th December, 1917, which was made applicable, as regards the French Zone, to British subjects, by King's Regulation No. 1 of 1918. The dahir of 1917 was modified by a dahir of the 22nd December, 1923, which was likewise applied to British subjects by King's Regulation No. 4 of 1924.

54. The "patentes" tax (article 64 of the Act of Algeciras) was regulated by a dahir of the 9th October, 1920, which was made applicable to British subjects by "The 'Impôt des Patentes' (French Zone) Regulation, 1920." This dahir was amended by one of the 23rd May, 1922, and applied to British subjects by "The 'Impôt des Patentes' (French Zone) Amendment Regulation, 1922."

55. In 1909 an incident arose affecting British treaty rights as regards taxation, which recalled the incident of 1893 (see paragraph 26). The Sultan, without consulting the Powers, issued instructions for the collection from foreigners and protected persons at Fez of dues from which they had hitherto been exempt—market dues on woollen, cotton and silk garments, second-hand clothes, drapery, slippers, silver, arms, charcoal, wheat (resale), butter, oil, preserved meats, vegetables, wood, salt, wool. The Foreign Office approved the action of His Majesty's Minister in giving instructions for protected persons, pending a decision by the Powers, to pay the dues under protest and warning the Moorish authorities that repayment would be demanded. At the same time, His Majesty's Minister was reminded of the attitude taken up by His Majesty's Government with regard to the 1893 incident.

56. On another occasion, in 1909, tax was levied, in accordance with instructions issued by the Sultan, on goods belonging to a British-protected

Conf. 9617,
No. 380.

Conf. 9617,
Nos. 392 and
405.

Conf. 9617,
No. 392.

person, which had already paid import duty. His Majesty's Minister at Tangier pointed out to the Moorish Government that the tax was a breach of treaty stipulations, and referred to article 4 of the General Treaty of 1856. The modification of this stipulation in regard to certain specified taxes by the Madrid Convention and the Algeciras Act did not affect the general principle that except where His Majesty's Government had given their assent to any special tax being levied on British subjects or British-protected persons, they were absolutely exempt from all taxes or impositions whatever. His Majesty's Government agreed with this view, and the sum collected was, in fact, returned.

57. This case also raised a point which is of interest in connexion with the provision in the commercial convention of 1856, limiting to 10 per cent. *ad valorem* the duty on goods imported by British subjects. The point was whether goods of British origin should be exempted from any further tax, even though they had passed out of British hands and were in the possession of Moorish subjects. The view of His Majesty's Government was that any such taxation was contrary to the spirit and intention of both the commercial treaty of 1856 and the Algeciras Act. In ancient treaties, such as the Capitulations, it was customary to provide for the safety and good treatment of the British merchant, and to secure as an element of such good treatment that the goods which he brought to the foreign country should not pay more than a certain fixed rate of duty. This stipulation was preserved in British treaty arrangements with Morocco, probably on account of the primitive system of government prevailing there. Treaties on the modern model regard the nationality of the goods instead of that of the merchant who carries them; and that this was the view held by all the treaty Powers to be applicable in Morocco, was clearly proved by the wording of article 66 of the Algeciras Act, which does not speak of goods in the hands of the merchant, but provides that as a temporary measure goods of foreign origin shall, on entry, pay a special tax of 2½ per cent. *ad valorem*. The intention was clearly that such goods should not be subject to any dues exceeding the treaty rates plus 2½ per cent., and its effect would be entirely nullified if additional taxes could be imposed on the same goods inland. The French, Spanish, German and some of the other representatives concurred in the view of His Majesty's Government, and His Majesty's Minister suggested to the doyen that the Diplomatic Corps should address a protest to the Makhzen, declaring that the Powers absolutely refused to allow taxes to be imposed on goods of foreign origin over and above those authorised by treaty, even if the goods belonged to Moroccan citizens. There is nothing to show whether effect was actually given to this suggestion. In connexion with this point it may also be held that article 66 of the Act of Algeciras (which speaks of goods of foreign origin), article 4 of the United Kingdom-France Declaration of 1904, article 4 of the Franco-German Convention of 1911 (paragraph below), and, possibly, by implication, the United Kingdom-France Transit Agreement of the 24th August, 1916 (paragraph 96 below), prohibit inequality based on the origin of goods.

58. It has been said that the intention of the Algeciras Act was to internationalise the Moroccan question, but in effect France found herself in the main free to settle the lines of her Moroccan policy. However, disorders in Morocco hindered the application of French policy, and various incidents brought Germany into the field of diplomatic discussion. On the 9th February, 1909, France signed a declaration with Germany which ran:—

“Le Gouvernement de la République française, entièrement attaché au maintien de l'intégrité et de l'indépendance de l'Empire chérifien, résolu à y sauvegarder l'égalité économique, et par suite à ne pas y entraver les intérêts commerciaux et industriels allemands,

“Et le Gouvernement impérial allemand, ne poursuivant que des intérêts économiques au Maroc, reconnaissant d'autre part que les intérêts politiques particuliers de la France y sont étroitement liés à la consolidation de l'ordre et de la paix intérieure et décidé à ne pas entraver ces intérêts,

“Déclarent qu'ils ne poursuivront et n'encourageront aucune mesure de nature à créer en leur faveur ou en faveur d'une Puissance quelconque un privilège économique et qu'ils chercheront à associer leurs nationaux dans les affaires dont ceux-ci pourront obtenir l'entreprise.”

59. In March 1910 France concluded agreements with Morocco embracing the evacuation of the Shawia (the coastal region of which Casablanca and Settat

are the principal centres), the evacuation of the Algerian frontier region and a French loan to Morocco.

60. On the 16th November, 1910, Spain concluded an agreement with Morocco with the object of reaching a settlement of the difficulties that existed in the Spanish frontier regions. The agreement dealt with three main objects: (i) The administration of the occupied region in the Riff and of the territory lying near the Spanish fortresses of Alhucemas and Peñon de Vélez; (ii) Ceuta frontier arrangements; (iii) Melilla war indemnity.

61. In 1911 anarchy in Morocco rose to a head, and the Sultan, besieged in Fez, appealed to France for assistance. A French expeditionary force marched on Fez and raised the siege. Germany now renewed her claims to a voice in Moroccan affairs, and the despatch of a German gunboat to Agadir brought about the second Moroccan crisis. Negotiations followed between France and Germany which resulted in the important convention of the 4th November, 1911.

62. Article 1 of this convention runs:—

“Le Gouvernement impérial allemand déclare que, ne poursuivant au Maroc que des intérêts économiques, il n'entravera pas l'action de la France en vue de prêter son assistance au Gouvernement marocain pour l'introduction de toutes les réformes administratives financières et militaires dont il a besoin pour le bon gouvernement de l'Empire comme aussi pour tous les règlements nouveaux et les modifications aux règlements existants que ces réformes comportent. En conséquence, il donne son adhésion aux mesures de réorganisation, de contrôle et de garantie financière que, après accord avec le Gouvernement marocain, le Gouvernement français croira devoir prendre à cet effet, sous la réserve que l'action de la France sauvegardera au Maroc l'égalité économique entre les nations.

“Au cas où la France serait amenée à préciser son contrôle et sa protection, le Gouvernement impérial allemand, reconnaissant pleine liberté d'action à la France, et sous la réserve que la liberté commerciale, prévue par les traités antérieurs, sera maintenue, n'y apportera aucun obstacle. . . .”

Accordingly, by article 2, the German Government “ne fera pas obstacle à ce que la France, après accord avec le Gouvernement marocain, procède aux occupations militaires du territoire marocain qu'elle jugerait nécessaire au maintien de l'ordre et de la sécurité des transactions commerciales. . . .”

63. Article 4 runs:—

“Le Gouvernement français déclare que, fermement attaché au principe de la liberté commerciale au Maroc, il ne se prêtera à aucune inégalité pas plus dans l'établissement des droits de douane, impôts et autres taxes, que dans l'établissement des tarifs de transport par voie ferrée, et notamment dans toutes les questions de transit.

“Le Gouvernement français s'emploiera également auprès du Gouvernement marocain afin d'empêcher tout traitement différentiel entre les ressortissants des différentes Puissances; il s'opposera notamment à toute mesure, par exemple la promulgation d'ordonnances administratives sur les poids et mesures, le jaugeage, le poinçonnage, &c., qui pourraient mettre en état d'infériorité les marchandises d'une Puissance. . . .”

64. Article 6 modified to some extent the privileges secured under the Act of Algeciras with regard to adjudications for public works. The article provides that the French Government will see to it that works and supplies required for the construction of roads, railways, posts, telegraphs, &c., will be granted in accordance with the rules of adjudication, and that such rules will not place the nationals of any Power in a position of inferiority. It goes on to provide, however, that the exploitation of such “grandes entreprises” as those above mentioned may be “librement concédées à des tiers” by the Moroccan Government.

The fifth paragraph of article 6 runs:—

“De même, le Gouvernement français s'emploiera auprès du Gouvernement marocain pour que, durant la période où restera en vigueur l'article 66 de l'Acte d'Algeciras, il confie à un ressortissant d'une des Puissances représentées au Maroc un des trois postes de délégué chérifien au Comité spécial des Travaux publics.”

This reference to article 66 of the Algeciras Act being in force is an indication as to the retention of the limits of customs duties.

65. Article 9 provides for the reference to an arbitrator of complaints brought by foreign nationals against the Moorish authorities or agents, which have not been found capable of adjustment through the intermediary of the French consul and the consul of the interested Power. This mode of procedure was to continue pending the introduction of a "régime judiciaire inspiré des règles générales de législation des Puissances intéressées et destiné à remplacer, après entente avec elles, les tribunaux consulaires."

66. By article 12, the two Governments undertake, at the request of the Moorish Government, to endeavour, in agreement with the other Powers and on the basis of the Madrid Convention, to secure the revision of the lists and position of foreign protégés and mokhalats, and also to move the signatory Powers to introduce such modifications into the Madrid Convention "que comporteraient . . . le changement du régime des protégés et associés agricoles."

67. Article 13 abrogated all contrary stipulations in previous treaty instruments.

68. By article 14 the convention was to be communicated to the Powers signatory of the Algeciras Act, and the two Governments engaged to support each other in obtaining the accession of those Powers.

69. According to Basdevant's *Traité et Conventions en vigueur entre la France et les Puissances étrangères*, the convention of 1911 was acceded to by all the Powers signatory of the Act of Algeciras on the following dates: Austria-Hungary, December 28, 1911; Belgium, April 24, 1912; Spain, November 6, 1912; United States, December 15, 1911; Great Britain, November 14, 1911; Italy, November 7, 1911; Morocco, November 6, 1911; Netherlands, March 15, 1913; Portugal, May 14, 1913; Russia, November 15, 1911; Sweden, November 11, 1911. So far as the accession of the United States is concerned, the above statement appears to be incorrect, as the United States Government in their note of the 15th December, 1911, to the French Ambassador in Washington deliberately refrained from expressing any opinion on the political parts of the Franco-German Convention, and as regards the articles relating to commercial rights and the administration of justice, pointed out that accession could only be done by and with the advice and consent of the United States Senate. The United States Government were willing, when the proper time came, to enter into negotiations for new treaty arrangements regarding extra-territorial rights and rights of United States protégés, and in general to agree in principle to the other articles of the Franco-German agreement provided that the commercial and other advantages secured by existing United States treaties were preserved.

70. The accession of the United Kingdom was made on the explicit understanding that the provisions of articles 4 and 7 of the United Kingdom-France Declaration of 1904 were in no way affected, that British subjects in Morocco would receive no less favourable treatment than that accorded to the subjects of any other Power, and that adequate arrangements would be made for placing the town and municipal district of Tangier definitely under international control.

71. There were also explanatory notes annexed to the convention of 1911. By these notes it was agreed that "dans l'hypothèse où le Gouvernement français croirait devoir assumer le Protectorat du Maroc, le Gouvernement impérial n'y apporterait aucun obstacle," and that "l'adhésion du Gouvernement allemand, accordée d'une manière générale au Gouvernement français par l'article 1^{er} de ladite convention, s'applique, naturellement, à toutes les questions donnant matière à réglementation et visées dans l'Acte d'Algésiras." The French Government promise that as soon as the judicial system contemplated by article 9 of the convention is instituted and the consular courts are replaced, German nationals shall be placed in exactly the same conditions as French nationals. The view was expressed also that the expression "les changements du régime des protégés" in article 12 of the convention "implique l'abrogation, si elle est jugée nécessaire, de la partie de la Convention de Madrid qui concerne les protégés et associés agricoles."

72. The Franco-German Convention of 1911 is contended by the French Government to have effected important modifications of previous treaty rights

in Morocco. This contention is developed in the course of diplomatic correspondence between the British and French Governments arising out of the consumption and gate taxes in the French Zone, an aspect which is dealt with later on in this memorandum. It may be useful, however, at this point to set out statements made in the debate in the French Senate and from certain other sources which bear on the interpretation and effect of the convention.

73. In the debate in the French Senate the president of the Foreign Affairs Commission (M. Deschanel) said:—

"Nous ne sommes pas maîtres des tarifs! Mais est-ce donc là une nouveauté et pouvons-nous espérer autre chose? Pouvons-nous supprimer le passé, les grands intérêts commerciaux de l'Angleterre, notre accord de 1904 avec elle, établissant la liberté commerciale, et l'Acte d'Algésiras qui la consacrait au profit de toutes les Puissances? Et d'autre part, pouvons-nous supprimer ce traité de commerce que l'Allemagne, devançant et déjouant l'Angleterre, avait réussi à conclure avec le Maghzen?"—(French Senate, December 16, 1911.)

74. The *rapporteur* (M. Long) referred to article 4 of the convention, according to which the French Government declared that "il ne se prêtera à aucune inégalité, pas plus dans l'établissement des droits de douane, impôts et autres taxes que dans l'établissement des tarifs de transport." M. Long said: "On peut regretter l'impossibilité où nous serons d'établir au Maroc une barrière douanière qui aurait pu nous assurer, comme dans certaines de nos colonies, le privilège exclusif du commerce du Maroc. Mais enfin ce n'est pas là un nouveau régime." It was necessary (he said) to compare the article with the provisions of (the first paragraphs of) article 4 of the Anglo-French Declaration of 1904, which were couched in almost similar terms. M. Long went on to say:—

"Ce qui est à retenir, par exemple, de cet article 4 [Franco-German Convention], c'est que ces clauses qui ne font que préciser le principe posé à l'article 1^{er} montrent du moins très clairement que le Gouvernement marocain reprend le plein exercice de sa souveraineté en ce qui concerne l'établissement des droits de douane, impôts et autres taxes, puisque, précisément, cet article 4 n'en subordonne l'établissement à aucune autre restriction que le respect du principe de l'égalité."

"Sous le régime d'Algésiras, les articles 75 et 76 imposaient l'adhésion du Corps diplomatique à tout établissement ou remaniement d'impôts. L'Etat marocain reprend à cet égard sa pleine et entière liberté, sauf une restriction spéciale aux minerais de fer. En ce qui concerne les douanes, l'article 103 [sic: ? 104] de l'Acte d'Algésiras imposait cette adhésion diplomatique à toute revision. Aujourd'hui, le Gouvernement marocain retrouve à cet égard le plein exercice de sa souveraineté, dans la limite, bien entendu, de ses obligations conventionnelles qui dérivent des traités passés avec diverses Puissances. . . ."—(French Senate, December 18, 1911.)

75. The President of the Council (M. Caillaux) said: "Il n'est pas douteux que c'est chose sérieuse de s'engager à instituer la porte ouverte et à exclure tout tarif différentiel. Mais ce régime n'existe-t-il que pour le Maroc? Quel est donc le régime du Congo? Il est le même. Que dis-je? Il est plus rigoureux." M. Caillaux went on to remark that, in the Congo conventional basin, customs duties were limited to a maximum of 10 per cent. for goods of any origin. "Au Maroc les droits sont actuellement de 12;50 pour cent, ce qui ne fait pas une grosse différence; mais on n'est pas lié pour la quotité, on est lié seulement sur la question de principe."—(Senate, December 18, 1911.)

76. M. Poincaré (President of the Council in the succeeding French Government) said, in a subsequent debate on the same question:—

"Cette disposition [regarding economic equality and freedom of commerce in article 4] implique évidemment, pour le Gouvernement marocain le droit d'établir des impôts ou des taxes applicables aux étrangers, sans aucune autre condition que le respect de l'égalité de traitement."

"Le Gouvernement marocain, il est vrai, a signé . . . un certain nombre de traités avec les Puissances européennes: en 1856 avec la Grande-Bretagne; en 1861 avec l'Espagne; en 1890 avec l'Allemagne; . . .

"Mais . . . les clauses de ces traités qui seraient en contradiction avec l'accord du 4 novembre tomberaient vis-à-vis des nations adhérentes en vertu de l'article 13.

"Au reste, toutes ces conventions ont été conclues pour des durées très brèves : . . . Sans doute . . . il a été stipulé qu'après l'expiration de ces délais, ces traités demeureraient en vigueur jusqu'à ce qu'ils eussent été révisés d'un commun accord. Mais . . . il serait contraire au droit public moderne que cette clause pût être interprétée dans le sens de la perpétuité du *statu quo*. Et, tout en respectant scrupuleusement l'égalité économique, qui est le grand principe consacré par le traité du 4 novembre 1911, le Gouvernement français s'emploiera à résoudre, au mieux des intérêts français et marocains, ces délicates questions de tarifs douaniers. . . ." (Senate, February 10, 1912.)

77. The compilation: *Traités, Codes et Lois du Maroc*, published by P.-Louis Rivière, which is prefaced by a letter from General Lyautey, concludes the introduction (Tome I) with the following passage:—

"L'édifice conventionnel qui a précédé, au Maroc, l'établissement du Protectorat français demeure debout dans son ensemble. D'une part, en effet, les dispositions des traités antérieurs à la Conférence d'Algésiras n'ont été infirmées qu'autant qu'elles se trouvent contraires à celles de l'Acte du 7 avril 1906; pour le reste, elles demeurent en vigueur. D'autre part, les clauses de cet Acte n'ont été entamées dans leur principe ni par le Traité de Protectorat signé à Fez, le 30 mars 1912, ni par le Traité de Versailles, ni par aucune convention ultérieure. L'Acte d'Algésiras demeure la charte internationale du Maroc."

78. The Réglementation douanière of the Service des Douanes et Régies du Maroc (1931) in the section (128) on import tariff states: "Les marchandises d'origine étrangère sont passibles, à leur entrée au Maroc, d'un droit de douane de 10 pour cent *ad valorem*," and mentions Morocco's treaties with Spain of 1799 and 1861, with the United Kingdom of 1856 and with Germany of 1890. (The special tax of 2½ per cent. under article 66 of the Act of Algéciras is also mentioned.) In the section (162) on exportation it is stated: "Les traités passés par l'Empire chérifien avec les diverses Puissances étrangères ont fixé le taux des taxes de sortie à percevoir sur les produits d'origine marocaine. Le tarif des droits d'exportation, actuellement appliqué, résulte des dispositions combinées des traités des 9 décembre 1856 (anglo-marocain), 20 novembre 1861 (hispano-marocain), 1^{er} juin 1890 (germano-marocain) et 21 octobre 1892 (franco-marocain), dont les stipulations ont été rendues applicables à tous les États en vertu de la clause de la nation la plus favorisée insérée à l'article 17 de la Convention de Madrid du 3 juillet 1880 et du principe de l'égalité économique entre toutes les Puissances posé par l'Acte d'Algésiras." Again, in regard to the origin of goods, the publication states (paragraph 54) that, in conformity with the provisions of the Act of Algéciras and of article 17 of the Madrid Convention, article 4 of the Anglo-French Declaration of 1904, article 4 of the Franco-German Convention of 1911, article 1 of the Anglo-French Agreement of the 24th August, 1916, "il n'est fait aucune distinction, à l'entrée au Maroc, au point de vue de l'application du tarif, en raison de l'origine ou de la provenance des marchandises." In this connexion attention may be drawn to the observations in paragraph above. A despatch of the 21st November, 1911, from His Majesty's Ambassador at Berlin recorded that the German Government, according to a statement of the Secretary of State for Foreign Affairs in the Reichstag on certain points connected with the Morocco Convention, were of the opinion that all German treaty rights in respect of Morocco remained in force in virtue of the axiom of international law that treaties contracted by a State continued to be operative after a protectorate has been established over such State. Any complaints which Germany might have to make to Morocco in regard to her treaty rights would in future be addressed to the Sultan through French channels.

79. It may be admitted that by their accession to the Franco-German Convention of 1911 His Majesty's Government engage to adopt a benevolent attitude towards the French authorities in Morocco as regards the introduction of all reforms of an administrative, judicial, economic, financial and military

nature, necessary for the good government of the country, and as regards all new regulations and modifications of existing regulations required by such reforms. Dahirs have, in fact, been issued during the French protectorate (see paragraph 80 *et seq.* below), modifying or replacing former regulations drawn up with the approval of the Diplomatic Body, as in the case of the "tertib" and the urban tax. The "tertib" regulations of 1913, as approved by the Diplomatic Body, contained a final article providing for revision after two years on the demand of one of the Algéciras Powers. The French Ambassador in London in a note of the 26th March, 1913, stated that the French Government "estime que l'application de cette disposition serait peu compatible avec le plein exercice du protectorat et des droits qui lui ont été reconnus par l'accord du 4 novembre 1911. Il formule donc à cet égard des réserves." In the minutes on the paper, the view was taken that the French Government were no doubt right on this point, and, in reply, His Majesty's Government took note of the reservation. Nevertheless, the benevolent attitude of His Majesty's Government in such respects is without prejudice to their already existing treaty rights, which are unaffected by the Franco-German convention. It can be admitted that the provisions of the convention regarding adjudications modify previous regulations based on the Act of Algéciras. It cannot be contended that the judicial reforms under the convention affect British rights of consular jurisdiction, and His Majesty's Government do not admit that any of the commercial and fiscal privileges under British treaties have lost their force by virtue of the Franco-German convention. The moral obligation of His Majesty's Government to apply dahirs to British subjects by King's Regulations in order not to embarrass the French Government in carrying out measures necessary for the good government of Morocco is subject to there being no actual discrimination against British trade. (The same principle applies to the Spanish Zone, see paragraph 82 *et seq.* below.)

80. The conclusion of the convention of 1911 with Germany left France free to enter into negotiations with Morocco, with the result that a protectorate treaty was signed at Fez on the 30th March, 1912.

81. By the first paragraph of article 1 of this treaty, which may be compared with the first paragraph of article 1 of the Franco-German Convention of 1911, France and Morocco "sont d'accord pour instituer au Maroc un nouveau régime comportant les réformes administratives, judiciaires, scolaires, économiques, financières et militaires que le Gouvernement français jugera utile d'introduire sur le territoire marocain."

By the third paragraph of article 1 the French Government "se concertera avec le Gouvernement espagnol au sujet des intérêts que ce Gouvernement tient de sa position géographique et de ses possessions territoriales sur la côte marocaine."

By the final paragraph of the article, "la ville de Tanger gardera le caractère spécial qui lui a été reconnu et qui déterminera son organisation municipale."

By article 2, the Sultan agrees that the French Government should proceed with such military occupation of Moorish territory as may be deemed necessary for the maintenance of order and the security of commercial transactions, and should undertake police measures on land and in Moroccan waters.

Article 4 runs:—

"Les mesures que nécessitera le nouveau régime de Protectorat seront édictées, sur la proposition du Gouvernement français, par Sa Majesté chérifienne ou par les autorités auxquelles elle en aura délégué le pouvoir. Il en sera de même des règlements nouveaux et des modifications aux règlements existants."

Article 5:—

"Le Gouvernement français sera représenté auprès de Sa Majesté chérifienne par un Commissaire Résident général, dépositaire de tous les pouvoirs de la République au Maroc, qui veillera à l'exécution du présent accord."

"Le Commissaire Résident général sera le seul intermédiaire du Sultan auprès des représentants étrangers et dans les rapports que ces représentants entretiennent avec le Gouvernement marocain. Il sera, notamment, chargé de toutes les questions intéressant les étrangers dans l'Empire chérifien. Il aura

le pouvoir d'approuver et de promulguer, au nom du Gouvernement français, tous les décrets rendus par Sa Majesté chérifienne."

Article 6 :—

"Les agents diplomatiques et consulaires de la France seront chargés de la représentation et de la protection des sujets et des intérêts marocains à l'étranger."

"Sa Majesté le Sultan s'engage à ne conclure aucun acte ayant un caractère international sans l'assentiment préalable du Gouvernement de la République française."

82. The French Protectorate Treaty of 1912 was followed by the Franco-Spanish Convention of the 27th November, 1912, defining the French and Spanish positions in Morocco.

By article 1 :—

"Le Gouvernement de la République française reconnaît que, dans la zone d'influence espagnole, il appartient à l'Espagne de veiller à la tranquillité de ladite zone et de prêter son assistance au Gouvernement marocain pour l'introduction de toutes les réformes administratives, économiques, financières, judiciaires et militaires dont il a besoin, comme aussi pour tous les règlements nouveaux et les modifications aux règlements existants que ces réformes comportent, conformément à la déclaration franco-anglaise du 8 avril 1904 et à l'Accord franco-allemand du 4 novembre 1911."

"Les régions comprises dans la zone d'influence déterminée à l'article 2 resteront placées sous l'autorité civile et religieuse du Sultan, suivant les conditions du présent accord."

"Ces régions seront administrées, sous le contrôle d'un haut-commissaire espagnol, par un khalifa choisi par le Sultan sur une liste de deux candidats présentés par le Gouvernement espagnol. Les fonctions du khalifa ne seront maintenues ou retirées au titulaire qu'avec le consentement du Gouvernement espagnol."

"Le khalifa résidera dans la zone d'influence espagnole et habituellement à Tétouan; il sera pourvu d'une délégation générale du Sultan, en vertu de laquelle il exercera les droits appartenant à celui-ci."

"Cette délégation aura un caractère permanent. En cas de vacance, les fonctions de khalifa seront, provisoirement et d'office, remplies par le pacha de Tétouan."

"Les actes de l'autorité marocaine dans la zone d'influence espagnole seront contrôlés par le haut-commissaire espagnol et ses agents. Le haut-commissaire sera le seul intermédiaire dans les rapports que le khalifa, en qualité de délégué de l'autorité impériale dans la zone espagnole, aura à entretenir avec les agents officiels étrangers, étant donné d'ailleurs qu'il ne sera pas dérogé à l'article 5 du Traité franco-chérifien du 30 mars 1912."

"Le Gouvernement de Sa Majesté le Roi d'Espagne veillera à l'observation des traités et spécialement des clauses économiques et commerciales insérées dans l'Accord franco-allemand du 4 novembre 1911."

"Aucune responsabilité ne pourra être imputée au Gouvernement chérifien du chef de réclamations motivées par des faits qui se seraient produits sous l'administration du khalifa dans la zone d'influence espagnole."

83. By article 7 :—

"La ville de Tanger et sa banlieue seront dotées d'un régime spécial qui sera déterminé ultérieurement; elles formeront une zone comprise dans les limites décrites ci-après."

84. By article 10 :—

"Les impôts et ressources de toutes sortes dans la zone espagnole seront affectés aux dépenses de ladite zone."

85. By article 11 :—

"Le Gouvernement chérifien ne pourra être appelé à participer à aucun titre aux dépenses de la zone espagnole."

86. Article 13 provides an arrangement for each zone to receive the produce of its own customs. The Tangier customs receipts are to be divided between the international, Spanish and French zones, according to the ultimate destination of the goods. The following provisions may be quoted :—

"Les deux Gouvernements conviennent :

"1. Que, balance faite des recettes douanières que chacun des deux administrations zonaires encaissera sur les produits introduits par ses douanes à destination de l'autre zone, il reviendra à la zone française une somme totale de 500,000 pesetas hassani se décomposant ainsi :

"2. Que les recettes douanières encaissées par le bureau de Tanger devront être réparties entre la zone internationalisée et les deux autres zones, au prorata de la destination finale des marchandises. En attendant que le fonctionnement des chemins de fer permette une exacte répartition des sommes dues à la zone française et à la zone espagnole, le service des douanes versera en dépôt à la Banque d'Etat l'excédent de ces recettes, paiement fait de la part de Tanger."

"Les administrations douanières des deux zones s'entendront par l'entremise de représentants, qui se réuniront périodiquement à Tanger, sur les mesures propres à assurer l'unité d'application des tarifs."

87. Article 18 runs :—

"En ce qui concerne le Comité des Valeurs douanières, le Comité spécial des Travaux publics et la Commission générale des Adjudications, durant la période où ces comités resteront en vigueur, il sera réservé à la désignation du khalifa de la zone espagnole un des sièges de délégué chérifien dans chacun de ces trois comités."

"Les deux Gouvernements sont d'accord pour réserver à chaque zone et affecter à ses travaux publics le produit de la taxe spéciale perçue dans ses ports en vertu de l'article 66 de l'Acte d'Algésiras."

"Les services respectifs seront autonomes."

"Sous condition de réciprocité, les délégués de l'administration de la zone française voteront avec les délégués du khalifa dans les questions intéressant la zone espagnole et notamment pour tout ce qui concerne la détermination des travaux à exécuter sur les fonds de la taxe spéciale, leur exécution, et la désignation du personnel que cette exécution comporte."

88. Article 19 :—

"Le Gouvernement de la République française et le Gouvernement de Sa Majesté catholique se concerteront en vue de :

"1. Toutes les modifications qui devraient être apportées dans l'avenir aux droits de douane;

"2. L'unification des tarifs postaux et télégraphiques dans l'intérieur de l'Empire."

89. Article 21 :—

"Le Gouvernement de la République française et le Gouvernement de Sa Majesté catholique s'engagent à provoquer la revision, d'accord avec les autres Puissances et sur la base de la Convention de Madrid, des listes et de la situation des protégés étrangers et des associés agricoles visés par les articles 8 et 16 de cette convention."

"Ils conviennent également de poursuivre auprès des Puissances signataires toute modification de la Convention de Madrid que comporteraient, le moment venu, le changement du régime des protégés et associés agricoles, et éventuellement l'abrogation de la partie de ladite convention concernant les protégés et associés agricoles."

90. Article 24 :—

"Le Gouvernement de la République française et le Gouvernement de Sa Majesté catholique se réservent la faculté de procéder à l'établissement, dans leurs zones respectives, d'organisations judiciaires inspirées de leurs législations. Une fois ces organisations établies et les nationaux et protégés de chaque pays soumis, dans la zone de celui-ci, à la juridiction de ces tribunaux, le Gouvernement de la République française, dans la zone

d'influence espagnole, et le Gouvernement de Sa Majesté le Roi d'Espagne, dans la zone d'influence française, soumettront également à cette juridiction locale leurs nationaux et protégés respectifs.

"Tant que le paragraphe 3 de l'article 11 de la Convention de Madrid du 3 juillet 1880 sera en vigueur, la faculté qui appartient au Ministre des Affaires étrangères de Sa Majesté chérifienne de connaître en appel des questions de propriété immobilière des étrangers fera partie, pour ce qui concerne la zone espagnole, de l'ensemble des pouvoirs délégués au khalifa."

91. The letters annexed to the Franco-Spanish Convention of the 27th November, 1912, dealt with the appointment of the Khalifa, and also stated that "pour les relations diplomatiques des Gouvernements étrangers avec le Sultan, il est bien entendu, en effet, que la mention faite dans la présente convention (see article 1) de l'article 5 du Traité franco-chérifien du 30 mars 1912 en réserve à la France le monopole."

92. The French protectorate over Morocco was recognised by His Majesty's Government in December 1914, such recognition being announced in the following notice, dated the 19th December, 1914, published in the *London Gazette* :—

"His Majesty's Government having been informed that the Government of the French Republic have recognised the British protectorate over Egypt, His Britannic Majesty's Principal Secretary of State for Foreign Affairs hereby gives notice that His Majesty's Government adhere to the Franco-Moorish Treaty of the 30th March, 1912."

93. On the other hand, His Majesty's Government have not acceded to the Franco-Spanish Convention of the 27th November, 1912, although the position of Spain in the Spanish Zone has been accepted *de facto* by His Majesty's Government.

94. Shortly before the conclusion of the Franco-Spanish Convention of 1912 France and Italy signed, on the 28th October, 1912, an agreement to the effect that the two countries "confirment leur mutuelle intention de n'apporter réciproquement aucun obstacle à la réalisation de toutes les mesures qu'ils jugeront opportun d'édicter, la France, au Maroc, et l'Italie, en Libye," and that most-favoured-nation treatment should be reciprocally assured to their nationals, products, establishments and enterprises.

95. On the 11th June, 1914, an agreement was concluded between Switzerland and France. By article 1 Switzerland is to enjoy in the French Zone "liberté économique, sans inégalité aucune, telle qu'elle résulte de l'Acte général d'Algésiras du 7 avril 1906 et des conventions internationales subséquentes," and also unconditional most-favoured-nation treatment. By article 2 Switzerland renounced capitulatory privileges in the French Zone. By article 3 "les traités et conventions de toute nature en vigueur entre la Suisse et la France sont, sauf clause contraire, étendus à la Zone française de l'Empire chérifien, pour autant que cette extension n'est pas contraire au contenu même desdits accords ou n'est pas incompatible avec l'égalité économique stipulée au § 1 du présent arrangement." All the Powers have renounced their rights of consular jurisdiction in the French Zone with the exception of the United States and the United Kingdom. Many of the instruments of renunciation contain the provision set out in article 3 of the above agreement with Switzerland of 1914.

96. On the 24th August, 1916, an agreement was concluded between the United Kingdom and France respecting trade with Morocco and Egypt in transit through British and French territories in Africa. Article 1 runs :—

"Goods exported from or despatched to the United Kingdom, which may be despatched to or emanate from Morocco, and which pass in transit through . . . territories bordering on Morocco and belonging to France or recognising her sovereignty . . . shall be accorded a treatment exactly similar to that applied to goods exported from or despatched to France . . . so far as concerns customs duties and other dues to which they may be liable in the territories through which they pass in transit, so far as concerns railway rates and imposts, so far as concerns the customs regulations in force affecting their ingress and egress, so far as concerns the method of transit, and, in general, so far as concerns all customs facilities."

This agreement, it may be noted, deals with goods of United Kingdom origin.

97. In 1919, as the result of negotiations between His Majesty's Government and the French Government, a draft convention was drawn up concerning Egypt and Morocco. In May of that year, however, it was learned that the French Government would not consent to sign the convention until the question of Tangier and of the Spanish Zone had been disposed of. In a despatch from Paris to Lord Curzon reporting the French attitude, Lord Balfour stated : "The convention is very near completion. In fact, the text is agreed and a covering letter to M. Pichon had already been drafted. The questions of Tangier and of the Spanish Zone, moreover (as the French Government know very well), have nothing to do with this convention. If, therefore, the French Government really intended at the eleventh hour to refuse signature, this would have amounted to a bad breach of faith, and I should have proposed to take a strong line with the French Government." In view, however, of certain considerations affecting Egypt, it was decided not to press the French to sign; the negotiations were suspended and the convention was never signed. Nevertheless, it seems reasonable to contend that the French Government at the time accepted the principles contained in the draft of the convention as ready for signature.

98. The preamble of the draft convention ran :—

"His Britannic Majesty's Government and the Government of the French Republic, deeming that, by reason of the recognition by the former of the French protectorate in Morocco, and by the latter of the British protectorate in Egypt, the time has arrived for giving full measure of effect to the declaration of the 8th April, 1904, both in Egypt and in the French Zone of Morocco, in which territories the two respective Governments henceforward assume responsibility for the maintenance of peace, order and good government;

"And cognisance having been taken by the British Government of the guarantees afforded to them by the laws already promulgated in the French Zone of Morocco, and by the Government of the French Republic of the guarantees afforded to them by the Egyptian draft judicature Law for Unified Tribunals;

"Have determined to substitute the provisions contained herein for the régime at present prevailing in Egypt so far as relates to French nationals, and in the French Zone of Morocco so far as relates to British nationals."

99. Article 1 provides for the renunciation of British capitulatory privileges in the French Zone.

By article 5—

"All treaties between Great Britain and Morocco are and shall remain abrogated so far as concerns the French Zone. Pending, however, the conclusion of a new treaty of commerce and navigation, the *commercial* convention of the 9th December, 1856, between Great Britain and Morocco, supplemented by article 68 of the Act of Algéciras of the 7th April, 1906, relative to the export of cattle, shall remain in force except as regards any stipulations incompatible with article 1 of the present convention."

This implies that the Commercial Convention of 1856 was considered to be still valid.

100. As regards Tangier, article 9 of the Secret Franco-Spanish Convention of 1904, article 1 of the French Protectorate Treaty of 1912 and article 7 of the Franco-Spanish Convention of 1912 recognised the existence of a special régime there. It was not, however, until 1923 that a convention was drawn up laying down the organisation of the Tangier Zone. The convention was signed at Paris on the 18th December, 1923, by the United Kingdom, France and Spain. It was ratified by these Powers and acceded to by Belgium, Netherlands, Portugal and Sweden. Italy became a party when the revising agreement of the 25th July, 1928, was concluded between the United Kingdom, France, Italy and Spain, to which also Belgium, Netherlands, Portugal and Sweden acceded.

101. The statute defines the Tangier Zone as lying within the boundaries fixed by the Franco-Spanish Convention of 1912. Under the sovereignty of the Sultan, whose rights in this respect are not prejudiced by the statute, the zone is to enjoy legislative and administrative autonomy, although in respect of diplomatic matters there is to be no derogation from the provisions of article 5

of the French Protectorate Treaty of 1912, the French Resident-General being, therefore, the channel of communication *vis-à-vis* foreign Powers. Thus, article 5 runs:—

"The Tangier Zone shall possess, under authority delegated by His Shereefian Majesty and subject to the exceptions provided for, the most extensive legislative and administrative powers. This delegation of authority shall be permanent and general, except in diplomatic matters, where there shall be no derogation from the provisions of article 5 of the Protectorate Treaty of the 30th March, 1912.

"The duly constituted authorities of the zone may, however, negotiate with the consuls on questions of interest to the zone within the limits of its autonomy."

102. Article 13 abrogates Capitulations in the zone, together with the system of protection. The provisions of the Madrid Convention of 1880 remain in force so far as concerns naturalisation.

103. By article 7—

"The Tangier Zone shall respect all treaties in force.

"Economic equality among nations, resulting from such treaties, shall continue to be observed in Tangier, even if the said treaties are subsequently abrogated or modified."

104. Paragraphs 1 and 2 of article 8 run:—

"International agreements concluded in the future by His Shereefian Majesty shall only extend to the Tangier Zone with the consent of the International Legislative Assembly of the zone.

"By exception, international agreements to which all the Powers signatories of the Act of Algéiras are contracting parties or shall have acceded apply automatically to the zone."

105. According to article 20—

"The Tangier Customs shall levy duties and taxes only on goods destined exclusively for consumption in the zone.

"Goods landed at Tangier and destined for the use or consumption in the French or Spanish Zones shall enjoy the benefit of the ordinary rules of transit, warehousing or temporary admission, the proper customs duties being collected at the custom-houses of the zone of consumption.

"The transit regulations will be based on the conclusions of the Barcelona Conference of 1921.

"Similarly, imported goods arriving through the French or Spanish Zones shall pay custom duty on entering the Tangier Zone.

"Export duties will be leviable only on goods originating in the zone."

106. Article 29 provides that the Sultan shall nominate a Mendoub to represent him at Tangier, who will promulgate the legislation passed by the international assembly and countersigned by the Resident of the Committee of Control. The legislative powers are vested in an International Legislative Assembly under the presidency of the Mendoub and composed of representatives of the foreign and native community (article 32). A Committee of Control, consisting of the consuls *de carrière* of the Powers signatory of the Algéiras Act, has the right of veto over the laws and regulations voted by the Assembly (articles 30 and 31). By the fifth paragraph of article 30 it will be the duty of the Committee of Control to ensure the observance of the régime of economic equality and the provisions of the Statute of Tangier.

107. Article 28 provides that Moroccan subjects shall enjoy complete equality with the nationals of the Powers in the matter of duties and taxes of all kinds. They shall pay exactly the same duties and taxes.

108. Articles 32 and 33 provide for the drawing up of certain fiscal enactments, including a duty on alcohol, registration and stamp taxes, and consumption duties on sugars, colonial products, candles and beers.

109. Article 55 abrogates all contrary clauses of previous treaty instruments.

110. A Shereefian dahir was promulgated on the 16th February, 1924, organising the administration of the Tangier Zone, articles 11 and 12 of which run:—

Article 11—

"L'Administration de la zone est tenue de respecter les traités actuellement en vigueur entre Nous et les Puissances.

"S'étendent notamment de plein droit à la Zone de Tanger les accords internationaux auxquels toutes les Puissances signataires de l'Acte d'Algéiras sont parties contractantes ou auront adhéré.

"En cas de désaccord entre les stipulations desdits traités et les lois et règlements établis par l'Assemblée législative internationale, les stipulations des traités prévaudront.

"L'Administration de la Zone veille d'une façon spéciale à l'observation des articles 3, 7 (paragraphe 2), 8 (paragraphe 3), 10, 11 et 12 de la convention en date du 18 décembre 1923."

Article 12—

"Les accords internationaux, conclus à l'avenir par Notre Majesté chérifienne, ne s'étendront à la Zone de Tanger qu'avec l'assentiment de l'Assemblée législative internationale. Il en sera de même de Nos décrets rendus conformément à l'article 5 du Traité de Protectorat du 30 mars 1912.

"Par exception, s'étendront de plein droit à la Zone de Tanger:

"1. Les accords internationaux auxquels toutes les Puissances signataires de l'Acte d'Algéiras seront parties contractantes ou auront adhéré;

"2. Toutes dispositions législatives applicables aux deux Zones française et espagnole et relatives:

"(a) Au fonctionnement des services postaux et télégraphiques chérifiens avec l'étranger ainsi qu'à l'unification des tarifs y applicables;

"(b) Au commerce des armes et des munitions à leur usage."

111. So far as customs duties are concerned, the position in Tangier is the same as in the rest of Morocco. The duties are limited to 10 per cent., together with the special tax of 2½ per cent. authorised by the Act of Algéiras.

112. As regards consumption and other taxes, there is no question of the issue of King's regulations providing for their application to British subjects, as the Capitulations in the zone have been abolished. The Tangier Statute has also authorised certain consumption and other duties, which brings the Tangier Zone more or less into line with the legislation in the French and Spanish Zones. The United Kingdom, being a party to the Tangier Statute, and being represented on the Committee of Control, must be held to have agreed to fiscal measures as ratified by the Committee of Control. The United Kingdom Government would have a right to protest against any proposed fiscal measures outside the Tangier Statute which were contrary to British treaty rights. For example, it was considered that the United Kingdom Government would have been entitled to protest, on treaty grounds, against the new gate tax in Tangier on goods entering by sea; His Majesty's consul-general was authorised to agree to it, but he made it clear that this approval must not be considered as prejudicing the question of right. Any new consumption taxes not covered by the Tangier Statute would have to be agreed to by His Majesty's Government in the person of their representative on the Committee of Control.

113. The consent of the United States Government, who alone of the Algéiras Powers retain their capitulatory rights in the Tangier Zone, is necessary for the application of fiscal measures to United States citizens.

114. Although, as has been explained, Morocco is divided into three zones for administrative purposes, the sovereignty of the Sultan over the territory as a whole has not been prejudiced. As regards the customs, Morocco must be regarded as an economic unity; the customs regulations of the French Zone recognise this principle, and article 13 of the Franco-Spanish Convention of 1912, which created the Spanish Zone of Morocco, and articles 20 and 21 of the Tangier Statute appear to be based on the same principle.

115. Consumption taxes are leviable in each zone irrespective of whether they have been paid in another zone. Gate taxes are levied in each zone on goods

entering by sea and on local goods. Both these taxes are dealt with in detail in subsequent portions of this memorandum.

116. Negotiations have recently taken place between His Majesty's Government and the French Government with regard to the desire of the latter to see introduced into Morocco certain measures and reforms of an economic character, and on the 29th January, 1935, an agreement was signed, in the form of exchanges of notes (Annex 1), providing for reforms of this nature in respect of the French Zone.

The broad lines of the agreement are as follows:—

- (i) Quotas are to be imposed on cotton and silk goods; cement; iron and steel, and machinery; motor vehicles; tyres; refined sugar.
- (ii) In return for the quota advantages, His Majesty's Government have agreed to an increase of the customs duties, at present fixed at a maximum of 12½ per cent. *ad valorem*, to a general level of 15 per cent. *ad valorem*. The duties on certain goods, of particular interest to Moroccan industry, and of comparatively little interest to United Kingdom trade, are to be raised to 25 per cent. Certain other goods are placed on the free list, and the duty on coal (other than anthracite) is to be reduced to 10 per cent. *ad valorem*.
- (iii) A new system of customs valuation is to be substituted for the present system.
- (iv) An assurance is given by His Majesty's Government to consider favourably requests for reciprocal advantages for Moroccan nationals or goods.
- (v) The opportunity is taken to reach a practical settlement of the question of the application to British subjects of gate taxes in the French Zone (see paragraph below).

The notes are to enter into force on a date to be agreed upon between the two Governments as soon as possible after the 1st January, 1935.

117. It is stated in the notes that the acceptance of His Majesty's Government "only extends to the particular measures . . . specified, and does not extend to any alteration of these measures, and is, moreover, conditional upon all the measures specified being put into force. . . . His Majesty's Government's acceptance of these measures is given by His Majesty's Government in waiver of their treaty rights, and in no way prejudices the assertion of these rights as regards any measures other than those specified. . . ." The French Government likewise reserved their point of view as regards treaty rights.

118. The principal treaty provisions which the proposed changes touch upon are:—

- (i) As regards *Customs Duties*.—Article 7 of the Anglo-Moroccan Commercial Convention of 1856, limiting import duties to 10 per cent. *ad valorem*. The French Government have contended in the past that, as a result of the accession of the United Kingdom to the Franco-German Convention of 1911, or, alternatively, to the Franco-Moroccan Protectorate Treaty of 1912, Morocco has acquired the right to complete tariff autonomy. His Majesty's Government have resisted this contention (see paragraphs 126, 128–130, 161–164). The agreement with the French Government of the 29th January last, in which His Majesty's Government give their consent to certain tariff changes, may be taken as tending to confirm the treaty rights of His Majesty's Government by constituting a virtual admission by the French Government that they were not able to impose such changes without the consent of His Majesty's Government.
- (ii) As regards *quotas*, the position is not so clear.
- (a) It might be held that article 6 of the United Kingdom Commercial Convention of 1856, under which merchandise imported by British subjects may not be prohibited, provides a basis for protesting against the introduction of quota restrictions without the consent of His Majesty's Government. As, however, quota restrictions were not known at the time the convention was concluded, it is not certain whether such a contention would succeed in an international court.
- (b) The introduction of quota restrictions appears to be contrary to the principle of "economic liberty," which is referred to in the preamble to the Act of Algeciras, and more specifically reserved in the Franco-German Convention of

1911. It must be admitted, however, that these words are vague and general and might not alone be sufficient to support a case against quota restrictions. Here again, the consent given by His Majesty's Government to the introduction of specific quotas would strengthen the case for resisting the introduction of further quota restrictions without their consent.

119. In considering the position of other Powers, it appears at first sight that the French Government are bound only to obtain the consent of His Majesty's Government (Anglo-Moroccan Commercial Convention of 1856) and of the Spanish Government (Spanish-Moroccan Treaty of 1861) for the introduction of increased customs duties. (It should also be noted that in the Franco-Italian agreement relative to Libya and Morocco of the 28th October, 1912 (see paragraph 94 above), Italy agreed not to raise any obstacle to any of the measures which France may judge opportune to issue in Morocco.) It might, however, be contended (a) that all the Powers which have most-favoured-nation rights, either through separate treaties (*e.g.*, Italy, Switzerland, United States of America, Denmark, Belgium, the Netherlands), or through the Madrid Convention of 1880 (*e.g.*, also Norway, Portugal, Spain and Sweden), can rely on the British and Spanish treaties until they are abrogated, as a waiver is not an abrogation; (b) that article 66 of the Act of Algeciras shows that the 10 per cent. limit has become part of the general Algeciras system for Morocco; (c) that increased import duties, unless accepted by all the signatories of the Act of Algeciras and not only by certain of them for their own benefit, infringe the principle of equality laid down in the preamble of the Act. It has also been pointed out (paragraph 118 (ii)) that quota restrictions may possibly be considered to infringe not only article 6 of the Anglo-Moroccan Commercial Convention of 1856, but also the principle of economic liberty laid down in the preamble to the Act of Algeciras and in the Franco-German Convention of 1911, to which most of the Algeciras Powers have acceded.

120. It would, therefore, be open to all the above Powers, in the event of France failing to obtain their consent before introducing increased tariffs or quotas, to bring a case before the Permanent Court of International Justice. As regards the Act of Algeciras, the fact that the French Government had considered it necessary to obtain the consent of His Majesty's Government to the introduction of the measures would tend to strengthen the case of the Algeciras Powers against them.

121. The French Government are endeavouring to obtain the consent of the other Powers concerned to the new economic reforms.

122. Having regard to the customs unity of the Moroccan Empire (paragraph 114 above), it is proposed eventually to conclude, in respect of the Spanish Zone, an Anglo-Spanish exchange of notes on lines similar to the Anglo-French exchange of notes, and also, as provided for in the Anglo-French exchange of notes, to extend eventually to the Tangier Zone the new increased customs duties. It is also proposed that the Anglo-Spanish exchange of notes should embody a practical settlement of the outstanding consumption duties in the Spanish Zone now in dispute, in the same way as the Anglo-French exchange of notes have provided a practical settlement of the gate taxes in the French Zone.

II.—Consumption Duties in the French Zone.

123. As already observed, the official French thesis as regards the overriding effects of the Franco-German Convention of 1911 on previous treaty stipulations has been advanced in the diplomatic correspondence regarding consumption duties.

124. In 1914 His Majesty's Government were informed of a proposal of the authorities in the French Zone to impose a consumption duty on sugar. British interests were not appreciably affected, and there was, therefore, no desire to embarrass the French Government by protesting against its imposition. His Majesty's Ambassador at Paris was instructed to inform the French Government, however, that His Majesty's Government must "in principle reserve all the commercial privileges which they enjoy under existing treaties with Morocco, which privileges are in no way diminished by their recognition of the French protectorate" (Annex 2).

5795/5795/
1915103648/5795/
1919

125. In their reply of the 8th January, 1915, the French Government stated that they had no intention of submitting British subjects in Morocco to any measure which deprived them of such privileges without the prior consent of His Majesty's Government. This had been the procedure in the case of the tax on alcohol. If the Shereefian Government did proceed with the proposed tax on sugar it could not be exacted from British subjects unless with the consent of His Majesty's Government (Annex 3).

126. In a note of the 24th July, 1915, the French Government informed His Majesty's Government of the decision to introduce the sugar tax and, as British interests were not appreciably affected, they trusted that His Majesty's Government would not object. Another reason for counting upon the consent of His Majesty's Government was that "l'adhésion du Gouvernement britannique aux réformes de tout ordre que nous introduisons au Maroc doit être considérée en droit comme accordée une fois pour toutes par la reconnaissance faite le 19 décembre dernier du Traité de Protectorat français sur le Maroc. Le Gouvernement du Roi a également adhéré, au moins implicitement, au Traité franco-allemand du 4 novembre 1911; . . . Il est superflu de rappeler que les deux actes précités stipulent dans leur article 1^{er} le pouvoir réglementaire absolu du représentant de la République au Maroc." After comparing the British position in Egypt with the French position in Morocco, the French Government went on to state that "nous avons consenti, tant que le *statu quo* ne serait pas modifié en Egypte, à prévenir le Gouvernement britannique de nos intentions de réformes au Maroc, confiants qu'il n'y refuserait pas un assentiment qu'en droit strict nous ne nous croyons pas tenus de proposer" (Annex 4). In informing the French Government that His Majesty's Government agreed to the imposition of the sugar tax, His Majesty's Ambassador at Paris was instructed to add that, as regards the general questions raised in M. Delcassé's note of the 24th July, 1915, His Majesty's Government had certainly recognised the French protectorate in Morocco, but that they felt confident the French Government would agree that it was better to leave till quieter times the discussion of the renunciation of British and French extra-territorial treaty rights and jurisdiction in Morocco and Egypt respectively (Annex 5).

127. The French view is also expounded in reply to certain reserves made by the Italian representative at Tangier in connexion with the consumption tax on sugar. It is not known what form the Italian representations took, but the reply of the French Resident-General of the 10th January, 1916, is annexed (Annex 6). The French Resident-General based his attitude on articles 1 and 4 of the Franco-German Convention of 1911, and on the passage in the explanatory letters annexed to the convention (see paragraph 71 above), where it is stated that "l'adhésion . . . accordée d'une manière générale . . . par l'article 1^{er} de ladite convention, s'applique naturellement à toutes les questions donnant matière à réglementation et visées dans l'Acte d'Algésiras." It was agreed that the protectorate had thus "l'autonomie douanière comme l'autonomie fiscale," and the accession of the Italian Government precluded all right to object to the imposition of such taxes.

128. The imposition in the French Zone in 1919 of further consumption taxes on tea, coffee, chicory, &c., raised again the question of principle, and on instructions from His Majesty's Government, His Majesty's Ambassador at Paris and His Majesty's agent at Tangier addressed representations to the French Government and to the Resident-General at Tangier respectively (Annexes 7 and 8). These representations took the line that by the Anglo-Moroccan Commercial Convention of 1856, supplemented by article 66 of the Act of Algéciras, the maximum customs duty on goods imported by British subjects is 12½ per cent. *ad valorem*, and a tax on the same goods, amounting to an increase in the import duty, required the previous consent of His Majesty's Government. The instructions referred to M. Delcassé's notes of the 8th January and the 24th July, 1915, and pointed out that most of the rights enjoyed by British subjects under the treaty and convention of 1856 and the Act of Algéciras fell under one or other of the categories of questions over which the French Government claimed to possess absolute power, as a consequence of their convention with Germany of 1911 and the protectorate treaty with Morocco of 1912. If the French contention were admitted, the British treaty would no longer exist—a view which His Majesty's Government could not countenance. It was a recognised principle that when a third party assents to a protectorate of one State over another, the protected State is not thereby absolved from any treaty

128301/51217/
1919

obligations which it may have incurred towards the assenting Power. The French Government themselves had adopted this attitude in regard to their treaty rights in Zanzibar. As showing that the French Government had not been consistent in their attitude, the instructions referred to certain articles in the draft convention relating to Morocco and Egypt (see paragraphs 97-99), negotiated by the French and British Governments in 1918-19, including article 5, which specifically maintained in force the Commercial Convention of 1856, and could not have been regarded by the negotiators as a dead letter. His Majesty's Government, therefore, found it necessary to protest against the imposition of the dues without their previous agreement having been formally requested and obtained, and regarded the goods imported by British subjects as exempt from their incidence.

129. In their reply of the 21st November, 1919 (Annex 9), the French Government again asserted that, by virtue of the treaties of the 4th November, 1911, and the 30th March, 1912, the Shereefian Government, "est maître de ses tarifs douaniers," subject to the principle of economic equality, although it was not then intended to use this power. The new taxes were not customs duties, but internal consumption taxes applicable to colonial products of any origin. The French Government agreed, however, that as Great Britain had not renounced her capitulatory privileges, the dahir in question could not be enforced on British subjects until made applicable to them by King's Regulations. Meanwhile, instructions were being sent to the Resident-General not to levy the tax on the goods imported by British subjects for their personal consumption, but this exemption would not apply to goods imported for their commercial clientèle, as this would be contrary to the principle of economic equality.

130. On the 20th February, 1920, His Majesty's Embassy at Paris addressed another note to the French Government (Annex 10) reiterating the arguments in the Embassy's note of the 8th November, 1919 (Annex 7), which had not been refuted by the French Government. The duties themselves were a matter of relatively slight importance, and His Majesty's Government had no wish to embarrass the Protectorate authorities in raising the funds necessary for the proper administration of the zone. The French Government, however, not merely requested, but claimed as a right that the duties should be made applicable to British subjects regardless of the treaties of 1856 and the Act of Algéciras, and His Majesty's Government were therefore obliged to insist on the obvious fact that the treaties of 1856 and the Act of Algéciras and all others signed by Great Britain before the Franco-Moorish Treaty of 1912, unless and until they were specifically modified or abrogated, remained in force. As regards the distinction between goods imported by British subjects for their household consumption and those imported for their commercial clientèle, His Majesty's Government considered that article 7 of the Commercial Convention of 1856 and article 66 of the Act of Algéciras, expressly preclude the imposition of duties in excess of 12½ per cent. *ad valorem* on any goods imported by British subjects, whether for their own consumption or for that of their clientèle.

131. A misunderstanding then arose as a result of which the French Government were under the impression that permission had been given by His Majesty's Government for the application of the new consumption taxes to British subjects, whereas the permission given had reference only to certain new customs regulations regarding ship's stores at the ports (see Annexes 11-14). On being informed of the real position and that His Majesty's Government maintained their previous attitude, the French Government, in a note of the 23rd March, 1920, made an appeal to the friendship of His Majesty's Government, and referred to the French attitude in Egypt. "Le Gouvernement de la République ne doute pas que le Gouvernement de Sa Majesté ne s'emploie à rendre possible à la Puissance protectrice du Maroc l'exercice de ses droits dans ce pays comme le Gouvernement de la République fait en Egypte en ce qui concerne les mesures édictées par le Haut-Commissariat britannique ou par l'autorité militaire britannique" (Annex 15).

132. About this time, His Majesty's Government were considering a modification of their attitude. In a letter to the Board of Trade of the 18th March, 1920, it was pointed out that the French Government were adopting a reasonable attitude as regards the application of certain duties to French citizens in Egypt. His Majesty's Government held, nevertheless, that just as the Egyptian Government must hold themselves bound to obtain the consent of the

155305/51217/
1919A 1484/638/
28/1920A 700/700/28/
1920
A 1217/638/
28/1920A 1227/638/
28/1920

French Government to legislation affecting the rights of French citizens under the Capitulations, so the French Government were under similar obligations in Morocco. Despite this, however, the Foreign Office did not consider it advisable that the theoretical right of British subjects to be relieved, by virtue of the Capitulations and the Act of Algeciras, from obligations which fell on French and other nationals in Morocco, should in practice be generally insisted on. There was no reason, apart from treaties, why British subjects should not pay the taxes which others paid, and the benefits of which were shared by the community at large. It might be necessary to withhold King's Regulations in order to emphasise a point of principle or to resist a tax aimed obviously at British interests in particular, but save in such exceptional cases it was felt that it would be advantageous if taxation in Morocco were made binding on British subjects with the least possible delay.

A 1949/1959/
638/28/1920

133. These considerations, together with the fact that the refusal of His Majesty's Government to admit the application to British subjects of the consumption duties on tea, coffee, spices, &c., had been maintained long enough to constitute an effective protest against the manner in which those duties were imposed, led His Majesty's Government to propose a solution of the dispute, which was put to the French Government in August 1920 (Annexes 16 and 17).

A 3259/638/
28/1920

134. This proposal was that taxation imposed in Egypt and Morocco should so far as possible be applied to French and British nationals, *pari passu*, and His Majesty's Government expressed willingness to impose new duties on British subjects in Morocco as and when similar duties became operative as regards French citizens in Egypt. (The particular duty then in question was that on alcohol.) The French Government replied, however, that the application of taxes to British subjects in Morocco should take effect as soon as the French Government agreed to the application to their own nationals of taxes in Egypt, irrespective of the attitude of third Powers in Egypt (enclosure in Annex 17).

A 6383/638/
28/1922

135. The argument on this point was not pursued. As regards the Egyptian duty on alcohol, the assent of all the Powers concerned was obtained and the duty imposed. Accordingly, in June 1921, instructions were given by His Majesty's Government that the increased consumption duty on alcohol in Morocco should be made applicable to British subjects.

W 5005/6194/
1416/28/1921

136. Early in 1922 His Majesty's Government learned that British subjects were actually paying the increased consumption duty on sugar and the duty on candles, which had not yet been made applicable to them by King's Regulations. Payment of the duties was made at the Customs, together with import duty, and goods could only be withdrawn from the Customs on production of a receipt for import duties, consumption duties and aconage charges. The refusal of His Majesty's Government to make the duties applicable to British subjects appeared, therefore, to be of no real utility. Moreover, the duties in themselves were not unreasonable. It was decided, therefore, to make these duties applicable to British subjects, and King's Regulations were accordingly issued (Nos. 1 and 2 of 1922).

W 782/782/
28/1922

W 1133/782/
28/1922

137. The French authorities in Morocco were also showing a tendency to consult His Majesty's Government before the actual publication of the dahirs. This was done in the case of the duty on sugar and candles referred to above (see Marshal Lyautey's note of the 30th June, 1921, Annex 18), and it was also done in January 1923, when an enquiry was made (see Annex 19) whether His Majesty's Government would be prepared to assent to a proposed dahir increasing the consumption duties on sugar, tea, coffee and pepper, and make them applicable to British subjects. As regards the latter, it was decided to make a virtue of necessity, and the dahir was made applicable to British subjects by King's Regulations (Nos. 1 and 4 of 1923). At the end of 1924, however, the French authorities abandoned the procedure of informing His Majesty's Government before the issue of a dahir. In December the French Resident-General at Rabat communicated to His Majesty's consul-general two dahirs increasing the consumption duties on alcohol and sugar, which were to be put into operation immediately. The Resident-General admitted that the consent of His Majesty's Government was legally necessary to make the duties applicable to British subjects, but said that they would, nevertheless, be collected at once, though an exception might be theoretically possible as regards goods imported by a British subject for his personal use, and he considered this action was justified having regard to what

W 7554/1416/
28/1921

W 303/503/
193/28/1923

W 10743/
10765/11285/
10743/28/1924

had passed when the question was thrashed out between the two Governments in previous years (see Annex 20). His Majesty's consul-general, on instructions from the Foreign Office, pointed out to the French authorities, in a note of the 7th January, 1925 (see Annex 21), that while His Majesty's Government endeavoured to co-operate with the French Administration by applying reasonable taxation to British subjects, they did not admit and had never admitted, the right of the French authorities to anticipate their consent. As the duties were not open to objection in themselves, King's Regulations were issued making them applicable to British subjects.

W 10765/
11285/10743/
28/1924

W 518/518/
28/1925

138. Similarly, a dahir of the 6th January, 1926, imposing consumption duties on petrol, rubber tyres, playing-cards and matches was made operative prior to its notification to His Majesty's consul-general at Rabat, and Sir A. Ryan again drew the attention of the Resident-General to the attitude taken up by His Majesty's Government in regard to their consent being anticipated by the French authorities. The tax was made applicable to British subjects by King's Regulation, but in a note to the Resident-General regarding the King's Regulation, Sir A. Ryan made a reservation, worded in wide terms, concerning the innovation introduced by extending the new tax to already existing stocks. Sir A. Ryan's reservation was to the effect that the decision of His Majesty's Government in this particular case was not to be considered as a precedent for the future. "S'il était saisi d'autres demandes en vue d'étendre à ses ressortissants de nouvelles taxes de consommation futures, le Gouvernement britannique garderait sa pleine liberté d'appréciation et d'action tant en ce qui concerne les taxes elles-mêmes qu'en ce qui concerne leur applicabilité aux stocks."

W 773/778/
28/1926

W 5190/778/
28/1926

139. In 1930 a dahir was issued imposing certain consumption duties in the French Zone. The provisions of the dahir relating to soya-bean oil and to frozen meat appeared to constitute both discrimination against products from abroad and a real measure of protection for local products. Accordingly, the French protectorate authorities were informed (see Annex 22) that, although His Majesty's Government were prepared to apply the dahir to British subjects, they did not feel they could do so until they were convinced that British interests would not be prejudiced. The manner in which the soya-bean oil and frozen meat duties appeared to be discriminatory and protective was explained to the French authorities and a request made that the dahir should be amended. Satisfactory modifications were made and an amending dahir issued which His Majesty's Government were able to apply to British subjects by King's Regulation.

W 9727/6730/
28/1930

W 11584/
12930/6730/
28/1930

W 3777/421/
28/1931

140. A dahir of the 4th June, 1929 (supplemented by a later one of the 1st June, 1933), prohibited the import of cereals into the French Zone except by special permit in the event of local supplies being insufficient. In the view of His Majesty's Government this prohibition was contrary to the principle of commercial liberty and the "open door" in Morocco and in contradiction to articles 2 and 6 of the Commercial Convention of 1856. In a note of the 10th June, 1929, His Majesty's consul-general at Rabat made express reserves regarding the application of the dahir to British subjects on this basis (see Annex 23), and on the 11th July, 1929, His Majesty's Ambassador at Paris was instructed to lodge a protest with the French Government on the same grounds (see Annex 24). The French Government justified their action by contending that it was necessary in order to safeguard the vital interests of the country, a principle that was embodied in the Geneva Convention of 1927 regarding import and export prohibitions. "Si une telle restriction est admise d'une manière générale par la Convention de Genève de 1927, a fortiori doit-elle être acceptée à l'égard d'un pays dont la production ne bénéficie d'aucune protection, hormis un droit de douane fixé ne variant à 10 pour cent, auquel s'ajoutent 2½ pour cent *ad valorem* perçus au titre de la taxe spéciale" (see Annex 25). As it appeared to be the fact that the prohibition was in the best interests of Morocco, and as British interests appeared to be only slightly affected, His Majesty's representative at Paris was instructed to inform the French Government (see Annex 26) that, while still of the opinion that the dahir was a violation of the convention of 1856, His Majesty's Government were anxious not to cause the French Government any embarrassment in Morocco and were willing to waive their objections, provided that their action did not constitute a precedent and

File W 5683/
5683/28/1929

W 9038/5683/
28/1929

that the principle of commercial equality and of the "open door" was maintained.

141. An attempt was made to obtain from the French protectorate authorities an assurance to the effect that the prohibition was provisional only, and that a certain quantity of British fine flour should be allowed for the year 1934. As, however, there appeared no likelihood of obtaining this assurance, His Majesty's consul-general at Rabat was instructed in November 1934 to state that His Majesty's Government only waived their request in order not to embarrass the protectorate authorities, and reserved the right to reopen the matter should any foreign fine flour be permitted to enter at any future date. When making this statement, His Majesty's consul-general also intimated that His Majesty's Government were prepared to issue a King's Regulation if the authorities so requested. No such request was made, but a King's Regulation (No. 1 of 1935) was issued in February 1935 covering the dahirs in question.

142. Dahirs of the 13th July, the 21st August and the 15th November, 1933, and of the 23rd May and the 22nd November, 1934, were also issued dealing with the establishment of a wheat fund ("caisse du blé") and imposing taxes for the benefit of the fund on the principal cereals, both on import and export. On instructions from the Foreign Office, His Majesty's consul-general at Rabat pointed out to the protectorate authorities in November 1934 that His Majesty's Government took particular exception to the provisions which imposed import duties on wheat and other cereals, contrary to article 7 of the Anglo-Moroccan Commercial Convention of 1856. At the same time he intimated the willingness of His Majesty's Government to issue a King's Regulation on a request being made therefor. No such request was made by the French authorities, but a King's Regulation (No. 2 of 1935) was issued in February 1935 covering all the dahirs in question.

143. It should be borne in mind in connexion with the issue of King's Regulations Nos. 1 and 2 of 1935 above that in the interval between notifying to the protectorate authorities the willingness of His Majesty's Government to issue the regulations on a request being made and their actual issue, His Majesty's Government concluded the agreement of the 29th January, 1935, with the French Government, one of the objects of which was to clear the ground of outstanding matters at issue in respect of the French Zone.

144. The above account deals only with consumption duties which have given rise to controversy regarding treaty rights. The following schedule contains a list of dahirs issued and of the corresponding King's Regulations.

Date of dahir or "arrêté."	Commodities.	Date of King's Regulation.
Oct. 18, 1914	Alcohol	April 22, 1915.
Dec. 12, 1915	Sugar	June 5, 1916.
June 2, 1916	Alcohol (amendment)	October 23, 1916.
Nov. 24, 1916	Alcohol (amendment)	July 25, 1917.
Nov. 23, 1917	Sugar (amendment)	April 8, 1918.
Mar. 6, 1920	Alcohol (amendment)	July 11, 1921 (published August 30, 1921).
July 5, 1921	Sugar (amendment)	March 20, 1922 (published April 12, 1922).
July 5, 1921	Candles	March 20, 1922 (published April 12, 1922).
Jan. 21, 1922	Beer	January 22, 1922 (published May 19, 1922).
Mar. 18, 1922	Beer (amendment)	April 13, 1922 (published July 17, 1922).
Oct. 1, 1917		
June 8, 1922	Sugar, goods containing sugar, saccharine, &c.	February 10, 1923 (published April 27, 1923).
June 8, 1922		
Jan. 8, 1923		
Jan. 13, 1923		
Aug. 25, 1919	"Colonial Produce" (tea, coffee, chicory, &c.)	February 10, 1923 (published May 23, 1923).
Jan. 8, 1923	Alcohol (wines, vermouth, &c.)	October 29, 1923 (published December 20, 1923).
Aug. 11, 1923		
Dec. 4, 1924	Alcohol (amendment)	March 25, 1925.
Dec. 4, 1924	Sugar, goods containing sugar, saccharine, &c. (amendment)	March 26, 1925.
Jan. 6, 1926	Petrol essences, rubber tyres, inner tubes, playing-cards and matches	May 27, 1926.

Date of dahir or "arrêté."	Commodities.	Date of King's Regulation.
Nov. 24, 1927	Alcohol, wines, vermouth, &c.	May 10, 1928.
Jan. 10, 1928	Sugar, goods containing sugar, chocolate and cocoa	May 21, 1928 (duties payable as from date of King's Regulation).
June 20, 1930	Sugar, goods containing sugar, tea, chocolate, petrol essences, rubber tyres, inner tubes, lubricating oils, vegetable oils and frozen meat	March 28, 1931 (partly applicable only as from date of King's Regulation).
Dec. 28, 1930		
Sept. 14, 1932	Ditto. (amendment)	February 1, 1933 (applicable as from September 14, 1932).
Nov. 3, 1932	Wheat	April 6, 1933.
June 4, 1929	Import of cereals	February 4, 1935.
June 1, 1933		
July 13, 1933		
Aug. 21, 1933	Wheat Fund	February 5, 1935.
Nov. 15, 1933		
May 23, 1934		
Nov. 22, 1934		

N.B.—In addition to those listed above, there have been a number of amending dahirs and "arrêtés" in respect of which there were at the time no corresponding King's Regulations. These deal with modifications in the rates of duties, the classification of various products, &c. The only products not included in, or related to, commodities mentioned in the schedule are explosives, in respect of which consumption duties were levied by "Arrêté viziriel" of the 12th January, 1922, for which no corresponding King's Regulation was issued.

III.—Consumption Duties in the Spanish Zone.

145. Consumption duties were first imposed in the Spanish Zone by a dahir dated the 27th February, 1922, which referred to the measure as an "internal tax upon the consumption of sugar, tea and coffee . . . which shall be leviable from the moment of the importation of the said products into the zone." The Spanish Government, instead of approaching His Majesty's Government when the dahir was issued, in order that it might be made applicable to British subjects and protected persons, waited until the 1st November to do so, and in the intervening period the Spanish authorities attempted to levy the new duties on British-protected persons. On the 21st December, 1922, a note (see Annex 27) was sent to the Spanish Ambassador protesting against the illegal practices of the Spanish authorities, but expressing readiness to issue a King's Regulation, with effect from the date of issue, as soon as goods illegally detained by the Spanish authorities had been released unconditionally. Further difficulties arose owing to the failure of the Spanish authorities to refund in full the deposits paid by British subjects and protected persons in order to secure the release of their goods, and a note was sent to the Spanish Ambassador on the 3rd April, 1923, again protesting against the practices of the Spanish authorities and making it clear that His Majesty's Government would not issue the necessary King's Regulation until satisfaction was obtained. The necessary instructions were sent to the Spanish authorities (see Annexes 28-30). On the 22nd June, 1923, His Majesty's agent reported that, the full amounts deposited having been refunded, he had that day issued a King's Regulation applying the dahir to British subjects and protected persons, with effect as from that date.

146. Meanwhile, on the 15th June, 1923, the attention of the Spanish Ambassador had been called to the fact that His Majesty's Government had received from the Spanish Government no official notification of, or a request to apply to British subjects, a further dahir imposing a consumption duty on alcohol in the Spanish Zone, thereby implying that His Majesty's Government were prepared to issue a King's Regulation provided the necessary formalities were carried out. In this case also the Spanish authorities had endeavoured to make the tax applicable to British subjects, and in notes of the 22nd May, 1923, and the 22nd June, 1923 (see Annexes 31 and 32), His Majesty's vice-consul at Tetuan

W 10151/6578/
28/1922

W 2375/1928/
28/1927

W 4950/1928/
28/1923

W 4620/1928/
28/1923

W 4829/1928/
28/1923 made it clear that His Majesty's Government could not consent to the collection of this tax from British subjects prior to the issue of a King's Regulation and unless the sums already paid by British subjects were refunded. On the 9th July, 1923, the Spanish Ambassador addressed a note to the Foreign Office (Annex 33) asking that the dahir imposing the duty on alcohol might be applied by King's Regulation to British subjects and protected persons, on receipt of which instructions were sent to his Majesty's agent at Tangier to prepare a draft King's Regulation.

W 5554/1928/
28/1923 147. Before action was taken, the question arose as to whether or not United States and Netherlands nationals and protected persons were exempt from the payment of consumption duties, and it was ascertained from His Majesty's agent at Tangier that, while the duties on sugar, coffee and tea had been rendered applicable to such nationals and protected persons, nothing had been settled as regards their payment of the duty on alcohol. On the 27th December, 1923, a note was addressed to the Spanish Chargé d'Affaires (Annex 34) stating that His Majesty's Government, in view of the non-application of the tax on alcohol to United States and Netherlands nationals, hesitated to proceed definitely with a step that would place British subjects at a disadvantage compared with other foreign nationals in the same position; and this was followed by a note of the 22nd January, 1924 (Annex 35), stating that, while His Majesty's Government were anxious to meet the request of the Spanish Government, they would not feel justified in applying the tax on alcohol to British subjects at that moment in view of the facts that there were still outstanding at Tetuan certain deposits improperly levied from British subjects and protected persons, and that no requests had been addressed by the Spanish Government to the United States and Netherlands Governments to make the tax applicable to their nationals.

W 343/343/
28/1924 148. On the 11th September, 1924, the Spanish Embassy called attention to the introduction of further taxes in the Spanish Zone, including a consumption tax on beer, and expressed the hope that there would be no impediment to their application to British subjects and protected persons; they added that their Government proposed shortly to institute certain other consumption taxes on a small number of additional articles, including candles. The Foreign Office enquired whether the United States and Netherlands Governments had been similarly approached. It was learned subsequently that the Spanish authorities were collecting the tax on beer from British subjects, and it was decided that, pending a definite decision, British subjects should be advised to pay under protest and that the Spanish authorities should be informed that His Majesty's Government would claim a refund of such illegally levied moneys. After much delay in securing a refund from the Spanish authorities for amounts illegally levied, King's Regulations were issued on the 28th November, 1925, applying the duties on both alcohol and beer to British subjects and protected persons (see correspondence in Annexes 36 and 37). As regards the duty on candles, this was made applicable to British subjects and protected persons by King's Regulation issued on the 30th December, 1927, after an exchange of notes between His Majesty's consul at Tetuan and the Spanish Delegate-General (see Annexes 38, 39), by which the latter agreed to refund amounts illegally levied and also to apply the dahir to candles which might in the future be manufactured in the Spanish Zone.

W 139/139/
28/1928 149. In February 1930 the Spanish Government drew the attention of His Majesty's Ambassador at Madrid to a series of new dahirs, including some relating to consumption taxes, and asked that the necessary measures might be taken by His Majesty's Government to make them applicable to British subjects and protected persons (see Annex 40). Instructions were sent to His Majesty's consul at Tetuan to issue the necessary King's Regulations, and His Majesty's Ambassador at Madrid informed the Spanish Government accordingly (see Annex 41). This was the first occasion on which His Majesty's Government had failed to stipulate that the Spanish authorities should first refund the amount of taxes illegally collected from British subjects and protected persons. The departure from precedent had, however, been noticed by His Majesty's consul-general at Tangier, who had, on his own authority, instructed the acting British consul at Tetuan to adopt the procedure normally followed, and to make the issue of the King's Regulations contingent upon the settlement of claims for refunds. The Spanish authorities, however, believed, or affected to believe, that the acting British consul was acting without instructions in delaying the issue of the King's Regulations pending a settlement of the claims, and showed no disposition to make

W 8201/1027/
28/1930

the required refund. It was, therefore, decided to inform the Spanish Government officially that the issue of the King's Regulations would be delayed accordingly; this was done in a note from His Majesty's Ambassador at Madrid. Subsequently, the Spanish authorities having continued in their refusal to make the desired refunds, the whole question was reconsidered by the Foreign Office, when the following considerations were taken into account:—

- (a) The suspension of the issue of the King's Regulations, pending satisfaction of the claims, might result in the accumulation of the latter over a long period, and, consequently, it would probably prove necessary, in order to settle the claims, and at the same time to maintain the legal rights of His Majesty's Government, to make the eventual King's Regulations retrospective to the date when it was first decided to issue them.
- (b) The Spanish authorities had been successfully levying the duties on British subjects without King's Regulations having been issued—an undesirable situation.
- (c) It was more important that His Majesty's Government's extra-territorial rights should be preserved than that the claims of British subjects, which, though legally good, had no particular merit, should be promptly met.

150. After consultation with His Majesty's consul-general at Tangier it was decided to issue King's Regulations, antedated to the 19th June, 1930, making applicable to British subjects the consumption duties on sugar, matches, colonial articles and wines, and not to make this action dependent upon the prior settlement of claims for refunds. His Majesty's consul-general at Tangier was informed accordingly, and asked to instruct His Majesty's consul at Tetuan so to inform the Spanish authorities, stating that His Majesty's Government had been influenced in their decision by their desire to prove agreeable to the Spanish Government and to avoid the possibility of British subjects being placed in an unduly advantageous position, but that they could not admit that duties could be levied on British subjects until the issue of King's Regulations. At the same time it was decided to take up the claims for refunds for the period prior to the 19th June, 1930, with the Spanish Government direct, and to urge them in future to arrange for due warning to be given to His Majesty's Government of the issue of such dahirs, in order to enable King's Regulations applying them to British subjects to be issued simultaneously in all cases where the dahirs did not appear to be either protective or discriminatory. The Spanish Government expressed their inability to meet the claims, on the grounds, firstly, that such action would confer an extraordinary advantage upon British subjects and protected persons, and, secondly, that it was the consumer, not the British trader, who really paid the tax. In view of the attitude of the Spanish Government and of the facts that most of the goods on which the duties were imposed were of foreign, rather than of British, origin, and that in the French Zone corresponding King's Regulations were always issued after the entry into force of such dahirs and antedated, the question was considered of antedating the four King's Regulations to the 15th January, 1930, the date of the issue of the dahirs in the Spanish Zone. His Majesty's consul-general at Tangier, in view of the determination of the Spanish Government at that time to do their utmost to undermine the capitulatory régime, deprecated the action suggested, and advanced the proposal that the claims should be held in reserve as a future bargaining asset; this policy was adopted, the four King's Regulations were not further antedated, and nothing more was said to the Spanish Government.

151. By a dahir of the 31st March, 1934, a tax on imported wheat and flour described as a "consumption tax," although not applied to goods produced locally, was imposed; no request was received from the Spanish authorities for the issue of a King's Regulation, and protests were made in writing by His Majesty's consul at Tetuan. The Foreign Office took the view that, while the British commercial interest did not appear to be substantial, the tax was tantamount to an increase in the import duty above the maximum sanctioned by treaty, and it was desirable to maintain the principle that customs duties on goods imported into Morocco could not be so increased without the consent of His Majesty's Government. The dahir of the 31st March was subsequently modified by a dahir and Vizirial decree of the 20th September, 1934, but retained the

W 9195/1027/
28/1930

W 9649/1027/
28/1930

W 11172/1027/
28/1930

W 1541/501/
28/1931

W 3225/501/
28/1931

W 6647/4202/
28/1934

features of the previous dahir, to which His Majesty's Government took exception.

On the 29th June, 1934, twelve further dahirs were issued, four of which imposed new taxes, the remaining eight increasing the taxes already in force. All were described as "consumption taxes," although in two cases only (alcohol and candles) was local produce affected, so that again the action of the Spanish authorities amounted in practice to an increase in the customs duties. His Majesty's consul at Tetuan protested both orally and in writing to the Spanish High Commissioner against the general application of these measures before the consent of His Majesty's Government had been obtained, and also against the discriminatory nature of certain of the duties.

W 7075/4202/
28/1934

W 1181/29/
28/1935

152. On the 22nd January, 1935, the Spanish High Commissioner addressed a note to His Majesty's consul at Tetuan (Annex 42), in which the following contentions were advanced in defence of the dahirs above referred to:—

- (a) The world economic situation might be held to justify the overriding of treaty stipulations in the interests of the common good.
- (b) The dahirs applied to the trade of all countries, and therefore did not violate the Anglo-Moroccan Commercial Convention of 1856 or the Act of Algeciras, which laid down the principle of economic equality.
- (c) Prohibitions of import, if of general application, did not infringe the British Commercial Treaty of 1856 or the principle of economic liberty without inequality in the Act of Algeciras. Such measures had been taken in the French Zone.
- (d) State monopolies were held to be customary in international relations.

W 1791/29/
28/1935

153. As this note revealed an unsatisfactory attitude on the part of the Spanish authorities, His Majesty's Ambassador at Madrid and His Majesty's consul at Tetuan were instructed, on the 2nd March, 1935 (Annex 43), to make formal protests to the Spanish Government against the dahirs issued on the 29th June, 1934, which, with one exception, imposed taxes on imported goods only, and against the dahir and Vizirial decree of the 20th September, 1934, which imposed a consumption tax on imported wheat, flour and its derivatives. The view of His Majesty's Government was that the taxes either involved an increase in the customs duties, contrary to article 7 of the Anglo-Moroccan Commercial Convention of 1856, as modified by article 66 of the Act of Algeciras, or represented an increase in internal duties contrary (as regards enforcement on British subjects) to article 4 of the Anglo-Moroccan General Treaty of 1856. A note on the above lines, and an aide-memoire stating the assurances required by His Majesty's Government before the necessary King's Regulations could be issued, were left at the Spanish Ministry of State (see Annex 44). It was, at the same time, intimated to the Spanish Government that His Majesty's Government would be obliged to consider bringing the matter before the Permanent Court of International Arbitration unless their views on the matter were met. Similar representations were made by His Majesty's consul at Tetuan.

154. The following schedule includes a list of dahirs issued and of the corresponding King's Regulations, excluding those of 1934, in respect of which no King's Regulation has been issued:—

Date of dahir.	Commodities.	Date of King's Regulation.
Feb. 27, 1922	Sugar, coffee and tea	June 22, 1923.
Apr. 15, 1922	Alcohol	November 28, 1925.
Aug. 9, 1924	Beer	November 28, 1925.
Aug. 6, 1927	Sugar, coffee and tea (amendment)	November 21, 1927.
Aug. 6, 1927	Candles	December 30, 1927.
Dec. 30, 1929	Alcohol (amendment)	April 5, 1930.
Dec. 30, 1929	Petrol	September 19, 1930.
Dec. 30, 1929	Powder, ammunition and explosives	September 19, 1930.
Dec. 30, 1929	Wines	November 24, 1930 (applied as from June 19, 1930).
Dec. 30, 1929	Matches	November 24, 1930 (applied as from June 19, 1930).
Jan. 20, 1930		June 19, 1930).
Dec. 30, 1929	Spices	November 24, 1930 (applied as from June 19, 1930).
Dec. 30, 1929	Sugar, coffee and tea (amendment)	November 24, 1930 (applied as from June 19, 1930).

It is understood that, so long as the special régime enjoyed by the United Kingdom remains in force in Morocco, the fines and penalties contemplated in article 9 of the regulations in question can only be enforced against British nationals with the assent of His Majesty's consular authorities in Morocco, under a procedure which can be agreed subsequently.

3. The Administration of the French Zone will modify the Arrêté Viziriel of the 31st July, 1933, in such a manner that the gate taxes applicable to the products enumerated below shall be the same as those applicable to similar local products:—

Yarns and tissues of cotton, pure or mixed, and all articles manufactured from yarns or tissues of cotton, pure or mixed.

Yarns and tissues of flax, hemp or artificial silk, and all articles manufactured from yarns or tissues of flax, hemp or artificial silk, pure or mixed.

Yarns and tissues of wool, pure or mixed, and all articles manufactured from yarns or tissues of wool, pure or mixed.

It is understood that His Majesty's Government in the United Kingdom undertakes to apply the provisions of the above-mentioned "arrêté" as thus modified to British nationals, as well as the provisions of any other regulations concerning the gate taxes which have been made up to the time of signature of the exchange of notes of this day's date, in so far as these regulations have not already been applied to British nationals.

These measures and reforms being agreed to, the Government of the French Republic desire to receive, in return, an assurance that, on the analogy of the reciprocity clause adopted by the Council of the League of Nations in September 1930 in respect of the A and B Mandates, His Majesty's Government in the United Kingdom will give favourable consideration to requests made to it with a view to securing in commercial matters to persons belonging to Morocco, or to goods imported therefrom, advantages corresponding to those accorded in Morocco to British nationals and to United Kingdom goods.

The French Government propose that the arrangements referred to in the preceding paragraphs should be put into force as soon as possible after the 1st January, 1935, as may be agreed upon between the Government of the Republic and His Majesty's Government in the United Kingdom.

I have, &c.

CH. CORBIN.

List A.

Products to be made subject to the Quota System.

Cement.
Cotton tissues.
Natural silk tissues.
Artificial silk tissues.
Iron and steel, manufactures of iron and steel, and machinery.
Motor vehicles and parts thereof.
Pneumatic tyres and tubes and solid tyres.
Refined sugar.

List B.

Products to be made subject on Importation to a Duty of 25 per Cent. ad valorem.

Cement.
Edible pastes.
Seed oils.
Motor vehicles and parts thereof.

ANNEX 1.

Exchange of Notes between His Majesty's Government in the United Kingdom and the French Government regarding contemplated Economic Measures and Reforms in Morocco (the French and Tangier Zones), January 29, 1935.

Note No. 1.

M. Corbin to Sir John Simon.

(Translation.)
Your Excellency,

*French Embassy,
London, January 29, 1935.*

AS His Majesty's Government in the United Kingdom are aware, it is the desire of the Government of the Republic to see introduced in Morocco certain measures and reforms of an economic character, and discussions on this matter have recently taken place between representatives of our two Governments. I have now the honour to state that, as concerns the French Zone, the measures and reforms which the French Government propose to introduce are as follows:—

I.—Quotas.

1. The importation of the products enumerated in List A annexed hereto will be subjected to a quota system conforming to the rule of economic equality.
2. Accordingly, the quotas shall be calculated as follows:—

A global quota will be fixed each half-year for each of the products enumerated in List A, taking as basis the imports in the last corresponding period for which statistics have been published. Thus, in 1935, the global quotas for the first half-year will be fixed in accordance with the statistics for the first half of 1933, and those for the second half of 1935 in accordance with the statistics for the second half of 1934.

Within the theoretical global quotas thus fixed, which may be increased or reduced in accordance with economic necessities, each exporting country will receive a quantitative share proportional to the imports from it of the product in question in the period 1928 to 1933 inclusive.

3. In the event of a quota not being exhausted during the half-yearly period for which it was fixed, the Government of the Protectorate may, on request made to it, carry forward the unused balance to the following half-year.

4. The management of the quotas shall be arranged by the Protectorate Government, in concert with the corporative organisations designated for this purpose by the Government of each of the exporting countries.

II.—Tariffs and Gate Taxes.

1. Customs duties to come into force at the same time as the quota system above described.

The articles enumerated in List B annexed hereto will be made subject to a duty of 25 per cent. *ad valorem* (including the 2½ per cent. duty established by the Act of Algeciras), subject to the observations contained in the said list.

Products necessary for agriculture, such as agricultural machinery, &c., as well as raw materials necessary for industry, such as coal having a volatile content greater than 10 per cent., &c., will be made subject to reduced duties. In the case of the coal above mentioned, the duty shall be 10 per cent. *ad valorem* (including the duty of 2½ per cent. *ad valorem* established by the Act of Algeciras).

Other articles, except those to which duty-free entry will be accorded, shall be subject to a normal tariff of 15 per cent. *ad valorem* (including the duty of 2½ per cent. established by the Act of Algeciras).

2. As the collection of the full amount of the *ad valorem* customs duties depends on their correct assessment, the French Government propose the adoption by the Protectorate Government of the draft regulations annexed hereto,⁽¹⁾ which are designed to improve the conditions of collection of these duties.

⁽¹⁾ Not reproduced.

186. By a subsequent exchange of notes of the 5th and 7th June, 1930, a provisional commercial agreement was concluded between the United Kingdom and Egypt on the basis of reciprocal most-favoured-nation treatment as regards goods. This exchange of notes was to remain in force until the 16th February, 1931, unless previously replaced by a treaty, and has been prolonged since for periods of one year.

187. Provisional commercial agreements on a most-favoured-nation basis were also concluded with the other capitulatory Powers, but no other Power appears to have made the proviso contained in Sir P. Loraine's note of the 16th February, 1930.

Foreign Office, July 1, 1935.

capitulatory treaties, and it was stated that it was the treaty of 1809 and the Capitulations before that date, with their 3 per cent. duty, to which His Majesty's Government would have the right to revert. According to the Law Officers' report of 1889, however, it is the treaty of 1838 that should have been mentioned. Having regard to the principle that what has been modified is annulled, there is considerable doubt whether the claim to revert to capitulatory rights as regards customs duties which was subsequently modified by terminable treaties is a valid one. But the case for reverting to the 1838 treaty is not so weak as that for reverting to the 1809 treaty.

181. In February 1929 the Egyptian Government announced their intention to establish the Egyptian tariff by legislative means and to conclude conventions in virtue of such legislation. They accordingly gave formal notice of denunciation of the United Kingdom-Egypt Commercial Convention of 1889, which would thus terminate on the 16th February, 1930. According to the view of His Majesty's Government, on the disappearance of Egypt's commercial treaties, there was a case in strict law for claiming that, under the Capitulations, His Majesty's Government could insist that Egypt should revert to a customs flat rate of 3 per cent. The disappearance of the Capitulations in Turkey, it was considered, need not be held to affect the position. But general, as opposed to legal, considerations made it impracticable to insist on such an obligation, and it was thought desirable, while making a reservation of our rights, to ensure a reasonable measure of compliance with our wishes, by the judicious use of the lever afforded by the Capitulations.

182. In March 1929 the Egyptian Minister of Finance informed Lord Lloyd, that while fully maintaining their legal rights, the Egyptian Government were desirous of removing any unnecessary apprehensions as to the new legislative proposals, and agreed to publish the draft Customs and Excise Law, with the tariff schedules, in order to enable interested parties to make suggestions and alterations.

183. On the 30th May, 1929, Lord Lloyd addressed a note to the Egyptian Minister for Foreign Affairs acknowledging the notification of the denunciation of the commercial convention of 1889 and welcoming the assurances given by the Minister of Finance in March. The note concluded with the statement that the denunciation automatically terminated, as from the 16th February, 1930, the temporary derogations from capitulatory rights contained in the existing "Règlement douanier égyptien," which were accepted by article 12 of the denounced convention. "The full and formal consent of His Majesty's Government is an essential condition precedent to the exercise by the Egyptian Government after the 16th February, 1930, of powers of this kind and of jurisdiction over British subjects contrary to the Capitulations." A copy of Lord Lloyd's note was sent to the representatives of capitulatory Powers in Egypt.

184. The draft customs law and schedules were published on the 18th December, 1929, and it was feared that the interval before the enforcement of the law was too short to provide adequate opportunity for interested parties to formulate suggestions. However, it became realised that if serious economic results were to be avoided, it was essential that the new tariff should not be delayed after the 17th February, 1930.

185. It only remained, therefore, to consider in which form the consent of His Majesty's Government should be communicated to the Egyptian Government. On the 16th February, 1930, a note was addressed to the Egyptian Government by Sir P. Loraine in a form which appeared adequately to safeguard the position in regard to the Capitulations. In this note His Majesty's Government recorded "their acceptance of the law, together with the tariff schedule as now published, or with such minor modifications as may be lawfully introduced, the new Excise Law, and the continued application of the existing 'Règlement douanier' to British subjects and goods of British origin, and to take the necessary steps to inform British subjects established in Egypt." The note also stated that in order to avoid any possible misunderstanding "this acceptance must be regarded as provisional for one year as from the 17th February, and subject to the proviso that British subjects and goods of British origin will enjoy most-favoured-nation treatment in any circumstances that may arise during the year, and that the double duty contemplated in article 2 of the law will in no circumstances be applied to British subjects and goods of British origin."

Conf. 13656,
No. 103.

Conf. 13656,
No. 114.

VI.—Egypt and Tariff Autonomy.

172. The possibility of the French Government drawing an analogy between the position of Morocco as regards tariff autonomy and that of Egypt makes it desirable to give some account of the development of the question in Egypt.

173. By the treaty of 1809 between Great Britain and Turkey and by the older Capitulations most-favoured-nation treatment was obtained for British subjects and ships and a limit of 3 per cent. was fixed for duties on goods imported by British subjects.

174. The convention with Turkey of 1838 confirmed the privileges conferred on British subjects and ships by the existing Capitulations except as specifically altered by the present convention. The convention contained a most-favoured-nation clause as regards British subjects and ships, but the import duty was fixed at 3 per cent. plus a 2 per cent. internal duty.

175. A treaty of 1861 was concluded between Great Britain and Turkey in substitution of the convention of 1838, and, unlike the convention of 1838 and previous treaties, was terminable after a certain period. The treaty of 1861 confirmed "now and for ever all the previous Capitulations, with the exception of those clauses which it is the intention of the present treaty to modify." It contained a most-favoured-nation clause for British subjects and ships, and the import duty was now limited to 8 per cent. for articles imported from British territory. Similar treaties were concluded by Turkey with other capitulatory Powers.

176. An Ottoman firman of 1867 gave Egypt independence as regards customs duties, and another firman of 1873 gave Egypt power to conclude separate commercial conventions.

177. In 1882-83 Turkey exercised her right to terminate the British Treaty of 1861 and nine other treaties with other Powers which expired about the same date. There remained, however, five treaties which still had some years to run, and pending the conclusion of a new treaty, His Majesty's Government claimed most-favoured-nation treatment under the Capitulations as regards the 8 per cent. import duty. The Turkish Government contended, however, that the Capitulations as regards the import duty had been modified once and for all by the 1861 treaty, and when that treaty terminated the Capitulations on that point came to an end. The dispute appears to have been compromised, Turkey being willing, in fact, to grant most-favoured-nation treatment, though not admitting the obligation in principle.

178. There are two Law Officers' opinions bearing on this point. An opinion of 1883 advised that, on the termination of the 1861 treaty, there was a complete reversion to the *status quo* before the treaty of 1838. An opinion of 1889 advised—

- (i) That the Capitulations entitled British subjects to most-favoured-nation treatment.
- (ii) That the practice of the Porte with regard to the modification of the Capitulations by terminable treaties would be sufficient if shown to be constant to establish the position that the Capitulations revive on the termination of the treaties modifying them.

(As to (ii) it does not seem possible to establish evidence of such constant practice.)

- (iii) That (contrary to the opinion of 1883) the 1838 treaty should be held to have revived on the termination of the treaty of 1861.

179. In 1884 Egypt concluded a commercial treaty with Greece, and in 1889 one with Great Britain, and between 1892 and 1906 commercial agreements were concluded with most of the capitulatory Powers, all being terminable. As a result, while those treaties lasted, Egypt was unable to raise customs duties above 8 per cent. The last treaty was one with Italy, and it was on the termination of this in 1930 that Egypt claimed to have freedom to introduce a new tariff.

180. The position in this respect was considered in 1922, when a despatch was addressed to Lord Allenby, in which His Majesty's Government asserted the view that the capitulatory Powers on the termination of their temporary commercial agreements could claim the rights resulting from their non-terminable

enumerated products shall be the same as those applicable to similar local products. In return, His Majesty's Government undertake to apply the provisions of the decree as modified to British nationals, as well as the provisions of any other gate tax regulations which have been made up to the time of signature of the exchange of notes, in so far as they have not already been applied to British nationals.

V.—Gate Tax in Spanish Zone.

167. New regulations for the collection of the gate tax in the Spanish Zone were introduced by a dahir of the 1st September, 1931, modelled on the French dahir of the 20th April, 1917. The dahir, which was published on the 25th September, 1931, had not been brought to the notice of His Majesty's consul at Tetuan, though the Spanish delegate-general, in the course of verbal representations by His Majesty's consul regarding certain points in the dahir, admitted that this should have been done before the dahir was issued.

168. On instruction from the Foreign Office His Majesty's consul at Tetuan drafted a King's Regulation making the tax applicable to British subjects. Mr. Gurney, His Majesty's consul-general at Tangier, however, drew attention to what appeared to be discrimination arising from the different rates of tax levied on soya-bean oil and olive oil. On instructions from Mr. Gurney, His Majesty's consul at Tetuan reminded the local authorities that until a King's Regulation was issued, the dahir was not applicable to British subjects. At the same time he made a formal protest against its having already been applied to them, and stated that, pending reference to His Majesty's Government, he made all reserves on the question of the apparent discrimination as regards soya-bean oil.

169. On the 24th February, 1932, the Foreign Office pointed out to Mr. Gurney that the discrimination in the tax between olive oil and soya-bean oil was not a breach of British most-favoured-nation rights, and explained the policy of His Majesty's Government in regard to the enforcement of dahirs. "Where the dahir is in contradiction of their treaty rights His Majesty's Government have a clear and proper case for refusing to enforce it. This is not so in the present case. Where the dahir is, though not contrary to treaties, in fact discriminatory against British trade, the case comes very near the line. It may be good policy to use the capitulatory position for what it is worth, to try to get the dahirs amended so that they will not be discriminatory against British trade in fact, even though in form they are not discriminatory. This lever should not, however, be used too frequently because it is not a very strong one, and the use of it is apt to prejudice the capitulatory position itself. In spite of the fact that, strictly speaking, the Spanish authorities are not entitled to levy the taxes on British subjects until the King's Regulation is made, it is the case . . . that in practice they both can and do. . . . In view of these considerations His Majesty's Government were disposed to enforce by King's Regulation all dahirs imposing taxation which cannot be said to be contrary to the letter of the treaty rights of His Majesty's Government."

170. Unless any fresh arguments were brought forward, His Majesty's consul at Tetuan was to be authorised to issue the necessary King's Regulation. A vizirial decree was issued on the 17th March, 1932, equalising the rates of gate tax payable on olive and other edible oils, and a King's Regulation was issued on the 7th July, 1932, making the dahir and vizirial decrees applicable to British subjects as from the 1st January, 1932.

171. The above regulations have since been modified by a dahir and a vizirial decree of the 1st November, 1934, the effect of which is that the gate tax will be leviable on imported goods only. His Majesty's Ambassador at Madrid and His Majesty's consul at Tetuan were instructed (March 1935) to make representations to the Spanish Government and Spanish Zone authorities setting out the treaty rights of His Majesty's Government, and pointing out that the new regulations infringe the principle of equalisation of taxes between imported and local products; that His Majesty's Government will be unable to accept them unless amended in this respect; that if they are not amended and are nevertheless applied to British subjects without the consent of His Majesty's Government, the latter reserve the right to make claims for refund of duties; and, finally, that prior notice of intended measures of this nature should be given to British consular officers (Annex 49). The text of the note addressed to the Spanish Government is contained in Annex 50. Similar representations have been made by His Majesty's consul at Tetuan.

[11543]

F 2

W 13455/
13455/28/1931

W 1751/583/
28/1932

W 2313/583/
28/1932

W 1751/583/
28/1932

W 4075/583/
28/1932

W 8092/583/
28/1932

on imported goods after their arrival in Morocco, as opposed to the levy on goods transported from one town to another, and also to any modifications of the rate of the tax as fixed by the regulations accepted by the Diplomatic Body at Tangier. His Majesty's Government were willing, in accordance with their general policy, to waive their rights to a certain extent as regards justifiable changes in the rate of the tax, and they had, in fact, agreed to certain changes of this kind in the past. But His Majesty's Government had never abandoned their rights, and could not agree to any differentiation in the levy of the tax as between imported goods and local products. Consequently, they were obliged to protest against the tariffs recently promulgated.

161. The reply, dated the 7th July, 1934, of the French Resident-General (Annex 46) challenged the whole basis of British treaty rights in Morocco. The French contention is that article 13 of the Madrid Convention, regarding the gate tax, has lapsed, and articles 1 and 4 of the Franco-German Convention of 1911 gives France entire freedom as regards the establishment of duties and other taxes, subject to economic equality and commercial freedom. Article 13 of the convention of 1911 abrogates all contrary treaty stipulations. The Shereefian Government, therefore, considered they had an absolute right to modify the gate tax as they thought proper and of their own initiative.

162. This contention is the same as that put forward on earlier occasions by the French Government, and refuted in notes addressed by His Majesty's Ambassador at Paris to the French Government (see paragraphs 126, 128-130).

163. It was thought possible that a practical settlement of the question of the gate tax might be reached in the course of the pending general trade discussions with the French Government, but the French attitude has been to make the removal of the discrimination against imported goods in the levy of the gate tax and similar taxes dependent upon the recognition of the right of the protectorate authorities to tariff autonomy. This is, however, not acceptable to His Majesty's Government, since it is essential to maintain in principle the rights under article 7 of the Anglo-Moroccan Commercial Convention of 1856 and article 66 of the Act of Algeciras, whereby the customs duty on goods imported by British subjects into Morocco is limited to 12½ per cent. *ad valorem*. Even if His Majesty's Government admitted certain agreed increases in customs duties as part of an arrangement reached during the pending trade discussions, it would have to be made clear that such increases were to be regarded as agreed derogations from the terms of the convention of 1856.

164. On instructions from His Majesty's Government, His Majesty's Embassy at Paris, in a note of the 9th November, 1934 (Annex 47), drew the attention of the French Government to the above correspondence between His Majesty's consul-general at Rabat and the French Resident-General, and expressed the surprise of His Majesty's Government at the latter's attitude. His Majesty's Government were unable to accept any suggestion that the removal of discrimination against imported goods in the levy of the gate tax should be dependent on the recognition of the right of the protectorate authorities to tariff autonomy. His Majesty's Government had stated that they might be willing to admit certain agreed increases in customs duties, but such increases would have to be regarded as agreed derogations from the principle laid down in the Anglo-Moroccan Commercial Convention of 1856 (article 7). But, with reference to the contentions of the Resident-General, His Majesty's Government were unable to comprehend how their accession to an agreement between France and Germany could be held to modify Morocco's obligations under previous treaties, and they therefore requested the repeal of the recent illegal modification of the gate tax.

165. In their reply of the 22nd November, 1934 (Annex 48), the French Government stated that they were unable to agree that the treaties of 1904 and 1911 had no bearing on the question of the gate tax. They considered, however, that it was useless to continue the discussion on the judicial aspect, and desired to reach a practical settlement of the matter in the course of the negotiations between the two Governments regarding the introduction of certain economic reforms in Morocco (see paragraph 116 above).

166. This practical settlement is embodied in Note No. 1 (II (3)) of the agreement of the 29th January, 1935 (see Annex 1), between His Majesty's Government in the United Kingdom and the French Government on the following lines. The French Government agree to modify the vizirial decree of the 31st July, 1933 (paragraph 160 above), so that the gate taxes applicable to certain

W 6720/1142/
28/1934



1936

33

IV.—Gate Tax in the French Zone.

155. By article 13 of the Madrid Convention of 1880, "les étrangers . . . payeront la taxe dite des portes. La quotité et le mode de perception . . . seront . . . l'objet d'un règlement spécial entre les représentants des Puissances et le Ministre des Affaires étrangères de Sa Majesté chérifienne. Ladite taxe ne pourra être augmentée sans un nouvel accord avec les représentants des Puissances." Regulations were issued with the concurrence of the Powers on the 30th March, 1881 (*State Papers*, Vol. 72, p. 636), and on the 2nd June, 1896 (*Annuaire du Maroc*, 1905, p. 221).

156. Up to 1917 the tax was not levied in ports on goods imported by sea; it was only on leaving the ports for the interior that the tax was paid by foreign goods, and it had thus always been a purely internal duty. A dahir of the 20th April, 1917, was sent home by Sir H. White, which replaced the regulations of 1881 and 1896, the most important modification being that the tax was now to be paid at the customs-house, though on behalf of the municipal authorities, at the same time as the import duty. In a later despatch Sir H. White reported that, in accordance with article 5 of the dahir, the municipal authorities at Casablanca had considerably raised the gate tax on wool, which had called forth strong protests from British merchants. The head of the Cabinet diplomatique informed His Majesty's consul at Casablanca that the French protectorate authorities had the right to make new regulations and to modify those already existing even to the extent of modifying the tariff of taxes fixed by the Maghzen in concert with the Diplomatic Body at Tangier under the provisions of the treaties. Sir H. White deplored the apparent intention of the French to put into force measures which would be resisted in normal circumstances and to face His Majesty's Government with a *fait accompli* after the war.

157. On the 2nd June, 1917, instructions were sent to Sir H. White by the Foreign Office pointing out that it was desirable to maintain British commercial rights in Morocco, and instructing him to make suitable representations pointing out the objections to the dahir. Before receiving the instructions, Sir H. White had written privately to the Resident-General saying that it was not necessary to discuss the question of principle as the views of His Majesty's Government were well known, but asking why the protectorate authorities had made such a heavy increase in the gate tax on wool without previous warning. No reply was received, and on the 25th July, 1917, Sir H. White again wrote privately to the Resident-General stating the case more fully. He quoted M. Delcassé's statement of 1915 that a tax could not be exacted from British subjects without the consent of His Majesty's Government, and added that he hoped an amending dahir would be drawn up and official conflict avoided. No reply was received.

158. In February 1918 Sir H. White reported to the Foreign Office that he had received no reply to his private representations on the dahir of 1917, and proposed, in view of the lapse of time and the pending negotiations between the two countries regarding the abolition of Capitulations, that he should take no further action. This proposal was approved. No King's Regulation was ever issued.

159. The question of the application of a gate tax in Tangier on goods entering by sea arose in 1927. His Majesty's consul-general considered that, although His Majesty's Government would be entitled to object on treaty grounds, it might be desirable to accept in the present instance, and he was authorised, in view of the urgent necessity of raising revenue, and of the fact that His Majesty's Government had tacitly acquiesced in the gate tax on goods arriving by sea in the French Zone, to raise no further objection.

160. Further alterations were made in the gate tax as applied in the French Zone, and by a decree of the 31st July, 1933, a new tariff was introduced providing for increased duties on certain imported products. His Majesty's consul-general at Rabat pointed out that, as a result of the progressive changes, the tax has become equivalent to an additional and protective import duty. After consulting the Board of Trade, it was decided to make strong representations to the authorities of the French Zone. Accordingly, on the 28th April, 1934, His Majesty's consul-general at Rabat addressed a note (Annex 45) to the French Resident-General, which, after stating the legal position based on the Madrid Convention of 1880 and the Regulations of 1881 and 1896, went on to observe that the assent of His Majesty's Government was necessary both to the levy of the tax

[11543]

53

41

Note No. 2.

Sir John Simon to M. Corbin.

Your Excellency,

Foreign Office, January 29, 1935.

With reference to your Excellency's note (No. 1), I have the honour to state that His Majesty's Government in the United Kingdom, in accordance with article 1 of the Franco-German Convention of 1911 regarding Morocco, to which they have acceded, and in accordance with their general friendly policy of not availing themselves of their treaty rights in Morocco to obstruct the introduction of administrative and economic measures which are desirable for the well-being of the French Zone of Morocco, hereby declare their acceptance of the economic measures and reforms specified in your Excellency's note. This acceptance only extends to the particular measures therein specified and does not extend to any alteration of these measures, and is, moreover, conditional upon all the measures specified being put into force. I must, moreover, state that His Majesty's Government's acceptance of these measures is given by His Majesty's Government in waiver of their treaty rights and in no way prejudices the assertion of these rights as regards any measures other than those specified in your Excellency's note.

With reference to the penultimate paragraph of your Excellency's note, I have the honour to state that, on the analogy of the reciprocity clause adopted by the Council of the League of Nations in September 1930 in respect of the A and B Mandates, His Majesty's Government in the United Kingdom will give favourable consideration to requests made to it with a view to securing in commercial matters to persons belonging to Morocco, or to goods imported therefrom, advantages corresponding to those accorded in Morocco to British nationals and to United Kingdom goods.

His Majesty's Government agree with the suggestion in the concluding paragraph of your note under reply that the time for the introduction of these measures shall be that subsequently agreed upon between the two Governments as soon as possible after the 1st January, 1935.

I have, &c.

JOHN SIMON.

Note No. 3.

M. Corbin to Sir John Simon.

(Translation.)

French Embassy.

Your Excellency,

London, January 29, 1935.

I have the honour to acknowledge receipt of your Excellency's note (No. 2) regarding certain economic measures and reforms which it is desired to introduce in Morocco.

I am instructed to inform you that the French Government, like His Majesty's Government in the United Kingdom, fully reserves its point of view in relation to the treaty aspects of the matter, while none the less agreeing to reach a practical solution in accordance with the notes (Nos. 1 and 2) exchanged between your Excellency and myself.

I have, &c.

CH. CORBIN.

Note No. 4.

M. Corbin to Sir John Simon.

(Translation.)

French Embassy.

Your Excellency,

London, January 29, 1935.

The Government of the Republic, as representing His Shereefian Majesty, desires the introduction in the Tangier Zone of certain increased customs duties.

[11543]

G

61

which are specified in the Annex of this note, and desires to know whether His Majesty's Government in the United Kingdom is in agreement with this proposal.

It is understood that, if His Majesty's Government should agree to this proposal, it could only be brought into force when the conditions provided by article 8 of the Tangier Statute have been complied with.

I have, &c.

CH. CORBIN.

Annex relating to the increase of Customs Duties in the Tangier Zone.

1. The Articles enumerated in the list below will be made subject to a duty of 25 per cent. *ad valorem* (including the 2½ per cent. duty established by the Act of Algeciras), subject to the observations continued in the said list:—

Products to be made subject on importation to a duty of 25 per cent. ad valorem.

Cement.
Edible pastes.
Seed oils.
Motor vehicles and parts thereof.

Products necessary for agriculture, such as agricultural machinery, &c., as well as raw materials necessary for industry, such as coal having a volatile content greater than 10 per cent., &c., will be made subject to reduced duties. In the case of the coal above mentioned, the duty shall be 10 per cent. *ad valorem* (including the duty of 2½ per cent. *ad valorem* established by the Act of Algeciras).

Other articles, except those to which duty-free entry will be accorded, shall be subject to a normal tariff of 15 per cent. *ad valorem* (including the duty of 2½ per cent. established by the Act of Algeciras).

2. As the collection of the full amount of the *ad valorem* Customs duties depends on their correct assessment, the French Government, representing His Shereefian Majesty, propose the adoption in the Tangier Zone of regulations designed to improve the conditions of collection of these duties.

Note No. 5.

Sir John Simon to M. Corbin.

Your Excellency,

Foreign Office, January 29, 1935.

With reference to your Excellency's note (No. 4), I have the honour to state that His Majesty's Government in the United Kingdom are in agreement with the increases of Customs duties to be applied in the Tangier Zone as set forth in the Annex to your Excellency's note.

These increases can, however, only be brought into force when the conditions provided by the Tangier Statute have been fulfilled.

With reference to paragraph 2 of the Annex to your Excellency's note, His Majesty's Government would view favourably the introduction in the Tangier Zone, in accordance with the provisions of the Tangier Statute, of new Regulations to improve the conditions under which Customs duties are collected.

I have, &c.

JOHN SIMON.

ANNEX 2.

Sir Edward Grey to Sir F. Bertie (Paris).

(No. 742.)
Sir,

Foreign Office, December 28, 1914.

I transmit to your Excellency herewith a copy of a despatch from His Majesty's Chargé d'Affaires at Tangier, respecting a proposal of the authorities in the French Zone in Morocco to impose a "droit de consommation" on sugar.

You should inform the French Government that His Majesty's Government understand that British interests will not be appreciably affected by the proposed duty, and that His Majesty's Government therefore have no desire to embarrass the French Government by protesting against its imposition. His Majesty's Government must, however, in principle, reserve all the commercial privileges which they enjoy under existing treaties with Morocco, which privileges are in no way diminished by their recognition of the French Protectorate.

I am, &c.

(For the Secretary of State).
RALPH PAGET.

ANNEX 3.

M. Delcassé to Sir F. Bertie (Paris).

January 8, 1915.

M. l'Ambassadeur,

Par sa lettre du 1^{er} de ce mois, votre Excellence a bien voulu me faire savoir que le Gouvernement de Sa Majesté ne pensait pas que les intérêts britanniques seraient affectés d'une manière appréciable par l'établissement d'une taxe sur le sucre au Maroc et n'avait d'ailleurs pas l'intention d'embarrasser le Gouvernement de la République en protestant contre cette mesure.

En même temps, Sir Edward Grey a prié votre Excellence de rappeler qu'en principe le Gouvernement de Sa Majesté considère que les privilèges commerciaux reconnus à la Grande-Bretagne par les traités en vigueur avec le Maroc n'ont subi aucune atteinte du fait de la reconnaissance du Protectorat français sur l'Empire chérifien.

En remerciant le Gouvernement de Sa Majesté de ses dispositions amicales à l'expression desquelles nous sommes très sensibles, je serais reconnaissant à votre Excellence de lui faire savoir qu'il n'est nullement dans les intentions du Gouvernement de la République de soumettre les ressortissants anglais au Maroc à aucune mesure qui les priverait de la jouissance desdits privilèges, sans qu'au préalable le Gouvernement de Sa Majesté ait bien voulu y donner son assentiment. Votre Excellence voudra bien se souvenir qu'il a été ainsi procédé lors de l'établissement dans la Zone française du Maroc d'une taxe sur l'alcool. Il est évident que la reconnaissance du protectorat français sur le Maroc ne saurait à cet égard avoir pour la Grande-Bretagne des effets autres que la reconnaissance du protectorat britannique sur l'Égypte n'en comporte pour la France.

Si le Gouvernement chérifien donne suite au projet de taxe sur les sucres auquel fait allusion la lettre de votre Excellence, ladite taxe ne pourra être exigée des ressortissants britanniques, au moins tant que le Gouvernement de Sa Majesté n'aura pas consenti à ce qu'ils y soient soumis. Je crois devoir ajouter que non seulement mon Département n'a pas eu connaissance de réclamations élevées à ce sujet par des ressortissants anglais, mais même aucun dahir chérifien n'a jusqu'ici été publié qui autorise la perception d'une telle taxe et justifie les craintes dont témoigne la communication précitée.

Agréer, &c.

DELCASSE.

ANNEX 4.

M. Delcassé to Sir F. Bertie (Paris).

July 24, 1915.

M. l'Ambassadeur,

J'ai l'honneur d'exposer à votre Excellence que la nécessité d'augmenter les ressources du Protectorat marocain va obliger le Résident général de la République à Rabat à frapper d'une taxe de consommation les sucres introduits dans la Zone française de l'Empire chérifien. Au cours de sa récente visite à Rabat, M. White a laissé aux fonctionnaires de la Résidence générale l'impression que cette taxe, qui n'affecterait pas d'une manière sensible les intérêts britanniques, ne soulèverait vraisemblablement pas en fait d'objection de la part du Gouvernement du Roi. Me référant à ma note du 7 janvier dernier, je veux espérer que le Gouvernement de Sa Majesté britannique approuvera les déclarations de son représentant à Tanger.

Le Gouvernement de la République est d'autant plus fondé à escompter un assentiment à la mesure envisagée que l'adhésion du Gouvernement britannique aux réformes de tout ordre que nous introduisons au Maroc doit être considérée en droit comme accordée une fois pour toutes par la reconnaissance faite le 19 décembre dernier du Traité de Protectorat français sur le Maroc. Le Gouvernement du Roi a également adhéré, au moins implicitement, au traité franco-allemand du 4 novembre 1911; dans sa lettre au Chargé d'Affaires de France à Londres en date du 14 novembre de la même année, le Principal Secrétaire d'Etat des Affaires étrangères déclarait en effet que, sous la réserve de la conclusion d'un arrangement destiné à placer la ville et le district municipal de Tanger sous un contrôle international, le Gouvernement de Sa Majesté avait "grand plaisir à donner son adhésion à la convention franco-allemande." Or, on peut dire qu'en ce qui concerne la France et la Grande-Bretagne l'arrangement relatif au statut de Tanger est conclu: la note de mon Département du 21 décembre 1914 constatait l'accord complet des deux Gouvernements à ce sujet. Cet accord, en raison des termes, rappelés plus haut, dont s'est servi Sir Edward Grey, emporte bien l'adhésion du Gouvernement de Sa Majesté au traité franco-allemand, dont le traité de Protectorat n'est d'ailleurs que la conséquence. Il est superflu de rappeler que les deux actes précités stipulent dans leur article 1^{er} le pouvoir réglementaire absolu du représentant de la République au Maroc. Il est également inutile d'ajouter que les nouvelles taxes déjà établies ou celles dont l'établissement est prochain seront égales pour tous et qu'il ne sera constitué à ce sujet de privilège au profit de personne.

Peut-être le Gouvernement britannique objectera-t-il que, si la déclaration du 19 décembre 1914 stipule que la reconnaissance du Protectorat français sur le Maroc est faite sous la forme d'une adhésion formelle aux dispositions explicites du traité franco-marocain du 30 mars 1912, cependant la proclamation du Protectorat britannique sur l'Égypte n'a amené jusqu'ici aucune modification du *statu quo* en ce qui concerne les intérêts français en ce dernier pays. Le Gouvernement de la République en convient aisément, mais il s'attend que le Gouvernement britannique ne tarde pas à tirer de l'établissement de son Protectorat sur l'Égypte les conséquences qu'il comporte et il ne croit pas qu'on puisse de bonne foi soutenir que les réformes introduites au Maroc, et dont tous les habitants sans aucune exception ont ressenti les bienfaits comme ils doivent tous en supporter les charges, aient, tout bien considéré, lésé les intérêts des sujets britanniques. Néanmoins, animés en ce qui concerne les affaires marocaines du même souci d'entente dont nous constatons partout les heureux effets, et dans un sentiment de courtoisie qui s'inspirait de l'esprit de l'accord du 8 avril 1904, nous avons consenti, tant que le *statu quo* ne serait pas modifié en Égypte, à prévenir le Gouvernement britannique de nos intentions de réformes au Maroc, confiants qu'il n'y refuserait pas un assentiment qu'en droit strict nous ne nous croyons pas tenus de provoquer.

Je serais heureux d'apprendre que votre Excellence aura bien voulu soumettre les considérations qui précèdent à la plus amicale attention de Sir Edward Grey et que le Gouvernement de Sa Majesté ne fera pas d'objection à l'établissement, dans la Zone française de l'Empire chérifien, d'une taxe modérée de consommation sur les sucres.

Agrérez, &c.
DELCASSE.

ANNEX 5.

Sir Edward Grey to Sir F. Bertie (Paris).

(No. 650.)

Sir,

Foreign Office, August 5, 1915.

With reference to your Excellency's despatch No. 284 of the 27th ultimo, regarding the imposition of a consumption tax on sugar imported into the French Zone in Morocco, I request that your Excellency will inform M. Delcassé that, as already stated in my despatch No. 742 of the 28th December last, His Majesty's Government recognise the reasons which prompt the French Government to impose this tax and have agreed to its imposition.

Your Excellency should add that, as regards the general questions raised by M. Delcassé, His Majesty's Government have certainly recognised the French Protectorate in Morocco, but that they feel confident the French Government will agree that it is better to leave till quieter times the discussion of the renunciation of British and French extra-territorial treaty rights and jurisdiction in Morocco and Egypt respectively.

I am, &c.

(For the Secretary of State).
W. LANGLEY.

ANNEX 6.

The Resident-General, Rabat, to the Italian Chargé d'Affaires, Tangier.

M. le Chargé d'Affaires,

Rabat, le 10 janvier 1916.

Vous avez bien voulu, par une lettre en date du 27 décembre dernier, me faire part d'objections qui s'opposeraient, à votre avis, à l'application du dahir chérifien paru au *Bulletin officiel* du 13 décembre dernier et portant établissement d'un droit de consommation sur les sucres.

L'argumentation présentée, en l'espèce, par la Légation d'Italie, repose, semble-t-il, sur une fausse interprétation de l'Acte général d'Algésiras.

Tout d'abord, il ne s'agit pas, contrairement à l'opinion émise par vous, de la création d'une des taxes municipales, les seules visées à l'article 64 de cet acte et qui, en vertu de son texte, ne pouvaient pas être étendues aux ressortissants étrangers sans le consentement du Corps diplomatique, mais bien d'un droit de consommation, applicable, notamment, aux sucres indigènes, ainsi qu'à ceux qui sont importés de la Zone espagnole dans celle du Protectorat français.

Le Gouvernement du Protectorat n'oublie pas les stipulations de l'Acte d'Algésiras, mais l'adhésion du Gouvernement royal à l'accord franco-allemand du 4 novembre 1911 et au traité de Protectorat, qui modifient profondément le régime antérieur, exclut toute controverse au sujet dudit droit, quelle qu'en soit la nature.

Vous n'ignorez certainement pas que, sous réserve du maintien de l'égalité économique, l'article 1^{er} de l'accord franco-allemand a conféré à la France les droits réglementaires, en matière économique et financière, dans la mesure où des réformes seraient nécessaires pour le bon gouvernement de l'Empire chérifien. Précisés par la lettre interprétative de l'accord du 4 novembre, où il est expressément stipulé que "l'adhésion accordée d'une manière générale au Gouvernement français par l'article 1^{er} de ladite convention s'applique, naturellement, à toutes les questions donnant matière à réglementation et visées dans l'Acte d'Algésiras," ces droits ont été, sans qu'il puisse subsister aucun doute, confirmés par l'article 1^{er} du traité du Protectorat.

L'adhésion du Gouvernement royal à ces différents accords et, notamment, à l'article 4 de l'accord franco-allemand qui, interdisant toute inégalité "dans l'établissement des droits de douane, impôts et autres taxes," confère au Protectorat l'autonomie douanière comme l'autonomie fiscale, sous la seule réserve du principe d'égalité, implique nécessairement son assentiment aux mesures de réorganisation fiscale édictées par le Protectorat.

D'une manière plus générale, cette adhésion nous garantit implicitement le consentement des Puissances aux réformes en dehors desquelles la France serait dans l'impossibilité d'exercer ses droits au Maroc et d'y remplir la mission qu'elle y a assumée.

La promulgation du nouveau dahir est donc, à la fois conforme à la logique et au droit et, d'ailleurs, n'a motivé aucune objection de la part des autres Puissances signataires des accords susvisés.

Veuillez agréer, &c.
SAINT-AULAIRE.

ANNEX 7.

His Majesty's Embassy, Paris, to French Government.

November 8, 1919.

His Majesty's Government have been informed by His Majesty's agent and consul-general at Tangier that by a Shereefian dahir of the 25th August, a "droit de consommation" has been imposed on certain articles of merchandise imported in the French Zone, such as tea, coffee, chicory, &c.

His Majesty's Minister has the honour, under instructions from His Majesty's Secretary of State for Foreign Affairs, to point out that the imposition of this "droit de consommation" amounting in fact to an increase in the import duties on the articles affected, without the previous consent of His Majesty's Government having been obtained, reopens a discussion left unfinished in 1915. At that time the immediate occasion for an exchange of notes was the imposition of a "droit de consommation" on sugar, but as His Majesty's Government raised no objection to this tax, of which, as a matter of fact, they were given due notice, and as they proposed that the question of French and British extra-territorial rights in Egypt and Morocco respectively should be left until quieter times, no discussion on general principles actually took place.

In view, however, of the recent dahir, Sir George Grahame is directed to recall the attention of the Ministry for Foreign Affairs to the fact that by the Anglo-Moroccan Commercial Convention of 1856, supplemented by article 66 of the Act of Algeciras, the maximum duty which can be imposed on goods imported into Morocco by British subjects is 12½ per cent. *ad valorem*, and that thus, if it is desired to impose on the same goods a tax amounting to an increase in the import duty, the previous consent of His Majesty's Government is required.

That this view was shared by the French Government on the 8th January, 1915, is proved by the following passage in a note of that date from the Minister for Foreign Affairs to His Majesty's Ambassador in Paris:—

"Il n'est nullement dans les intentions du Gouvernement de la République de soumettre les ressortissants anglais au Maroc à aucune mesure qui les priverait de la jouissance desdits privilèges sans qu'au préalable le Gouvernement de Sa Majesté ait bien voulu donner son assentiment. . . . Si le Gouvernement chérifien donne suite au projet de taxe sur les sucres, auquel fait allusion la lettre de votre Excellence, ladite taxe ne pourra être exigée des ressortissants britanniques, au moins tant que le Gouvernement de Sa Majesté n'aura pas consenti à ce qu'ils y soient soumis."

It should be noted that the above opinion was put on record within a month after the adhesion of Great Britain on the 19th December, 1914, to the Franco-Moorish Treaty of 1912, on which the claim of the Protectorate to the right to impose a "droit de consommation" without the consent of His Majesty's Government is based. The fact that M. Delcassé could approve such language so soon after the adhesion of His Majesty's Government to the treaty of 1912 appears to His Majesty's Government to show clearly that the French Government had no intention of construing that adhesion as an abrogation of British rights in Morocco acquired by previous treaties, and the same view is put on record in a note addressed by His Majesty's Ambassador in Paris to the Minister for Foreign Affairs on the 1st January, 1915.

It was not in fact until July 1915 that the theory on which the Protectorate authorities seem to be now acting was first formulated. In a note dated the 24th of that month and addressed to Sir F. Bertie, M. Delcassé expressed himself as follows:—

"... l'adhésion du Gouvernement britannique aux réformes de tout ordre que nous introduisons au Maroc doit être considérée en droit comme accordée une fois pour toutes par la reconnaissance faite le 19 décembre dernier du Traité de Protectorat français sur le Maroc."

Later on in the same note it is maintained that article 1 of both the Franco-Moorish treaty of 1912, and the Franco-German treaty of 1911 (to which the United Kingdom had adhered, subject to adequate arrangements being made for the internationalisation of Tangier), confer upon France "le pouvoir réglementaire absolu."

Absolute power, then, according to the precise wording of these articles, is claimed over the administrative, judicial, educational, economic, financial, and military spheres. But most of the rights enjoyed by British subjects under the Anglo-Moroccan treaty and convention of 1856 and the Act of Algeciras fall under one or other of the above categories, and it would logically follow, if this contention were admitted by His Majesty's Government, that these rights no longer survive, having (unknown at the time to either Government) ceased to exist on the 19th December, 1914.

This is not a view which can be accepted by His Majesty's Government. It is a recognised principle that when a third party assents to a Protectorate of one State over another, the protected State is not thereby absolved from any obligations which it may have incurred towards the assenting Power, and in support of this principle it is sufficient to instance the case of the British Protectorate over Zanzibar. There is nothing in the treaty of 1890 expressly retaining in force the earlier treaties between Zanzibar and other countries, but the French Government continue to claim in Zanzibar all their rights under earlier treaties which have not been abrogated by any special arrangement with His Majesty's Government.

His Majesty's Government observe that with regard to Morocco the French Government have not acted entirely in accordance with the theory propounded by M. Delcassé in his note of the 24th July, 1915; had they done so they would not have negotiated with Great Britain in 1918 the draft Morocco-Egypt Convention.

Article 2 of that draft convention provides for the abolition of the British consular courts in the French Zone; article 7 again lays down that His Majesty's Government shall renounce all the rights they possess in virtue of the Act of Algeciras regarding the establishment and functions of the State Bank of Morocco. But had the Administration of the Protectorate been in possession of the absolute power claimed in M. Delcassé's note, these arrangements, construed as judicial and financial reforms, need never have been made the subject of negotiation. Again, article 6 (*sic*)⁽¹⁾ specifically maintains in force the Commercial Convention of 1856, which evidently could not have been regarded by the negotiators of the draft convention as a dead letter.

Clearly then, if certain financial and economic rights admittedly survive, all the rights conferred by the earlier treaties must also survive, including the right to exemption from an import duty in excess of 12½ per cent. *ad valorem*.

In view of the considerations set forth above, Sir G. Grahame is instructed by Earl Curzon of Kedleston to protest to the French Government against the imposition of these dues without the previous consent of His Majesty's Government having been formally requested and obtained, and to state that His Majesty's Government cannot but regard the goods imported by British subjects as exempt from the incidence of these dues.

(1) This should be article 5. See paragraph 99 of memorandum.

ANNEX 8.

Sir H. White (Tangier) to French Resident-General.

M. le Résident général,

November 24, 1919.

I have the honour, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to inform your Excellency that his attention has been called to the dahir of the 25th August last, imposing a "droit de consommation" on tea, coffee and other commodities imported into the French Zone.

In the opinion of His Majesty's Government, the imposition of this tax, without the previous consent of His Majesty's Government having been obtained, reopens a discussion left unfinished in 1915. At that time the immediate occasion for an exchange of notes was the imposition of a "droit de consommation" on sugar, of which, in effect, His Majesty's Government were given due notice, and to the incidence of which their assent was previously obtained. As, however, they raised no objection to this tax and proposed that the question of the renunciation of French and British extra-territorial rights in Egypt and Morocco should be left to quieter times, no discussion on general principles took place.

In view, however, of the promulgation of the above-mentioned dahir without previous consultation with His Majesty's Government, I am to remind your Excellency that by the Anglo-Moroccan Commercial Convention of 1856, supplemented by article 66 of the Act of Algeciras, the maximum duty which can be imposed on goods imported into Morocco by British subjects is 12½ per cent. *ad valorem*. If, therefore, it is desired to impose on the same goods a tax amounting to an increase in the import duty, the previous consent of His Majesty's Government is indispensable.

That the French Government shared this view on the 8th January, 1915, is proved by the following passage in the note of that date from M. Delcassé:—

"Il n'est nullement dans les intentions du Gouvernement de la République de soumettre les ressortissants anglais au Maroc à aucune mesure qui les priverait de la jouissance desdits privilèges sans qu'au préalable le Gouvernement de Sa Majesté ait bien voulu donner son assentiment. . . . Si le Gouvernement chérifien donne suite au projet de taxe sur les sucres, auquel fait allusion la lettre de votre Excellence, ladite taxe ne pourra être exigée des ressortissants britanniques, au moins tant que le Gouvernement de Sa Majesté n'aura pas consenti à ce qu'ils y soient soumis."

It is important to note that the above opinion was put on record within a month after the adhesion of Great Britain to the Franco-Moorish Treaty of 1912 (the 19th December, 1914), for it would seem to be on the adhesion of Great Britain to that treaty that the claim of the Protectorate authorities to impose, without the consent of His Majesty's Government, a "droit de consommation" on imports is based. The fact that M. Delcassé could approve such language so soon after the adhesion of Great Britain to the treaty of 1912 clearly shows that the French Government had no intention of construing that adhesion as an abrogation of the British rights in Morocco acquired by previous treaties; and the same view was put on record shortly after in a communication on the subject addressed to the French Government by His Britannic Majesty's Ambassador at Paris.

It was not, in fact, till July 1915 that the theory on which the promulgation of the dahir in question would seem to be based was first formulated. In a note dated the 24th of that month addressed to His Majesty's Ambassador, M. Delcassé expresses himself as follows:—

"... l'adhésion du Gouvernement britannique aux réformes de tout ordre que nous introduisons au Maroc doit être considérée en droit comme accordée une fois pour toutes par la reconnaissance faite le 19 décembre dernier du Traité de Protectorat français sur le Maroc."

Later on, in the same note, it is maintained that article 1 of both the Franco-Moorish Treaty of 1912 and the Franco-German Treaty of 1911 (to which the

United Kingdom had adhered, subject to adequate arrangements being made for the internationalisation of Tangier) confer upon France "le pouvoir réglementaire absolu."

Absolute power, then, according to the precise wording of these articles, is claimed over the administrative, judicial, educational, economic, financial and military spheres. But most of the rights enjoyed by British subjects under the Anglo-Moroccan Treaty and Convention of 1856 and the Act of Algeciras fall under one or the other of the above categories; and it would logically follow, if the contention of the French Government were admitted, that these rights now no longer survive, having (unknown at the time to either Government) ceased to exist on the 19th December, 1914.

This is not a view which His Majesty's Government can countenance. It is a recognised principle that when a third party assents to a Protectorate of one State over another the protected State is not thereby absolved from any treaty obligations which it may have incurred towards the assenting Power. In support of this principle it is sufficient to instance the British Protectorate over Zanzibar. There is nothing in the treaty of 1890 expressly retaining in force the earlier treaties between Zanzibar and other countries, but the French Government continue to claim in Zanzibar all their rights under the earlier treaties which have not been abrogated by any special arrangements with His Majesty's Government.

It is satisfactory to observe that the French Government has not acted, even as regards Morocco, consistently with the theory propounded by M. Delcassé; otherwise they would not have negotiated with Great Britain in 1918 the draft Morocco-Egyptian Convention.

Article (2) of that draft provides for the abolition of the British consular courts in the French Zone; article (7) again lays down that His Majesty's Government shall renounce all the rights which they possess in virtue of the Act of Algeciras regarding the establishment and the functions of the State Bank of Morocco. But had the Administration of the Protectorate been in possession of the absolute power claimed in M. Delcassé's note, these rearrangements, construed as judicial and financial reforms, need never have been made the subject of negotiation. Again, article (6) specifically maintains in force the commercial convention of 1856, which evidently could not have been regarded by the negotiators of the draft convention as a dead letter.

Clearly, then, if certain judicial, financial and economic rights admittedly survive, all the rights conferred by the earlier treaties must survive, including the right to exemption from an import duty in excess of 12½ per cent. *ad valorem*.

I have the honour, therefore, to inform your Excellency that His Majesty's Government find it necessary to protest against the imposition of these dues without their previous agreement having been formally requested and obtained, and must regard the goods imported by British subjects as exempt from their incidence.

I avail, &c.

HERBERT E. WHITE.

ANNEX 9.

French Ministry for Foreign Affairs to His Majesty's Embassy, Paris.

November 21, 1919.

Par sa note du 8 de ce mois, l'Ambassade de Sa Majesté britannique à Paris a exposé que le Principal Secrétaire d'Etat des Affaires étrangères estime que les dispositions du dahir du 25 août 1919 portant création d'une taxe intérieure de consommation sur les principales denrées coloniales et leurs succédanés ne sont pas applicables aux sujets et ressortissants de l'Empire britannique au Maroc tant que leur perception n'a pas été autorisée par un acte formel du Gouvernement de Sa Majesté.

Le Ministère des Affaires étrangères a l'honneur de faire savoir que le Gouvernement chérifien, ainsi que l'affirmait la note de M. Delcassé du 24 juillet 1915, est, pourvu que le principe de l'égalité économique soit respecté, maître de

[11543]

H

ses tarifs douaniers. Une telle maîtrise résulte des termes généraux des traités du 4 novembre 1911 et du 30 mars 1912 auxquels a adhéré, réserves faites en ce qui concerne le régime prévu pour Tanger, le Gouvernement de Sa Majesté britannique.

Le Gouvernement chérifien ne se propose pas, au surplus, au moins pour l'instant, de faire usage de cette maîtrise douanière.

Il ne s'agit pas, en effet, d'un droit de douane, mais d'une taxe intérieure de consommation applicable à des produits coloniaux de toute origine. Les sommes escomptées de cette taxe sont nécessaires à l'équilibre du budget marocain et à l'achèvement de travaux publics dont le commerce britannique est appelé bénéficier.

Mais le Gouvernement français reconnaît volontiers que, tant que le Gouvernement britannique n'aura pas renoncé à ses privilèges capitulaires et que ses tribunaux consulaires continueront à fonctionner au Maroc, les infractions commises à toutes les dispositions législatives nouvelles non reconnues par l'autorité anglaise ne pourront pas être réprimées.

Aussi, le Gouvernement français se plaint à espérer que le Gouvernement allié voudra bien, comme il l'a fait en 1915 en ce qui concerne la taxe de consommation sur les sucres, provoquer les mesures nécessaires pour faire prendre par l'autorité consulaire britannique les règlements qui donneront aux infractions au dahir du 25 août 1919, dont le texte est ci-joint, une sanction qui ne peut venir, à l'égard des ressortissants anglais, que des juridictions consulaires de la Grande-Bretagne.

En attendant la promulgation de l'Ordre en Conseil sollicité, le Ministère des Affaires étrangères prescrit à la Résidence générale de la République à Rabat de ne pas faire appliquer aux sujets et ressortissants britanniques au Maroc les dispositions du dahir du 25 août dernier. A cet effet, les autorités chérifiennes autoriseront, sur demandes présentées par les consuls britanniques, la remise des produits visés au dahir sans le paiement de la taxe nouvelle. Il ne pourrait être question que des produits nécessaires à la consommation personnelle des sujets et ressortissants de l'Empire et à celle des personnes vivant sous leur toit. Toute mesure étendant le bénéfice d'une semblable disposition aux produits destinés à la clientèle commerciale des intéressés romprait en leur faveur la règle de l'égalité économique, qui est le fondement du droit contractuel au Maroc et dont le Gouvernement britannique n'a cessé de réclamer la stricte application.

ANNEX 10.

His Majesty's Embassy, Paris, to French Ministry for Foreign Affairs.

February 20, 1920.

With reference to the note from the Ministry for Foreign Affairs dated the 21st November, 1919, regarding the imposition of consumption duties in Morocco, His Majesty's Embassy has the honour, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to inform the Ministry for Foreign Affairs that, in the opinion of His Majesty's Government, the terms of that note seem to be based not on any new arguments, but only upon a repetition of the thesis which was put forward in M. Delcassé's note of the 24th July, 1915, namely, that the adherence of Great Britain to the Franco-Moorish Treaty of 1912 confers upon the French Government, as of right, absolute discretion to impose upon British subjects in Morocco any taxes which they may consider advisable, regardless of the exemptions secured for British subjects by the earlier treaties, *e.g.*, those of 1856 and the Act of Algeciras, which ostensibly remain unabrogated and in full force.

His Majesty's Embassy is instructed, in these circumstances, to set forth once more those arguments which have convinced His Majesty's Government that the French Government are not justified in maintaining the position which they have adopted.

The French Government state that their claim to impose taxation is based upon article 1 of the Franco-Moorish Treaty of 1912, which contemplates the introduction of "economic reforms." Having once adhered to the treaty containing this clause, Great Britain, it is argued, is bound to accept all such reforms. But this same clause contemplates the introduction of reforms of various other kinds, judicial, administrative, financial and educational. The

logical conclusion to be drawn from this would seem to be that Great Britain is bound likewise to accept, amongst other things, all judicial reforms, and His Majesty's Government are led to enquire whether the French Government feel entitled to abolish at their discretion the British consular courts. It would not appear that they did feel so entitled, when they entered last year upon special negotiations with the British Government with this end in view, and, in these circumstances, His Majesty's Government are quite unable to understand which of the privileges secured by treaty for British subjects the French Government consider to have survived the Franco-Moorish Treaty of 1912, and which of these privileges have, in their opinion, ceased to exist. His Majesty's Government are bound to observe that, pending any specific explanation of this subject, they must continue to maintain that all such privileges exist unimpaired.

It was brought to the notice of the Ministry for Foreign Affairs in His Majesty's Embassy's note of the 8th November, 1919, that at the time when Great Britain adhered to the Franco-Moorish Treaty of 1912, the French Government did not envisage, any more than the British Government, the possibility of claiming the administrative freedom which the former now wish to exercise; and M. Delcassé's note of the 8th January, 1915, in which it was admitted that the French authorities had no right to deprive British subjects in Morocco of their privileges, except with the previous consent of His Majesty's Government, goes to prove this contention.

His Majesty's Government consider it only natural that neither Government should have conceived the possibility of making the claim which is now advanced by the French Government, for there is no precedent within the knowledge of His Majesty's Government for a protecting Power claiming that the mere avowal of an intention to introduce reforms in a protected country *ipso facto* absolves that country from the obligations towards other Powers previously incurred by it; and the theory on which the French Government wish to go in Morocco would not appear to be one on which they act in their relations towards the British Protectorate in Zanzibar, where they claim for their nationals all such rights accruing to them under earlier treaties as have not been specifically abrogated. His Majesty's Government observe that no attempt is made in the note from the Ministry for Foreign Affairs of the 21st November last to refute these arguments.

It is hoped by His Majesty's Government that this explanation will suffice to show why they are unable, on the grounds advanced by the French Government, to agree to the imposition of these duties upon British subjects. His Majesty's Government consider that the duties themselves are a matter of relatively slight importance, and they have no wish to embarrass the authorities of the Protectorate in raising the funds necessary for the proper administration of the zone. The French Government, however, does not merely request, but claims as a right, that such duties should be made applicable to British subjects regardless of the treaties of 1856 and the Act of Algeciras, and His Majesty's Government are obliged, in the face of this claim, to insist once more on the obvious fact that the treaties of 1856 and the Act of Algeciras, and all other instruments signed by Great Britain (?) prior to the Franco-Moorish Treaty of 1912, unless and until they have been specifically modified or abrogated, remain in force.

In the last paragraph of its note, the Ministry for Foreign Affairs states that it is willing to defer for the present applying the new duties to goods consumed in the households of British subjects, but that there can be no question of exempting the goods imported by British subjects for their commercial clientèle. His Majesty's Government must observe, however, that there is nothing in the treaties referred to in the preceding paragraph which go to justify such a distinction, and that article 7 of the Commercial Convention of 1856 and article 66 of the Act of Algeciras expressly preclude the imposition of duties in excess of 12½ per cent. *ad valorem* on any goods imported by British subjects whether for their own consumption or for that of their clientèle.

In bringing the above to the attention of the Ministry for Foreign Affairs, Lord Derby is instructed once more earnestly to protest against the action of the Protectorate authorities in neglecting to request and to obtain the consent of His Majesty's Government before imposing these dues, and to repeat that in the view of His Majesty's Government the goods imported by British subjects are exempt from the incidence of the duties.

ANNEX 11.

Lord Derby (Paris) to Lord Curzon.

(No. 474.)

My Lord,

Paris, February 18, 1920.

In accordance with the instructions contained in your Lordship's despatch No. 313 of the 28th ultimo, I drew the attention of the Ministry for Foreign Affairs to the failure of the French authorities to follow the proper procedure in the case of certain new customs regulations which had been introduced by the Protectorate authorities in the French Zone of Morocco.

I have the honour to transmit to your Lordship herewith copy of the reply which I have received from the Ministry for Foreign Affairs on the subject. The Ministry admits that the penalties under such regulations cannot be enforced against British subjects except with the consent of the British authorities, and adds that the attention of the French Resident-General at Rabat has been drawn to the necessity of communicating in cases of this nature with His Majesty's diplomatic agent at Tangier, with a view to the application to British subjects of legislative measures introduced by the Shereefian Government.

I have, &c.
DERBY.

Enclosure in Annex 11.

Note from French Ministry for Foreign Affairs.

Par sa note du 4 février, l'Ambassade de Sa Majesté britannique a signalé au Ministère des Affaires étrangères que des règlements douaniers avaient été promulgués dans la Zone française de l'Empire chérifien qui, aux termes des traités, ne pouvaient être appliqués aux ressortissants britanniques sans l'assentiment préalable des autorités royales. L'Ambassade de Sa Majesté reconnaît d'ailleurs la justice et l'utilité des nouvelles règles édictées.

En prenant acte du jugement porté sur la nouvelle réglementation, le Ministère des Affaires étrangères a l'honneur de faire savoir à l'Ambassade d'Angleterre qu'il ne disconvient pas que, tant que le Gouvernement britannique n'aura pas renoncé au Maroc au bénéfice des privilèges qu'il tient des Capitulations, les infractions aux nouvelles dispositions édictées par le Gouvernement chérifien ne pourront être sanctionnées à l'égard des ressortissants britanniques qu'après que ces nouvelles dispositions auront été rendues obligatoires par les autorités anglaises. Le Ministère des Affaires étrangères appelle l'attention du Résident général de la République à Rabat sur la nécessité de se mettre dans des cas analogues en rapports avec l'agent diplomatique de Sa Majesté à Tanger pour lui demander de rendre applicables aux ressortissants britanniques les mesures législatives promulguées par le Gouvernement chérifien.

PALEOLOGUE.

Paris, le 16 février 1920.

[A 700/700/28]

ANNEX 12.

Earl Curzon to the Earl of Derby (Paris).

(No. 670.)

My Lord,

Foreign Office, February 25, 1920.

With reference to your Lordship's despatch No. 474 of the 18th February, relative to the new customs regulations in the French Zone of Morocco, I have to inform you that I have now instructed His Majesty's agent at Tangier, as soon as he is requested to do so by the Resident-General, to issue a King's Regulation making the new arrangements applicable to British ships.

I am, &c.
(For the Secretary of State),
R. SPERLING.

ANNEX 13.

*French Ministry for Foreign Affairs to His Majesty's Embassy, Paris.**March 6, 1920.*

Le Ministère des Affaires étrangères a l'honneur d'accuser réception à l'Ambassade de Sa Majesté britannique de ses notes des 20 et 26 février et du 2 de ce mois.

Le Gouvernement de la République apprend avec la plus vive satisfaction que l'agent diplomatique de Sa Majesté à Tanger a reçu pour instructions de rendre applicables dans la Zone française du Maroc par un Ordre royal aux ressortissants britanniques les nouvelles taxes créées pour équilibrer le budget chérifien, dès que le Résident général de France au Maroc en aura fait la demande au représentant de l'Angleterre.

Des instructions analogues ayant déjà été adressées aux agents de la République en Egypte, la controverse juridique sur l'interprétation des traités à ce point de vue, se trouve n'avoir plus d'intérêt pratique.

Les traités du 4 novembre 1911 et du 30 mars 1912 confèrent bien à la France le droit absolu d'introduire au Maroc toutes les réformes nécessaires au bon gouvernement de l'Empire chérifien, et le Gouvernement français reconnaît à la Grande-Bretagne le même droit en Egypte. Mais, tant que les Capitulations restent en vigueur dans ces deux pays, il est nécessaire de recourir à l'intervention de l'autorité consulaire pour rendre applicables aux Anglais au Maroc, et aux Français en Egypte les nouvelles taxes établies. Cette nécessité n'a cessé d'être reconnue par le Ministère des Affaires étrangères, comme il est exposé dans les différentes notes adressées à ce sujet à l'Ambassade de Sa Majesté britannique.

ANNEX 14.

[A 1217/638/28]

Earl Curzon to the Earl of Derby (Paris).

(No. 895.)

My Lord,

Foreign Office, March 15, 1920.

I have not received copies of the notes addressed by your Excellency to the French Government on the 20th and 26th ultimo and 2nd instant, to which reference is made in your despatch No. 716 respecting the payment of duties by British subjects in Morocco. I am therefore unaware whether the French Government have any good reason for assuming from the text of those notes that His Majesty's Government propose to make all the new taxes instituted by the Administration in Morocco, applicable to British subjects.

Such a view is not in accordance with the instructions contained in my despatches Nos. 591 and 627 to which your Excellency refers, while my despatch No. 670 deals only with the new Customs Regulations (not the "droits de consommation"), to which His Majesty's Government have no objection.

I request that your Excellency will at once inform the French Government of the misunderstanding which appears to have arisen and make it clear that His Majesty's Government maintain the point of view stated in my despatch No. 591.

I am, &c.
(For the Secretary of State),
R. SPERLING.

ANNEX 15.

*French Ministry for Foreign Affairs to His Majesty's Embassy, Paris.**March 23, 1920.*

Par sa note du 17 de ce mois l'Ambassade d'Angleterre à Paris a fait savoir au Ministère des Affaires étrangères que c'est par une interprétation inexacte de la note du 2 mars qu'il avait été compris que l'agent de Sa Majesté à Tanger était invité à rendre applicables à ses ressortissants au Maroc les nouvelles taxes créées

pour équilibrer le budget chérifien. Sir H. White avait seulement reçu l'ordre d'appliquer aux navires portant pavillon britannique les règlements douaniers promulgués par le Protectorat.

Le Ministère des Affaires étrangères, en accusant réception de cette communication qu'il porte à la connaissance du Résident général de France à Rabat, a l'honneur de faire savoir à l'Ambassade de Sa Majesté qu'il fait un nouvel et confiant appel à l'amitié du Gouvernement britannique pour que son agent à Tanger soit invité à appliquer à ses ressortissants les mesures édictées par le Protectorat sous le régime de l'égalité économique pour permettre au Maroc un développement dont bénéficient au même titre les ressortissants de toutes les Puissances. Le Gouvernement de la République ne doute pas que le Gouvernement de Sa Majesté ne s'emploie à rendre possible à la Puissance protectrice du Maroc l'exercice de ses droits dans ce pays comme le Gouvernement de la République fait en Egypte en ce qui concerne les mesures édictées par le Haut-Commissariat britannique ou par l'autorité militaire britannique.

ANNEX 16.

[A 5259/638/28]

Earl Curzon to the Earl of Derby (Paris).

(No. 2809.)
My Lord,

Foreign Office, August 19, 1920.

I have to refer to your Excellency's despatch No. 828 of the 17th March, one enclosure to which deals with the payment by British subjects in Morocco of the consumption taxes imposed by the French authorities. The consideration of this question by His Majesty's Government was deferred for some time owing to the prospect that a convention regarding Egypt and Morocco would be shortly concluded with the French Government; but as no such arrangement has yet been arrived at, I think it desirable that I should not further delay explaining the attitude of His Majesty's Government towards the consumption taxes imposed in the French Zone of Morocco.

It appears to His Majesty's Government equitable that the taxation imposed in Egypt and Morocco should, so far as possible, be applied to French and British nationals, *pari passu*, and His Majesty's Government are prepared to impose new duties on British subjects in Morocco as and when similar new duties are imposed on French citizens in Egypt. Thus, in the present case, the French Government have consented to accept an increased duty on alcohol imported into Egypt, and His Majesty's Government are therefore disposed to apply to British subjects in Morocco the corresponding increase in the duty on alcohol imported into Morocco, as from the date on which the increased duty in Egypt comes into force.

It should, however, be observed that, although the French Government have consented to the Egyptian tax on alcohol, the tax cannot yet be imposed, as the consent of the Italian Government to the new duties is still being withheld.

His Majesty's Government therefore feel justified in deferring the issue of a King's Regulation in Morocco making the corresponding duty applicable to British subjects until the revised duty in Egypt actually becomes operative.

In informing the French Government of the course which His Majesty's Government propose to adopt in this matter, your Excellency should also point out that His Majesty's Government have, in matters relating to increases of the duties payable in Egypt, always followed the correct course of obtaining the consent of the interested Governments before the duties have been promulgated. In the case of the consumption duties in Morocco, on the other hand, the French Government have followed the contrary course of first authorising the promulgation of the new duties, and then claiming the assent of His Majesty's Government on the ground that it is essential to increase the revenue.

I am, &c.

CURZON OF KEDLESTON.

ANNEX 17.

The Earl of Derby (Paris) to Earl Curzon.

(No. 2868.)
My Lord,

Paris, September 8, 1920.

On receipt of your Lordship's despatch No. 2809 of the 19th August on the subject of the consumption taxes imposed by the French Government on British subjects in Morocco, I addressed a note to the Ministry for Foreign Affairs setting forth the arguments of His Majesty's Government contained therein.

I have now received a reply from the Ministry for Foreign Affairs, a copy of which I have the honour to transmit herewith, in which the French Government state that they are unable to accept the view taken by His Majesty's Government in this matter.

I have, &c.

DERBY.

Enclosure in Annex 17.

*French Ministry for Foreign Affairs to His Majesty's Embassy, Paris.**September 5, 1920.*

Par sa note du 24 août dernier, l'Ambassade de Sa Majesté britannique à Paris a fait observer au Ministère des Affaires étrangères qu'il n'y avait pas, au point de vue de l'égalité des taxes de consommation, égalité entre les ressortissants français en Egypte et les ressortissants britanniques au Maroc. Ceux-ci, d'après le Gouvernement français, doivent se soumettre aux taxes établies par le Gouvernement chérifien. En Egypte, au contraire, par suite de refus de certaines Puissances d'acquiescer à ce régime, les taxes édictées par le Gouvernement égyptien ne sont pas applicables aux Français. Le Gouvernement britannique estime dès lors qu'il convient d'attendre pour la taxation des Anglais au Maroc que la taxation des Français soit possible en Egypte.

En accusant réception de cette communication, le Ministère des Affaires étrangères a l'honneur de faire savoir qu'à son avis la situation des ressortissants britanniques au Maroc ne peut dépendre de l'attitude prise par des Gouvernements tiers en Egypte. Le Gouvernement de Sa Majesté britannique a pris au Maroc vis-à-vis du Gouvernement français un engagement analogue à celui que le Gouvernement de la République a pris au regard du Gouvernement de la Grande-Bretagne en Egypte. Cet engagement est tenu dès l'instant que le Gouvernement français l'exécute en enjoignant à ses nationaux d'acquitter les taxes qui leur sont demandées. Le Gouvernement de la République attend avec confiance de l'amitié du Gouvernement britannique que des mesures analogues soient prises par lui au Maroc. Agir autrement serait entraver de la manière la plus regrettable l'œuvre de progrès entreprise au Maroc par la Puissance protectrice et dont il serait injuste que les ressortissants britanniques retirent les avantages sans prendre une part égale dans leur contre-partie fiscale.

ANNEX 18.

French Resident-General to His Majesty's Agent and Consul-General (Tangier).

M. l'Agent diplomatique.

Rabat, le 30 juin 1921.

J'ai l'honneur de vous faire connaître que d'impérieuses nécessités d'ordre budgétaire, qui ont leur origine dans la diminution importante du rendement des produits et impôts *ad valorem*, tels que la douane, le tertib, &c., m'ont amené, d'accord avec le Département des Affaires étrangères, à procéder, d'une part, à des compressions des dépenses, d'autre part, au relèvement de certaines taxes spécifiques destinées à assurer l'équilibre du budget de 1921. En conséquence, j'ai fait préparer deux dahirs, dont l'un porte relèvement de 50 pour cent de la

taxe de consommation sur les sucres, et l'autre création d'une taxe de consommation de 40 francs par quintal sur les bougies.

Vous trouverez ci-joint un exemplaire de chacun de ces textes, qui seront soumis au sceau de Sa Majesté le Sultan et communiqués au Conseil de Gouvernement du 11 juillet.

Je vous serai très obligé de vouloir bien tenir cette communication comme strictement confidentielle jusqu'à la publication des textes au *Bulletin officiel* du Protectorat, dont vous serez prévenu par télégramme, et de prendre les dispositions nécessaires pour rendre applicables aux ressortissants britanniques de la Zone française de l'Empire chérifien ces nouvelles taxes que j'ai tenu, à cette fin, à porter à votre connaissance avant leur mise en vigueur.

Veillez agréer, &c.

LYAUTEY.

ANNEX 19.

Mr. Robertson to Lord Curzon.

(No. 3.) (Extract.)

My Lord,

Tangier, January 5, 1923.

I have the honour to inform your Lordship that M. Gracy, who is temporarily in charge of the French Agency here during the absence of M. de Carbonnel in the French Zone, called on me this morning and informed me that, in order to balance their budget, the Protectorate authorities have decided that it will very shortly be necessary to increase the consumption duties on sugar, tea, coffee and pepper. M. Gracy, who pointed out that this information should be treated as confidential on account of the possibility of speculation by merchants dealing in these goods, explained that he had communicated it to me so that I might enquire whether His Majesty's Government would assent to the proposed increases of duty and would be prepared to issue a King's Regulation making them applicable to British subjects.

ANNEX 20.

His Majesty's Consul-General, Rabat, to His Majesty's Consul-General, Tangier.

(Extract.)

Sir,

December 10, 1924.

I have the honour to transmit herewith copies of a note from the French Resident-General, dated the 5th December, with three enclosures relative to increases in the consumption duties payable in the French Zone on alcohol, sugar and articles containing sugar, except condensed milk.

* * * * *

3. As certain points were not clear to me I saw the acting head of the Cabinet Diplomatique on the 9th December, with the following results.

* * * * *

6. M. Rageot referred to the communication made to me as an act of courtesy. I observed that it might be courteous, but that, as I understood it, our assent to the increases was necessary to make them legally applicable to British goods. He admitted this, but said the increased duties would, nevertheless, be collected on all goods at once, though an exception might be theoretically possible in the case of goods imported by a British subject for his personal use.

7. I objected that in that case the French were simply forcing our hands. M. Rageot did not demur, but assured me that what they were doing was perfectly justifiable, having regard to what passed when the question was threshed out some years ago

ANNEX 21.

His Majesty's Consul-General, Rabat, to French Resident-General.

M. le Commissaire Résident général,

Rabat, le 7 janvier 1925.

Par une note du 5 décembre votre Excellence a bien voulu me communiquer certains textes relatifs à la majoration des droits de consommation sur le sucre, l'alcool et les produits les contenant, en me priant de faire le nécessaire dans le but de rendre légale l'application des nouvelles surtaxes aux ressortissants britanniques. Je n'ai pas manqué de transmettre cette demande au Gouvernement britannique et de lui faire part des explications orales que M. Rageot, faisant alors fonctions de Chef de votre Cabinet diplomatique, eut l'obligeance de me fournir sur ma demande dans notre entretien du 9 décembre.

Le Gouvernement de Sa Majesté, tout en manifestant sa volonté d'étudier la demande précitée dans un esprit bienveillant, m'a chargé de faire remarquer à votre Excellence qu'il s'est toujours montré disposé à prêter son concours aux autorités du Protectorat en ne pas tardant à rendre applicables à ses ressortissants toute taxe raisonnable décrétée par le Gouvernement chérifien, mais qu'il n'a jamais reconnu et ne saurait reconnaître à ces autorités le droit d'anticiper son consentement à la perception de nouvelles taxes, auxquelles les ressortissants britanniques ne peuvent être astreints qu'en vertu d'une "King's Regulation" en due forme.

Je me réserve de porter à la connaissance de votre Excellence dans une communication ultérieure la décision qui sera prise éventuellement par le Gouvernement britannique relativement aux surtaxes particulières dont il s'agit dans la note sus-citée.

Je profite, &c.

ANDREW RYAN.

ANNEX 22.

His Majesty's Consulate-General, Rabat, to French Residency-General.

M. le Délégué,

Rabat, le 12 septembre 1930.

Par lettre du 24 juin dernier j'ai eu l'honneur de faire connaître à M. le Commissaire Résident général que je ne manquerais pas de soumettre au Gouvernement britannique la demande dont il avait bien voulu me saisir visant l'application aux ressortissants britanniques en Zone française des dispositions d'un dahir du 20 juin portant création de certaines taxes intérieures de consommation et relèvement de certaines taxes existantes.

Le Gouvernement de Sa Majesté britannique, dont je viens de recevoir les instructions à ce sujet, tout en étant disposé à rendre les dispositions de ce dahir applicables aux ressortissants britanniques, se sent dans l'impossibilité de le faire avant qu'il soit assuré que les dispositions dont il s'agit ne portent pas atteinte aux intérêts britanniques.

Sous ce rapport l'attention de mon Gouvernement a été retenue par les taxes sur les huiles de soya et les viandes frigorifiées.

En ce qui concerne les huiles de soya il n'est pas douteux que la nouvelle taxe met ce produit en état d'infériorité vis-à-vis les huiles d'arachides. Comme ces deux sortes d'huiles se vendaient avant la promulgation du dahir au même prix à peu de chose près, il s'ensuit que les huiles de soya, auxquelles le commerce britannique s'intéresse beaucoup, ne peuvent plus concurrencer les huiles d'arachides, qui sont notamment de provenance française. Aussi paraît-il que l'imposition des huiles de soya ne donne pas lieu uniquement à cette discrimination en faveur d'un autre produit, mais elle constitue également une mesure de protection pour l'industrie locale des huiles d'arachides.

Quant aux viandes frigorifiées, le caractère protectionniste est clairement souligné dans les déclarations faites au Conseil du Gouvernement par M. le Directeur général des Finances. Selon le compte rendu publié par la presse locale,

M. Branly a donné les précisions suivantes sur le but visé par cette taxe: "La Chambre d'Agriculture de Rabat et du Gharb a réclamé avec insistance une taxation des viandes frigorifiées. La taxe sera fixée à 1 franc le kilo, chiffre modéré au regard des consommateurs, mais qui constituerait néanmoins une protection intéressante pour les éleveurs marocains." Ultérieurement la taxe fut portée à 2 francs le kilo afin de rendre encore plus efficace, dit-on, la protection accordée à l'élevage local. Il est également à noter que l'exclusion des animaux vivants de la portée du dahir semble établir une différence de traitement entre les viandes destinées à la consommation qui sont importées de France et celles en provenance d'autres pays.

Les taxes précitées paraissant donc au Gouvernement de Sa Majesté britannique comme des mesures de protection et de discrimination, je suis chargé de vous prier de bien vouloir lui donner votre assurance que les clauses imposant ces taxes seront modifiées. Le Gouvernement britannique tient en outre, et il serait également heureux de recevoir votre assurance à ce sujet, à ce que cette modification produise ses effets à compter de la date de l'entrée en vigueur du dahir en question et que toutes les taxes non prévues au dahir modificatif soient remboursées aux ressortissants britanniques qui les ont acquittées.

Veuillez agréer, &c.
T. C. RAPP.

ANNEX 23.

His Majesty's Consul-General, Rabat, to French Resident-General.

M. le Commissaire Résident général, Rabat, le 10 juin 1929.
Mon attention a été attirée sur la publication par la presse locale du 6 courant du texte d'un dahir qui a été pris par Sa Majesté le Sultan, en date du 4 juin 1929, interdisant d'une façon générale l'importation dans la Zone française de l'Empire chérifien des blés, des farines et des semoules. Bien que ce texte n'ait pas encore paru sur le *Bulletin officiel* du Protectorat, j'ai toute raison de croire à son authenticité. Il soulève une question tellement importante qu'il me semble nécessaire d'en saisir votre Excellence sans retard.

A part la perturbation qu'il apporte à la marche d'affaires commerciales intéressant à plusieurs points de vue mes ressortissants, le dahir en question me paraît être en contradiction formelle avec les dispositions des articles 2 et 6 de la convention commerciale passée entre le Maroc et la Grande-Bretagne le 9 décembre 1856, pour ne citer qu'un seul texte particulier, ainsi qu'avec le principe de la liberté commerciale reconnu comme base des rapports économiques entre le Maroc et les autres pays.

Dans ces conditions, tout en soumettant la question à l'appréciation du Gouvernement de Sa Majesté britannique, je crois devoir faire dès à présent les réserves les plus expresses concernant l'application du dahir soit aux marchandises de provenance britannique soit aux marchandises d'autre origine dont s'intéressent des ressortissants britanniques. Je réserve aussi le droit de mon Gouvernement de demander que tout ressortissant lésé de n'importe quelle façon par l'application du dahir soit indemnisé par les autorités compétentes.

J'ai l'honneur d'ajouter que je me tiens à la disposition de la Résidence générale pour communiquer au Foreign Office toute expression des vœux du Gouvernement chérifien sur les questions de principe soulevées par le dahir, au cas où votre Excellence estimerait utile de m'en faire part sans attendre la communication ultérieure que j'aurai probablement à vous adresser dès que j'aurai reçu les instructions que j'attends de Londres.

Veuillez agréer, &c.
ANDREW RYAN

[W 6421/5683/28]

ANNEX 24.

Mr. A. Henderson to Sir W. Tyrrell (Paris).

(No. 1577.)
Sir,

Foreign Office, July 11, 1929.

I transmit herewith a copy of correspondence with the Board of Trade and His Majesty's consul-general at Rabat in regard to the recent prohibition of the importation of certain cereals into the French Zone of Morocco.

2. I shall be glad if your Excellency will address a protest to the French Government against the prohibition on the ground that it constitutes a violation of articles 2 and 6 of the Anglo-Moroccan Commercial Convention of 1856.

I am, &c.
(For the Secretary of State).
I. KIRKPATRICK.

ANNEX 25.

French Ministry for Foreign Affairs to His Majesty's Embassy, Paris.

Paris, le 5 août 1929.

Par sa note du 17 de ce mois, l'Ambassade de Grande-Bretagne à Paris a fait savoir au Ministère des Affaires étrangères que l'attention du Gouvernement de Sa Majesté a été attirée sur un dahir du 4 juin 1929 qui prohibe l'entrée des blés, farines et semoules dans la Zone française de l'Empire chérifien. Motif pris de ce que cette interdiction constituerait une violation des articles 2 et 6 du traité de commerce anglo-marocain du 9 décembre 1856, elle a été chargée d'en demander le retrait.

Le Ministère a l'honneur de faire connaître à l'Ambassade qu'il ne croit pas que la protestation dont elle a bien voulu le saisir soit fondée.

Il est exact que, par l'article 6 du traité de commerce du 9 décembre 1856, le Maroc s'est interdit: (1) de prohiber les marchandises ou produits, à l'exception de ceux énumérés à l'article 2 dudit traité, importés par les sujets anglais; (2) d'établir une discrimination au détriment de ressortissants britanniques.

Le Gouvernement chérifien n'a pas manqué au second de ces engagements par le dahir du 4 juin 1929 qui respecte entièrement l'égalité économique puisqu'il atteint les marchandises de toutes provenances y compris, et pour la plus grande partie, les marchandises de provenance française.

Quant à l'engagement de ne pas établir de prohibitions à l'importation, il doit, comme toutes les clauses de ce genre, s'entendre sous la réserve implicite, consacrée par la doctrine et la pratique, que les dérogations à la règle de non-interdiction d'entrée sont légitimes lorsqu'il s'agit, dans des circonstances anormales, de sauvegarder les intérêts vitaux du pays.

En droit, la convention internationale de Genève du 8 novembre 1927, conclue en vue d'abolir d'une manière absolue les prohibitions à l'importation, dispose, dans son article 5: "que des mesures de prohibition peuvent être établies lorsqu'il s'agit de sauvegarder dans les circonstances extraordinaires et anormales les intérêts vitaux du pays."

Si une telle restriction est admise d'une manière générale par la Convention de Genève de 1927, *a fortiori* doit-elle être acceptée à l'égard d'un pays dont la production ne bénéficie d'aucune protection, hormis un droit de douane fixé *ne varietur* à 10 pour cent, auquel s'ajoutent 2½ pour cent *ad valorem* perçus au titre de la taxe spéciale.

Or, la mesure édictée par le dahir chérifien du 4 juin dernier répond indiscutablement à une préoccupation justifiée de sauvegarder les intérêts essentiels du pays.

Il est certain, en effet, que l'afflux de blés, farines et semoules livrables à bas prix dont était menacé le marché marocain eût entraîné une crise économique particulièrement grave qui, en atteignant non seulement la production, l'industrie et le commerce européens mais encore l'élément indigène, eût risqué de compromettre l'ordre public que tout Gouvernement a le devoir de maintenir sur son territoire.

[11543]

En fait, la mesure prise par le Gouvernement chérifien n'est pas sans précédents, soit à l'étranger, soit au Maroc.

La plupart des Puissances ont institué des prohibitions. En ce qui la concerne, la Grande-Bretagne a édicté le "dye-stuffs import regulation act 1920" dont l'application est générale et ce nonobstant la clause de réciprocité stipulée en faveur de l'Empire chérifien par le traité susvisé du 9 décembre 1856. Ce faisant, elle a donc estimé à bon droit, que les clauses générales relatives aux prohibitions n'étaient pas impératives et qu'elle pouvait s'en écarter à condition que les mesures prises s'appliquassent, sans discrimination, à tous les pays.

Le Maroc lui-même a, en ces dernières années, prononcé à plusieurs reprises des prohibitions d'importation (en particulier celles visant les blés, orges et leurs dérivés, dahir du 22 février 1921) sans provoquer aucune réclamation des Puissances étrangères. Il est permis de supposer que celles-ci n'auraient cependant pas manqué de protester si elles avaient estimé que ces mesures constituaient une atteinte aux traités régissant leurs relations commerciales avec l'Empire chérifien.

Pour ces raisons, le Gouvernement de la République, à son regret, ne voit pas la possibilité d'intervenir auprès du Gouvernement chérifien pour faire rapporter le dahir du 4 juin 1929.

ANNEX 26.

[W 9038/5683/28]

Mr. A. Henderson to Mr. N. M. Henderson (Paris).

Foreign Office, September 16, 1929.

Sir,
I have received your despatch No. 1137 of the 7th ultimo enclosing a copy of the reply of the French Government to the protest which was recently addressed to them on the subject of the dahir of the 4th June last regarding the importation of cereals into the French Zone of Morocco.

2. I observe that the French Government have endeavoured, as it was expected that they would, to justify their action on the plea that the prohibition of the import of wheat was essential for the well-being and prosperity of the French Zone and that in such circumstances the provisions of the Anglo-Moroccan commercial convention of 1856 did not apply. You will have observed from Sir A. Ryan's despatches Nos. 102 and 132 that both he and the British Chamber of Commerce in Morocco seem to consider that the French Government were justified in their contention that this dahir was necessary in the best interests of the country. It would further appear from the letter addressed by the British Chamber of Commerce to Sir A. Ryan on the 24th June last, that British interests are only directly affected by the dahir to a very small extent and that from the practical point of view little if any prejudice would be caused to British firms operating in Morocco if the dahir were to be made applicable to British subjects.

3. In these circumstances it seems to me undesirable that His Majesty's Government should persist in their protest against the dahir, and I shall therefore be glad if you will inform the French Government, in reply to their note of the 5th ultimo, that, while still of the opinion that the terms of the dahir constitute a violation of the provisions of the Treaty of 1856, His Majesty's Government are anxious not to cause the French Government any embarrassment in Morocco and are therefore willing, in view of the considerations advanced by the French Government, to waive their objections to the dahir, provided that it is clearly understood that their action in this case in no way constitutes a precedent, and that the principle of commercial equality and of the "open door" in Morocco is still maintained, unimpaired.

I am, &c.
(In the absence of the Secretary of State).
A. W. A. LEEPER.

ANNEX 27.

[W 10151/6578/28]

Marquess Curzon to M. Merry del Val.

Your Excellency,

Foreign Office, December 21, 1922.

In my note of the 28th November last, I had the honour to inform your Excellency that I was still awaiting a report from His Majesty's agent and consul-general at Tangier on the subject of the proposed application to British subjects of the dahir of the 27th February last imposing consumption duties on sugar, tea and coffee in the Spanish Zone of Morocco.

2. I have now received a report from Mr. Robertson from which it appears that the Spanish authorities at Tetuan, notwithstanding the fact that the dahir has not yet been made applicable to British subjects by King's Regulation, are attempting to levy the new consumption duties on British-protected persons. For example, the firm of I. and D. Cohen, who have for long enjoyed British protection, recently desired to withdraw a consignment of green tea from the customs, and presented a letter guaranteeing payment of the tax should it be made incumbent upon them to do so by the issue of a King's Regulation. The customs authorities refused to accept this letter of guarantee in lieu of a cash payment. Messrs. Cohen then deposited with His Majesty's vice-consul at Tetuan the amount of the tax, and the latter proposed to the Spanish authorities by way of compromise that they should order the release of Messrs. Cohen's consignment on the understanding that the sum in his hands would be paid to the competent authority upon the dahir being made applicable to British subjects by the issue of a King's Regulation having retroactive effect; and further that they should cause all other similar consignments to be released on the same terms. Although this proposal was a gratuitous concession which His Majesty's vice-consul was in no way bound to put forward, the Spanish authorities have as yet returned no reply and the goods of British-protected persons are still detained in the customs-house.

3. His Majesty's Government feel bound to protest strongly against these illegal practices. Nevertheless, they are prepared to issue a King's Regulation with effect from the date of issue as soon as they learn that the goods now illegally detained by the Spanish authorities have been released unconditionally.

4. Your Excellency will readily understand that His Majesty's Government must disclaim all responsibility for the delay in making the dahir applicable to British subjects and protected persons, which is due solely to the fact that the Spanish Government instead of approaching His Majesty's Government when the dahir was issued, waited until the 1st November to do so, and that meanwhile the Spanish authorities have been endeavouring to levy the consumption duties on British-protected persons, to whom the provisions of the dahir are admittedly not applicable.

I have, &c.

(For the Secretary of State).

G. H. VILLIERS.

ANNEX 28.

[W 2375/1928/28]

Marquess Curzon to M. Merry del Val.

Your Excellency,

Foreign Office, April 3, 1923.

In your Excellency's note of the 7th ultimo you were good enough to inform me that deposits made by British subjects and protected persons on account of consumption duties in the Spanish zone had now been refunded. The Spanish Government requested that in these circumstances the new duties should now be made applicable to British subjects by King's Regulation.

2. In reply, I regret to have to inform you that according to reports just received from His Majesty's agent and consul-general at Tangier effect has not yet been given by the local Spanish authorities to the instructions of the Spanish Government. Not only is it the case that deposits made by British subjects and protected persons have been refunded in part only and not in full, but British

subjects and protected persons are being required by the local Spanish authorities to pay, and not merely to deposit, the amount of the duties, the authorities asserting that they have received instructions from the Spanish Government to enforce payment. Reiterated requests by His Majesty's vice-consul at Tetuan for written confirmation of this assertion have hitherto remained unanswered.

3. It is of course not open to question that these new duties cannot legally be levied from British subjects and protected persons in the Spanish Zone of Morocco until the necessary King's Regulation has been issued. On receipt of your note I was glad to think that this matter had now been disposed of, and I am correspondingly disappointed to find that I was mistaken. His Majesty's Government must reiterate their protest against practices which they feel sure the Spanish Government must deplore as much as they do. Manifestly, until the deposits which have been illegally exacted have been returned in full, it will be impossible for His Majesty's Government to issue a King's Regulation, which, as you are aware, they would have been perfectly ready to do had the Spanish Government approached them on the subject at the time when the dahir imposing the duties was first issued.

I have, &c.

(In the absence of the Secretary of State).

G. H. VILLIERS.

ANNEX 29.

M. Merry del Val to Marquess Curzon.

(Translation.)

My Lord,

Spanish Embassy.

London, April 16, 1923.

In reply to your note of the 3rd instant, I have the honour to inform your Lordship that immediately after receiving it I communicated its contents to my Government, and that I have this morning received the text of the instructions which, in view thereof, have been sent to the competent authorities of the Spanish Zone of the Protectorate of Morocco, in order that the amounts which have been demanded in respect of the tax on sugar, tea and coffee of British subjects and protected persons in that territory, though it was merely as a deposit, may be returned to them, and in order that the authorities may refrain from collecting this tax from British nationals and protégés until the King's Regulation approving the extension to them of the duty referred to is published.

I hope, therefore, shortly to be informed that the instructions in question have been carried into effect, and I shall hasten to acquaint your Lordship thereof with the request that the requisite King's Regulation above referred to may be promulgated as soon as possible.

I have, &c.

ALFONSO MERRY DEL VAL.

ANNEX 30.

M. Merry del Val to Marquess Curzon.

(Translation.)

My Lord,

Spanish Embassy.

London, June 9, 1923.

In accordance with the contents of my note under date the 16th April last, I have the honour to inform your Excellency that according to news which the Government of His Majesty the King, my august Sovereign, has received from the High Commissioner of Spain in Tetuan, the return of all money, whether paid on deposit or paid out, for the tax on sugar, coffee and tea in the Spanish Zone of the Protectorate to British subjects and British-protected subjects, which had been required of them without the Royal decree of His Britannic Majesty, extending to the above the application of the above tribute, having been published. In order to effect this, our authorities have relied on the registers in the customs-houses and the claims of the interested parties. In the same way will be returned all sums for which proof of payment can be established, in case the return has not been completely effected because of the possible absence of some claim.

On the other hand, ever since the 16th April last sugar, coffee and tea imported into the Spanish Zone of the Moroccan Protectorate have been delivered to British subjects and British-protected subjects free of all tax. Under these circumstances, and in view of the friendly attitude adopted by the British Government in this matter, I venture to beg your Excellency to transmit at your earliest possible convenience the necessary instructions for the publication of the Royal decree imposing the tax on sugar, coffee and tea in the Spanish Zone of the Moroccan Protectorate to the subjects and protected subjects of Great Britain.

I avail, &c.

ALFONSO MERRY DEL VAL.

ANNEX 31.

His Majesty's Vice-Consul, Tetuan, to Spanish Secretary-General.

(Translation.)

Sr. Secretario General,

Tetuan, May 22, 1923.

With reference to previous correspondence on the subject of the consumption tax on sugar, tea and coffee, I have the honour to draw your attention to the fact that British subjects are being required to pay a similar impost on alcohol imported by them, although the tax in question has not yet been approved by King's Regulation, a circumstance to which my predecessor directed the attention of your department in his letter of the 22nd August, 1922.

With a view to arriving at a prompt and satisfactory solution of this question, I venture to suggest that, as in the case of the consumption tax on sugar, tea and coffee, instructions be issued to the customs authorities of the zone to refund to British subjects and protégés the sums paid by them in respect of the consumption tax on alcohol, and to refrain from levying the said tax until a King's Regulation shall have been issued making it applicable to British subjects and protégés.

On the receipt of an intimation from you that instructions in this sense have been issued and of your official request that the tax be made applicable to British "ressortissants," I shall not fail to communicate without delay with my superiors recommending that the necessary King's Regulation be issued without delay.

I take, &c.

(Signature).

His Majesty's Vice-Consul.

ANNEX 32.

His Majesty's Vice-Consul, Tetuan, to Spanish Secretary-General

(Translation.)

Sr. Secretario General,

Tetuan, June 22, 1923.

With reference to my letter of the 22nd May relative to the consumption tax on alcohol, I have the honour to inform you that His Majesty's diplomatic representative in Tangier directs me to draw your attention to the fact that British subjects and protégés are still being required to pay this impost, and that the Customs Controller at Larache has informed the British vice-consul in that town that he has explicit instructions to collect the tax without distinction of nationality. I am therefore instructed to inform you that His Majesty's Government cannot consent to the collection of the said tax from British subjects prior to the issue of a King's Regulation, which they would, however, no doubt be prepared to issue without delay on receipt of an intimation that the measures outlined in my letter above mentioned had been adopted.

I take, &c.

(Signature).

His Majesty's Vice-Consul.

ANNEX 33.

M. Merry del Val to Marquess Curzon.

(Translation.)
My Lord.

*Spanish Embassy,
London, July 9, 1923.*

The Shereefian dahir dated the 15th April, 1922, enforcing the regulation respecting the amended tax on alcohol was published in the *Official Bulletin* of the zone of the Spanish Protectorate in Morocco on the 25th July, 1922.

The Spanish Government would be grateful to the British Government if the latter would be so good as to issue a King's Regulation applying the said tax to the nationals and protégés of Great Britain in the above-mentioned zone for the purposes of the payment thereof.

I have, &c.

ALFONSO MERRY DEL VAL.

ANNEX 34.

[W 9681/1928/28]

Marquess Curzon to Spanish Chargé d'Affaires.

Sir,

Foreign Office, December 27, 1923.

In M. Merry del Val's note of the 9th July last, and in subsequent correspondence, his Excellency urged that the consumption duty on alcohol in the Spanish Zone of Morocco should be applied by King's Regulation to British subjects. When, a few days previously, M. Merry del Val mentioned this matter to him in conversation, the Permanent Under-Secretary of State intimated that, in spite of the categorical instructions issued by the Spanish Government, there were still a number of cases in which the sums levied from British subjects had not actually been refunded.

2. Since then I have been waiting to hear from His Majesty's representative at Tangier that there were no further claims outstanding, and I have just learnt that there are none at Larache, but that the report from Tetuan is still awaited.

3. In the meantime it appears that this duty has not yet been applied to United States and Netherlands nationals, and I therefore hesitate to proceed definitely with a step which will place British subjects at a disadvantage compared with other foreign nationals in the same position. I shall be grateful if you will be so good as to acquaint me with the situation in this respect.

I have, &c.

(For the Secretary of State).

G. H. VILLIERS.

ANNEX 35.

[W 343/343/28]

Marquess Curzon to M. Merry del Val.

Your Excellency,

Foreign Office, January 22, 1924.

With reference to my note of the 27th ultimo, I have the honour to inform your Excellency that His Majesty's vice-consul at Tetuan has now reported that the local authorities do not appear yet to have received instructions to refund to British subjects and protected persons the amounts improperly levied in respect of the consumption duty on alcohol. So far as he can ascertain, no refunds have been made to Messrs. Perez and Murto and other British claimants, whilst in one case a refund has actually been refused.

2. In a further report His Majesty's agent and consul-general states that he has been informed by his United States and Netherlands colleagues that their Governments have not yet been requested by the Spanish Government to apply the duty on alcohol to their subjects and protected persons.

3. His Majesty's Government are anxious to comply with the request of the Spanish Government for the early application of the duty on alcohol to British nationals, but in the light of the reports referred to above, you will agree that they would not be justified in doing so at this moment.

I have, &c.

(For the Secretary of State).

R. H. CAMPBELL.

ANNEX 36.

Marquess Merry del Val to Mr. Chamberlain.

(Translation.)

Sir,

Spanish Embassy, London.

In your note of the 22nd January, 1924, your Excellency was good enough to inform me that it was not possible to publish a King's Regulation notifying to British nationals in the Spanish Zone of the Protectorate of Morocco their obligation to pay the duties on alcohol and beer until the total amount of these duties prematurely paid by British subjects and British-protected persons in the said zone had been refunded. In a communication dated the 21st instant the Spanish Government informed me that the total of the sums claimed up to the present date under this head had been paid. In view of this, I have to request your Excellency to take the necessary steps in order that there may be no further delay in despatching appropriate instructions to the British consular officers in the Spanish Zone of the Protectorate of Morocco that, upon the publication of the relative King's Regulation British subjects and British-protected persons may pay the new duties and be liable like the rest of the inhabitants of the Spanish Zone to the provisions of the regulations enforcing payment.

I have, &c.

EL MARQUÉS DE MERRY DEL VAL.

ANNEX 37.

[W 11162/1562/28]

Mr. Chamberlain to Marquess Merry del Val.

Your Excellency,

Foreign Office, December 10, 1925.

With reference to your note, I have the honour to inform your Excellency that the British consul at Tetuan issued on the 28th November last King's Regulations making applicable to British subjects in the Spanish Zone the dahirs imposing a markets tax on alcohol and beer.

I have, &c.

(For the Secretary of State).

C. W. ORDE.

ANNEX 38.

His Majesty's Consul, Tetuan, to Spanish Delegate-General.

(Translation.)

Sir,

December 24, 1927.

In my note of the 24th October I had the honour to inform your Excellency that my Government regretted that they were unable to apply to British subjects the dahir of the 6th August imposing a consumption duty on candles. The reason for this attitude on the part of my Government, as you are aware was that, as the duty was imposed only on imported candles, and not on such candles as might be manufactured within the zone, it partook of the nature of a customs duty rather than of a consumption duty, and thus constituted an infraction of international agreements on the subject of the customs régime in Morocco.

2. I am now, however, pleased to be able to inform your Excellency that, actuated by a desire in no way to embarrass your Administration, my Government have declared their willingness to sanction the dahir by King's Regulation

[11543]

K

immediately without any textual modifications provided your Excellency can be good enough first to give me formal assurances on two points. The first of these is that the amounts so far illegally levied on British subjects in respect of this duty shall be refunded. The total amount involved, as stated in my note of the 30th November, is 3,355 pesetas. The second assurance for which I am to ask is that the Makhzen will undertake to extend the application of the duty in question to candles manufactured within this zone so soon as such manufacture has reached sufficient importance to lead my Government to make a formal request in this sense.

3. In communicating the foregoing to your Excellency, I have to add that, although my Government are prepared to accept the solution of the present difficulty on the lines which I have stated, they nevertheless venture to expect that, in any similar cases which may arise in future, due regard will be paid to treaty stipulations in the texts of the dahirs themselves.

4. I should be grateful if your Excellency could be good enough to give urgent attention to this matter so that, if you are prepared to accept the conditions set forth in this note, I may be able to issue the required King's Regulation before the close of the year.

I avail, &c.
G. C. ALLCHIN.

ANNEX 39.

Spanish Delegate-General to His Majesty's Consul, Tetuan.

(Translation.)
Sr. Consul,

December 28, 1927.

In reply to your note of the 24th December, received yesterday, in which you inform me that the Government of His Britannic Majesty is prepared to accept the text of the dahir on candle duty, and thus ready to issue the King's Regulation ordering the payment of the said duty by British subjects and protégés as soon as this High Commission gives assurances (i) that refund will be made of the sums paid by British subjects and protégés from the imposition of the duty until the publication of the said King's Regulation, and (ii) that the Makhzen undertakes to extend the application of the said duty to candles which may be manufactured within the zone, this High Commission has the pleasure to inform you that, duly authorised by the Government of His Catholic Majesty, it agrees to the two conditions set out above, and states that it will similarly bear in mind the desire expressed by the British Government that, in similar cases occurring in future, treaty stipulations will be taken into account in drawing up other dahirs. I therefore hasten to communicate to you the acceptance of both the conditions mentioned, so that, in accordance with the desire expressed in your note under reply, you may publish the King's Regulation before the end of the year.

I avail, &c.
DIEGO SAAVEDRA.

ANNEX 40.

Spanish Government to His Majesty's Ambassador, Madrid.

(Translation.)

Your Excellency,

February 11, 1930.

The High Commissioner of Spain in Morocco addressed on the 28th ultimo a note to Mr. A. E. Watkinson, consul of Great Britain, in Tetuan, requesting him to be good enough to take the necessary measures for the application to British subjects and protected persons in the Spanish Zone of the Protectorate in Morocco of the following dahirs of His Imperial Highness the Caliph:—

1. Dahir establishing a tax on carburants;
2. Dahir establishing a consumption tax on tobacco;
3. Dahir establishing a tax on colonial goods;

4. Dahir creating a consumption tax on powder, munitions and explosives;
5. Dahir establishing a consumption tax on all classes of wine imported into or made in the zone;
6. Dahir establishing a reduced tariff on denaturalised alcohols;
7. Dahir establishing a consumption tax on sugar, tea and coffee;
8. Dahir establishing in the zone of Spanish Protectorate in Morocco the "Personal Identity Card";
9. Dahir establishing a tax on fish caught in the jurisdictional waters of the zone and not entering into the same;
10. Dahir regulating the tax on the transmission of immovable property;
11. Dahir modifying the tariffs and rules of application of the patents tax; and
12. Dahir modifying the dispositions of the regulations relative to the stamp tax in the Spanish Zone of Protectorate in Morocco of the 7th August, 1924.

I have the honour to confirm this to your Excellency in support of the request referred to above, and to point out the great interest which His Catholic Majesty's Government has in the favourable reception of the said request on the part of His Britannic Majesty's Government.

I avail, &c.
E. DE PALACIOS

ANNEX 41.

His Majesty's Ambassador, Madrid, to Spanish Minister of State.

Your Excellency,

June 12, 1930.

With reference to your Excellency's note of the 11th February last, I have the honour, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to inform your Excellency that His Majesty's Government have authorised Mr. Watkinson, His Majesty's consul at Tetuan, to issue King's Regulations making applicable to British subjects all the dahirs mentioned in your note under reference, with the exception of those instituting a tax on tobacco, as well as those which deal with a system of personal identity cards and a reduced tariff on alcohol; in regard to the last dahir, the issue of necessary King's Regulations has already been authorised. Mr. Watkinson has also been instructed to issue King's Regulations in respect of two dahirs instituting a tax on matches and establishing certain rules concerning medical practitioners, in regard to which he was recently approached by the Protectorate authorities.

I am at the same time to inform your Excellency that, in regard to the King's Regulation concerning the consumption duty on petrol, His Majesty's Government will have no alternative but to repeal the King's Regulation should it be found in practice that oil refining companies of other nationalities receive more favourable treatment in regard to the payment of this tax.

I have, &c.
GEORGE GRAHAME.

ANNEX 42.

Spanish High Commissioner to His Majesty's Consul, Tetuan.

Sr. Consul,

January 22, 1935.

With reference to your despatch of the 18th July last regarding the publication in the *Boletín oficial* of the zone of a dahir dated the 29th June of that year relative to certain edible oils, I have the honour to inform you that I am directed by the High Commissioner to state that I disagree with your opinion that the said dahir is contrary to the international agreements in force.

The High Commission might have invoked the present economic situation, which is so widespread that there is no country in which treaties, statutes and privileges alike have not had to yield to the need for all classes of society,

including members of foreign communities, to make their share of sacrifices for the common good. This is especially the case in the Spanish Zone of Morocco, where, thanks to the costly and prolonged efforts of the protecting Power, a state of peace and prosperity has been reached, and an organisation established which benefits in a marked degree the commerce of all those countries which trade with Morocco. It is right, therefore, that those merchants should contribute—on a scale which is moderate, indeed, when compared with the burden they have to bear in other countries—to the revenues of the zone. It is, however, unnecessary to mention these facts, because it is obvious that the High Commission, in publishing the dahirs in question, is merely exercising a right which is fully recognised, without departing from treaty obligations. Neither the Convention of Commerce and Navigation of the 9th December, 1856, nor the Act of Algeciras, which establish the principle of economic equality, are violated by the dahirs in question, since the duties created or increased are created or increased for the trade of all countries without exception.

Article 15 of the 1856 treaty states as follows: "Aucune prohibition, soit quant à l'exportation, soit quant à l'importation d'un article quelconque, ne s'appliquera aux sujets de toute autre nation." (Incorrect reference and incomplete quotation. Reference is to article 5 of the 1856 Convention of Commerce and Navigation, the last sentence of which runs: "No prohibition, either as to the exportation or importation of any article, shall apply to British subjects, unless such prohibition shall apply to subjects of every other nation."—A.M.M.) This condition being respected, as it is in the present case, and as the principle of "liberté économique sans aucune inégalité" referred to in the Act of Algeciras is also respected, the protests which you have been pleased to make are without foundation.

The right of tax and even prohibit the entry into Morocco of certain articles (provided the measure be a general one) has been exercised repeatedly, as is shown, for instance, by the prohibition of the entry of absinthe, &c., Moorish slippers ("babuchas"), &c., into the French Zone, and the existence of State monopolies, as is the usual customs in international relations.

The objection that the new taxes tend to favour the Spanish olive oil industry can hardly be sustained; for Spain is not the only producing country. Without quoting others, Great Britain herself possesses in her Empire olive-producing territories, so that Spain has no monopoly of olive oil. There has therefore been no infringement, from any point of view, of the Act of Algeciras.

LUIS TEMES.

ANNEX 43.

[W 1791/29/28]

Sir John Simon to His Majesty's Representatives at Madrid (No. 112) and Tangier (No. 56).

Sir,

Foreign Office, March 2, 1935.

With reference to my despatch No. 442 of the 19th October last regarding the imposition by the Spanish authorities of consumption duties on goods imported into the Spanish Zone of Morocco, I have to inform your Excellency that it has now been decided, in order to safeguard the position of His Majesty's Government in the United Kingdom under the relevant treaties, that formal protests shall be made to the Spanish Government in this matter. I shall accordingly be glad if you will now address a note to the Spanish Minister for Foreign Affairs on the following lines:—

2. On the 29th June last a number of dahirs were published in the Spanish Zone of Morocco creating new consumption taxes on certain goods imported into the zone and increasing the amount of existing taxes. With one exception, these taxes are stated in the dahirs to be on imported goods only. Moreover, on the 20th September last a Vizirial decree and dahir were issued imposing a consumption tax in the zone on imported wheat flour and its derivatives.

3. These new taxes may be held to constitute one of two things. Either they involve an increase in the customs duties of the zone and must be held

contrary to article 7 of the Convention of Commerce and Navigation between the United Kingdom and Morocco, signed in Tangier in 1856, as modified by article 66 of the Act of Algeciras, or, on the other hand, they may represent an increase in the internal duties of the zone, in which case their enforcement on British subjects is contrary to article 4 of the General Treaty between the United Kingdom and Morocco, signed at Tangier in the same year. In either case, the new duties involve direct discrimination between goods imported into the zone and similar goods produced locally.

4. In these circumstances, His Majesty's Government in the United Kingdom are obliged formally to protest against the dahirs in question. They are unable to acquiesce in measures, which infringe in this manner their treaty rights in Morocco, being applied without consent and must therefore request their repeal.

5. In handing this note to the Minister, you should make the following verbal communication, which you may embody in an aide-mémoire:—

His Excellency will be aware that His Majesty's Government have always been anxious to give every assistance to the authorities in the zone and have been willing, when specifically requested by the Spanish authorities, voluntarily to assent to taxes and regulations and to extend them to British subjects resident in the zone, by the issue of King's Regulations, provided that such taxes and regulations are not directly prejudicial to British interests or discriminatory against British trade. In the present case His Majesty's Government, without prejudice to their treaty rights, would be willing, at the specific request of the Spanish Government, to issue King's Regulations applying to British subjects in the zone all the increased duties referred to, subject only to the following reservations:—

- (1) His Majesty's Government would not be prepared to extend to British subjects the duties on edible seed oils and candles unless imported olive oil and locally manufactured candles were made liable to equivalent duties.
- (2) Nor could His Majesty's Government accept in their present form the consumption duties on imported wheat flour and derivatives of flour. The consumption duty on imported flour is at such a high level in comparison with the maximum selling price permitted within the zone by the vizirial decree that the import and sale of wheat is now economically impossible. Moreover, in view of the fact that domestic production of flour in the zone is not adequate to supply the requirements of the market, such a high rate of consumption duty cannot be justified on the grounds of economic necessity. While, therefore, His Majesty's Government have no desire to place any obstacle in the way of measures intended to benefit Moroccan agriculture, they are unable to acquiesce in the establishment of arbitrary rates of what are in effect import duties, which can only operate as a barrier to legitimate imports and must inevitably result in smuggling. His Majesty's Government would be prepared to issue the necessary King's Regulations in respect of these measures only if they were amended so that the rates of duty would be equitably adjusted in order to permit of the importation of British flour into the zone.

(To Tangier only.)

6. Mr. Monck-Mason should also point out, with reference to the Spanish High Commissioner's note of the 22nd January last, that the attitude of His Majesty's Government as set out in this aide-mémoire provides a complete answer to the second paragraph of the note. The present economic conditions cannot be held to justify the Spanish authorities in overriding British treaty rights, although they may justify the Spanish authorities in asking that His Majesty's Government should give favourable consideration to the request for the waiver of such rights in certain particular matters, a sympathetic attitude which is, in fact, being followed by His Majesty's Government. As regards the penultimate paragraph of the note of the 22nd January, His Majesty's consul may state that His Majesty's Government duly protested against the application of measures of prohibition in the French Zone as being contrary to British treaty rights unless



1936

90

voluntarily accepted by His Majesty's Government; that, in the recent case of Moorish slippers, His Majesty's Government, in pursuance of their general benevolent policy which they are equally ready to adopt towards the Spanish subjects by King's Regulation; and that, as regards monopolies, the position is regulated by treaty provisions, and His Majesty's Government would not fail to take exception to any monopolies other than those sanctioned by treaties and are unaware of the exact significance of the Spanish High Commissioner's reference in this connexion.

(Madrid.)

6. Finally, you should express the sincere hope that the Spanish Government (unless they prefer to repeal the new duties) will see their way to avoiding any conflict with His Majesty's Government in this matter by requesting our formal concurrence in the dahirs, and by giving assurances on the specific points mentioned above, such as will enable His Majesty's Government to extend the force of the taxes to British subjects in the zone. If the Spanish Government should fail to give satisfaction to His Majesty's Government in either of these ways, His Majesty's Government will be obliged seriously to consider bringing the matter before the Permanent Court of International Justice.

(Madrid.)

7. His Majesty's consul at Tetuan is being instructed to make similar representations locally.

I am, &c.

JOHN SIMON.

ANNEX 44.

(1)

Sir G. Grahame (Madrid) to Sir John Simon.

(No. 150.)
Sir,

Madrid, March 13, 1935.

I have the honour, with reference to your despatch No. 112 of the 2nd instant, to transmit to you herewith copies of a note and of an aide-mémoire which, according to your instructions, were left by the counsellor of this Embassy with the Under-Secretary of State for Foreign Affairs regarding the imposition by the Spanish authorities of consumption duties on goods imported into the Spanish Zone of Morocco.

2. In accordance with those instructions, Mr. Snow informed Sr. Aguinaga of the sincere hope of His Majesty's Government in the United Kingdom that the Spanish Government would, unless they preferred to repeal the new duties, see their way to meeting the views of His Majesty's Government by requesting their formal concurrence in the dahirs in question, and by giving assurances on the specific points mentioned in the aide-mémoire. At the same time, Mr. Snow intimated to Sr. Aguinaga that, in the contrary case, His Majesty's Government would be obliged to consider bringing the matter before the Permanent Court of International Justice.

3. At one moment during the conversation, Sr. Aguinaga went so far as to admit the possibility of meeting the views of His Majesty's Government; but, reflecting, perhaps, that the decision lay with the Presidency of the Council (which is responsible for Moroccan affairs), he later confined himself to stating that the representations which had been made would be carefully considered.

I have, &c.

GEORGE GRAHAME.

71

(2)

Sir G. Grahame (Madrid) to Spanish Minister of State.

Your Excellency,

March 8, 1935.

Under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, I have the honour to approach your Excellency in regard to the following matter:—

On the 29th June last a number of dahirs were published in the Spanish Zone of Morocco creating new consumption taxes on certain goods imported into the zone and increasing the amount of existing taxes. With one exception these taxes are stated in the dahirs to be on imported goods only. Moreover, on the 20th September last a vizirial decree and dahir were issued imposing a consumption tax in the zone on imported wheat flour and its derivatives.

These new taxes may be held to constitute one of two things. Either they involve an increase in the customs duties of the zone and must be held contrary to article 7 of the Convention of Commerce and Navigation between the United Kingdom and Morocco, signed in Tangier in 1856, as modified by article 66 of the Act of Algeciras, or, on the other hand, they may represent an increase in the internal duties of the zone, in which case their enforcement on British subjects is contrary to article 4 of the general treaty between the United Kingdom and Morocco signed at Tangier in the same year. In either case the new duties involve direct discrimination between goods imported into the zone and similar goods produced locally.

In these circumstances His Majesty's Government in the United Kingdom are obliged formally to protest against the dahirs in question. They are unable to acquiesce in measures, which infringe in this manner their treaty rights in Morocco, being applied without consent, and must therefore request their repeal.

I have, &c.

GEORGE GRAHAME.

(3)

Aide-Mémoire for His Excellency the Minister of State.

Spanish Zone of Morocco.

His Excellency will be aware that His Majesty's Government have always been anxious to give every assistance to the authorities in the zone and have been willing, when specifically requested by the Spanish authorities, voluntarily to assent to taxes and regulations and to extend them to British subjects resident in the zone, by the issue of King's Regulations, provided that such taxes and regulations are not directly prejudicial to British interests or discriminatory against British trade. In the present case His Majesty's Government, without prejudice to their treaty rights, would be willing, at the specific request of the Spanish Government, to issue King's Regulations, provided that such taxes and regulations are not directly prejudicial to British interests or discriminatory against British trade. In the present case His Majesty's Government, without prejudice to their treaty rights, would be willing, at the specific request of the Spanish Government, to issue King's Regulations applying to British subjects in the zone all the increased duties referred to subject only to the following reservations:—

(1) His Majesty's Government would not be prepared to extend to British subjects the duties on edible seed oils and candles unless imported olive oil and locally manufactured candles were made liable to equivalent duties.

(2) Nor could His Majesty's Government accept in their present form the consumption duties on imported wheat flour. The consumption duty on imported flour is at such a high level in comparison with the maximum selling price permitted within the zone by the vizirial decree that the import and sale of wheat is now economically impossible. Moreover, in view of the fact that domestic production of flour in the zone is not adequate to supply the requirements of the market, such a high rate of consumption duty cannot be justified on the grounds of economic necessity. While, therefore, His Majesty's Government have no desire

91

to place any obstacle in the way of measures intended to benefit Moroccan agriculture, they are unable to acquiesce in the establishment of arbitrary rates of what are in effect import duties, which can only operate as a barrier to legitimate imports and must inevitably result in smuggling. His Majesty's Government would be prepared to issue the necessary King's Regulations in respect of these measures only if they were amended so that the rates of duty would be equitably adjusted in order to permit of the importation of British flour into the zone.

Madrid, March 8, 1935.

ANNEX 45.

His Majesty's Consul-General, Rabat, to French Residency-General.

April 28, 1934.

M. le Délégué,

L'attention du Gouvernement de Sa Majesté britannique dans le Royaume-Uni ayant été retenue par la question des droits de porte, j'ai l'honneur, en conformité d'instructions que je viens de recevoir, de soumettre son point de vue à votre Excellence.

Les conditions dans lesquelles les droits de porte s'appliquent aux étrangers sont établies par l'article 13 de la Convention de Madrid de 1880, aussi bien que par les règlements promulgués en vertu de cette convention avec l'approbation du corps diplomatique de Tanger en 1881 et 1896. La convention et les règlements disposent d'une manière expresse que la taxe ne pourra pas être augmentée sans un nouvel accord avec les représentants des Puissances signataires, tandis que les règlements n'autorisent que l'application de la taxe aux marchandises transportées d'une ville marocaine à une autre et aux produits indigènes qui entrent dans les villes.

Telle étant la situation juridique, il est évident que l'assentiment du Gouvernement de Sa Majesté britannique est nécessaire, premièrement, au prélèvement de la taxe sous aucune forme, non pas sur des marchandises transportées d'une ville à une autre mais, à leur arrivée au Maroc, sur des marchandises importées, et, deuxièmement, à une modification quelconque du taux de cette taxe tel que l'ont fixé les règlements acceptés par le corps diplomatique de Tanger.

Fidèle à sa politique habituelle le Gouvernement de Sa Majesté britannique est disposé, s'il en reçoit la demande, à déroger, dans une certaine mesure, de ses droits là où des changements du taux de la taxe pourraient se justifier. En effet, votre Excellence voudra bien admettre que dans le passé le Gouvernement de Sa Majesté n'a soulevé aucune objection à certaines modifications de cette nature qui ont été effectuées. Cependant le Gouvernement de Sa Majesté n'a d'aucune façon abandonné ses droits et ne saurait accepter que la taxe prélevée sur des marchandises importées diffère en n'importe quel degré de celle prélevée sur les produits indigènes. Il se trouve donc obligé de soulever la plus forte objection aux tarifs récemment promulgués.

En cette circonstance, je suis chargé de suggérer à votre Excellence l'opportunité d'une discussion de toutes les dérogations subies par les règlements de 1881 et 1896, discussion dont le but serait d'arriver à un accord satisfaisant les besoins de l'administration locale sans discrimination des importations britanniques.

Veuillez agréer, &c.

Le Consul général,

W. S. EDMONDS.

ANNEX 46.

French Residency-General to His Majesty's Consul-General, Rabat.

M. le Consul général,

July 7, 1934.

Par note du 28 avril dernier vous avez bien voulu me faire savoir que l'attention du Gouvernement de Sa Majesté britannique avait été retenue par la question des droits de porte. Votre Gouvernement estime qu'aux termes de l'article 13 de la Convention de Madrid de 1880 et des règlements de 1881 et 1896, toutes modifications en la matière auraient dû recevoir son assentiment. Il se voit donc obligé de protester contre les tarifs récemment promulgués et vous êtes chargé de suggérer au Gouvernement du Protectorat l'opportunité d'une discussion générale en vue d'arriver à un accord satisfaisant les besoins de l'administration locale sans discrimination des importations britanniques.

Tout en appréciant pleinement les sentiments amicaux exprimés dans votre note précitée, je crois devoir vous rappeler que les dispositions de l'article 13 de la Convention de Madrid sont devenues caduques. En effet, le traité franco-allemand du 4 novembre 1911 auquel le Gouvernement britannique a adhéré accorde au Gouvernement français au Maroc, par ses articles 1 et 4, une entière liberté en matière d'établissement d'impôts et autres taxes, sous la seule réserve de l'égalité économique et de la liberté commerciale.

L'article 13 du même traité abroge toutes clauses d'accord, convention, traité ou règlement contraires à ses stipulations.

Se fondant sur ces textes, et à condition d'assurer l'égalité de chances entre importateurs au Maroc, quelle que soit leur nationalité, le Gouvernement chérifien est convaincu de son droit absolu de modifier les droits de porte dans la mesure qu'il estime opportune et de sa seule initiative. En particulier, la simple équité l'autorise à frapper de droits différents le produit fini importé de l'étranger et le produit fabriqué au Maroc avec des matières premières ayant déjà acquitté, de ce chef, le droit de porte.

Je puis vous assurer que dans les modifications apportées ou à apporter aux droits de porte, le principe de l'égalité économique et de la liberté commerciale, qui reste la seule obligation contractuelle du Maroc en la matière, continuera à être respecté. Dans ces conditions, le Gouvernement du Protectorat ne peut que considérer comme étant sans objet la discussion suggérée par le Gouvernement de Sa Majesté britannique.

Veuillez agréer, &c.

H. PONSOT.

ANNEX 47.

His Majesty's Embassy, Paris, to French Ministry for Foreign Affairs.

November 9, 1934.

His Majesty's Embassy presents his compliments to the Ministry for Foreign Affairs and, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, has the honour to invite their attention to recent correspondence which has been exchanged between the Resident-General of the Government of the Republic at Rabat and His Majesty's consul-general regarding the gate tax in Morocco.

2. As the Ministry will be aware, the conditions in which the gate tax is applicable to foreigners in Morocco were laid down in article 13 of the Madrid Convention of 1880, as well as in regulations subsequently issued thereunder by the Moroccan authorities with the approval of the Diplomatic Body at Tangier in 1881 and in 1896. It is expressly laid down in the convention and in the regulations that no increase in the amount of the tax shall be made except with the consent of the representatives of the signatory Powers. In addition, provision is only made in the regulations for the levying of the tax on goods transported from one town to another in Morocco and on local produce entering the towns. In 1917 the authorities of the French Protectorate made certain

alterations in the rate of the tax and extended to it imports. His Majesty's Government in the United Kingdom entered a protest at the time, but, in order not to embarrass the Government of the Republic during the war, refrained from pressing their protest. His Majesty's Government have, however, recently received complaints of further modifications in the rate of the tax which discriminate against imported goods, and His Majesty's consul-general at Rabat was therefore instructed to make representations on this subject to the French authorities in Morocco.

3. The Resident-General at Rabat, in replying by note of the 7th July last to Mr. Edmonds's representations, ignored the argument therein put forward that the alteration of the rate of gate tax and its imposition on imported goods are contrary to article 13 of the Madrid Convention, and confined himself to stating that in virtue of the adherence of His Majesty's Government to the Franco-German Treaty of the 4th November, 1911, this article has ceased to be operative, and that the French Government enjoy in Morocco "une entière liberté en matière d'établissement d'impôts et autres taxes, sous la seule réserve de l'égalité économique et de la liberté commerciale."

4. His Majesty's Government had hoped that it might be possible to reach a practical settlement of this question in the course of the general trade discussions which are in progress regarding the commercial régime in Morocco. They were not, however, able to concur in the attitude adopted by the French negotiators in this matter in so far as the latter appeared to suggest that the removal of the discrimination against imported goods in the levy of the gate tax and similar taxes should be made dependent upon the recognition of the right of the Protectorate authorities to tariff autonomy. His Majesty's Government find it impossible to accept any such suggestion, since they cannot agree to abandon the rights of His Majesty's Government under article 7 of the Anglo-Moroccan Commercial Convention of 1856, whereby the rate of customs duty on goods imported by British subjects into Morocco are limited to 10 per cent. *ad valorem*, and the additional 2½ per cent. sanctioned by article 66 of the Act of Algéciras. It has been indicated to the French negotiators that His Majesty's Government might be prepared to admit certain agreed increases in the customs duties as part of the arrangement which is being discussed in the present negotiations, but it would have to be made clear in any agreement concluded on the subject that such increases were to be regarded as agreed derogations from the principle laid down in the convention of 1856.

5. His Majesty's Government are unable to conceal the surprise with which they learnt of the contents of M. Ponsot's communication of the 7th July. As the Ministry will doubtless recollect, the point of view of His Majesty's Government concerning their special rights under the early Moroccan treaties regardless of their participation in subsequent agreements has been made plain to the Government of the Republic on several occasions, and most recently in His Majesty's Embassy's memorandum of the 20th February, 1920. Since this date the rights of His Majesty's Government of control over taxation imposed upon British subjects in Morocco, which they consider to be incontestable, have been generally recognised in practice, and His Majesty's Government are therefore at a loss to understand why the same argument to which they had previously replied should now be advanced once again by M. Ponsot in his note of the 7th July to His Majesty's consul-general at Rabat. They are unable to comprehend how their adherence to an agreement concluded between the French and German Governments regarding French assistance to Morocco could be held to modify the obligations of the Moroccan Government under previous treaties, and in these circumstances His Majesty's Government would request the Government of the Republic to be so good as to intervene with the authorities of the Protectorate with a view to securing the repeal of the recent illegal modification of the gate tax.

November 9, 1934.

Annex 48.

French Minister for Foreign Affairs to His Majesty's Embassy, Paris.

November 22, 1934.

Le Ministère des Affaires étrangères a l'honneur d'accuser réception de la note No. 730 que lui a fait tenir l'Ambassade d'Angleterre à Paris le 9 de ce mois, au sujet de la revision des droits de porte au Maroc.

Il ne saurait se déclarer d'accord avec la thèse suivant laquelle les traités de 1904 et de 1911 seraient sans effet en matière de droits de porte au Maroc, l'établissement de ces droits restant régi par des taxes antérieures.

Il croit cependant inutile d'ouvrir une discussion juridique à ce sujet car la communication du Consul général de Grande-Bretagne à Rabat au sujet des droits de porte et la réponse de principe du Résident général appartiennent à un stade de la discussion qui se trouve dépassé par les conversations qui eurent lieu à Londres au mois de juin dernier.

La question du régime économique du Maroc ayant alors été examinée au cours de négociations commerciales entre le Gouvernement britannique et le Gouvernement français, il fut constaté, après consultation des divers départements ministériels anglais intéressés, que les deux Gouvernements, tout en réservant l'un et l'autre leur opinion en matière juridique, se trouvaient d'accord pour "approcher la question pratique dans un esprit accommodant."

Le Ministère des Affaires étrangères ne verrait que des avantages à rechercher, dans cet esprit, une solution à la question des droits de porte qui, d'ailleurs et parallèlement à la démarche du Consul général de Grande-Bretagne à Rabat, a déjà fait l'objet de conversations entre représentants qualifiés des deux Gouvernements, conformément à l'accord susmentionné.

En ce qui concerne les autres questions en cours de discussion, et dont Sir Robert Cahill a entretenu M. de La Baume par sa lettre du 12 de ce mois, le Ministère des Affaires étrangères se tient prêt à faire connaître sa réponse au cours de conversations qui pourraient avoir lieu comme l'été dernier avec le concours d'un agent du Protectorat.

Quant au projet d'évaluation des valeurs en douane au Maroc qui a été communiqué à M. Yeames le 26 septembre dernier, le Ministère des Affaires étrangères accèderait volontiers à la suggestion de Sir Robert Cahill de l'examiner indépendamment de la question des contingents et des droits de douane. Il désire néanmoins mentionner que le taux des droits de douane à instituer reste fonction de la perception exacte de ces droits. Aussi lui paraît-il indispensable que la mise en vigueur du nouveau système de perception des droits coïncide exactement avec l'établissement du nouveau tarif et des contingents.

Le Ministère des Affaires étrangères serait heureux que ces indications fussent retenues par le Gouvernement britannique en vue d'un règlement prochain de l'ensemble de la question dans un esprit amical et conformément à l'entente intervenue au mois de juin dernier.

ANNEX 49.

[W 2305/976/28]

Sir John Simon to Sir G. Grahame (Madrid).

(No. 153.)
Sir,

Foreign Office, March 19, 1935.

I transmit to your Excellency herewith copy of despatch from His Majesty's consul-general at Tangier regarding the issue by the authorities of the Spanish Zone of Morocco of a dahir and vizirial decree, dated the 1st November, 1934, modifying the existing gate tax regulations, and I have to request you to address a communication to the Spanish Government on the following lines:—

The conditions in which the gate tax is applicable to foreigners in Morocco were laid down in article 13 of the Madrid Convention of 1880 (*State Papers*, Vol. 71, p. 643), as well as in regulations subsequently issued thereunder by the Moroccan authorities, with the approval of the Diplomatic Body at Tangier, in 1881 (*State Papers*, Vol. 72, p. 638) and in 1896 (printed in the *Annuaire du*

[11543]

M



Maroc, 1905, p. 221). It is expressly laid down in the convention and in the regulations that no increase in the amount of the tax shall be made except with the consent of the signatory Powers. In addition, provision is only made in the regulations for the levying of the tax on goods transported from one town to another in Morocco and on local produce entering the towns. On the 1st September, 1931, the authorities of the Spanish Zone issued a dahir and vizirial decree, modified, at the instance of His Majesty's Government in the United Kingdom, by a vizirial decree of the 17th March, 1932, which imposed a gate tax both on local produce entering towns and on goods imported by sea. His Majesty's Government agreed to accept these regulations and made them applicable to British subjects in the Spanish Zone by a King's Regulation. As regards the position in the French Zone, the notes exchanged between His Majesty's Government in the United Kingdom and the French Government on the 29th January last, embodying certain measures of economic reforms, include an undertaking by the Administration of the French Zone so to modify a vizirial decree of the 31st July, 1933, as to make the gate taxes applicable to certain enumerated products the same as those applicable to similar local products. In return for this undertaking His Majesty's Government have agreed to apply the provisions of the above-mentioned vizirial decree, as thus modified, to British subjects, as well as the provisions of any other regulations concerning gate taxes which have been made up to the time of signature of the exchange of notes, in so far as they have not already been applied to British subjects.

His Majesty's Government are of the opinion that both in virtue of the special arrangements governing the gate tax, to which reference has been made above, and of the provisions of article 4 of the General Treaty of 1856 between the United Kingdom and Morocco, no taxes of this nature can be applied to British subjects unless agreed to by His Majesty's Government and made binding on British subjects by King's Regulation. While His Majesty's Government are unwilling to embarrass the Spanish authorities in their efforts to ensure the economic well-being of the zone, and while they are prepared, as heretofore, to co-operate by applying reasonable taxation to British subjects, they are unable to accept the dahir and vizirial decree of the 1st November, 1934, unless amended, in view of the fact that they infringe the principle of the equalisation of taxes as between imported and local products. This principle, as has been already pointed out, is embodied in the recent agreement between His Majesty's Government and the French Government, and His Majesty's Government earnestly trust that the necessary steps will be taken to amend the new gate taxes accordingly, in which event His Majesty's Government would be prepared to make them applicable to British subjects. If the regulations are not so amended, and if they are applied to British subjects without the consent of His Majesty's Government, the latter must reserve the right to put forward claims for the refund of taxes illegally levied.

Finally, in order to ensure in the future a greater measure of harmony in the application of measures of taxation in the Spanish Zone, His Majesty's Government desire to urge very earnestly that His Majesty's consular officers in the zone should be given prior notice of intended measures of this nature.

2. His Majesty's consul at Tetuan is addressing a similar communication to the Spanish High Commissioner.

I am, &c.
MAURICE PETERSON.

ANNEX 50.

Sir G. Grahame (Madrid) to Spanish Minister of State.

Your Excellency,

I have the honour, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to invite your attention to the issue by the authorities of the Spanish Zone of Morocco of a dahir and vizirial decree, dated the 1st November, 1934, modifying the existing gate tax regulations.

As your Excellency will be aware, the conditions in which the gate tax is applicable to foreigners in Morocco were laid down in article 13 of the Madrid Convention of 1880 (*British State Papers*, vol. 71, p. 643), as well as in

Madrid, March 30, 1935.

regulations subsequently issued thereunder by the Moroccan authorities with the approval of the Diplomatic Body at Tangier in 1881 (*British State Papers*, vol. 72, p. 638) and in 1896 (printed in the *Annuaire du Maroc*, 1905, p. 221). It is expressly laid down in the convention and in the regulations that no increase in the amount of the tax shall be made except with the consent of the signatory Powers. In addition, provision is only made in the regulations for the levying of the tax on goods transported from one town to another in Morocco and on local produce entering the towns. On the 1st September, 1931, the authorities of the Spanish Zone issued a dahir and vizirial decree, modified at the instance of His Majesty's Government in the United Kingdom, by a vizirial decree of the 17th March, 1932, which imposed a gate tax both on local produce entering towns and on goods imported by sea. His Majesty's Government agreed to accept these regulations, and made them applicable to British subjects in the Spanish Zone by a King's Regulation. As regards the position in the French Zone, the notes exchanged between His Majesty's Government in the United Kingdom and the French Government on the 29th January last, embodying certain measures of economic reforms, include an undertaking by the administration of the French Zone so to modify a vizirial decree of the 31st July, 1933, as to make the gate taxes applicable to certain enumerated products the same as those applicable to similar local products. In return for this undertaking, His Majesty's Government have agreed to apply the provisions of the above-mentioned vizirial decree, as thus modified, to British subjects, as well as the provisions of any other regulations concerning gate taxes which have been made up to the time of signature of the exchange of notes, in so far as they have not already been applied to British subjects.

His Majesty's Government are of the opinion that, both in virtue of the special arrangements governing the gate tax, to which reference has been made above, and of the provisions of article 4 of the General Treaty of 1856 between the United Kingdom and Morocco, no taxes of this nature can be applied to British subjects unless agreed to by His Majesty's Government and made binding on British subjects by King's Regulation. While His Majesty's Government are unwilling to embarrass the Spanish authorities in their efforts to ensure the economic well-being of the zone, and while they are prepared, as heretofore, to co-operate by applying reasonable taxation to British subjects, they are unable to accept the dahir and vizirial decree of the 1st November, 1934, unless amended, in view of the fact that they infringe the principle of the equalisation of taxes as between imported and local product. This principle, as has been already pointed out, is embodied in the recent agreement between His Majesty's Government and the French Government, and His Majesty's Government earnestly trust that the necessary steps will be taken to amend the new gate taxes accordingly, in which event His Majesty's Government would be prepared to make them applicable to British subjects. If the regulations are not so amended, and if they are applied to British subjects without the consent of His Majesty's Government, the latter must reserve the right to put forward claims for the refund of taxes illegally levied.

Finally, in order to ensure in the future a greater measure of harmony in the application of measures of taxation in the Spanish Zone, I am to urge your Excellency to take account of His Majesty's Government's earnest desire that His Majesty's consular officers in the zone should be given prior notice of intended measures of this nature.

I have, &c.
GEORGE GRAHAME.

RUSSIA

[N 5192/16/38/1936]

No. 2^A.

[Treasury Solicitor]

[July 30, 1936]

*Case for the Opinion of the Law Officers of the Crown and
Mr. Andrewes-Uthwatt.*

THE opinion of the Law Officers is desired upon the question whether a sum in sterling, which, with interest, amounts probably to over £500,000, and is held by the Midland Bank (Limited) to the credit of a Russian Banking Corporation created under Czarist and destroyed by Soviet law, and known in England as the Moscow Industrial Bank, can be recovered by the Crown as *bona vacantia*.

The principles of the law of England as to *bona vacantia* are simple, definite and comprehensive. All property within the jurisdiction which has no other owner belongs to the Crown. The subject was fully discussed *in re* Sir Thomas Spencer Wells, Swinburne-Hanham *v.* Howard, 1933, Ch. 29, and in the cases there cited.

These general principles, however, though simple in themselves, have on occasion been found difficult to apply. The difficulties have arisen, first, in connexion with the assets of dissolved corporations, and, secondly, where there has been a conflict between the law of England and the law of some other country.

With regard to the assets of dissolved corporations, until the decision *in re* Wells removed the difficulties, it was believed that the effect of the decision in *In re* Higginson and Dean, *ex parte* Attorney-General (1899) Q.B. 325 was that a debt due to a corporation disappeared when the corporation was dissolved, and that the Crown was entitled to claim as *bona vacantia* only sums which before the dissolution of the corporation had been held on trust for it. This view seems to have been present to the mind of Lord Atkin, in his judgment in Russian and English Bank *v.* Baring Bros. and Co. (Limited) (pp. 20, 21, 22 of transcript). It is clear that his attention had not been directed to the judgments *in re* Wells, in which, at p. 59, it was laid down that *In re* Higginson and Dean had been misunderstood, and that anything which could devolve upon the Crown as part of the estate of an intestate could become the property of the Crown upon the dissolution of a corporation.

On the question of conflict of laws, the application of the English law of *bona vacantia* to goods formerly the property of a foreign natural or juristic person may possibly depend upon the law of the country where that person was domiciled. In the case of a natural person, the question whether he has left surviving him anyone entitled in succession upon his death intestate is to be decided by the law of his domicile. If he has left no such person, and if his property is situate within the jurisdiction of the courts of the country of his domicile, it will fall to the *fiscus* of that country. In France, and, it is believed, in the majority of countries, the *fiscus* takes the property as *bona vacantia*, not claiming by any right of succession. Even in Scotland, where the Crown, in this connexion, is described as *ultimus hæres*, the expression is metaphorical and does not imply any idea of succession; in *Torrie v. Munsli* (1832), Court of Session, 10 S., pp. 597, 602, the Lord Ordinary said: "The right of the Crown to succeed to a bastard is not so much in the nature of succession as heir, as that all *bona vacantia* fall to the Crown." An important decision on the point is *re* Barnett's Trusts, 1902, 1 Ch. 847.

Before leaving the question of the law of England, it should be noted that s. 296 of the Companies Act, 1929, is not applicable to the present case; in the first place, it appears to relate only to companies registered under the Act; and, secondly, it is not retrospective (*re* Wells, *ut supra*, pp. 42, 48 and 63). Therefore, whatever the date of destruction of the Russian corporations, the matter must be decided under the common law relating to the prerogative, as was the case also in *Higginson and Dean* and *in re* Wells. It is interesting, however, to note that the legislature in s. 296 appears to have taken the same view of the rights

Recovery
by the
Crown, as
*bona
vacantia*,
of assets of
the Moscow
Industrial
Bank, a
destroyed
Russian
corpora-
tion.



of the Crown as the Court of Appeal in *re Wells*, providing that "where a company is dissolved, all property and rights whatsoever . . . vested in or held on trust for the company immediately before its dissolution . . . shall . . . be deemed to be *bona vacantia*."

A further point of some importance is that the assets of dissolved companies fall to the Crown freed from all the liabilities of the company. *Re Wells*, p. 50. They are, of course, subject to rights *in rem*, so that the holder of an unsatisfied debenture will take priority of the Crown. *Gough's Garages (Limited) v. Pugsley*, 1930, 1 K.B. 615.

The question whether the conditions required by English law are fulfilled in the case of the fund under consideration will be dealt with later. It may be convenient if, before doing so, the general position and the facts as to the Moscow Industrial Bank are outlined.

It may first be remarked that it is proposed to describe the Russian juristic persons concerned as "corporations" rather than as "companies," and to refer to them as "destroyed" rather than as "dissolved," since the words "company" and "dissolved" suggest in the English courts a company registered under the Companies Acts, and a process of termination analogous to those laid down for English registered companies under the Acts. In continental countries, also, the word dissolution, it is believed, carries implications which do not arise from the facts now under consideration. To describe these Russian corporations as nationalised might create the impression that the State had taken over the business by succession and not by confiscation.

To begin with the general position, it is a matter of common knowledge that there is a large body of claims, amounting to something like £290 million, by persons in England in respect of losses which they suffered as a result of the revolution in Russia. There are also claims by creditors of specific corporations. It appears to be regarded as a hardship that there should remain in the hands of the English banks, in circumstances which will be outlined shortly, funds which admittedly do not belong to them and which might be applied in alleviation of financial suffering or in settlement of claims, and there has been a good deal of private and political pressure to induce the Crown to take steps to collect these funds, either by legislation, or as *bona vacantia*, and to apply the proceeds on an *ex gratia* basis, either for the benefit of sufferers generally, or in settlement of the claims of the English creditors of the corporations to which the funds belonged.

It has been felt that legislation would be unsatisfactory, both as being confiscatory in character and as disregarding the rights of the Crown in respect of *bona vacantia*.

If the funds could be recovered as *bona vacantia* the question of *ex gratia* grants is not without difficulty. The exercise of the granting power of the Crown is limited by the spirit of the agreement between King and Parliament underlying the surrender of the hereditary revenue by the Civil List Acts; the nature of this agreement is indicated in s. 46 (1) (vi) of the Administration of Estates Act, 1925, as being that the power shall be exercised in accordance with the existing practice. The existing practice would not allow of the application by way of *ex gratia* grant of funds formerly the property of a specific corporation towards the satisfaction of moral claims not arising out of some transaction with the corporation in question. Thus creditors and perhaps shareholders of the corporation might be entitled to consideration. Claimants against another corporation or against the Russian Government would not. The Treasury, however, is of opinion that if these funds or any of them are in fact *bona vacantia*, it is the duty of the Crown to collect them, and thereafter to make the best possible use of them, leaving the precise method to be determined when the sums have been recovered.

The circumstances in which these funds have become immobilised is briefly as follows:—

The overthrow of the Czarist Government in Russia in 1917 was followed by decrees issued by the Soviet Government designed to effect the abolition of private banking and industrial corporations, the nullification of their shares, and the transfer of their assets to, and their ultimate confiscation by, the State.

The date of destruction of the banking corporations has been accepted by the House of Lords (*Russian and English Bank v. Baring Bros. and Co. (Limited)*)

as not later than the 28th January, 1918. They accepted for the purposes of the case the findings of Mr. Justice Eve in *In re Russian Bank for Foreign Trade and Russo-Asiatic Bank*, 1934 Ch. 720. The evidence of Dr. Konkevitch, the expert in Russian law, upon whose opinion the learned judge founded his decision, will be found in Documents Nos. 2 and 3 sent herewith. Translations of the decrees are Document No. 4. With regard to the industrial corporations, the date is less easy to determine, and, it is thought, must be considered separately in each case.

In January 1918 there were a number of Russian banking corporations constituted under Czarist law which had branches in this country; others, either for their own purpose or on behalf of customers, had funds deposited with English banks, but had never had in this country any place of business. All these corporations presumably had been regularly created, with constitutions framed according to Czarist law, and their existence could be terminated only by the law of the country in which they were created. The U.S.S.R. was not recognised by His Majesty's Government as the *de jure* Government of Russia until 1924, and until that time its decrees, though enforced in Russia, had no validity as law in the English courts. So soon as the U.S.S.R. was recognised, its decrees were also recognised by the English courts as the law of Russia, with effect retroactively to 1917 (*Lazard Bros. and Co. v. Midland Bank (Limited)* (1933) A.C. 289, 297).

The result was to leave in the hands of certain English banks funds which may be classified as follows:—

1. Funds which were, or which may have been, the property of the Czarist Government,
2. Funds which were the property of a destroyed Russian corporation which had a branch in this country, and in respect of which a winding-up order had been made in this country, and
3. Funds which were the property of a destroyed Russian corporation which had no branch in this country and therefore in respect of which no winding-up order can be made (*In re Lloyd Generale Italiano* [1885] 29 Ch. D. 219).

Although difficult questions arise with regard to the funds comprised in categories 1 and 2 above, the present case is concerned only with funds falling within category 3.

No complete list of these funds is available, but certain information has been obtained about them from persons interested and from proceedings in the English courts relating to them.

It is, however, thought desirable to test the question of the Crown's rights, and it is thought that a suitable subject for a test case is the sum of over £500,000 held by the Midland Bank (Limited) to the credit of the Moscow Industrial Bank.

With regard to this sum, there are two sources of information, first, a memorandum compiled by Mr. David Allan, of Messrs. Allan, Charlesworth and Co., Chartered Accountants, and, secondly, two copies of entries from ledgers kept at the Midland Bank (Limited), made from certified copies of entries in the books of the Midland Bank (Limited) and produced during the examination of Mr. Baldry, the then head of the Legal Department of the Midland Bank, who was giving evidence for the bank upon the hearing of the position of V. Poliakov for a winding-up order against the Moscow Industrial Bank. In this second source the Moscow Industrial Bank is shown as having on the 23rd March, 1925, a credit balance of £59,195 4s. 10d. in respect of its Moscow account, and a credit balance of £348,803 6s. 9d. in respect of its Petrograd account.

There does not appear to be any method by which these statements can be made evidence in any other case; but it is submitted that they are sufficient to justify proceedings in some form which would leave the precise amount of the fund to be determined during the course of the action.

The information derived from Mr. Allan's memorandum is as follows:—

The Moscow Industrial Bank was a Russian company incorporated under the pre-revolutionary Russian laws. At the time of the revolution in 1917 the capital of the bank was 50 million roubles. The bank had several branches in Russia, but none abroad, but during the war it was engaged in business in this country.

The bank had two accounts in London with the Midland Bank (Limited). One account was the Moscow Industrial Bank, Petrograd account, the second was

the Moscow Industrial Bank, Moscow account. The credit balance of the Petrograd account in favour of the Moscow Industrial Bank as appearing in the books of the Midland Bank (Limited) was, on the 31st December, 1929, £403,403 8s. 6d., and the credit balance of the Moscow account on the same date was £66,178 4s. 4d., making the total balance equal to £469,581 12s. 10d. This amount is exclusive of interest from the 30th June, 1924, to the 30th June, 1928, equal to £51,450 13s. 9d., which amount of interest was debited by the Midland Bank to the accounts of the Moscow Industrial Bank as having been previously credited in error and also exclusive of any further interest since the 30th June, 1928. The question of interest was raised in the proceedings of Lazard Bros. and Co. (Limited) v. Midland Bank (Limited) (1933 A.C. p. 289), and the final figure of the indebtedness of the Midland Bank was fixed in the Garnishee Order Absolute dated the 18th May, 1931, and made by Mr. Justice Roche at £542,730 14s. 7d., as on the date of the Garnishee Order *nisi* (the 12th December, 1930). The Garnishee Order Absolute was subsequently set aside by the Court of Appeal. An appeal from the judgment of the Court of Appeal was dismissed by the House of Lords.

It is suggested that as the judgment of Mr. Justice Roche has gone, it would not be advisable to adopt the figure as determined in his judgment though the fact that the Midland Bank was indebted to the Moscow Industrial Bank may be accepted. The uncertainty as to the figure may possibly be a factor in deciding upon the procedure to be adopted.

Whether the conditions in which this sum stands to the credit of the Moscow Industrial Bank in the books of the Midland Bank (Limited) are such that it has become *bona vacantia* by the Law of England is the question for consideration.

The first point is whether the fund is ownerless. As to this, the House of Lords in Russian and English Bank v. Baring Bros. and Co. (Limited), based its judgment on the assumption that the facts and dates accepted by Mr. Justice Eve in *In re Russian Bank for Foreign Trade and Russo-Asiatic Bank, 1934*, Ch. 720, were established. As has been said, in that judgment it was decided that the latest date when the banks could be regarded as possessing a juristic personality was the 26th January, 1918.

A corporation which has been destroyed by the law of the country of its origin has been destroyed everywhere. *Banque Internationale de Commerce de Petrograd v. Goussakov* (1923) 2 K.B. 682, 691. *Lazard Bros. and Co. (Limited) v. Midland Bank (Limited)* (1933) A.C. 289, 297, 302.

Neither Mr. Justice Eve nor the House of Lords enquired into the possibility of a claim by the Soviet Government as successors of the Czarist corporations. The terms of the Soviet decrees, the history of the executive acts which followed them, and the decisions of the English courts seem to make it unlikely that any such claim will be made, or, if made, could be successful. It is clear, however, from the remarks of Lord Blanesburgh (transcript, p. 16) that the possibility that some claim might be made by the Soviet Government will not be overlooked by any court before which the matter may come. The most probable claim would seem to be that the decrees in question had an extra-territorial effect and that the Soviet Government was entitled to the fund by virtue of the decrees and not as successor to the destroyed corporation.

The fund is situate within the jurisdiction of the English courts, and was so situate at the time when the corporation was destroyed; and it has been definitely held, both in the United States and in France, that the decrees of the Soviet Government made in December 1917 and January 1918 have no extra-territorial effect, because no Government has any power to confiscate property not within its jurisdiction. The English decisions most directly relevant are those of Mr. Justice Hill, affirmed by the Court of Appeal, in the *Jupiter* (No. 3), 1927, p. 122, 250; and of Mr. Justice Maugham, in *In re Russian Bank for Foreign Trade, 1933*, 1 Ch. 745. There is reason to believe that certain circulars issued by the Russian Government, which are referred to in the *Jupiter* (No. 3), at pp. 144 and 145, and commented upon by Mr. Justice Maugham (as above, at p. 767), operate as a disclaimer of any rights by the Russian Government over assets situate outside Russia. If the interpretation of these circulars should become material, an opinion would be obtained from Dr. Konkevitch, the expert in Russian law whose views were accepted as to the date of destruction.

The Chargé d'Affaires of the Russian Government in 1924 wrote to the Midland Bank (Limited) giving notice that his Government claimed all sums

standing in the books of the bank to the credit of former Russian banking and other nationalised companies. The bank denied liability, and the claim has not been followed up.

If the Law Officers advise that, apart from the possible attitude of the Russian Government, the Crown can make a claim to the fund in question with reasonable prospects of success, the Russian Government will be approached before any action is taken. In any case, if proceedings are commenced, it may be necessary to give notice thereof to the Russian Government so that they may appear if they think fit.

With regard to the form of the proceedings, it is possible that the normal practice would be to proceed by English information (Robertson, Civil Proceedings by an action against the Crown, p. 310); in which case the true facts about the fund might be ascertained by interrogatories delivered in proceedings of that kind. On the other hand, if it is thought that the evidence as to the existence of the fund is sufficient a more practical method of procedure might be an action by the Attorney-General for an account of the money in the hands of the bank and payment of the amount found due.

The Law Officers and Counsel are requested to advise—

- (1) Whether the fund standing in the books of the Midland Bank (Limited), to the credit of the Moscow Industrial Bank is *bona vacantia*.
- (2) If it is, what proceedings should be taken for its recovery.
- (3) Generally on the case.

List of Papers.

- (1) Transcript of the shorthand notes of the judgments of the House of Lords in Russian and English Bank v. Baring Bros. and Co. (Limited) (N 2237/16/38/1936).
- (2) Copy affidavit of Dr. Konkevitch, sworn the 29th November, 1933.
- (3) Transcript of shorthand notes of cross-examination of Dr. Konkevitch, the 20th February, 1934.
- (4) Copies, decrees, &c., of the Russian Socialist Federal Soviet Republic (list attached, Annex A).
- (5) Copies of entries from ledgers kept at Midland Bank (Limited).

Opinion.

1. In our opinion the Crown has a reasonable prospect of succeeding in proceedings directed to recovering as *bona vacantia* the fund standing in the books of the Midland Bank (Limited) to the credit of the Moscow Industrial Bank.

2. The proceedings should be by way of English information.

3. We think that it would be desirable before instituting any proceedings to take the whole position into consideration. The Crown is bound to be met with demands to apply any recovered assets towards satisfaction of claims against the Russian Government or Russian Banks or traders, and those demands would have to be considered. Whatever be the legal rights of the Crown, we assume that money recovered would be used in some way for meeting claims.

If that be so, the Crown would, we think, find itself committed to the general policy of collecting wherever possible ownerless Russian debts in this country. It would, secondly, be faced with the need for determining in accordance with workable principles the way in which the assets were to be applied.

As to the first matter, haphazard collection based on such information as to Russian debts as might come to the knowledge of the Crown would be difficult to justify, and information as to ownerless Russian debts could be obtained only as a result of returns made under the compulsion of some Act of Parliament.

As to the second matter, there is room for considerable difference of opinion as to the way in which recovered assets ought to be applied. Are unpaid creditors of the particular Russian corporation to have a preferential claim? Are creditors of a Russian corporation to be allowed to set off unsatisfied claims which they may have against other extinct Russian corporations or Russian traders? We understand some banks, and it may be the Midland Bank, have claims of this kind. Or

are the recovered funds to be treated as applicable as a general fund for meeting unsatisfied claims against Russian concerns—or against the Russian concerns and the Russian Government?

In our view it would be a mistake for the Crown to institute any proceedings of the nature under review except as part of a predetermined policy, the object of which was to satisfy on defined lines claims against Russian traders.

It is also, we think, right to point out that there are grounds on which it could be argued that the Soviet Government has a title to the debts due to nationalised corporations. It may be that that Government would make no claim, but the point might well be raised and have to be dealt with.

4. We suggest for consideration whether it would not be desirable to attack the situation on entirely different and narrower lines and secure the passing of a short Act of Parliament giving jurisdiction to the Courts to wind up dissolved corporations which had assets in this country notwithstanding that such corporations had no place of business in this country, and possibly at the same time deal by legislation with the assets in this country of the former Russian Government.

DONALD SOMERVELL.

T. J. O'CONNOR.

A. ANDREWES-UTHWATT.

*Law Officers' Department,
July 30, 1936.*

ANNEX A.

(Paper No. 4.)

List of Decrees, &c.

1. Decree on the Nationalisation of Banking.—Published in No. 35 of the *Gazette of the Workers' and Peasants' Government*, the 17th December, 1917.
2. Decree of the Council of People's Commissars confiscating share capital of the former Joint Stock Banks.—No. 18 of the *Gazette of the Workers' and Peasants' Government*, the 26th January, 1918.
3. Order of the Principal Commissariat of the People's Bank.—No. 32, *Izvestiya*, the 12th April, 1918.
4. Order of the Head Office of the People's Bank.—No. 34, the 27th April, 1918.
5. Collection of Enactments and Orders of the Workers' and Peasants' Government.—No. 98 of 1918, published in No. 98 of the Collection of Enactments 1918, Article 997, and in No. 36 of the *Economicheskaya Zhizn* of the 19th December, 1918.
6. Decree of the Council of People's Commissaries of the 19th January, 1920 (Collection of Enactments and Orders of the Government of Workers and Peasants, Nos. 4 and 5, Article 25, promulgated in the *Izvestiya* of the All-Russian Central Executive Committee of Soviets, the 25th January, 1920).

SPAIN

[W 11524/9549/41/1936]

No. 2.

[September 14, 1936]

Lord Cranborne to the Attorney-General.

My dear Attorney-General,

Foreign Office, September 5, 1936.

I AM writing in the absence of the Secretary of State to ask your views on a difficult point which has arisen in regard to the application of the Foreign Enlistment Act, 1870, to the civil war in Spain.

Applica-
bility of the
Foreign
Enlistment
Act to a
civil war.

As you know, arrangements are virtually complete with other Powers for the application to Spain and Spanish territories of a general régime of non-intervention in the struggle now proceeding. Certain Powers, and in particular Germany and Italy, have made it an express condition of participation in this régime that it should be applicable not merely in the sense that no arms or war material will be allowed to go to either side, but also in the sense that there shall be no loans or subscriptions in favour of either side and that no volunteers shall be recruited outside Spain for the forces of either of the contesting parties.

It is with reference to the question of the enlistment of volunteers that I am now writing. The position is that, unless Section 4 of the Foreign Enlistment Act can be regarded as being applicable to the present case, so that it will be an offence under the Act to enlist in the military or naval forces of either side, we shall have no means of stopping such enlistment. This fact might give other countries a pretext for escaping from the Non-Intervention Agreement in regard to the export of arms, and would be a very serious matter. What is even more important, perhaps, from our point of view than actually being in a position to prosecute individual British subjects for enlisting with the contending forces would be to prevent the recruiting and enrolment in this country of volunteers for either side. As you know, the Foreign Enlistment Act, on the assumption that it is applicable, makes it an offence for any person within His Majesty's dominions, whether a British subject or not, to induce any other person to accept or agree to accept combatant service. This would effectively prevent recruiting, and, for the rest, once we had issued a warning that the Foreign Enlistment Act would be applied, we feel we should be faced at the worst only with a small trickle of British subjects going abroad for enlistment, who would, of course, thereby be laying themselves open to penalties on their return to this country. There would be no recruiting and no large-scale departures for Spain. We feel fairly certain that this situation, if it could be achieved, would be one which would not give any other Power a legitimate pretext for seeking to escape from the Non-Intervention Agreement in regard to the export of arms.

The question is, however, whether the Foreign Enlistment Act is applicable to the case of a civil war, as it would be in the case of a war between two foreign States proper in which this country was neutral. In this connexion I enclose a copy of the Foreign Enlistment Act, 1870 (Paper No. 1). Sections 4-7, in conjunction with the definition of foreign State contained in Section 30, are the principal provisions relevant on the subject of enlistment; a copy of a letter, with its enclosures, which we wrote to the Home Office on the 26th August last on the subject of the applicability of the Act (Paper No. 2); and a copy of a private letter which I have received from the Home Secretary, in which, as you will see, he expresses some doubts as to the applicability of the Act, though he says that these doubts are not shared by his advisers, among whom, I believe, is the Director of Public Prosecutions (Paper No. 3). The Home Secretary suggests that you should be consulted. In view of the terms of his letter, however, and of the fact that the question is becoming urgent, we have not thought it necessary to submit the matter by a reference in the ordinary way, and we feel little doubt that the Home Secretary will agree with us in thinking that a more or less informal expression of your views is all that is required in the circumstances.

[14996]

E 2



The Foreign Office letter to the Home Office and the Home Secretary's letter to me are, I think, self-explanatory as to the issues involved, and all I need do here is to add some further comments in the light of his observations.

As you will see, the Home Secretary seems to agree that, in virtue of the definition of foreign State contained in Section 30 of the Act, enlistment in the forces of the legitimate Spanish Government would be enlistment in the service of a foreign State at war with another foreign State, since under the definition section (Section 30) the insurgents would appear to be a foreign State for the purposes of the Act. I am assuming for the purposes of the argument that the legitimate Government of Spain is, in fact, "at war" with the insurgents within the meaning of the Act. This, as you will see from our letter to the Home Office, is a point which may not be altogether clear, but, at any rate, the Home Secretary has not expressed any different view in regard to it from that which we ourselves hold. His doubt arises on the question whether the insurgents, though they may be a foreign State for the purposes of the Act, and "at war" with the Spanish Government, can be said to be "at peace" with His Majesty. Our feeling is that the answer to this question is in the affirmative, for various reasons. The Home Secretary's difficulty, I believe, is whether it is possible for His Majesty to be at peace with an entity with which, whatever it may be called, he is not in diplomatic relations. My advisers doubt whether the existence of diplomatic relations is really relevant, because it has often happened in the past that His Majesty has not been in diplomatic relations with foreign States or Governments, yet no one would have suggested that he was not at peace with them. For instance, diplomatic relations with Russia were completely suspended for years after the revolution and were not resumed until a measure of recognition had been extended to the Soviet Government. Yet I do not suppose that it would have occurred to anybody to say that this country was not capable of being at peace with Russia during that time merely because of the absence of diplomatic relations. In the same way, if the insurgents should succeed and become the Government of Spain, there may well be an interval before they are recognised as such, during which diplomatic relations will be suspended. Yet we shall, we trust, be "at peace" with them.

It seems to us that the question of war and peace is a question of fact and that if there are no hostilities between this country and a foreign community, which *ex hypothesi* is for the purposes of the Act to be deemed a "foreign State," we are entitled to take the view that His Majesty is at peace with that community.

Any other view would seem to lead to a contradictory result if the wording of Section 4 of the Act is considered. That section, in conjunction with the definition of foreign State in Section 30, appears to elevate an insurgent community into the position of a foreign State for the purposes of the Act. The words therefore "any foreign State at war with any foreign State" clearly contemplate that such a community may be "at war" with the other foreign State concerned. But if it is capable of being "at war" with this other foreign State, why is it not equally capable of being "at peace" with yet another foreign State, viz., His Majesty.

Coming to more general considerations, it will be apparent that if the Home Secretary's doubts are well founded the effect is to give Sections 4-7 of the Act a one-sided application in relation to a civil war. It is very difficult to suppose, however, that such can have been the intention of the framers of the Act. The definition of foreign State in Section 30, which is a very striking one, is difficult to explain on any other ground but that the framers of the Act deliberately intended the Act to be applicable as well to a civil war as to an ordinary war. It would seem inconsistent with any such intention to make the Act applicable only to enlistment with the insurgent forces in a civil war. The framers of the Act must, moreover, have been aware that His Majesty's Government have normally adopted an attitude of neutrality in civil wars and have often issued proclamations of neutrality in such cases; yet a situation in which it was an offence without a licence from the Crown to enlist on one side in a civil war, while it was no offence to enlist on the other, would clearly cut across the ordinary obligations of neutrality under international law. These, indeed, do not compel a State to prevent its subjects from enlisting with the forces on either side, but they do require that if a State *does* prevent its subjects from enlisting in the forces on one side it shall apply the same treatment to the other.

There are, I am told, no decided cases, or at least it has not been possible to find any, in which persons have been prosecuted for enlisting in or giving aid to the forces of the legitimate Government in a civil war. On the other hand, there are plenty of cases of prosecutions for enlisting in or giving aid to insurgent forces in a civil war. This fact, which can probably be explained on extraneous grounds (for instance, in the case of the American Civil War, the sympathies of this country were almost entirely on the Confederate side, to whom aid was in consequence mainly given) does not appear to us to affect the question of the interpretation of the Act.

As you are aware, in cases where it has been decided to recognise the insurgents as belligerents, it has been the custom to issue a proclamation of neutrality, and thereafter to apply the strict rules of neutrality as they would be applied under international law in the case of an ordinary war. The principal obligation is, of course, that of impartiality—to treat both sides alike. In the proclamation which was issued in the case of the American Civil War (copy of which is enclosed), you will observe in the passage marked A that an express warning was given against enlistment with the forces of either side, and this after a reference to the then Foreign Enlistment Act (of 1819, 59 Geo. 3, cap. 69). The relevant section of that Act was similar in substance to Section 4 of the present Act, though somewhat different in its wording, and did not contain the passage about a foreign State at peace with His Majesty. It is clear, however, that the Government, in promulgating the neutrality proclamation in the American Civil War, regarded the then Foreign Enlistment Act as applicable to enlistment with both sides, and it is very difficult to suppose that only a few years after, in 1870, with the experience of the American Civil War fresh in their minds, an Act would have been framed which would place His Majesty's Government in the dilemma that in a civil war they would either not be able to prevent enlistment with either side at all, or that, in so far as they could prevent enlistment on one side, they could only do so by departing from that attitude of neutrality which has been the main feature of British policy in such cases in the past. This, of course, is the dilemma we shall be faced with now, if the Home Secretary's doubts are well founded—a dilemma which will become even more acute if we should decide to recognise the insurgents as having belligerent status, with its attendant obligation of treating both belligerents alike.

I hope I have not wearied you with this long explanation of our views, but the matter is an important one in the circumstances, and we are most anxious to be in a position to issue a warning that persons enlisting with the forces of either side will render themselves liable to penalties under the Act. Our feeling is that if we could only get so far as to issue this warning it would probably have the effect of stopping any large scale enlistment or any attempt at recruiting in this country, so that our main purpose would be achieved without our having to apply the Act at all. We feel, therefore, that if our interpretation of the Act is at all a possible one we should take the risk, if risk there be, of acting upon it in the circumstances.

Yours, &c.
CRANBORNE.

LIST OF PAPERS.

- No. 1.—Foreign Enlistment Act, 1870.
- No. 2.—Foreign Office to Home Office, August 26, 1936 (W 8823/62/41/1936)—Annex A.
- No. 3.—Sir John Simon to Lord Cranborne, September 3, 1936 (W 10515/9549/41/1936)—Annex B.

Report.

Attorney-General to Lord Cranborne.

Dear Cranborne,

I will assume, as you do, that the Government of Spain is at war with the insurgents within the meaning of the Act, and that the latter are a foreign State as defined. The definition is curious, in that the words "part of" appear only to qualify "province" and perhaps people, but the insurgents, in their title at any rate, seem to assume to be the Government of the whole of Spain.

On the other point which you submit to me, while appreciating the Home Secretary's argument, I take your view. I think that if a body of persons is a foreign State within the Act, then they are a foreign State for the purpose of being at peace with His Majesty, whether recognised or not. Put in another way, the words "at peace" mean "not at war with," and may perhaps have been inserted to make it clear that the Act would not make it an offence to enlist with our allies.

Also it seems to me clear that the definition must be read into the words "foreign State" in both places in which they occur in section 4. If "at peace" means at peace with a recognised Government, there are difficulties in that the words of the definition would cover bodies of persons very unlikely to be recognised in the technical sense.

The words of the Act do not seem to me very apt for application to a civil war, but I have come to the conclusion that they would be construed in the way you suggest, and I therefore think you would be justified in issuing the warning.

D. B. SOMERVELL.

Law Officers' Department,
September 14, 1936.

ANNEX A.

(Paper No. 2.)

Foreign Office to the Home Office.

Sir,

Foreign Office, August 26, 1936.

I AM directed by Mr. Secretary Eden to inform you that in connexion with the negotiations which the French Government are at present conducting with a view to the conclusion of a joint agreement amongst the Powers chiefly concerned to prohibit the supply of arms to Spain, the French Chargé d'Affaires in London has enquired whether His Majesty's Government for their part would examine the possibility of preventing, under an international agreement, the establishment in this country of recruiting bureaux for volunteers to assist either of the contending parties in Spain.

2. Mr. Eden is advised that His Majesty's Government would be in a position in practice to prevent the establishment of such bureaux by making it clear that under section 4 of the Foreign Enlistment Act, 1870, recruiting itself would be an offence, as would also the taking of service in the forces of either side. In this connexion, however, there are a number of points of law on which Mr. Eden would welcome Sir John Simon's observations:—

(1) Does the Foreign Enlistment Act apply to the case of a civil war as well as to the case of a war proper? Mr. Eden is advised that the answer to this question is in the affirmative. The definition of "foreign State" in Section 30 of the Act appears to have the effect of placing an insurgent community of the kind now involved in the Spanish civil war on the same footing, for the purposes of the Act, as a recognised State; and on its true construction Section 4, coupled with this definition, would appear to make it an offence to enter the military service of either side in a civil war (assuming both sides to be "at peace" with His Majesty), or to recruit volunteers for such service. It may be observed in

this connexion that the Foreign Enlistment Act in force previous to the present one (59 Geo. 3, cap. 69) was applied and enforced during the American Civil War of 1861-65 (*cf.*, for instance, *The Queen versus Rumble*, 1864, 4 F. and F. 175, *English Reports*, vol. 176, p. 519).

(2) Can Section 4 of the Foreign Enlistment Act be made applicable prior to a declaration of neutrality by His Majesty's Government? Mr. Eden is advised that there is nothing in the Foreign Enlistment Act to suggest that Section 4 does not become *ipso facto* applicable in the event of a war (which by virtue of the definition of "foreign State" in Section 30 appears to include a civil war), or that its application is in any way dependent on the prior issue of a formal proclamation of neutrality. The tenour of the proclamation of neutrality⁽¹⁾ made in the case of the American Civil War, of which a copy is enclosed, confirms this view, since it was framed in the form of a warning that the then Foreign Enlistment Act (59 Geo. 3, cap. 69) (which was similar in this respect to the present Act) was applicable and would be applied, and implied that the position would have been the same even if there had been no proclamation of neutrality. The same may be said as regards the application of the present Act in its relation to the neutrality proclamation⁽²⁾ of 1912 issued during the Balkan wars, of which a copy is also enclosed. This view is supported by such cases as *Regina versus Jameson* (1896, 2 Q.B. 425). This was a prosecution under Section 11 of the Foreign Enlistment Act in connexion with the Jameson raid, for fitting out an expedition against the territories of a friendly foreign State. It was made clear that as regards cases coming under Section 11, the Act is *ipso facto* applicable when the case contemplated therein arises, and there is nothing in Section 4 of the Act to suggest that it, too, does not apply *ipso facto*, given always, in cases coming under Section 4, that there is a "war." In contrast to this, it would seem that sub-section (1) of the proviso to Section 8 may make the application of that Section dependent on the issue of a neutrality proclamation.

(3) Can it be held that in the absence of any declaration of neutrality or recognition by His Majesty's Government of the insurgents as belligerents there is a state of war within the meaning of Section 4 of the Act? The section only applies in the event of service being taken with a State at war with another State, and the question is whether in the absence of any official recognition of the belligerent character of the dispute a court would regard itself as precluded from concluding that a war existed. Mr. Eden is advised that a court would probably not take this view. The definition of "foreign State" in the Act clearly implies that a civil war may be a "war" for the purposes of Section 4 of the Act, and a recognition of belligerency does not create a war where none existed previously; it is merely a recognition that a war exists. No doubt if there had been a formal recognition a court would take judicial notice of it. But in its absence the court would probably allow the existence of a war (*i.e.*, a civil war) to be proved as a fact.

3. There is a further point to which it has been found necessary to give attention, namely, whether the application of the Act would in itself entail any implied recognition of the insurgents as belligerents. This is, of course, largely a political question, and is not one to which Mr. Eden is disposed to attach undue importance. It can, he feels, reasonably be argued that the Act is a purely municipal piece of legislation and not in any sense a document having any international effect such as, for example, a proclamation of neutrality would have. It would be possible to maintain that the fact that His Majesty's Government choose to regard the hostilities as amounting to a war for the purpose of applying a piece of domestic legislation and of preventing persons in this country from taking service with either side could not have any international effect or imply internationally any recognition of the insurgents as belligerents.

4. Subject, therefore, to Sir John Simon's views on the points mentioned in paragraph 2 above, and to any other observations which he may wish to put forward, I am to suggest that it would be advisable to issue in the near future a public warning to the effect that as from a given date (which might be the date of the coming into force of the international non-intervention agreements now being negotiated by the French Government, or such other date as might seem desirable), persons taking military or naval service with either side would render

⁽¹⁾ *State Papers*, Vol. 51, pp. 165-169.

⁽²⁾ *State Papers*, Vol. 105, pp. 163-168.



1936

110

SPAIN

themselves liable to proceedings under the Foreign Enlistment Act. If Sir John Simon sees no objection, Mr. Eden proposes to inform the French Government that it will be possible by these means effectively to prevent the enlistment in this country of volunteers in this case.

I am, &c.

H. J. SEYMOUR.

ANNEX B.

(Paper No. 3.)

Sir John Simon to Lord Cranborne.

My dear Cranborne,

Home Office, September 3, 1936.

I MENTIONED to you just now the question put to the Home Office by the Foreign Office as to whether, from the point of view of our criminal law, an announcement could properly be made that it would be a breach of the Foreign Enlistment Act for any British subject to take military or naval service *with either side* in the Spanish trouble. I appreciate the force of the argument that the language of Section 4 of the Act of 1870, together with the definition of "foreign State" in Section 30, is wide enough to justify this proposition. But for the following reason I have felt enough doubt to think it right to suggest that you should consult the Attorney-General.

I have no doubt that it is an offence under the Act of 1870 for a British subject to enlist with the insurgents against the existing Spanish Government. This arises because the insurgents, oddly enough, for the purposes of the Act are to be regarded as "a foreign State," and there is no doubt that the insurgents are "at war with a foreign State at peace with Her Majesty," viz., the Government of Spain. This point was, in fact, decided by the Privy Council in 1870 under an earlier Act where the provision of a ship for the use of a body of insurgents who were in rebellion against the established Government of Cuba was held to be a criminal offence. But would it have been an offence to give military aid to the existing Government of Cuba against the insurgents? The case in 1870 certainly never so decided, for before this curious result could follow, it would be necessary to hold that the insurgents were not only a foreign State but were a foreign State "at peace with Her Majesty."

It may be that that is the right view of the statute, and I do not say it is not. But it is a very odd view and I hesitate to go out of my way to lay down the law on a point which seems to me doubtful. I ought to add that legal advisers in whom I put great confidence connected with the Home Office think that my doubt is unjustified. Anyhow, I do not think it is for the Home Secretary, because he happens to be a decayed lawyer, to resolve doubtful points of law when the Attorney-General is available.

I realise, of course, that the last thing the Foreign Office would wish to do would be to announce that no one can lawfully help one side in Spain and everybody may help the other. But I am only concerned with making sure that you get a correct legal interpretation. If the Law Officers advise that there is nothing in my fears and that the existing statute makes it equally unlawful to help either side, I can see no possible objection to the announcement being made. But in that case it has been unlawful throughout; therefore do not say that it *will* be unlawful from a future date.

Yours ever,

JOHN SIMON.

SPAIN

111

[W 11520/9549/41/1936]

No. 3.

[September 15, 1936]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, September 4, 1936.

I HAVE the honour, by direction of His Majesty's Principal Secretary of State for Foreign Affairs, to state that he has deemed it advisable to give some consideration to the question of the form of the proclamation of neutrality that would be issued in the event of its being decided by His Majesty's Government in the United Kingdom to recognise that a state of war exists between the parties to the present civil conflict in Spain.

2. In 1916, at a time when the outbreak of hostilities between the United States of America and the United States of Mexico appeared to be imminent, there were drafted, in consultation with the Lord Chancellor, alternative shorter forms of a neutrality proclamation designed to replace the lengthy form of proclamation up till then used; copies of the relevant correspondence are enclosed herein (Paper A). It will be seen that the views expressed by Sir Edward Grey in his letter of the 27th June, 1916, to the Lord Chancellor received the concurrence of his lordship, who was also disposed to regard the briefer of the two forms of proclamation submitted to him (Annex A in Sir Edward Grey's letter) as sufficient for all immediate purposes.

3. It is thought therefore that this form would serve as a basis in the present case, but it would require some adaptation in view of the fact that the war is a civil war and not one between different countries. For the purpose of such adaptation certain passages in the neutrality proclamation issued during the American Civil War of 1861-1865 could be utilised. A copy of this proclamation is enclosed (Paper B).

4. It would also be necessary in issuing any proclamation to take account of the requirements of the constitutional position at present governing the relations between the United Kingdom and the other members of the British Commonwealth of Nations which has undergone a good deal of development since 1916. Although it has been the accepted view of His Majesty's Government in the United Kingdom that, in the case of a war proper between contending nations, the neutrality of the Empire must exist or not as a whole, it is perhaps open to question whether a recognition of belligerency accorded by one part of the Empire necessarily involves a similar recognition by other members of the Commonwealth. In any case it seems desirable to avoid the issues which might be raised by retaining in its previous form the reference to all British subjects which used to appear in neutrality proclamations.

5. In the light of the above considerations the Secretary of State has accordingly caused to be prepared a form of proclamation of which I have the honour to transmit the draft herewith (Paper C). I am to explain that the phrase that appears to require modification to bring the wording of the proclamation into accord with present-day intra-imperial relationships is the phrase "All our loving subjects." In the course of semi-official correspondence with this department on this aspect of the question of the form of proclamation the Dominions Office have expressed the following views, which are shared by the Foreign Office. The words "All our loving subjects" might be criticised by His Majesty's Governments in some of the Dominions on the ground that they implied that His Majesty, on the advice of the Privy Council in the United Kingdom, was taking action committing His Governments in the Dominions. On the other hand, a specific exception of British subjects in the Dominions would seem to be undesirable, inasmuch as it might create a false impression as to the position of the Dominions in relation to neutrality. Again, a specific enumeration of the British subjects to whom the proclamation was addressed would be difficult, since it would be necessary to include not only British subjects in all parts of the Empire other than the Dominions and their dependent territories, but also British subjects in foreign countries. In these circumstances it seems to the Dominions Office desirable to omit entirely the reference to "All our loving subjects" and to adopt an alternative phrase.

6. Having regard to the foregoing considerations the phrase "All our loving subjects" has been replaced, in the fourth paragraph of the enclosed draft

[14996]

F

Form of proclamation of neutrality to be issued in event of decision by His Majesty's Government in the United Kingdom to recognise that state of war exists between parties to civil conflict in Spain.



1936

proclamation, by the word "everyone," and has been deleted in the last paragraph of the draft. The word "everyone" would appear to have the merit of covering not only British subjects and British-protected persons wherever resident, but also foreign nationals within His Majesty's territories, so far as these may be affected.

7. Two further points require special mention. It is the usual practice in neutrality proclamations between contending States to recite that His Majesty is at peace with both parties. In the case of a civil war it is not possible to refer in this connexion to both parties, since one of them has no recognised international existence; its recognition as a belligerent does not entail its recognition as a separate State or Government capable of having international relations with other countries. In the case of the neutrality proclamation issued in the American Civil War the point was met by first of all reciting that His Majesty was at peace "with all Sovereigns, Powers and States," and then, after the mention of hostilities between the Government of the United States and the Confederate States, reciting that His Majesty was at peace with the Government of the United States. In the present case it seems preferable simply to recite that His Majesty is at peace, without stating with whom these relations subsist, since in point of fact they subsist with all the world.

8. The second point is that although the present proposed form of proclamation does not contain any specific reference to the Foreign Enlistment Act, 1870, as neutrality proclamations used to do, and as was contained in the proclamation issued in the case of the American Civil War, the present draft is, nevertheless, intended to include a reference to that Act amongst other acts which may be applicable to the situation. In this connexion I am directed to refer you to the definition of "foreign State" in section 30 of the Foreign Enlistment Act, the effect of which appears to be to make section 4 of the act applicable in the case of a civil contest between parties within the same State.

9. Mr. Eden would be glad to be informed at your earliest convenience whether a proclamation in the terms of the proposed draft (Paper C) would, in your opinion, be a proper one to be issued if required in the present case.

I have, &c.

H. J. SEYMOUR.

LIST OF PAPERS.

PAPER A.—Correspondence with the Lord Chancellor in 1916. (Law Officers' Reports, 1916: Confidential 10828, No. 7.)

PAPER B.—Proclamation by Queen Victoria in 1861 during the American Civil War. (State Papers, Vol. 51, pp. 165-169.)

PAPER C.—Draft Proclamation of Neutrality. (Annex No. I.)

Report.

We approve the form of declaration with the following alterations, which we consider desirable:—

In the first line substitute for the first four words "Whereas unhappily there is war."

Substitute the word "war" for "hostilities" in the second recital and the second operative paragraph.

The word "war" is used in the Foreign Enlistment Act, and as that Act is not being specifically referred to we think it is desirable to use the same language.

We would suggest that in the last line but one of the penultimate paragraph "and" should be substituted for "or."

In the last paragraph we suggest the omission of the words after "provided" and insertion of "therefor." The phrase "penalties . . . denounced by the law of nations" does not seem to us a good one.

We notice that word "charge" is used in the earlier documents, and unless there is some good reason for substituting "enjoin," we suggest using the word "charge."

D. B. SOMERVELL.

T. J. O'CONNOR.

Law Officers' Department,
September 15, 1936.

The Attorney-General to Lord Cranborne.

Dear Cranborne,

September 15, 1936.

This letter is supplementary to our opinion on the Neutrality Proclamation which I send herewith. I saw the Solicitor-General this afternoon and we discussed and agreed the opinion, but he raised a further point which it was not possible to clear up before he left.

I had read paragraphs 5 and 6 of the case as meaning that the document was put forward to us as a document which in the opinion of both the Foreign Office and the Dominions Office would not be read as applicable to British subjects in the Dominions. The Solicitor-General drew my attention to the second sentence in paragraph 6, which states that the word "everyone" would cover British subjects *wherever* resident, and therefore would include those in the Dominions. If this were right, it would seem that it in no way met the objection raised and admitted to "all our loving subjects."

Whether a proclamation issued on the advice of the Privy Council does or does not *prima facie* apply to the Dominions seemed to me a question which turned largely on constitutional usage, and as I was seeing the Dominions Secretary on another matter I took the opportunity of asking whether he or his advisers could throw any light on the matter. It is not, I think, clear that it does not apply or might not be taken as applying, especially when it deals with such a question as neutrality. It has, as you know, been suggested in South Africa that neutrality is a matter for each Dominion to determine for itself. In view of this and to meet the original objection, I would suggest the substitution of "all those whom it may concern" for "everyone," with the consequent grammatical alterations. The Solicitor-General would, I know, agree with this suggestion.

I do not think any reasonable objection could be taken to the proclamation in this form, but neutrality is a somewhat thorny question in our relations, at any rate with South Africa, and I had felt that it would be desirable to notify the Dominions, if time allowed, before this proclamation was issued. They might reasonably say that they ought to have been consulted before a document was issued which appeared to announce the neutrality of the King of the whole Empire. My concern is, of course, only with the constitutional aspect, but the Dominions Secretary, when I asked him on the other point, also expressed this view.

DONALD SOMERVELL.

Annex No. I.

(Paper C.)

Draft Proclamation of Neutrality.

Whereas hostilities unhappily exist between the Government of the Spanish Republic and certain forces styling themselves the Provisional Military Government of Spain; and

Whereas we, being happily at peace, are firmly purposed and determined to maintain a strict and impartial neutrality in regard to the said hostilities;

We therefore have thought fit, by and with the advice of our Privy Council, to issue this, our Royal Proclamation:—

And we do hereby strictly enjoin and command that everyone shall govern himself accordingly and shall observe a strict neutrality in and during the aforesaid hostilities in accordance with the laws and statutes of the realm in this behalf made or the law of nations in relation thereto;

And we do hereby further give warning that if anyone shall do any act in violation of the said laws and statutes or the law of nations he will in nowise obtain any protection from us, but will be liable to the penalties provided by the said laws and statutes, or denounced by the law of nations in that behalf.

[14996]

F 2



1937

THIS DOCUMENT IS THE PROPERTY OF HIS BRITANNIC MAJESTY'S GOVERNMENT

Printed for the use of the Foreign Office

CONFIDENTIAL

(15419)

REPORTS BY THE
LAW OFFICERS OF THE CROWN, &c.

1937



1937

(ii)

LIST OF REPORTS

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 1^a, &c.

No.		Date.	SUBJECT.	Page.
GENERAL.				
1 ^a	Law Officers... [Home Office]	July 14, 1937	Legislation required to implement the Draft Convention for the Prevention and Punishment of Terrorism...	1
SPAIN.				
1	Attorney-General ...	April 14, 1937	Application to civil war of Foreign Enlistment Act: Section 8 (building, equipping, commissioning or despatching of vessels for military or naval service of either side)	8
2	Law Officers...	April 15, 1937	Proposed perfection of an emergency landing ground for British military aircraft on the <i>British Neutral Ground</i> at Gibraltar ...	11

(iii)

ALPHABETICAL INDEX

(NAMES AND SUBJECTS)

1937

The figures refer to the numbers of the pages.

Cases cited are indicated by italics.

ACT—GIB.

A.

Acts of Parliament—

Extradition Act, 1870; position of fugitive offenders guilty of assassination, 1.

Foreign Enlistment Act, 1870; application to civil war, 2, 8–11.

Ditto; operation of article 8 in absence of declaration of neutrality, 9–11.

Aerodromes—Emergency landing ground for British military aircraft on *British Neutral Ground* at Gibraltar, 11–13.Aircraft—Emergency landing ground for British military aircraft on *British Neutral Ground* at Gibraltar, 11–13.

Arms and Ammunition—Supply to insurgents, 2.

B.

Belligerent rights—French blockade during hostilities with China in 1884, without other belligerent rights at sea, 9–10.

Blockade—Exercise of, without declaration of war, 9–10.

E.

Extradition—Position under Extradition Act of fugitive offenders guilty of assassination, 11.

G.

Gibraltar—Emergency landing ground for British military aircraft on *British Neutral Ground*, 11–13.

INS—WAR.

I.

Insurrection—

Legislation to give effect to draft convention on terrorism: necessity for notification of existence of civil war, 1–2.

Position under Foreign Enlistment Act, 2, 8–11.

Supply of arms to insurgents, 2.

Despatch of vessels to insurgents, 8–11.

Issue of proclamation of neutrality, 9.

N.

Neutrality—

In civil war: issue of proclamation of neutrality, 9.

No proclamations during Franco-Chinese hostilities of 1884; no declaration of war, 9–10.

Operation of article 8 of Foreign Enlistment Act in absence of declaration of neutrality, 9–11.

T.

Terrorism—Draft Convention for the Prevention and Punishment of, 1–8.

Treaties—Draft Convention for the Prevention and Punishment of Terrorism, 1–8.

V.

Vessels—Commissioning, despatch, &c., of vessels to contending parties in civil war, 8–11.

W.

War—

Civil war: see *Insurrection*.

Hostilities between France and China, 1884, without declaration of war, 9–10.



1937

Printed for the use of the Foreign Office

CONFIDENTIAL

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.: 1937

GENERAL

[W 14821/720/98/1937]

No. 1^A.

[Home Office]

[July 14, 1937]

Report.

THE legislation required to implement the 'Draft Convention for the Prevention and Punishment of Terrorism' raises, in our view, points of considerable difficulty both legal and political. The important departure made by the convention, which would undoubtedly require legislation, is that contained in article 3, which in effect would make it a criminal offence here to conspire to do or to aid and abet or incite the acts set out in article 2.

Legislation required to implement the Draft Convention for the Prevention and Punishment of Terrorism.

2. It is already a criminal offence to conspire here to commit murder abroad, but it is not we think an offence so to conspire to commit the other crimes mentioned in article 2. So far as we know there is little, if any, evidence that any evils in relation either to terrorist or ordinary crimes have resulted from this position. Parliament is usually averse to the creation of new offences unless some specific evil in this country can be pointed to. Though we dare say there is evidence of evils resulting in other countries from the absence of such a provision, the papers before us are not very specific on this head.

3. The convention is directed solely against acts against States, and no doubt the committee were restricted to this by their terms of reference. We think that legislation so restricted would be open to serious legal objections as well as raising political difficulties.

Our first general observation, which was foreshadowed in our earlier letter, is therefore that any legislation should in our view be general in its terms and not confined to acts directed against States. So far as our present law is concerned it regards at any rate some offences, when directed against a State, as entitled to more lenient treatment than when the motive is a private one. Thus section 3 (1) of the Extradition Act, 1870, protects from extradition a fugitive offender who has committed an otherwise extraditable offence, if the offence is one of a political character, and he may apply to the court to have this question determined. We understand that there is no suggestion that the law should be altered in this respect, and although the position of a fugitive offender who has committed the act abroad can be differentiated from that of those who have conspired here, the general policy which is given effect to in section 3 (1) has obviously a very important bearing on this whole question.

4. If the only acts likely to arise were cold-blooded assassinations or isolated incendiarism little objection could be felt, we think, to making it criminal here to plot such acts for commission abroad. The report which precedes the convention states that in the view of the committee a civil war was clearly outside the scope of the convention. The legislation therefore would have to contain provisions which made this exception and made it plainly. Some means would

* Copy annexed.

[17381]

c*



1937

2

GENERAL

have to be found of making it clear to the public when an insurrection or disturbance became a civil war. Presumably there would have to be a Proclamation to this effect. Even, however, in the period before the rising became a civil war the proposed legislation would, we think, make a number of activities criminal the inclusion of which as crimes might be open to political objection. Acts intended to cause death or grievous bodily harm and wilful destruction of or damage to public property are the normal incidents of any revolt or rising even before it has reached the stage of civil war. Under our present law, even after the revolt has reached a stage at which the Foreign Enlistment Act applies, there are acts which can lawfully be done, in co-operation with and by way of assistance to the insurgents. In the period before its provisions become applicable assistance to and indeed an express engagement with the insurgents is, as we understand it, lawful. When its provisions come into play it prohibits certain acts, such as an express engagement, fitting out an expedition, &c., but still leaves a measure of co-operation and assistance perfectly lawful. Speaking as lawyers, recent events have shown that the Foreign Enlistment Act is not a clearly drafted enactment and there is a good deal to be said, apart from the present question, for considering a new Act to deal more clearly with the matter.

It is the drawing of the line between acts which everyone would condemn and political movements attended by violence which may or may not finally result in a civil war which is, we think, the real difficulty in framing legislation on the lines of the convention.

5. Article 2 (4) requires careful consideration. It would make it a criminal offence to supply or manufacture in order to supply arms, &c., to any insurgents prior to the existence of a state of civil war. If such a provision was introduced at the present time one obvious comment would be that, as Germany and Italy would presumably not put themselves under any such restriction, the effect would be to favour Fascist insurgents, while any rising organised against Fascist dictators would find themselves unable to get the arms which they required. It is worth considering the general effects of the convention in the event of a rising being organised in Italy or Germany.

We would also like to comment on the actual words used in article 3. We think there might be difficulty about "incitement." The effect of including this might make statements in speeches in support of a rising in a foreign country, which are at present lawful, criminal offences. The words in article 3 (e) are also very wide words, and it might be considered whether in any event legislation should not be restricted substantially to article 3 (1) (a).

We have nothing to add to the comments by the Director of Public Prosecutions on articles 7, 12 and 13.

6. We have emphasised the difficulties which we think would arise in drafting and carrying through the legislation which would be necessary substantially to carry out the convention in order that these difficulties should get full consideration at this stage. We may have exaggerated them, as it is difficult to forecast the reaction of opinion in the House of Commons on a proposal of this kind. We have, as everybody must have, sympathy with the general aim of the convention, and if it were possible to find a means of defining isolated criminal acts and drawing a distinction between them and the acts of violence which arise out of embryonic and actual civil war many of the difficulties would disappear. We also cannot help thinking that the attitude of the House of Commons would be considerably influenced by the extent to which other European countries were going to ratify and enforce the terms of the convention. As is pointed out by the Director of Public Prosecutions, our present law covers a good deal of the area covered by the convention and we have a strict system of control over the export of arms. To go further is, we think, bound to bring us up against the difficulties which we have tried to point out, namely, the form in which the exclusion of civil war is to be effected and the further question whether the principle which has led the committee to propose the exclusion of civil war might not be felt here to be equally applicable to political risings before they could be said to have reached that stage.

D. B. SOMERVELL.
T. J. O'CONNOR.

Law Officers' Department, July 14, 1937.

GENERAL

3

[W 12328/720/98/1937]

Annex.

Draft Convention for the Prevention and Punishment of Terrorism.

(Translation.)

ARTICLE 1.

ACTS of terrorism within the meaning of the present convention are criminal acts which are directed against a State and which are intended or calculated to create a state of terror among individuals, groups of persons or the general public.

2. The object of the present convention is to ensure co-operation between the high contracting parties for the prevention and punishment of such acts when they are of an international character, it being the duty of States to refrain from any act designed to encourage terrorist activities directed against the safety and public order of another State.

ARTICLE 2.

Each of the high contracting parties should make the following acts committed on its own territory criminal offences if they are directed against another high contracting party and if they constitute acts of terrorism within the meaning of article 1:—

- (1) Any act intended to cause death or grievous bodily harm or loss of liberty to—
 - (a) Heads of States, persons exercising the prerogatives of the head of the State, their hereditary or designated successors;
 - (b) The wives or husbands of the above-mentioned persons;
 - (c) Persons charged with public functions or holding public positions when the act is directed against them in their public capacity.
- (2) Wilful destruction of or damage to public property or property devoted to a public purpose belonging to or subject to the authority of another high contracting party.
- (3) Any wilful act calculated to endanger the lives of members of the public.
- (4) The manufacture, obtaining, or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offence falling within the present article.
- (5) Any attempt to commit any of the acts falling within the present article.

ARTICLE 3.

1. Each of the high contracting parties should also make the following actions criminal offences when they are committed on his own territory with a view to acts of terrorism directed against another high contracting party, whatever the country in which the acts of terrorism are to be carried into execution:—

- (a) Any agreement to commit any of the acts mentioned in article 2 (Nos. (1) to (4));
- (b) Any direct public incitement, whether successful or not;
- (c) Any successful private incitement;
- (d) Any wilful complicity;
- (e) Any help given towards the commission of such an act.

2. Acts of participation in the offences falling within the present convention shall be treated as separate offences when the persons committing them can only be brought to trial in different countries.

ARTICLE 4.

Without prejudice to the characterisation of offences and to other special provisions of national law relating to the persons and property mentioned in article 2, no high contracting party shall make any distinction as regards the protection afforded by criminal law between acts, falling under articles 2 and 3, directed against the party itself and similar acts directed against another high contracting party.

[17381]

c* 2

GENERAL

ARTICLE 5.

1. In countries where the principle of the international recognition of previous convictions is accepted, foreign convictions for any of the acts mentioned in articles 2 and 3 will, within the conditions prescribed by the domestic law, be taken into account for the purpose of establishing habitual criminality.

2. Such convictions will, further, in the case of high contracting parties whose law recognises foreign convictions, be taken into account, with or without special proceedings, for the purpose of imposing, in the manner provided by that legislation, incapacities, disqualifications or interdictions whether in the sphere of public or of private law.

ARTICLE 6.

In so far as *parties civiles* are admitted under the domestic law, foreign *parties civiles*, including, in proper cases, a high contracting party, should be entitled to all rights allowed to nationals by the law of the country in which the case is tried.

ARTICLE 7.

1. Without prejudice to the provisions of paragraph 4 below, the acts set out in articles 2 and 3 shall be deemed to be included as extradition crimes in any extradition treaty which has been, or may hereafter be, concluded between any of the high contracting parties.

2. The high contracting parties who do not make extradition conditional on the existence of a treaty shall henceforward, without prejudice to the provisions of paragraph 4 below and subject to reciprocity, recognise the acts set out in articles 2 and 3 as extradition crimes as between themselves.

3. For the purposes of the present article, any act specified in articles 2 and 3, if committed in the territory of the high contracting party against whom it is directed, shall also be deemed to be an extradition crime.

4. The obligation to grant extradition under the present article shall be subject to any limitations recognised by the law of the country to which application is made.

ARTICLE 8.

1. When the principle of the extradition of nationals is not recognised by a high contracting party, nationals who have returned to the territory of their own country after the commission abroad of an offence mentioned in articles 2 or 3 should be prosecuted and punished in the same manner as if the offence had been committed in their own country, even in a case where the offender has acquired his nationality after the commission of the offence.

2. The provisions of the present article shall not apply if, in similar circumstances, the extradition of a foreigner cannot be granted.

ARTICLE 9.

Foreigners who are on the territory of a high contracting party and who have committed abroad any of the acts set out in articles 2 and 3 should be prosecuted and punished as though the act had been committed in the territory of that high contracting party, if the following conditions are fulfilled, namely, that—

- (a) Extradition has been demanded and could not be granted for a reason not connected with the act itself;
- (b) The law of the country of refuge recognises the jurisdiction of its own courts in respect of offences committed abroad by foreigners;
- (c) The foreigner is a national of a country which recognises the jurisdiction of its own courts in respect of offences committed abroad by foreigners.

ARTICLE 10.

The provisions of articles 8 and 9 shall also apply to acts referred to in articles 2 and 3 which have been committed in the territory of the high contracting party against which they were directed.

As regards the application of articles 8 and 9, the high contracting parties do not undertake to pass a sentence exceeding the maximum sentence prescribed by the law of the country where the offence was committed.

ARTICLE 11.

Each high contracting party should take on his own territory appropriate measures to prevent any activity contrary to the purpose of the present convention.

GENERAL

ARTICLE 12.

1. The carrying, possession and distribution of firearms, other than smooth-bore sporting-guns, and of ammunition and explosives should be subjected to regulation, and it should be a punishable offence to transfer, sell or distribute them to any person who does not hold such licence or make such declaration as may be required by the domestic legislation concerning the possession and carrying of such articles.

2. Manufacturers of firearms, other than smooth-bore sporting-guns, should be required to mark each arm with a serial number and factory mark permitting it to be identified, and to keep a register of the names and addresses of purchasers.

ARTICLE 13.

1. The following acts should be punishable:—

- (a) Any fraudulent manufacture or alteration of passports or other equivalent documents;
- (b) Bringing into the country, obtaining or being in possession of such forged or falsified documents knowing them to be forged or falsified;
- (c) Obtaining such documents by means of false declarations or documents;
- (d) Using any such documents which are forged or falsified or were made out for a person other than the bearer.

2. The wilful issue of passports, other equivalent documents, or visas, by competent officials to persons known not to have the right thereto under the laws or regulations applicable, with the object of assisting any activity contrary to the purpose of the present convention, should also be punishable.

3. The provisions of the present article shall apply irrespective of the national or foreign character of the document.

ARTICLE 14.

1. The results of the investigation of offences provided for in articles 2, 3 and 13 should in each country and within the framework of the law of that country be centralised in an appropriate service.

2. Such service should be in close contact—

- (a) With the police authorities of the country;
- (b) With the corresponding services in other countries.

3. It should furthermore bring together all information calculated to facilitate the prevention and punishment of the acts mentioned in articles 2, 3 and 13 and should, as far as possible, keep in close contact with the judicial authorities of the country.

ARTICLE 15.

Each service, so far as it considers it desirable to do so, should notify to the services of the other countries, giving all necessary particulars—

- (a) Any act mentioned in articles 2 and 3, even if it has not been carried into effect, such notification to be accompanied by descriptions, copies and photographs;
- (b) Any search for, any prosecution, arrest, conviction or expulsion of persons guilty of acts dealt with in the present convention, the movements of such persons and any pertinent information with regard to them, as well as their description, finger-prints and photographs;
- (c) Discovery of documents, arms, appliances or other objects connected with acts mentioned in articles 2, 3, 12 and 13.

ARTICLE 16.

1. The high contracting parties shall be bound to execute letters of request in accordance with their domestic law and practice.

2. The transmission of letters of request relating to offences referred to in the present convention should be effected—

- (a) By direct communication between the judicial authorities; or
- (b) By direct correspondence between the Ministers of Justice of the two countries, or by direct communication from the authority of the country making the request to the Minister of Justice of the country to which the request is made; or



GENERAL

(c) Through the diplomatic or consular representative of the country making the request in the country to which the request is made; this representative shall send the letters of request direct to the competent judicial authority, or to the authority indicated by the Government of the country to which the request is made, and shall receive direct from such authority the papers constituting the execution of the letters of request.

3. In cases (a) and (c), a copy of the letters of request shall always be sent simultaneously to the superior authority of the country to which application is made.

4. Unless otherwise agreed, the letters of request shall be drawn up in the language of the authority making the request, provided always that the country to which the request is made may require a translation in its own language, certified correct by the authority making the request.

5. Each high contracting party shall notify to each of the other high contracting parties the method or methods of transmission mentioned above which he will recognise for the letters of request of the latter high contracting party.

6. Until such notification is made by a high contracting party, his existing procedure in regard to letters of request shall remain in force.

7. Execution of letters of request shall not give rise to a claim for reimbursement of charges or expenses of any nature whatever other than expenses of experts.

8. Nothing in the present article shall be construed as an undertaking on the part of the high contracting parties to adopt in criminal matters any form or methods of proof contrary to their laws.

ARTICLE 17.

The participation of a high contracting party in the present convention shall not be interpreted as affecting that party's attitude on the general question of the limits of criminal jurisdiction as a question of international law.

ARTICLE 18.

The present convention does not affect the principle that, subject to the acts in question not being allowed to escape punishment, the characterisation of the various acts dealt with in the present convention and the determination of the applicable penalties and of the methods of prosecution and trial depend in each country upon the general rules of the domestic law. It, further, does not impair the right of the high contracting parties to make such rules as they consider proper regarding the effect of mitigating circumstances, the right of pardon and the right of amnesty.

ARTICLE 19.

If any dispute should arise between the high contracting parties relating to the interpretation or application of the present convention, and if such dispute has not been satisfactorily solved by diplomatic means, it shall be settled in conformity with the provisions in force between the parties concerning the settlement of international disputes.

If such provisions should not exist between the parties to the dispute, the parties shall refer the dispute to an arbitral or judicial procedure. If no agreement is reached on the choice of another court, the parties shall refer the dispute to the Permanent Court of International Justice, if they are all parties to the protocol of the 16th December, 1920, relating to the statute of that court; and if they are not all parties to that protocol, they shall refer the dispute to a court of arbitration constituted in accordance with the Convention of The Hague of the 18th October, 1907, for the Pacific Settlement of International Disputes.

ARTICLE 20.

1. The present convention, of which the French and English texts shall be both authentic, shall bear to-day's date. Until . . . it shall be open for signature on behalf of any member of the League of Nations and on behalf of any non-member State represented at the conference which drew up the present convention or to which a copy thereof is communicated for this purpose by the Council of the League of Nations.

GENERAL

2. The present convention shall be ratified. The instruments of ratification shall be transmitted to the Secretary-General of the League of Nations to be deposited in the archives of the League; the Secretary-General shall notify their deposit to all the members of the League and to the non-member States mentioned in the preceding paragraph.

ARTICLE 21.

1. After the . . . , the present convention shall be open to accession by any member of the League of Nations and any of the non-member States referred to in article 20 on whose behalf the convention has not been signed.

2. The instruments of accession shall be transmitted to the Secretary-General of the League of Nations to be deposited in the archives of the League; the Secretary-General shall notify their receipt to all the members of the League and to the non-member States referred to in article 20.

ARTICLE 22.

Any member of the League of Nations or non-member State which is prepared to ratify the convention under the second paragraph of article 20, or to accede to the convention under article 21, but desires to be allowed to make reservations with regard to the application of the convention, may so inform the Secretary-General of the League of Nations, who shall forthwith communicate such reservations to all the members of the League and non-member States on whose behalf ratifications or accessions have been deposited and enquire whether they have any objection thereto. Should the reservation be formulated within two years from the entry into force of the convention, the same enquiry shall be addressed to members of the League and non-member States whose signature of the convention has not yet been followed by ratification. If, within six months from the date of the Secretary-General's communication, no objection to the reservation has been made, it shall be treated as accepted by the high contracting parties.

ARTICLE 23.

Ratification of or accession to the present convention by any high contracting party implies an assurance by him that his legislation and his administrative organisation are in conformity with the rules contained in the convention.

ARTICLE 24.

1. Any high contracting party may declare, at the time of signature, ratification or accession, that, in accepting the present convention, he is not assuming any obligation in respect of all or any of his colonies, protectorates, overseas territories, territories under his suzerainty or territories in respect of which a mandate has been entrusted to him; the present convention shall, in that case, not be applicable to the territories named in such declaration.

2. Any high contracting party may subsequently notify the Secretary-General of the League of Nations that he desires the present convention to apply to all or any of the territories in respect of which the declaration provided for in the preceding paragraph has been made. The convention shall, in that case, apply to all the territories named in such notification ninety days after the receipt thereof by the Secretary-General of the League of Nations.

3. Any high contracting party may at any time declare that he desires the present convention to cease to apply to all or any of his colonies, protectorates, overseas territories, territories under his suzerainty or territories in respect of which a mandate has been entrusted to him. The convention shall, in that case, cease to apply to the territories named in such declaration one year after the receipt of this declaration by the Secretary-General of the League of Nations.

4. The Secretary-General of the League of Nations shall communicate to all the members of the League of Nations and to the non-member States referred to in article 20 the declarations and notifications received in virtue of the present article.



1937

8

GENERAL

ARTICLE 25.

The present convention shall, in accordance with the provisions of article 18 of the Covenant, be registered by the Secretary-General of the League of Nations on the ninetieth day after the receipt by the Secretary-General of the . . . ratification or accession.

The convention shall come into force on the date of such registration.

ARTICLE 26.

Each ratification or accession taking place after the deposit of the . . . instrument of ratification or accession shall take effect on the ninetieth day following the date on which the instrument of ratification or accession is received by the Secretary-General of the League of Nations.

ARTICLE 27.

A request for the revision of the present convention may be made at any time by any high contracting party by means of a notification to the Secretary-General of the League of Nations. Such notification shall be communicated by the Secretary-General to all the other high contracting parties and, if it is supported by at least a third of those parties, the high contracting parties undertake to hold a conference for the revision of the convention.

ARTICLE 28.

The present convention may be denounced on behalf of any high contracting party by a notification in writing addressed to the Secretary-General of the League of Nations, who shall inform all the members of the League and the non-member States referred to in article 20. Such denunciation shall take effect one year after the date of its receipt by the Secretary-General of the League of Nations, and shall be operative only in respect of the high contracting party on whose behalf it was made.

In faith whereof the Plenipotentiaries have signed the present convention.

Done at Geneva, . . . in a single copy, which will be deposited in the archives of the Secretariat of the League of Nations; a certified true copy thereof shall be transmitted to all the members of the League of Nations and all the non-member States referred to in article 20.

SPAIN

[W 7396/7/41/1937]

No. 1.

[April 14, 1937]

Lord Plymouth to the Attorney-General.

My dear Attorney-General,

Foreign Office, April 6, 1937.

Application
to civil war
of Foreign
Enlistment
Act:
Section 8
(building,
equipping,
com-
missioning
or des-
patching
of vessels
for military
or naval
service of
either
side).

YOU will remember that Lord Cranborne wrote to you on the 5th September* last for your views on the question whether or not the Foreign Enlistment Act, 1870 (of which a copy is enclosed herewith, Paper A) could be regarded as being applicable to hostilities such as those of the civil war in Spain. The point which he then put to you had especial reference to those sections of the Act which deal with the enlistment of individuals. I now want to put to you a point regarding section 8 of the Act, which forbids the building, equipping, commissioning or despatching of any vessel for the military or naval service of either side; and I hope you will allow me to put it in the same rather informal way that he did his last enquiry.

2. You will recall that on the 11th January last, acting on the strength of your reply of the 14th September to his letter of the 5th September, we issued a public warning that the Act was applicable to the state of affairs in Spain. In so doing we proceeded on the assumption that the Act is *ipso facto* applicable to any hostilities covered by its language, and that its application on any particular occasion is not dependent on the prior issue of a proclamation of neutrality by His Majesty. We have been advised in the past, and we think it is generally accepted, that this assumption is correct as a general proposition governing the application of the Act, but there is some doubt as to how far it holds good with

* See Confidential 15053. No. 2.

SPAIN

9

reference to section 8. In this connexion, may I refer you to paragraph 2 (2) of the letter from the Foreign Office to the Home Office of the 26th August last, of which a copy was enclosed as Paper 2 in Lord Cranborne's previous enquiry?

3. The doubt regarding section 8 arises from the reference to a proclamation of neutrality contained in sub-section (1) of the proviso to the section. The proviso reads:—

" . . . Provided that a person building, causing to be built or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following; (that is to say):—

" (1) if forthwith upon a proclamation of neutrality being issued by Her Majesty he gives notice to the Secretary of State that he is so building, causing to be built or equipping such ship and furnishes such particulars of the contract and of any matters relating thereto, or done or being done under the contract as may be required by the Secretary of State:

" (2) if he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe, for ensuring that such ship shall not be despatched, delivered or removed without the licence of Her Majesty until the termination of such war as aforesaid."

4. The above passage is so worded as apparently to assume that a proclamation of neutrality will, in fact, have been issued, and raises a doubt whether, in the absence of such a proclamation, section 8 is applicable at all. It may be argued that, until the proclamation is issued, the contractor is not in a position to give the required notice, and that, if the section is applied without a proclamation having been issued, the effect is to deprive the contractor of the protection afforded by the proviso.

5. The arguments against this view are: First, that it is very difficult to believe that the framers of the Act, had they really intended to make the application of section 8 as a whole dependent on the prior issue of a proclamation of neutrality, would have chosen to do so, not expressly, but by implication, *i.e.*, by the indirect method of including a reference to a proclamation in the proviso. And if it is accepted that the application of the rest of the Act is not dependent on any proclamation, it becomes all the more unlikely that such a method would have been employed for achieving that object in the case of section 8.

6. Secondly, it seems possible to interpret the proviso in such a way as not to lead to the result indicated at the end of paragraph 4 above. The use of the word "forthwith" in sub-section (1) of the proviso rather suggests that the real object of the reference to a proclamation of neutrality in that sub-section is to ensure that notice shall be given to the Secretary of State so soon as the contractor becomes aware that the Act is operative. It would seem possible to read the reference to a proclamation not as necessarily governing the operation of the exception which the proviso makes in favour of existing contracts, but as meaning no more than that if a proclamation of neutrality has, in fact, been issued, then the exception will only operate if the required notification is forthwith given to the Secretary of State. On this view, the absence of a proclamation would not cause the exception to become inoperative. It would remain operative, and, if dependent upon anything, would be dependent only upon the contractor giving such security, or taking or permitting to be taken "such other measures, if any, as the Secretary of State may prescribe" under sub-section (2) of the proviso. In this connexion it may be noticed, as the following paragraphs will show, that the Secretary of State has independent means of knowledge regarding ship-building, &c., and that the absence of a notice under sub-section (1) would not necessarily prevent him from being able to take steps under sub-section (2).

7. We have not been able to find any decided case on this question, but the events of 1884 in connexion with the hostilities then in existence between France and China furnish material which may be of some use. There had on this occasion been no declaration of war, no notification by either party to the other Powers that a state of war existed, and no proclamation of neutrality by any of the other Powers. At a certain stage the French Government notified the Powers that they intended to blockade part of the coast of Formosa (then under Chinese rule), but that they did not, for the time being, propose to exercise any of the

[17381]

D*



1937

10

SPAIN

other rights of a belligerent at sea. In the course of subsequent correspondence with the French Government, Her Majesty's Government stated that, although there had been no declaration of war, they were ready to regard the situation as in fact constituting a war, and on this basis to recognise the validity of the blockade as against British shipping. On any other basis than the existence of a war, the blockade would have been a "pacific blockade" and illegal in its application to vessels other than Chinese vessels. Her Majesty's Government added, moreover, that for their own part, in order not to exacerbate the situation, they would not issue any proclamation of neutrality, but "would confine themselves to the strict enforcement of the Foreign Enlistment Act."

8. In pursuance of this policy, the Customs were instructed to notify to the Foreign Office any cases that came to their notice of shipbuilding in this country for either France or China, and in due course a case was notified of some steam cutters being built for the order of the French Government. The Foreign Office, who clearly assumed that (there being what was regarded as a war) section 8 of the Foreign Enlistment Act was applicable, although no proclamation of neutrality had been issued, wrote to the Law Officers of the Crown on the 9th December, 1884 (copy enclosed herewith, Paper B), asking whether, in their opinion, it would be desirable for an official enquiry to be addressed to the French Government as to the purposes for which the cutters were intended, this suggestion being derived from an opinion of the Law Officers of the 30th March, 1881 (copy enclosed, Paper C), to the effect that in cases of suspected illegal shipbuilding Her Majesty's Government should find out from the foreign belligerent Power concerned whether the vessels in question were intended for its military or naval service or not.

9. In their reply of the 11th December, 1884 (copy enclosed, Paper D), the Law Officers, noting that there had been no proclamation of neutrality, but that the Foreign Enlistment Act was to be strictly enforced, stated that, in their view, an enquiry should be addressed to the French Government as suggested. This was done, but the eventual outcome of the matter does not appear from our records.

10. It seems clear from the above that the Law Officers as well as the Foreign Office assumed that section 8 was operative, notwithstanding the absence of a proclamation of neutrality; and it seems reasonable to infer that such was, in fact, their view, although the question was not in terms put to, or answered by, them.

11. In spite of this precedent, if such it can be called, and of the arguments set forth in paragraphs 5 and 6 above, the point remains a doubtful one, though, in view of the fact that a proclamation of neutrality will almost certainly not be issued in the present (Spanish) case, we should be very reluctant to have to conclude that section 8 is inoperative without one.

12. We have no knowledge at present of any undertakings which would contravene section 8, if applicable, although I understand that a firm who specialise in the construction of fast motor boats have recently received enquiries from the Spanish Government which, if they materialise, may make an immediate decision necessary. We therefore feel that we ought to know what the legal position is, and I should be most grateful for your views as soon as you can conveniently let me have them.

Yours, &c.
PLYMOUTH.

List of Papers.

- (A) Foreign Enlistment Act, 1870.
(B) Foreign Office letter to the Law Officers, 9th December, 1884. (See W 6340/7/41/1937.)

Enclosures—

- (i) Treasury letter of 5th December, 1884.
(ii) Correspondence with M. Waddington (see Confidential 5045, Nos. 558, 579, 585, 616, 631, 657, 718 and 739).
(iii) Foreign Office to Treasury, 27th November, 1884.
(iv) Draft letter to M. Waddington (see annex to Paper D).
(C) Law Officers' Report of 30th March, 1881. (See Confidential 4637, No. 46.)
(D) Law Officers' Report of 11th December, 1884. (See Confidential 5121, No. 35.)

SPAIN

11

Report.

Attorney-General to Lord Plymouth.

Dear Ivor,

The application of the Foreign Enlistment Act to any civil war presents certain difficulties both of construction and of proof. Its application to the civil war in Spain presents special difficulties. I agree with the view stated in paragraph 2 of your letter that, as a matter of law, a proclamation of neutrality is not a condition precedent to the application of the Act generally. I, however, take the view that, in applying it to a civil war, some warning by the Government, which would not, of course, necessarily bind the courts, that insurgents are in the Government's opinion a foreign State within the definition clause is clearly called for as a matter of policy and fairness. Such a warning has now been given with particular reference to sections 4 and 5.

There are those who disagree with the opinion I gave in my letter to Lord Cranborne, namely, that, assuming a body of insurgents satisfied the definition clause of a foreign State, they could be said to be "at peace with" His Majesty, although their belligerent rights had not been recognised. I adhere to my opinion, although there is scope for legal argument.

On section 8 there is perhaps even more scope for legal argument, but I think that the reference to a proclamation of neutrality in the proviso does not make such a proclamation a condition precedent to the commission of the offences specified in the earlier parts of the section. It is to be noted that under those sections it is necessary to prove "intent" or "knowledge" or "reasonable cause to believe." The fact that an event has not happened which would make the proviso operative does not, in my view, prevent the section coming into operation.

If there had to be a prosecution under this section, I would not like to state dogmatically that a court might not take a different view. There are also difficulties which might arise as to proof of the necessary facts to bring the insurgents within the definition of a foreign State. The Government are, however, in my view, justified in proceeding on the basis that the section is operative with regard to events in Spain. If a case had to be taken to the courts, I think that some regard should be paid by the courts to the fact that, although there has been no proclamation of neutrality, the Non-Intervention Agreement and the legislation based on it clearly recognise the existence of a state of civil war.

I have had a word with the Lord Advocate on this matter, as Scotland may also be affected, and he agrees generally with the view expressed above.

D. B. SOMERVELL.

Law Officers' Department,
April 14, 1937.

SPAIN

[W 8314/G/1937]

No. 2.

[April 27, 1937]

Foreign Office to the Law Officers of the Crown.

(Secret.)
Gentlemen,

Foreign Office, April 15, 1937.

I AM directed by Mr. Secretary Eden to refer to your letter of the 20th October, 1936, on the subject of the proposed reclamation of land from the sea in the vicinity of Gibraltar for the purpose of a military aerodrome.

2. As a result of the opinion which you expressed in that letter regarding the rights of His Majesty's Government over the territory in question, the proposal to reclaim land for the purpose of the aerodrome has now been temporarily abandoned. In view, however, of the urgent importance of providing some form of landing ground for military aircraft at Gibraltar, the Air Ministry have prepared an alternative proposal for the perfection of an emergency landing ground on the area of the existing British Neutral Ground. This proposal involves the construction of an east-west runway on the area shown

Proposed perfection of an emergency landing ground for British military aircraft on the British Neutral Ground at Gibraltar.



1937

12

SPAIN

in the sketch which forms the enclosure in this letter. The British Neutral Ground itself has already been prepared in such a way that it can serve for an emergency landing ground for fleet air arm aircraft, but, in order for the landing area to be suitable for use by modern land-based aircraft, a runway of at least 1,100 yards in length is necessary, and it is consequently necessary to include in the strip the entire width of the isthmus. The western fringe of this area at present contains a number of temporary and some permanent obstructions, including a number of army and civil buildings. These obstructions will have to be removed, and it will be necessary to rebuild certain structures for army accommodation in the area marked on the map north of the landing strip and immediately east of the main road to Spain.

3. It may be argued, in connexion with the present scheme, that the mere act of clearing away obstructions from a strip of the British Neutral Ground could not be regarded as a valid subject of complaint by the Spanish Government. In view, moreover, of the fact that aircraft have, as explained in Mr. Roberts's letter† of the 18th September last, landed and taken off from this zone in the past without protest from the Spanish Government, it may also be argued that no complaint could be based on the fact that a landing ground of a more or less permanent nature is now to be established. An objection to the proposed scheme might be raised on account of the proposed rebuilding of certain buildings for accommodation on the northern boundary of the British Neutral Zone. Although it would be possible to provide this accommodation without constructing any permanent buildings on this area, a greatly improved lay-out could be obtained if it were possible to build permanent two-storey buildings. In view, however, of the fact that permanent structures have been built in the zone in the past without serious objection by the Spanish authorities, it would be possible to argue that their construction does not constitute putting the zone to any "new work or fresh use" for which, as suggested in your letter, the Spanish Government might require to give their consent.

4. The advantage of the present scheme over the original scheme for reclaiming land to the west of the area is, of course, that it would be less likely to attract attention, and would not appear to be such a radical alteration in the territorial position at Gibraltar. On the other hand, it may be said that the changes made show an intention to use the zone to a greater extent for the purposes of aircraft landing and taking off than the occasional landings of military aircraft which have hitherto taken place. Mr. Eden would be glad to receive your views on *this proposal*.

5. There is, however, another aspect of the question which it has been necessary for His Majesty's Government to examine. The Air Ministry are considering the possibility of facilitating the use of the proposed landing strip by aircraft in cross winds by the erection of a windbreak screen. An experimental section of such a screen is now under construction and, subject to satisfactory results being obtained, the Air Ministry would propose to seek authority to erect a complete screen down the centre line of the landing strip. This screen would not be solid, but would be an iron or steel framework covered by slats, approximately 1,100 yards long, 50 feet high and 12 feet broad, but it is clear that this construction would attract a great deal of attention.

6. I am, therefore, to request your opinion whether, in view of all the circumstances, His Majesty's Government could successfully resist before an international court a claim by the Spanish Government that the alternative scheme is in excess of British rights or a violation of Spanish rights in the British Neutral Zone, (a) on the basis that no windbreak screen is erected, (b) on the basis that a windbreak screen is erected. Mr. Eden would also be grateful for any general observations which you may be good enough to offer.

7. It is of great importance that work on the landing ground at Gibraltar should be started at the earliest possible date, and I am accordingly requested to express the hope that you will be so good as to regard this matter as one of urgency.

I am, &c.

D. F. HOWARD

SPAIN

13

Enclosure.⁽¹⁾*Plan of proposed Landing Strip (Map Section, Air Ministry, No. 1541).**Report.*

The present proposal differs from that which we were previously asked to consider in that (1) no land is to be reclaimed; (2) the works now under consideration are described as the perfection of an emergency landing ground, and not as the establishment of an air base.

We summarised in our previous opinion the arguments which would, in our view, be available to each party on the assumption that the then proposed air base were established on existing ground without the addition of reclaimed land. Our summary was as follows:—

"Having considered the documents before us, we think that each side might put its case in two ways.

"The Spanish Government might claim, firstly, that the land, although in British occupation for ordinary administrative purposes, remained neutral, and that, although they had conceded or acquiesced in its use for certain defensive purposes connected with the fortress in the past, they had a right to give or withhold their consent for any new work or fresh use.

"Alternatively, if they must be taken to have conceded its use for any defensive purpose immediately connected with the fortress, the present proposal, they would say, went beyond such a concession.

"The British Government would claim, firstly, that the area had passed under full British sovereignty. They would point to the *de facto* position and rely particularly on events during and since the war.

"Alternatively, they might put forward a claim that the air base was primarily for the defence of the fortress as a Mediterranean fortress, and could again rely under this head on the past facts as to aeroplanes using the land and the letter already referred to."

We gave reasons for thinking that the reclamation proposal would considerably reinforce the Spanish Government case. It is clear that the limitations now proposed strengthen very much the case of the British Government and weaken that of the Spanish Government should they raise objections. It is not possible to say that the Spanish Government would have no legal basis for an objection. They could claim that this was a "new work or fresh use," and that their consent, express or tacit, was therefore required. On the other hand, the British Government could rely with force on the letter of the 25th August, 1915, to which we referred. They could further say that they were merely adapting the ground for a use already acquiesced in, a use which in modern conditions was necessary for the needs of the fortress.

Prediction in these matters is difficult, but we think that an objection to the present proposal would probably be successfully resisted before an international court.

In our view, the main issue involved would be the question whether the conversion of the site from an emergency landing ground for fleet air arm aircraft into a landing area suitable for use by modern land-based aircraft was "a new work or fresh use." We do not think the windbreak screen involves any new point of principle, but difficulties might well be avoided if the erection of the screen could be, at any rate, postponed. It is obviously desirable that there should not be an international case on the subject.

If this scheme is proceeded with, we do not think any difficulties to be encountered would be appreciably increased by the proposed erection of permanent buildings in place of the temporary and permanent buildings which are to be removed.

D. B. SOMERVELL.

T. J. O'CONNOR.

*Law Officers' Department,
April (?) 27, 1937.*

(1) Not reproduced.



1938

THIS DOCUMENT IS THE PROPERTY OF HIS BRITANNIC MAJESTY'S GOVERNMENT

Printed for the use of the Foreign Office

CONFIDENTIAL

(15717)

REPORTS BY THE
LAW OFFICERS OF THE CROWN, &c.

1938



1938

(ii)

LIST OF REPORTS

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 1^A, &c.

No.		Date.	SUBJECT.	Page.
GENERAL.				
1A	Law Officers... [Treasury Solicitor]	May 30, 1938	Imposition of an Embargo in times of strained relations between Great Britain and a foreign Power	1
1B	Law Officers for Scotland [Treasury Solicitor]	July 19, 1938	Ditto	7
1C	Law Officers... [Treasury Solicitor]	June 2, 1938	Treatment of Civil Aircraft, enemy and neutral, in Time of War	8
1D	Law Officers... [Treasury Solicitor]	Dec. 20, 1938	Issue of Documents to enable the High Court in England to exercise jurisdiction in prize	12

(iii)

ALPHABETICAL INDEX

(NAMES AND SUBJECTS)

1938

The figures refer to the numbers of the pages.

Cases cited are indicated by italics.

ACT—LAW.

A.

Acts of Parliament—
Naval Prize Act, 1864 (Section 3); interpretation, 14–15.
Supreme Court of Judicature Act, 1891 (Section 4); interpretation, 14.
Supreme Court of Judicature (Consolidation) Act, 1925 (Section 23); interpretation, 13.
Aircraft and Aerial Navigation—Treatment of civil and enemy aircraft on outbreak of war; jurisdiction of Prize Court, 8–12.

B.

Beale v. Thompson, 2–3.
Boedes Lust, 2–3.
Buchan v. Officers of State, 7.

C.

Cargoes—Found in enemy and neutral civil aircraft in British territory on outbreak of war, 8–12.
Compensation—Payment in connexion with laying of an embargo, 4.
Courts of Law—Summoning of the Crown: position in Scots Law, 7–8.
High Court of Justice; establishment as a Prize Court, 12–15.

E.

Embargoes—Imposition at time when war is in contemplation: position under British and International Law: kinds of embargo, 1–8.

G.

Grieve v. Edinburgh Corporation, 7.

L.

Law—Prerogative of laying an embargo on shipping: position under Laws of England and Scotland, 6–8.

M.

Manners and Miller v. King's Printer, 7.
Marie Leonhardt, 2.
Monypenny v. The Admiralty, 7.

PRE—ZAM.

P.

Prerogative—see "Law," "War."
Prize and Prize Courts—
Amendment of Prize Act to enable aircraft and cargo captured in aircraft to be dealt with by Prize Courts, 8–12.
Authority for Court of Admiralty, or its successor, the High Court of Justice, to exercise jurisdiction in prize: documents to be issued at outbreak of war, 12–15.
Treatment as prize of ships and cargo detained under embargo before outbreak of war, 4–5.

R.

Reprisal—Embargo, 1, 4.
Rotch v. Edie, 2–3.
Roumanian, 14.

S.

Sands v. Child, 2–3.
Scotland—Public Law and the prerogative, 7–8.
Somerville v. Lord Advocate, 7.
Südmark, 14.

T.

Touteng v. Hubbard, 2.

V.

Vessels—Imposition of an embargo in anticipation of war, 1–8.

W.

War—Royal Prerogative in matter of conduct of war: comparison between Laws of England and Scotland, 7–8.
West Rand Central Gold Mining Company v. Rex, 5.

Z.

Zamora, 13.



1938

Printed for the use of the Foreign Office

CONFIDENTIALREPORTS BY THE
LAW OFFICERS OF THE CROWN, &c.: 1938

GENERAL

[W 7040/G/1938]

No. 1A.

[Treasury Solicitor]

[May 30, 1938]

Case for the Opinion of the Law Officers.

Accompanying this Case is a Memorandum by the Solicitor to the Board of Trade (Annex A).

THE Committee of Imperial Defence having been advised that from the aspect of international law there is no objection to the adoption in future of the old practice of laying before the outbreak of war a general embargo on the merchant shipping of a prospective enemy, desire the advice of the Law Officers on the question whether authority exists under municipal law for such action.

The old practice well appears from the instances of such an embargo given on pp. 20 and 21 of *Rothery's Report on Prize Droits*. The most interesting of these is in some ways the first, namely, the embargo on Russian, Danish and Swedish property imposed in January 1801, as a consequence of the second armed neutrality. As Rothery says, no "war" with these countries followed, but it may be noted that the break up of the hostile alliance was largely facilitated by the attack of the British Fleet (with Nelson Second-in-Command) on Copenhagen and the destruction of the Danish Fleet on the 2nd April, 1801.

Earlier instances of embargoes are to be found, *e.g.*, the order for general reprisals against Spain the 10th July, 1739, followed by declaration of war, the 19th October (*Law and Custom of the Sea*, vol. II, p. 296).

The Common Law, in its early days at least, would seem to have found no difficulty in recognising the validity of these embargoes, made as a necessary measure to ensure the security of the State in view of the evident hostility of a foreign Power. What it did not recognise as valid on the authority of the Sovereign alone without the sanction of an Act of Parliament, was an embargo made in the interests of this country alone, and unrelated to the question of peace or war, such as that of 1767 referred to in the Memorandum of the Solicitor to the Board of Trade laying in a time of internal scarcity an embargo on ships and vessels engaged in the export of grain to foreign parts. Such an embargo infringes the Common Law right of merchants to trade freely in times of peace, and may—as in the instance of 1767—contravene express statutory rights to export, or the general rights conferred on foreign merchants for freedom of trade by Magna Charta and the various Statutes of Staple. The proceedings of 1767 were, however, regularised by the Indemnity Act of 7, Geo. III, chap. 7.

A hostile embargo directed against a foreign Power, that is to say, an embargo which, though not necessarily an act of war on the part of this country, may be so treated by the foreign State, has been imposed as already shown many times by this country and has been considered as lawful. This legality was recognised in the famous speech of Lord Erskine on the 8th March, 1808, attacking the Orders in Council made by way of retaliation to Napoleon's Moscow

Imposition of an Embargo in times of strained relations between Great Britain and a foreign Power.

[19701]

c*2



decrees (see *Parliamentary Debates*, vol. 10, column 961). Erskine referred to the treatise of Lord Hale, *De Portibus Maris*, which (see *Hargrave's Law Tracts*, vol. 1, p. 91) states that at common law in a time of public danger and *pro hac vice* there might be a general inhibition by proclamation restraining any from going beyond the sea without licence, and (p. 96) that prohibitions by proclamations in the time of hostilities or public danger or common scarcity might have a temporary effect and use. But Hale's statement is certainly too wide nowadays in so far as it refers to common scarcity as a justification for an embargo. In the case of *Sands v. Child* (4 *Modern Reports*, 176; 1 *Carthew's Report*, 294; 3 *Levinz*, 351; 1 *Skinner*, 334), it would seem to have been agreed in argument that the King by his prerogative may stop the ship of any subject and shut up the ports of England at his pleasure, especially where the safety of the nation is concerned, namely, in time of imminent danger (see 4 *Modern Reports* at pp. 177 and 179). *Carthew*, p. 297, says: "It was agreed that the King may grant embargoes on ships in time of war or may employ the ships of the subjects in time of danger for the service and defence of the nation."

Having regard to the number of instances in which an embargo in anticipation of war has been imposed by this country, it might reasonably be expected that if there were any doubt as to its legality that doubt would have made its appearance in the Law Courts. The search which has been made has, however, failed to find any reported doubt. On the other hand, the reports of cases in which the existence of an embargo was a material fact, without any such doubt being expressed, suggest that the force and validity of the embargo was beyond question—see, for instance, the judgment of Lord Kenyon, C.J., in *Rotch v. Edie* (6 *Term Reports*), p. 422, where he said: "In determining this case, however, I desire not to say any one word, though perhaps there will not be much difficulty in it when it comes to be considered, relative to the effect of an embargo laid on by this country on a ship insured in a port here." Compare, also the reports of *Beale v. Thompson* (4 *East's Reports*, 546; 3 *Bos and P's Reports*, 405) and *Touteng v. Hubbard* (3 *Bos and P's Reports*, 291). If an embargo was unusual or illegal, the point would surely have been raised in some connexion in such cases.

That the Prize Court recognises the validity of embargoes imposed by this country is sufficiently clear from the leading case of the *Boedes Lust*, where Sir William Scott said (5 *C. Rob.* at p. 245): "This property was seized provisionally . . . If [the conduct of the Government of Holland] had been such as to re-establish the relations of peace, then the seizure . . . would have proved in the event a mere embargo, or temporary sequestration. The property would have been restored, as is usual at the conclusion of embargoes; a process often resorted to in the practice of nations, for various causes not immediately connected with any expectations of hostility. During the period which this embargo lasted, it is said, that the courts might have restored, but I cannot assent to that observation; because on due notice of embargoes this court is bound to enforce them. It would be a high misprision in this court, to break them, by redelivery of possession to the foreign owner of that property, which the Crown has directed to be seized and detained for further orders. The court, acting in pursuance of the general orders of the State, and bound by those general orders, would be guilty of no denial of justice in refusing to decree restitution in such a case, for it has not the power to restore. Its functions are suspended by a binding authority, and if any injustice is done that is an account to be settled between the States."

The latest instances of embargoes levied on foreign ships in time of peace by this country appear to be those of the reprisals taken against the kingdom of the Two Sicilies in 1840 and against Greece in 1850 (*Phillimore's International Law*, vol. 3, at p. 27 *et seq.*, and p. 36 *et seq.*).

Although the tendency in practice of the last century was, so far from imposing embargoes before the outbreak of hostilities, rather to grant days of grace after the outbreak of war within which enemy shipping in our ports might leave, yet there seems no ground for holding that this generous practice has in effect changed the law. (*Cf.* the judgment of Sir Henry Duke in the case of the *Marie Leonhardt*, 1921, P., at p. 10.)

On the position at common law, general reference may perhaps also be made to the following authorities: *Blackstone's Commentaries*, vol. 1, pp. 270, 271; *Beaumes' Lex Mercatoria*, 6th Edition, 1813, by Joseph Chitty, vol. 1, pp. 392, 393;

Jacobs' Law Dictionary, 3rd Edition, 1820, by Sir T. E. Tomlins, vol. 1, Title "Imbargo"; *Chitty on the Prerogative*, pp. 164, 165; the *Encyclopædia of the Laws of England*, vol. 4, p. 477, article by T. Barclay (who states that embargoes in anticipation of war have, in our own times, fallen into disuse); and *Halsbury's Laws of England*, vol. 6, pp. 530 and 548, article by Sir W. Holdsworth and F. H. Lawson. (The article says "in time of war," but it is suggested that this must mean in time of apprehended war, for in war embargo merges in the general right of seizure in prize.) Reference may also be made generally to the article by Sir W. Holdsworth on the power of the Crown to requisition British ships in a national emergency, in 35 *L.Q.R.* at p. 12.

With regard to the question whether compensation is payable in respect of vessels detained under an embargo, it is submitted the imposition of an embargo is the act of the sovereign Power in the exercise of its right to defend the realm and as such, is a lawful act and does not give rise to any legal right to compensation on the part of those whose interests may be adversely affected. No reported case can be found in which any question of a right to compensation from the Crown or its officers by reason of an embargo has been discussed; such reports as exist suggest that, generally speaking, no such compensation was ever received, since if compensation were paid there would have been no need for disputes on the question whether owners, charterers or underwriters were to bear the actual losses, and such disputes seem to have been the main subject matter of the reported cases. If compensation were paid, it would have been paid as an act of grace, and it seems from the report of *Beale v. Thompson* (see 3 *Bos and P's Reports* at pp. 409, 410), that in the case of the Russian embargo of 1801 the Emperor of Russia did declare his intention of compensating all British subjects who had suffered thereunder. Whether or not this intention was fulfilled is left in doubt by the report, and, in any event, no similar intention would seem to have been expressed by the British Government (see the *Collection of Documents relating to the History of the Armed Neutralities of 1780 and 1800*, edited by Piggott and Omond).

The Law Officers will observe that this case is concerned only with the validity of an embargo and of claims for compensation therefor in municipal law. If it is the position that municipal law does not afford the right to compensation it may well be that the impossibility of obtaining redress in the courts would lead to the presentation through diplomatic channels of claims for compensation, which it might be difficult to resist.

As against the validity of such an embargo as is in question the following contentions may be urged:—

(1) The absence of authority on the point may to a large extent be accounted for by the fact that in most cases hostilities broke out within a short period of the imposition of the embargo, of which complaint might have been expected to be made (see *Rothery's Prize Droits*, p. 21). The effect of the subsequent outbreak of war is, it seems, that property detained under an embargo falls to be treated as prize (see *Boedes Lust*, *ubi supra*, at p. 245):—

"Now, with respect to the first of these pleas (*i.e.*, that the property was taken in a state of peace), it must be admitted that alone would not protect them, because the court has, without any exception, condemned all other property of Dutchmen taken before the war—and upon what ground?—That the declaration had a retroactive effect applying to all property previously detained, and rendered it liable to be considered as the property of enemies taken in time of war";

and at p. 246:—

"This was the state of the first seizure. It was at first equivocal, and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo so terminated. That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure. It is declared to be no embargo. It is no longer an equivocal act subject to two interpretations; there is a declaration of the animus by which it was done that it was done *hostili animo*, and is to be considered as an hostile measure *ab initio*."

[19701]

D*



Moreover, matters of prize are within the exclusive jurisdiction of the prize court, and in cases in which was followed, therefore, the complaints which might have been expected to be made of the invalidity of the embargo could not be entertained by the municipal courts of this country (see *Lecaux v. Eden*, 2 *Douglas* 594 at pp. 609 and 611, and *Lindo v. Rodney*, 2 *Douglas* 613 (n)).

(2) If, as is submitted, the *Boedes Lust* is good authority for the proposition that ships and cargo detained under an embargo fall to be dealt with as prize if war subsequently breaks out, this case has only any practical application if war does not break out before the determination of proceedings brought to challenge the validity of the embargo. But such proceedings could only be brought before the municipal courts of this country, and it is difficult to understand how their jurisdiction could be ousted when peace is yet unbroken. Accordingly it is submitted that the dicta in the *Boedes Lust*, that during the period the embargo lasted the court could not restore, "because on due notice of embargoes this court is bound to enforce them. It would be a high misprision in this court to break them by redelivery of possession to the foreign owner of the property" are ill-founded, for, *ex hypothesi*, no jurisdiction in prize could yet have vested in the court.

(3) The passage cited from the judgment in *Rotch v. Edie* (6 *Term Reports*, 413) is concerned only with the liability of an insurer upon a policy covering the risk of arrests of princes, peoples, &c. It may be admitted that an embargo would be such a risk; but there was no expression of view in *Rotch v. Edie* as to the legality of such an arrest, nor was there any occasion for it. The only real authority in favour of the validity of an embargo is the case of *Sands v. Child*, the various reports of which report only the arguments, and do not clearly disclose the views of the judges, and a decision on the point here in question was not in any event material to the issue in that case.

(4) A long period of desuetude has led to the lapse of any right which the Crown may at one time have purported to exercise in this regard, and the alleged right of embargo is contrary to the modern doctrine in regard to acts of state.

Although it is not intended in this case to raise any question of international law, it must be said that there seems no reason whatever to doubt the advice given to the Committee of Imperial Defence, that by that law the procedure by way of embargo is valid (*Hall's International Law*, 8th edition, pp. 435-443; *Moore's International Law Digest*, vol. 7, pp. 120 and 453; and all other standard works on international law).

The Law Officers are accordingly asked to advise:—

- (1) Whether in English law the laying of an embargo is justifiable in time of strained relations with a foreign Power, but before hostilities have broken out, upon the shipping of that Power in British waters.
- (2) If the answer to (1) is in the affirmative, whether compensation is payable in respect of such embargo (a) if hostilities follow the embargo, and (b) if hostilities do not follow.
- (3) Generally.

Opinion.

The laying of an embargo upon the ships of a foreign Power could be justified in English law as an act of mitigated hostility if imposed at a time when war with that Power was in contemplation.

2. So far as English law is concerned, the laying of such an embargo would give no right to compensation, whether hostilities followed or not.

3. We add some general observations on the form of our answer to 1, and also on the position under international law.

Embargo may be of two kinds, civil and belligerent. The latter class may further be sub-divided into (a) embargo by way of reprisal, and (b) embargo in anticipation of war. Most of the references and instances which appear in the case relate either to civil embargoes or embargoes by way of reprisal. We have looked into most of these cases and they none of them, in our view, afford a clear example of the form of embargo dealt with in the case.

But our attention has also been called to the embargo laid on Dutch shipping in 1832 with the object of forcing the Dutch Government to carry out the treaty

of the 15th November, 1831, and evacuate the territories assigned by that treaty to Belgium. This embargo was attacked by Sir Robert Peel and others on the ground that no state of war or of hostility existed between England and Holland. In the debate which followed (*Hansard*, vol. 15, p. 382 and pp. 770-830), it was conceded by the critics of the Government that the embargo would have been justified if imposed "in the *bona fide* contemplation of hostilities with the Power against which it was directed" (col. 778), and was defended by Dr. Lushington, the Attorney-General and the Solicitor-General of the day, on the ground that there was, in fact, a "probability or fair expectancy of war." Dr. Lushington admitted that embargo would be indefensible "without the probability of hostilities" (col. 792).

In our opinion, the discussion of the embargo of 1832 confirms the view that, in certain circumstances, an embargo laid in anticipation of war would be a legitimate exercise of the prerogative right, and that the maxim *nullum tempus occurrit regi* applies to protect it from loss by desuetude. It is justified in principle on the ground that, as the Crown has power to declare war, it has power, if such declaration is in contemplation, to impose a measure of coercion short of war in the hope that this will induce the Power against which it is directed to accede to the Crown's demands without a resort to war.

There remains to be considered the more difficult question of whether such an embargo could be justified in international law. Although we are invited to assume that this is the case, we feel that it must be closely examined, because (a) it would be clearly undesirable to do an act which could be impugned as a breach of international law; (b) consideration of international law would arise if subsequent condemnation of embargoed ships as prize were sought. It might be said that the embargo amounted to *force majeure*, and an argument could be advanced on somewhat similar lines to that used in *The Turul* (B. & C.P.C., vol. 3, p. 356); (c) claims for compensation to be settled by some international arbitration tribunal might result from the embargo.

We feel great doubt whether an anticipatory embargo not by way of reprisal would be to-day recognised by international law.

"There is an essential difference as to certainty and definiteness between municipal law and a system or body of rules in regard to international conduct, which, so far as it exists at all (and its existence is assumed by the phrase 'international law'), rests upon a consensus of civilised States, not expressed in any code or pact, nor possessing in case of dispute any authorised or authoritative interpreter, and incapable, indeed, of proof in the absence of any express international agreement, only by evidence of usage to be obtained from the action of nations in similar cases in the course of their history." (Lord Alverstone in *West Rand Central Gold Mining Company v. Rex* (1905, 2 K.B. 401).) Many of the text-books treat the anticipatory embargo as obsolete (e.g., *Hall*, p. 442; *Moore*, p. 453). Although Great Britain has since the war renounced The Hague Convention, it is not illegitimate to observe that it represented for many years a "consensus of civilised States" as to the desirability of permitting merchant ships belonging to belligerent Powers to depart from enemy ports freely or after days of grace after the commencement of hostilities (article 1). Although the argument is not conclusive, we think articles 1 and 2 of the convention are framed on the basis that anticipatory embargoes are no longer recognised. It is noteworthy that Dr. Pearce Higgins, in an exhaustive examination of the status of enemy ships in port at the outbreak of war (*British Year Book of International Law*, 1922-23, vol. III), does not refer to any case of embargo imposed before the outbreak of the Great War. The Brazilian seizure of German ships lying in her ports in October 1917 before Brazil declared war on Germany is not completely in point, since these ships were sheltering in Brazilian harbours to escape capture, and were not either prior to or at the time of the seizure detained by an embargo.

The general acceptance since, at any rate, the Crimean war of the principle of days of grace seems to us to place difficulties in the way of saying that an anticipatory embargo would not be considered to be a wrongful act by international law.

For these reasons, we think that the assumption which we are invited to make that "from the aspect of international law there is no objection to the adoption in future of the old practice of laying before the outbreak of war a



general embargo on the merchant shipping of a prospective enemy" requires reconsideration.

We would only add that, both internationally and municipally, the terms of any treaty existing with the prospective foreign enemy would be material.

D. B. SOMERVELL.
T. J. O'CONNOR.

Law Officers' Department,
May 30, 1938.

Annex A.

MEMORANDUM BY THE SOLICITOR TO THE BOARD OF TRADE.

(Secret.)

Prerogative of Laying Embargo on Shipping.

His prerogative of War enables The King either by proclamation or by Order in Council to enforce the execution of such laws as are already in being in such manner as he shall judge necessary, and this he may do not only whilst the state of war actually exists but also during a precautionary prelude to war.

Magna Charta, c. xxx, which confers upon foreign merchants and their merchandise the like freedom of trade as was then enjoyed by the English (unless prohibited in peace-time by Act of Parliament)—5 *Bac. Ab* (7th Edn.) 381, 382 and footnotes (b) and (c)—only applies to the persons and goods of the merchants. It ordains certain restrictions upon them on the outbreak of war.

"It seems agreed, from the fundamental principles of our Government, that The King cannot regularly prohibit trade, . . . but that every man may use the sea, and trade with other nations, as freely as he may use the air."

* * * * *

"But, notwithstanding this freedom of trade, yet it seems agreed, that The King may in time of war, and for the public service and safety, lay an embargo on ships, and employ the ships of his subjects on the public service; but this, say my Lord Chief Justice Holt, ought to be upon great emergencies, and for the public benefit, and not for the private interest of any person or society" (5 *Bac. Ab* (7th Edn.), 381, 382).

"His Majesty may during war, or threatened hostilities, and on occasions of emergency, lay an embargo on all shipping; and thereby prevent anyone from leaving the kingdom." (*Chitty on the Prerogative* (1820), p. 48.)

"The King may lay on a general embargo, and may do various acts growing out of sudden emergencies; but in all these cases the emergency is the avowed cause, and the act done is as temporary as the occasion. The King cannot change, by his prerogative of war, either the law of nations, or the law of the land, by general and unlimited regulations." *Ibid.* p. 50 (quoted from Lord Erskine, 10 *Gobbert's Parliamentary Debates*, 961).

In 1767 an Order in Council was made laying an embargo on all ships and vessels laden with wheat or wheat flour to be exported to foreign parts, which order was put into execution. It was then found that the order was contrary to law, and particularly to the 22 Car. II, c. 13 (since repealed by the Statute Law Revision Act, 1863), whereupon an Indemnity Act, 7 Geo. III, c. 7 was passed, of which the following is the preamble:—

"Whereas His Majesty, by an Order in Council bearing date the twenty-sixth day of September last, was pleased to order, that an embargo should be laid upon all ships and vessels laden, or to be laden, in the ports of Great Britain, with wheat or wheat flour to be exported to foreign parts, from the date thereof, until the fourteenth day of November following: which order could not be justified by law, but was so much for the service of the public, and so necessary for the safety and preservation of His Majesty's subjects, that it ought to be justified by Act of Parliament; and all persons advising or acting under, or in obedience to the same, indemnified."

It was no doubt in consequence of this mistake that, when by the 33 Geo. III, c. 67, s. 1, it was made a misdemeanour for any person to hinder, or obstruct, the loading, or unloading, or the sailing, or navigating, or any ship, keel or other vessel, a saving of the prerogative was included. Section 4 is as follows:—

"Provided always . . . that none of the pains, penalties, or punishments hereinbefore inflicted or authorized to be inflicted, shall be deemed, construed, or taken, to extend to any act, deed, matter, or thing whatsoever, committed, done or suffered, in the service or under or by virtue of, the authority of His said Majesty or his successors, anything herein contained to the contrary thereof in any wise notwithstanding."

[W 9839/G/1938]

No. 1B.

[Treasury Solicitor]

[July 19, 1938]

Opinion of the Law Officers of the Crown for Scotland.*

(Secret.)

IN our opinion there is now no difference between the Law of England and the Law of Scotland as to the nature, extent and incidents of the Royal Prerogative in relation to such matters as the conduct of war and warlike operations.

The development of modern Scots Law took place after the Union of the Crowns. With the exception of Sir George Mackenzie, who on this matter would not be treated as authoritative, none of the Scottish institutional writers or other early authorities treats of the Prerogative powers of the Crown as part of the public law of the land; and their refusal to embark on the topic has been judicially noticed (*His Majesty's Advocate v. Lord Dunglass*, 15 Sh. 314, per Lord Medwyn at p. 324). In the first Parliament of Charles II, the Scottish Parliament by the Act of 1661, cap. 13, expressly reasserted and confirmed the Royal Prerogative of the "power of armes and makeing of peace and war"; and the XVIIIth Article of the Treaty of Union inferentially affirmed the actual or prospective assimilation of the laws of the two countries in regard to "public right, policy and civil government," preserving only the difference (which still persists) in private law. In the few cases which have since arisen in which questions of the Prerogative have been raised, free use has been made in the Scottish Courts of English authorities and precedents; see, e.g., *Manners and Miller v. King's Printer*; and *Buchan v. Officers of State*, 1828 3 W. and Sh. 268; *Somerville v. Lord Advocate*, 1893 20 R. 1050; *Grieve v. Edinburgh Corporation*, 1918 S.C. 700; and *Monypenny v. The Admiralty*, 1922 S.C. 706.

Accordingly, while such cases as *Manners and Miller v. King's Printer* (cit. *supra*) indicate that the limits of the Prerogative are not necessarily identical on both sides of the Border, it is clear that such differences as may still exist are few and unimportant, and we see no cause to doubt that, as regards the class of prerogative power in question in this instance, there is no difference in the law, and that the Scottish Courts would determine the matter by reference to the same precedents and doctrines as would be invoked by the Courts of England.

We are accordingly in general agreement with the views expressed by our English colleagues.

There is, however, one practical difficulty to which we think it right to advert. By Scots Law the Crown can be directly convened as a defender in the Court of Session without resort to a Petition of Right. If the Prerogative were exercised in the circumstances figured, to the prejudice of, say, a British charterer of an arrested ship or a British owner of the cargo on such a ship—the aggrieved party could bring a direct action in Scotland challenging the validity of the Order in Council imposing the embargo. In such an action the Court would not only insist on being satisfied as to the theoretical existence of the prerogative power, but might also insist on being satisfied of the "state of emergency" and the "bona fide contemplation of hostilities" which justified the invocation of

* For the case submitted, see No. 1A.

Imposition of an embargo in times of strained relations between Great Britain and a foreign Power.



the Prerogative. In our view there is a risk that, on the latter point, the Court would not rest content with a bare certificate by the appropriate department of government; and, if independent proof were required, the furnishing of the necessary evidence might well be a source of embarrassment in the case of an anticipatory embargo not followed by a state of war. We recognise that the contingencies which we have envisaged are remote, and that it is very difficult to forecast the precise conditions under which the problem might present itself; but we feel bound to indicate the possibility of risk and difficulty which might arise.

T. M. COOPER.
J. S. C. REID.

*Lord Advocate's Chambers,
London, July 19, 1938.*

[W 7258/G/1938]

No. 1c.

[Treasury Solicitor]

[June 2, 1938]

Case for the Opinion of the Law Officers of the Crown.

Treatment
of Civil
Aircraft,
enemy and
neutral,
in Time of
War.

A SUB-COMMITTEE of the Committee of Imperial Defence was recently set up to report upon the political and legal aspects of the questions raised in the Air Ministry paper on the treatment of civil aircraft, enemy and neutral, in war (C.I.D. Paper No. 1231-B) with a view to the submission of the question to the Law Officers of the Crown. That paper, a copy of which is sent herewith (Paper A) advocated broadly that civil aircraft should be assimilated to merchant vessels in regard to liability to capture and that civil aircraft so captured should be subjected to Prize procedure. The Admiralty, however, found itself unable to adopt in their entirety the suggestions made in the Air Ministry paper having regard to the fact that no policy had yet been agreed upon which would enable any effective control to be exercised over air traffic passing over these Islands or over the high seas, and accordingly the Committee confined itself to the following questions which relate solely to civil aircraft found in British territory at the outbreak of war:—

1. The treatment of enemy civil aircraft in British territory on the outbreak of war.
2. The treatment of any cargo found in neutral or enemy civil aircraft in British territory on the outbreak of war.
3. The question of the amendment of the Prize Act to enable aircraft and cargo captured in aircraft to be dealt with by the Prize Courts.

As will be seen from the copy of its report (Paper B), the Sub-Committee suggested certain rules dealing with these questions which the Committee of Imperial Defence have adopted subject to the Law Officers' opinion being obtained upon the question whether they are justifiable in international law (see Paper C), and the Law Officers are requested to advise accordingly.

It will be observed that the recommendations of the Sub-Committee involve the application of the law of prize to subject matter to which it has never hitherto been applied. In the past the subject matter of prize jurisdiction has always been more or less closely connected with the sea. From the judgment in *Lindo v. Rodney* (2 Douglas 613 (n)) it appears that the jurisdiction of the Prize Court has from the earliest times been "to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships and goods that are or shall be taken; and to hear and determine according to the course of the Admiralty and the law of nations." In the Black Book of the Admiralty, vol. I, p. 29, the course of the Admiralty is described as follows:—

"Item.—If any of our ships or vessels do meet upon the sea or in port any other vessels which do make any resistance or defence against those of our ships or vessels then it is lawful for our men to assail the others as

enemies and by force to seize and bring them before the admiral entirely as they have taken them without pillaging or in damaging them and there to receive what the law and custom of the sea wills and requires."

It must be admitted at the outset that no precedent can be found for the proposition that aircraft are subject in international law to those rights and liabilities which, when applied to ships and their cargoes, may be conveniently described as "the law of prize." That there are no rules of international law relating to the rights and duties of belligerents with regard to enemy and neutral commercial air traffic is, of course, due to the fact that air navigation was, even at the end of the Great War, in its infancy. It is submitted, however, that it may be contended with much force that the nature of international law in its relation to shipping is due only incidentally to the fact that shipping travels upon the surface of the sea and that the real basis of its application is that shipping is a means of transport which differs from transport over land in the essential feature that while the former is at every stage of its journey subject to the municipal jurisdiction of the country through which it is passing the latter is, while on the high seas, subject to no local jurisdiction at all. Each ship is, of course, in certain respects subject to the jurisdiction of the country in which it is registered, but the law which governs the relations upon the high seas of one ship with another of different nationality is not and cannot be municipal. To regulate, therefore, relationships which would otherwise be subject to no regulation at all that body of customs and conventions has grown up which is now called international law. That that body has hitherto related only to shipping is no doubt due to the fact that shipping has in the past been the exclusive possessor of the attribute mentioned above, namely, of passing through a "no man's land" of municipal law. But with the development of aircraft has appeared a second mode of transport which shares with shipping the attribute referred to. Unless, therefore, aircraft flying above the high seas are to be subject to no regulation at all, which would be the negation of international law, it is clear that some body or other of customs or conventions will, sooner or later, grow up to control them. The establishment of such a body depends either on previous international agreement (which is non-existent so far as is material to this case) or on practice accepted by consent *ex post facto*. Whether a practice is accepted depends on its reasonableness.

It can hardly be supposed that enemy aircraft, found within the jurisdiction either at the outbreak of war or subsequently, are immune from capture (see in *re Ferdinand ex-Tsar of Bulgaria* [1921] 1 Ch. 107). If, therefore, the treatment of enemy civil aircraft were assimilated to that of enemy private property on land, such aircraft, although liable to forfeiture, would probably merely be sequestered with their cargoes, if enemy, until the end of the war. If enemy aircraft and cargoes were alone involved, it is unlikely that any advantage would arise from treating them as subject to the law of prize. But by reason of the international character of air transport it is inevitable that questions must arise with regard to neutral cargoes carried in enemy aircraft and enemy cargoes carried in neutral aircraft. The Air Convention of 1919, however, recognises the principle that each country has full jurisdiction in the air above its own territory, including its territorial waters. Accordingly, the rights of a belligerent against a neutral aircraft, within the jurisdiction of the belligerent could be regulated by municipal law, but having regard to the fact that questions must inevitably arise with regard to neutral aircraft and their cargoes (whether enemy or neutral) over or on the high seas, which can only be dealt with in accordance with international law, it is submitted that it is reasonable to apply the maritime rule in all cases. From the point of view of the belligerent, whose interests as well as those of the neutral are entitled to consideration, the practice is clearly convenient. Moreover, it is not without its advantages to the neutral. It has the two-fold merit of being comparatively well-established and of providing a procedure for the judicial determination of disputes. If the maritime rule is not adopted it does not follow that neutrals will be allowed by belligerents to carry on trade with the enemy unhampered by any restrictions. The rights of neutrals must in the case of conflict give way to the supreme urgency of military necessity (see the *Stigstad*, 1919, A.C. 279 at p. 288):—

"They (contraband, blockade and unneutral service), may also be treated, as in fact they are, as illustrations of the broad rule that belligerency and



neutrality are states so related to one another that the latter must accept some abatement of the full benefits of peace in order that the former may not be thwarted in war in the assertion and defence of what is the most precious of all the rights of nations, the right to security and independence. The categories of such cases are not closed."

If, therefore, the body of rules, which has already been built up in connexion with maritime transport, is not adapted in one piece to air transport, it must be supposed that another body of rules will, sooner or later, arise, and in so far as they have to deal with the same problems they may be expected to take the same form as those relating to maritime matters. It is submitted that it is in every respect more reasonable to adopt prize procedure at the outset than, refusing to take advantage of the benefits which that procedure provides, laboriously and with much friction to work out an independent body of regulations.

For these reasons it is submitted that the reasonable course, and, therefore, the course justifiable in international law, is to assimilate the treatment of aircraft, enemy and neutral, found within the jurisdiction or upon or over the high seas to that of shipping. This conclusion appears to be supported by the Code of Air Warfare Rules drafted by a Commission of Jurists appointed by the Governments of the British Empire, the United States of America, France, Italy, Japan and the Netherlands, at The Hague in 1923, to which the Law Officers are referred (Paper D). Those rules were never ratified by the participating States, but it is submitted that they are worthy of attention as expressing the views of enlightened opinion. The Law Officers are particularly referred to article 52 of those rules which subjects enemy civil aircraft to capture in all circumstances; to article 53 which subjects neutral civil aircraft to capture in circumstances similar to those in which neutral shipping may be captured, and article 55 which provides that the capture of an aircraft or goods on board an aircraft shall be made the subject of prize proceedings in order that any neutral claim may be duly heard and determined. Support for the conclusion is also to be found in the following authors:—

Hall's International Law, 8th Edition, p. 633,
Wheaton's International Law, 6th Edition, volume II, p. 910, and
Spaight, Air Power and War Rights, chapters 17 and 18.

This case has proceeded on the basis that it is reasonable and therefore justifiable to apply to enemy and neutral aircraft, within the limits specified, the whole body of the law of prize. The Law Officers will observe that the rules at present proposed have not so wide a purpose, and it may well be, therefore, that some of the objections which might be urged by neutrals would not be made while they are so limited. But the present limitation of the scope of the rules is due partly to reasons of policy and partly to the fact that it is not at present practicable to apply the rules as to capture or to visit and search to an aircraft whilst in flight. If policy changes and if it becomes practicable to devise rules as to capture and to visit and search of aircraft, it may be desirable to apply the law of prize in its entirety. It is submitted that such a course would be justifiable. If the law of prize is applicable at all it is applicable *in toto*.

If the Law Officers are of opinion that enemy and neutral aircraft may properly be subject to the law of prize, it remains to consider whether the Naval Prize Acts should be amended so as to confer on the Prize Court jurisdiction with regard to aircraft. It is, of course, clear that British Prize Courts are bound by Acts of the Legislature, and, if the Naval Prize Acts were amended in the sense mentioned, it seems clear that the Prize Court would, upon an application to it in that behalf, be obliged to deal with aircraft in accordance with the jurisdiction thereby vested in it. But if the application of prize law to aircraft is not justified in international law, the Prize Court, in dealing with aircraft, would no longer be administering international law (see the *Zamora*, 1916, 2 A.C. 77 at p. 93).

The Law Officers are accordingly asked to advise—

- (1) Whether the treatment of civil aircraft in accordance with the proposed rules set out in the sub-committee's report is consistent with international law;
- (2) Whether jurisdiction to deal with aircraft may, consistently with international law, be conferred on the Prize Court;

- (3) Whether the terms of the legislation conferring the jurisdiction may subject aircraft to the whole law of prize, or whether the jurisdiction should be limited to dealing with aircraft in accordance with the proposed rules; and
- (4) Generally upon the case.

List of Papers.

Paper A.—Air Ministry memorandum of March 31, 1936—C.I.D. Paper No. 1231-B (T 7669/G/1936).

Paper B.—Report of Sub-Committee of the C.I.D., dated February 11, 1938—C.I.D. Paper No. 1401-B (W 2549/G/1938).

Paper C.—Extract from Minutes of the 312th Meeting of the C.I.D., held on March 4, 1938 (W 3892/G/1938).

Paper D.—Report of Commission of Jurists upon the Revision of the Rules of Warfare, February 1923—Parliamentary Paper, Miscellaneous No. 14 (1924)—Cmd. 2201.

Opinion.

1. As there are admittedly no accepted principles of international law dealing with aircraft in war, this question does not admit of a positive answer. We are, however, of opinion that the application to aircraft of principles similar to those applied to shipping would be consistent with international law, though it is impossible to forecast in detail how a tribunal enforcing international law, unbound by any code with legislative force, would apply these principles in detail. Subject to what is said below under (3) and (4) applying the above test, we answer Yes to this question.

2. Yes. This view is reinforced by section 55 of the report of the Committee of Jurists of 1923.

3. We are not clear what legal issue is intended to be raised by this question. In deciding the form and scope of the legislation, the following points require to be considered:—

(1) The jurisdiction could be conferred on the Prize Court to deal with aircraft on principles of the Law of Nations. The Crown would proceed to act on the rules now before us or others, and would then seek to justify its action or ask for condemnation on the basis that what had been done was in accordance with international law. We are not sure whether this is what is contemplated or whether it is intended to bind the court by a code embodying the principles contained in the rules. If the latter course were followed, the Government could be certain that action under the rules would be upheld, but it would be adopting a wholly different basis from that on which the present law of prize is founded, and it might be desirable to make this clear in the legislation. The code would no doubt purport to embody principles of international law, and there might be some general provision enabling the court to apply international law in cases not expressly covered.

On either of these two bases it would presumably be possible to frame a Bill which limited the jurisdiction to the area covered by the rules. We think there are objections to such a limitation, but it would be easier to determine the answer to this question whether regarded as one of law or policy when the form of the new legislation has been considered.

(2) Is it intended to preserve the distinction between droits of the Crown and droits of the Lord High Admiral, or set up some special Aircraft Prize Fund or pay the whole proceeds of condemned prize into the Exchequer as droits of the Lord High Admiral?

4. We offer the following observations upon the proposed rules themselves. We note that the general description "enemy civil aircraft" does not follow the distinction adopted in the convention between public non-military aircraft and private aircraft (article 2). We presume that it was found impossible to carry out the projected distinction and that it is intended to include within the



description "civil aircraft" such machines as are described in article 4 as "public non-military aircraft" employed for customs or police purposes. The importance of this arises in regard to the projected rule I (ii) since presumably, at any rate, some of the customs and police aircraft would normally carry guns, and would therefore *ipso facto* fall to be condemned if, for example, they were blown out of their course and forced to land in England.

We note also that by rule I (iii) the according of days of grace is to be made expressly dependent upon a previous offer of days of grace by the enemy. We feel it difficult in any circumstances to think that this could accord with international law, since if every nation acted in a similar way, days of grace could never come into being. No doubt the policy underlying this provision has been carefully considered, but we should have thought that this sub-rule might have been framed in such a way as to enable Great Britain to take the initiative if she thought it desirable.

Sub-rule (iv).—The undertaking required of the crew "not to serve in an enemy aircraft while hostilities last" would, we think, be unduly restrictive and might be unacceptable internationally, though a restriction against serving in enemy military aircraft would clearly be unexceptionable. It is not unworthy of note that The Hague Convention XI of 1907 in the case of ships only required an undertaking not to engage while hostilities last in any service connected with the operations of the war, and we think anything wider than this requirement might be difficult to justify.

Sub-rule (v).—It appears to us that in certain circumstances it might be desirable to condemn an aircraft on the ground, for example, that it was "capable of conversion to warlike use" without necessarily detaining the crew as prisoners of war, but the proposed rule would make this impossible.

Rule II A (b).—We feel that in the concluding sentence the words "subject to any export prohibition which may apply to it" should be added. We feel that some saving words should also be added in respect of both Rule II A. and B. which would make it clear that nothing in the rules is to be construed as abrogating or limiting the sovereign right to requisition neutral cargo which may be needed for the use of the State.

D. B. SOMERVELL.
T. J. O'CONNOR.

Law Officers' Department,
June 2, 1938.

[T 2830/2830/370/1939]

No. 1D.

[Treasury Solicitor.]

[December 20, 1938.]

Case for the Opinion of the Law Officers.

Issue of documents to enable the High Court in England to exercise jurisdiction in prize. FOR many years it has been thought necessary, or at least desirable as a matter of precaution, to issue at the outbreak of a war certain documents authorising the Court of Admiralty or its successor, the High Court of Justice, to exercise jurisdiction in prize in connexion with the seizure, during the war recited in the documents, of all ships vessels and goods belonging to the enemy State with which His Majesty is at war. Those documents, of which copies are sent herewith, are three in number:—

- (1) An Order in Council ordering that a Commission in the form of the draft annexed thereto shall issue under the Great Seal authorising the Admiralty to require the High Court to proceed in prize (Paper No. 1);
- (2) The Commission referred to in the Order in Council (Paper No. 2); and
- (3) The Warrant to the Admiralty issued under the authority of the Commission (Paper No. 3).

The Law Officers are asked to advise whether the issue of any of these documents is now necessary.

It is submitted that the answer to this question depends upon the construction of section 23 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides as follows:—

"The High Court shall be a Prize Court within the meaning of the Naval Prize Acts, 1864 to 1916, as amended by any subsequent enactment, and shall have all such jurisdiction on the High Seas and throughout His Majesty's dominions and in every place where His Majesty has jurisdiction as under any Act relating to Naval Prize or otherwise the High Court of Admiralty possessed when acting as a Prize Court."

It will be seen from the accompanying memorandum (Paper No. 4), which contains the earlier history of the matter, that at any rate before the Naval Prize Act, 1864, the question was one upon which divergent views were entertained. The Naval Prize Act, 1864, was the first permanent statute dealing with prize. Section 3 of that Act (which is still in force) provides that "the High Court of Admiralty, and every Court of Admiralty or of Vice-Admiralty, or other Court exercising Admiralty jurisdiction in Her Majesty's Dominions, for the time being authorised to take cognisance of or judicially proceed in matters of prize, shall be a Prize Court within the meaning of this Act." It will be observed that in that section a distinction is drawn between the High Court of Admiralty and all other Prize Courts in that to the latter but not to the former the qualification is applied that they must be for the time being authorised to proceed in prize. Accordingly it is submitted that the effect of the Act of 1864 with regard to the High Court of Admiralty, whose successor the High Court of Justice now is, is that the Court is by virtue of that section a permanent Prize Court.

Doubts, however, continued to be expressed after the passing of the Act of 1864 as to the necessity of the issue of the documents in question to the High Court, and section 4 of the Supreme Court of Judicature Act, 1891, would seem to have been passed expressly for the purpose of removing those doubts. It provides:—

"Whereas doubts have arisen with respect to the position of the High Court in England and appeals therefrom in cases of prize and it is expedient to remove such doubts: be it therefore enacted as follows:—

"(1) The High Court in England shall be a Prize Court within the meaning of the Naval Prize Act, 1864, and shall have all such jurisdiction on the High Seas and throughout Her Majesty's Dominions and in every place where Her Majesty has jurisdiction as under the Naval Prize Act, 1864, or otherwise, the High Court of Admiralty possessed when acting as a Prize Court . . ."

Nevertheless it appears that doubts continued to be expressed upon the matter, and on the 24th January, 1896, Mr. A. T. Lawrence (as he then was) advised that any special Commission was unnecessary, and again, in 1897, the report of the Committee appointed under Mr. J. B. Aspinall to draft Prize Rules treated the Acts of 1864 and 1891 as providing, in effect, that no documents were necessary to authorise the High Court to sit as a Prize Court. On the other hand, when the Law Officers were asked to advise in 1898, they expressed the view that as regards the High Court it was arguable whether some kind of special authorisation was not necessary to enable it to act as a Prize Court, and accordingly that the present practice (*i.e.*, of issuing a Commission) should be adhered to. A copy of their Opinion is sent herewith (Paper No. 5).

It may well have been in consequence of their doubt that upon the outbreak of war in 1914 the old procedure was followed and a Commission and Warrant were issued to the High Court. It will be appreciated that at that date there had been no occasion for any judicial decision which could throw light upon the question. But since then support (if any support is necessary) has been given to the view that no special authorisation of the Prize Court is necessary. In the *Zamora* (1916, 2 A.C. 77 at p. 96), Lord Parker said:—

"Under that Act (*i.e.*, the Naval Prize Act, 1864) the Court of Admiralty became a permanent Court of Prize independent of any Commission issued under the Great Seal."



It will be observed that Lord Parker based his view upon the Naval Prize Act, 1864, and that he did not refer to the Supreme Court of Judicature Act of 1891 quoted above. But if Lord Parker's conclusion follows from the Act of 1864, it is submitted that it follows *a fortiori* from section 4 of the Act of 1891, which was expressed to be for the removal of doubts which had arisen with respect to the position of the High Court in England in cases of prize. Further authority for the proposition is to be found in Halsbury's *Laws of England*, vol. 26, p. 228. It is necessary, however, to draw the Law Officers' attention to the fact that in the *Roumanian* (1916, 1 A.C. 124 at p. 137) and in the *Südmark* (1917, A.C. 620 at p. 623) there are to be found dicta which may be thought to throw some doubt upon this conclusion. But it is submitted that in those cases the Court was having regard merely to the procedure which was actually adopted and was not considering the question whether any such procedure was necessary.

The material provision at present in force, namely, section 23 of the Judicature Act, 1925, quoted above, is substantially a re-enactment of section 4 of the Act of 1891. The view is submitted that upon the true construction of this section no ground for doubt exists that its effect is to render the issue of any authorisation to the Court unnecessary. But if the Law Officers are of opinion that any doubt arises upon the meaning of the words themselves, then it is submitted that the passage from the *Zamora*, to which reference has been made, establishes that the same conclusion is to be drawn from the Act of 1864.

It will be observed that, at the bottom of p. 4 of his memorandum, Parliamentary Counsel assumed that the Court would not take upon itself to determine judicially whether war had or had not broken out, but would accept without question the statement of some Minister of State on behalf of the Crown. It may have been that in 1898 the Law Officers had in mind that the issue of the documents in question was a convenient way of establishing the existence of a war. It is submitted, however, that this cumbersome procedure is not necessary for that purpose. For all other purposes the proclamation by the Crown that a state of war exists is conclusive and it is thought that there is no reason why the Prize Court, in like manner as all other Courts, should not take judicial notice of the existence of a state of war as made known by that proclamation.

The Law Officers are accordingly requested to advise whether it is necessary, to enable the High Court to exercise jurisdiction in prize, that any of the documents referred to should be issued.

LIST OF PAPERS.

- (1) Order in Council, August 5, 1914.
- (2) Commission issued under the Great Seal, August 6, 1914.
- (3) Warrant issued under the authority of (2), August 6, 1914.
- (4) Memorandum prepared by Parliamentary Counsel in connexion with the Bill of the Prize Courts Act, 1894.
- (5) Law Officers' Opinion, September 10, 1898. (Annex A.)

Opinion.

We share the doubts felt by the Law Officers in 1898 as to whether section 3 of the Naval Prize Act of 1864 justifies the view that the effect of that Act was to constitute a permanent Prize Court. The section has clearly received in the past, and in our view is open to, a contrary construction, and on that construction section 4 of the Supreme Court of Judicature Act, 1891, does not we think alter the position. That section seems to us to be designed to remove doubts arising from the jurisdiction of the High Court of Admiralty being exercisable by the High Court and to be unhelpful on the present question. It is, of course, vital that no ambiguity or serious possibility of adverse argument should exist as to the jurisdiction of the Prize Court, and in view of the dicta of Lord Parker in the *Roumanian* and the *Südmark*, which conflict with his dictum in the *Zamora*, we cannot feel that ambiguity does not exist or that the interpretation of the Naval Prize Act of 1864 is by any means certain.

For these reasons we advise that all the documents to which we are referred, namely, the Order in Council, the Commission referred to therein and the Warrant to the Admiralty, should be issued to enable the High Court to exercise jurisdiction in Prize.

D. B. SOMERVELL.
T. J. O'CONNOR.

Law Officers' Department,
December 20, 1938.

Annex A.

(Paper No. 5.)

Opinion of the Law Officers of the Crown.

WE advise that the proposed change in the form of the Admiralty Patent should *not* be adopted.

The proposed addition refers to Commissioners "for the time being," whereas the Patent is addressed to specific persons. The language of the addition is obscure and—though its meaning can be made out—the point is not one in which any ambiguity should be even possible.

We further think that the Commission should be under the Great Seal as hitherto.

We advise that the Admiralty Patent should remain in its present form.

A Commission under the Great Seal in the form as far as possible at present used should be issued to enable the Admiralty to deal with Courts under the Act of 1894, Section 2, in time of peace; the operation of that Section is confined to Courts in British Possessions.

As regards the High Court, the present practice should be adhered to. We think it arguable whether authorisation of this kind be not necessary to enable the High Court to act as a Prize Court, notwithstanding the language of the Naval Prize Act, 1864, and the Judicature Act, 1891, and the language of the Prize Courts Act, 1894, Section 2, suggests a possible doubt as to whether the practice of issuing such Commissions only on outbreak of war should be departed from in cases to which that Act does not apply.

RICHARD E. WEBSTER.
ROBERT B. FINLAY.

Law Officers' Department,
September 10, 1898.



1939

THIS DOCUMENT IS THE PROPERTY OF HIS BRITANNIC MAJESTY'S GOVERNMENT

Printed for the use of the Foreign Office

CONFIDENTIAL

(15938)

REPORTS BY THE
LAW OFFICERS OF THE CROWN, &c.

1939



(ii)

LIST OF REPORTS

NOTE.—The Reports, &c., not addressed to the Foreign Office are marked 1⁴, &c.

No.		Date.	SUBJECT.	Page.
BELGIUM.				
1 ⁴	Attorney-General and Mr. Andrewes Uthwatt [Treasury Solicitor]	May 26, 1939	Immunity from legal process of a member of a foreign embassy (and of his wife) in London: question whether right of immunity can be waived without consent of the diplomatic representative or his Government	1
GENERAL.				
1	Law Officers...	Mar. 17, 1939	Conclusion of Consular Conventions by His Majesty's Government: question whether obligations regarding consular immunity could be entered into without legislation	11
2	Law Officers for Scotland	Mar. 18, 1939	Conclusion of Consular Conventions by His Majesty's Government: question whether obligations regarding consular immunity could be entered into without legislation	42

(iii)

ALPHABETICAL INDEX

(NAMES AND SUBJECTS)

1939

The figures refer to the numbers of the pages.

Cases cited are indicated by italics.

AMA—EVI.

A.

"Amazone" (yacht), 1-10.
Archives—Inviolability of consular archives, 11-43.

B.

British Linen Bank, 1-10.

C.

Consular Privilege—See Immunity.
Conventions, Consular—See Treaties.

D.

Diplomatic Privilege—
Immunity from legal process of diplomats and their wives and families, 1-10.
Waiving of immunity of members of his staff by diplomatic representative or by his Government, 1-10.
Documents—Production of consular archives as evidence, 11-43.

E.

Evidence—Production of consular archives, 11-43.

HEM—TRE.

H.

Hemeleers, Commandant, 1-10.
Hemeleers-Shenley, Una, 1-10.

I.

Immunity—
From legal process, of diplomats and their wives, 1-10.
Waiving of immunity of members of his staff by diplomatic representative or by his Government, 1-10.
Consular immunity in relation to conclusion by His Majesty's Government of Consular Conventions, 11-43.

L.

Law—Relation between international and municipal law, 14.

S.

Shenley—See Hemeleers-Shenley.

T.

Treaties—Conclusion of Consular Conventions by His Majesty's Government, 11-43.



1939

Printed for the use of the Foreign Office

CONFIDENTIAL

REPORTS BY THE LAW OFFICERS OF THE CROWN, &c.: 1939

BELGIUM

[T 7037/282/373/1939]

No. 1^a.

[Treasury Solicitor]

[May 26, 1939]

Case for the Opinion of the Attorney-General and Mr. Andrewes Uthwatt.

COUNSEL may have seen in the *Weekly Notes* of last week (1939, p. 206) a report of a case relating to a yacht *Amazon* (reported also in *The Times* of the 9th May), in which Mr. Justice Langton allowed a motion on behalf of Commandant Hemeleers to set aside a writ for possession of the yacht and the warrant of arrest issued at the instance of his wife, Mme. Una Hemeleers-Shenley.

The plaintiff alleged that the yacht was hers, bought with her money; the commandant alleged that the yacht was owned by him and in his possession and control, and entered a conditional appearance under protest. In support of the motion he alleged that he was an Assistant Military Attaché on the staff of the Belgian Embassy and was therefore immune from process.

The registrar communicated with the Foreign Office, who gave the following certificate:—

“By direction of His Majesty's Principal Secretary of State for Foreign Affairs I have the honour hereby to certify that Capitaine Commandant Leon Hemeleers was received by His Majesty's Government as Assistant Military Attaché to the Belgian Embassy from the 25th October, 1920, and since that date his name has been included in the list prepared under the statute of 7 Anne, Cap. 12.

“ALEXANDER CADOGAN,
“Permanent Under-Secretary of State for
Foreign Affairs.

“May 1939.”

Langton J. held that the commandant enjoyed full diplomatic immunity and had also possession of the yacht, which was registered in his name and was laid up with Messrs. Thorneycroft and Co., of Southampton, who took their orders from him.

After referring to the *Cristina* (1938 A.C. 485), the judge held that the action did implead the commandant and bring property in his possession into issue, and the writ should be set aside with costs.

The plaintiff has given notice of appeal.

That judgment was delivered on the 8th May, but the first hearing of the motion was on the 24th April.

[21632]

c*



On the 28th April Mme. Hemeleers-Shenley issued a writ against the British Linen Bank claiming bonds and other securities to the value of somewhere in the neighbourhood of £200,000 which were alleged to be held by the bank in trust for the plaintiff absolutely, that the bank should transfer the same to her, an injunction to restrain the bank from parting with them to anyone else, an account of dividends and interest, and further or other relief and costs.

The bank, on the 2nd May, issued a summons asking—

- (1) That, unless the plaintiff obtained an injunction within four days, they should be at liberty to transfer the securities to their customer, the plaintiff's husband.
- (2) That they might be at liberty to issue an interpleader summons so that the issue between the plaintiff and their customer might be decided.
- (3) That they might be at liberty to lodge in court so many of the securities as were in their possession or power.
- (4) That further proceedings might be stayed under Order 57, Rule 6, or the general jurisdiction of the order: and such further or other order, &c.

On that summons Mr. Justice Morton in Chambers, on the same day as Mr. Justice Langton's judgment was delivered, made an order which has not yet been completed, but a copy of the minutes is sent herewith.

He ordered that, if the diplomatic privilege of Commandant Hemeleers was not waived within seven days from the date of the order so as to enable an interpleader summons to be issued by the bank and effectively served on him, or, alternatively, so as to enable the plaintiff to amend her writ by adding him as a defendant, the defendant bank should deposit in court a box containing the securities in the defendant's possession, of which particulars should be given by affidavit; and ordered that the defendant should forthwith give notice of the order to Commandant Hemeleers by sending by post a copy to his solicitors.

An affidavit of Mr. Tucker on behalf of the defendant bank was filed upon this summons, and Counsel is referred to it, with its exhibits, and the correspondence which has taken place between Messrs. Stephenson, Harwood and Tatham on behalf of Commandant Hemeleers, and Messrs. Beckingsales and Naylor on behalf of the bank.

The affidavit, with its exhibits, explains that in February 1937 the plaintiff authorised the bank to transfer to her husband all the securities then held by the bank on her behalf, and her husband, in consideration of the transfer of those securities (to the value of approximately £275,000, including the yacht *Amazon* and No. 4 Belgrave Square), undertook to leave to her and their child or children, provided that the children behaved to his satisfaction, the whole of his estate, with the exception of £15,000 left to his brother.

Owing to unhappy differences between the husband and wife, on the 29th March this year she gave him notice that she revoked all gifts made since the date of their marriage under the terms of article 1096 of the Code Civil of Belgium.

The affidavit states that at the date of the issue of the writ the defendant bank held nothing on behalf of the plaintiff, and an exhibit shows which of the investments named in the writ the bank held, or did not hold, at that date on behalf of the husband, some having been transferred to the customer beneficially by the plaintiff's direction and others having been deposited by the customer (the husband) alone as beneficial owner so far as the bank was aware. The bank claims no interest in the securities other than charges and costs.

The commandant is advised by his Belgian lawyers that the notice of revocation is not valid, and his solicitors suggest that it is obviously right and proper that any such question which involves Belgian law should be decided by the Belgian courts. The bank refuses to accede to a demand to hand over the securities, even those which may be the commandant's own, without an order of the court.

In the correspondence Counsel will see a reference to the minutes of order mentioning the period of seven days "from the date of this order," and pointing out that this must clearly be seven days from the date of completion of the order—a point which the bank's solicitors say they will bring to the attention of the registrar. In fact, it is suggested that the time should be seven days from service

of the order, since the minutes direct notice to be served on the commandant's solicitors.

The difficulty which arises will be appreciated from a reference to the minute by the Foreign Office Second Legal Adviser (Paper No. 6) and the note from the Belgian Ambassador (Paper No. 8).

It seems clear that the commandant and his wife both possess diplomatic immunity from process, and that the right to waive such immunity belongs not to him or his wife, but to the Belgian Ambassador or his Government; and the Belgian Ambassador is not willing that the commandant (or his wife) should waive the privilege.

There are proceedings in Belgium relating to these very securities, and it is thought preferable that the matter should be dealt with by the Belgian courts, not merely from the legal point of view, but also on grounds of policy, since the Belgian Ambassador does not wish to have such undesirable publicity in this country about the matrimonial disputes of a member of his embassy. The proceedings in Belgium are being conducted under a procedure which prevents publicity.

The attitude of the bank will be gathered from the correspondence. It feels that it is being placed in a most awkward position because it cannot effectively interplead.

The commandant has been advised by Mr. Wilfrid Hunt; and the latter agrees that in interpleader proceedings under Order 57 the commandant could not ask for the writ to be set aside for want of jurisdiction, and is also of opinion that, even if, as a party served with Notice of Order under Order 16, Rule 40, he appears under protest under Rule 41, he will similarly not be able to dispose of the action. It seems possible, however, that he might succeed in getting the order discharged or varied; and Counsel is requested to consider whether, having thus become a party to the action, he would not be entitled to go further and ask that the writ should be struck out.

If, however, it is not possible otherwise to stop the proceedings, it is suggested that it might be desirable for the Attorney-General to intervene, with or without counsel representing the Belgian Ambassador, on the ground that Mme. Hemeleers-Shenley is not entitled without the consent of the Belgian Ambassador, or the Belgian Government, to submit to the jurisdiction of the court as plaintiff any more than she would be entitled to do so as defendant.

It seems clear from the authorities referred to in Paper No. 6 that the commandant's wife is entitled to diplomatic immunity and that as defendant she could not waive it without such consent. The position seems to be usefully summed up in the second edition of *Halsbury's Laws of England*, vol. 6, paragraphs 626 ff.

It is submitted by the Foreign Office that, as regards waiver of diplomatic immunity, there is no difference in principle between submitting to the jurisdiction of the courts as a defendant and submitting to their jurisdiction as a plaintiff, but on that particular point there does not seem to be any definite authority.

The Belgian Ambassador supports the view that diplomatic privileges cannot be waived by members of his staff without his consent, and definitely states that he has not consented to either the commandant or his wife waiving their privileges so as to entitle either of them to submit to the jurisdiction of the English courts, whether in the capacity of a plaintiff or of a defendant; and he requests the Secretary of State for Foreign Affairs to take such steps as may be deemed advisable to have these matters brought to the notice of the court.

Counsel is requested to advise what, if any, action the Attorney-General should take in the matter and generally on the position.

List of Papers.

1. Writ, dated April 28, 1939.
2. Summons, dated May 2, 1939.
3. Draft Minutes of Order.
4. Affidavit of W. R. Tucker on behalf of defendant with exhibits annexed.
5. Correspondence between Stephenson, Harwood and Tatham, solicitors for Commandant Hemeleers, husband of the plaintiff, and the solicitors for the British Linen Bank (Incorporated).
6. Minute, dated May 11, 1939, by the Second Legal Adviser to the Foreign Office (Annex A).
7. Memorandum, dated May 23, 1939, by Mr. O. J. Hubbert (Annex B).
8. Note, dated May 16, 1939, from the Belgian Ambassador (Annex C).

Opinion.

1. In our opinion, Mrs. Shenley is entitled to maintain her action in the courts of England without obtaining the authority of the ambassador.

There may be a question whether Mrs. Shenley, as regards diplomatic immunity, stands in the same position as her husband, but we are content to assume that she does. We rest our conclusion on wider grounds.

The privilege of diplomatic immunity is directed to secure either that there is accorded to the diplomatic agent all the privileges which would be accorded to his Sovereign or that the diplomatic agent should be enabled to discharge his duties without hindrance. Both these objects require that the diplomatic agent and his staff should not be subjected to legal process against the will of the diplomatic agent; it is not necessary to serve either object that a member of the staff of the diplomatic agent should be precluded from resorting to the courts of this country as and when he pleases.

To accord to the diplomatic agent the right to negative the freedom of a member of his staff to sue in the courts would in truth be to accord to him a right to exercise sovereign power in England.

We would add that there is no authority upon the point, but our view of the matter is borne out by the general lines of the Statute 7, Anne, c. 12.

2. It follows that the case is not one in which the Attorney-General should intervene.

(Initialled) D. B. S(OMERVELL).
A. A. U(THWATT).

Law Officers' Department,
May 26, 1939.

Annex A.

(Paper No. 6.)

[T 6429/282/373]

Minute by the Second Legal Adviser to the Foreign Office.

MR. WITT of Messrs. Stephenson, Harwood and Tatham, solicitors to the Belgian Embassy, came to see me by appointment this morning to discuss questions of diplomatic privilege connected with the litigation between the Assistant Military Attaché of the Belgian Embassy and his wife. The litigation respecting the yacht *Amazon* (of which the judgment is reported in *The Times*) resulted in a decision that as the yacht was in the possession of the Assistant Military Attaché and he possessed diplomatic privilege and had not submitted to the jurisdiction the proceedings must be stayed. An appeal has been entered against this judgment.

2. In addition to this, however, there is other litigation. The wife is a lady of great wealth and had at various times in the past made gifts of securities to the value of thousands of pounds to her husband. These securities are deposited with the British Linen Bank in London. The wife now claims that she has

revoked the gifts. She has therefore issued a writ against the British Linen Bank claiming the return to her of the securities and damages if they part with possession of them or any of their proceeds to the husband. The British Linen Bank of course possesses no privilege. It has no claim to the securities itself and would in the ordinary way interplead and leave the issue to be fought out as between the husband and wife. It cannot, however, interplead because that means serving the interpleader notice on the husband who has diplomatic immunity. The Belgian Ambassador refuses to allow the husband to waive diplomatic immunity, being of the opinion that if he did so there would be a suit between the husband and wife involving most undesirable publicity about the matrimonial disputes of a member of his embassy. Litigation on the same issues is going on in Belgium where disputes between husband and wife are dealt with under a procedure which prevents publicity and he wishes all the issues to be left to the Belgian courts.

3. The British Linen Bank are no doubt afraid that they will be placed in the same position as Cables and Wireless (Limited) were in a suit brought by Haile Selassie, that is to say they may have judgment given against them in favour of the wife without having any protection against a subsequent claim by the husband. They have therefore combined with the wife to obtain orders from the court, the effect of which practically is to face the husband with the alternatives either of waiving diplomatic immunity (which he cannot do because his ambassador will not let him) or of losing his property. The bank took out a summons and obtained an order from the court under which the bulk of the securities were to be deposited in the court by the bank within seven days unless the husband waived diplomatic immunity. There are a number of securities which the order of the court does not affect, but in the case of them the bank refuses to accept the orders of the husband in relation thereto and takes up the attitude that if he does not like this he can waive his immunity and sue them.

4. The Belgian Ambassador realises that his Military Attaché is, as things stand, being caught on the horns of a dilemma and the solicitors of the Belgian Embassy came to consult me on the question of the possibility of adopting the following line. The wife also possesses diplomatic immunity. The right to waive, however, belongs not to her but to the ambassador or the Belgian Government. She had no right to purport to waive it by bringing these proceedings as plaintiff. The court should be informed that the Belgian Ambassador has not and does not agree to her waiving diplomatic immunity and should therefore stay the proceedings.

5. Mr. Witt and I investigated this suggested line of action from a legal point of view. It will be necessary first to show that the wife of the Military Attaché was a person to whom diplomatic immunity extends. We have of course no doubt that diplomatic immunity does extend to the wives of the diplomatic personnel of an embassy and not merely to the wife of the ambassador, and I think that there are various statements which we have made to foreign missions here or their Governments showing that this is our view. I have found a statement to this effect in one text-book, namely Satow's *Guide to Diplomatic Practice*, third edition, at the bottom of page 178, but I have not yet actually found either an English or a foreign judicial decision stating this as regards the wife of a member of the diplomatic staff. Apparently in the old case of *English v. Caballero*, 1823, 3 Dow. and R.Y. 25, the wife of the second secretary of the Spanish Embassy was arrested alone on the bill issued against husband and wife. A rule was obtained but discharged on the ground of insufficient evidence as to the husband's position and nothing appears in the judgments as to the wife's position, but it appears to have been assumed that if the husband could establish privilege the wife could not be arrested. I have not, however, looked at all the text-books. I am asking Mr. Hubbert if he would be good enough to look up the books and give me the references to anything useful⁽¹⁾. In any case I am disposed to think that the English courts would accept the view that the wives of the diplomatic staff were covered by immunity if they were informed by the Attorney-General that that was the view of His Majesty's Government, and also because if you can sue the wife the immunity of the husband may not be a very real one. If the Department can put their hands on any official statement by His Majesty's Government covering this point which is published or publishable it would be useful.

⁽¹⁾ See Paper No. 7, Annex B.



6. As regards the second point, the following passage occurs in *Halsbury's Laws of England*, vol. 6, p. 509:—

"The privilege may be waived, but since it belongs not to the minister but to the Sovereign by whom he is accredited, only by the direction or with the consent of that Sovereign, or in the case of a subordinate member of the legation of the minister at least. (*Re Republic of Bolivia Exploration Syndicate*, 1914, 1 Ch. at p. 156, *Dickinson v. del Sola*, 1930, 1 K.B. 376). Accordingly even if a minister or member of his entourage has entered an appearance or pleaded otherwise than to the jurisdiction it is open to him at a later stage to prove that his Government had not consented to the waiver of his privilege."

In principle therefore it seems that if the waiver of immunity by a subordinate member of the embassy who is sued as defendant is not effective when made without the consent of his ambassador, the waiver involved by such a person when he brings proceedings as plaintiff is also not effective if the ambassador does not consent, and that therefore if the fact that the ambassador does not consent is brought to the knowledge of the court the court should stay the action. The point, however, is a new one.

7. Another point is, supposing that the Belgian Ambassador decides to take this line, how the matter is to be brought before the court. Clearly the plaintiff will not do so. The husband cannot do so because he is not a party to the proceedings and will not be heard unless he becomes a party by submitting to the jurisdiction. I think that if counsel appeared on behalf of the Belgian Ambassador and asked permission to make a statement to the court the court would hear him. An alternative would be that the Attorney-General should inform the court and he could in that event of course submit to the court arguments and information on the two points involved.

8. Mr. Witt of course wanted to know whether the Foreign Office or the Attorney-General would intervene in this way. I said I could not answer this now and was not willing to consult the Attorney-General until we were officially informed that the Belgian Ambassador definitely wished this line to be taken, and if we got a communication from the Belgian Ambassador to this effect we would consider it and then let him know whether we thought he must be represented in court and make his point through counsel appearing for him alone, or whether the Attorney-General would appear together with or in substitution for counsel for the Belgian Ambassador. I expect, however, we shall hear something from the Belgian Embassy very soon.

p.p. W. E. BECKETT.

May 11, 1939.

Annex B.

(Paper No. 7.)

[T 6429/282/373]

Diplomatic Immunity of Wives of the Diplomatic Personnel of an Embassy.

SIR CECIL HURST in "Les immunités diplomatiques" in *Recueil des Cours* (Academy of International Law at The Hague), 1926, volume II, pp. 152-153 says:—

"On peut distinguer, parmi les membres d'une ambassade ou d'une mission qui ont droit aux immunités diplomatiques trois catégories différentes. . . .

"(1) Le personnel officiel, c'est-à-dire le chef de la mission et ceux qui prennent part à l'œuvre diplomatique de la mission, le conseiller, les secrétaires et les attachés. . . .

"(2) Les femmes et les familles des fonctionnaires compris dans la première catégorie. . . ."

At p. 158, Sir Cecil Hurst says:—

"Tout le monde est d'accord sur ce point que les immunités dont jouit un agent diplomatique s'étendent aussi à sa femme. En 1841, un arrêt de la Cour de Paris a déclaré 'que la femme d'un ministre public jouit des mêmes immunités que son mari.'⁽¹⁾

"Aucune décision dans ce sens n'a été rendue par les tribunaux anglais, mais dans beaucoup d'affaires le droit de la femme de l'agent aux immunités diplomatiques a été regardé comme une chose certaine.

"Tout récemment, le principe fut appliqué par la cour dans une affaire où la femme de l'agent diplomatique n'habitait pas la même maison que son mari, mais séparément un appartement à Londres. Une citation lui avait été signifiée pour le paiement du loyer, mais la Haute Cour de Justice de Londres déclara que la signification devrait être annulée.⁽²⁾ En 1907, le tribunal civil de la Seine a rendu une décision semblable. Un membre du Corps diplomatique de Paris, séparé de sa femme, avait un domicile distinct. Une action en justice fut intentée contre tous deux en paiement d'une somme de 1,949 francs, montant de fournitures d'automobiles. Le mari renonça à son privilège d'exemption, mais sans produire aucune autorisation de son Gouvernement à cet effet. La femme opposa l'incompétence du tribunal en sa qualité de femme d'un agent diplomatique. Le tribunal se déclara incompétent même à l'égard de la femme. La séparation des époux n'est en effet qu'une mesure essentiellement provisoire et ne rompt pas le lien conjugal qui subsiste entièrement. Les immunités diplomatiques de la femme restaient donc intactes.⁽³⁾

"Les tribunaux français ont aussi refusé de reconnaître un autre expédient qui a été employé pour soumettre à la juridiction la femme d'un individu qui jouit des immunités diplomatiques. Selon cet expédient, l'immunité du mari est reconnue, mais la condamnation de la femme pour dette personnelle est demandée.⁽⁴⁾

"Les privilèges sont accordés non seulement à la femme du chef de la mission, mais aussi aux femmes des secrétaires et de tout membre du personnel officiel."

Harvard Research in International Law, volume for 1932 at p. 101 states:—

"The English courts have on numerous occasions affirmed the immunity of the members of missions and their families from jurisdiction, making no distinction between chiefs of missions and members of the official personnel. *Taylor v. Best* (1854), 14 C.B. 487; *Magdalena Steam Navigation Company v. Martin* (1859), 2 E. and E. 94; *Parkinson v. Potter* (1885), 16 Q.B. 152; *Macartney v. Garbutt* (1890), 24 Q.B. 368; *Musurus Bey v. Gadban* [1894], 2 Q.B. 352; In *re Republic of Bolivia Exploration Syndicate (Limited)* [1914], 1 Ch. 138; *Assurance Compagnie Excelsior v. Smith* (1923), 40 T.L.R. 105; *Engelke v. Musmann* [1928], A.C. 433; *Dickinson v. Del Solar* (1929), 45 T.L.R. 637."

I have not been able to look up all these cases, but I doubt whether any of them concerns the wife of an attaché.

A. S. Hershey in *Diplomatic Agents and Immunities*, Washington, 1919, at p. 138 states:—

"It is generally agreed that the various members of the family and of the official suite of the envoy, together with their families, enjoy the same inviolability and the same immunities that he himself does."

⁽¹⁾ Dalloz, *Jur. Gén.*, Ag. Dip., sect. 1, art. 4, § 5, 157, note 2. Pradier-Fodéré, *Cours de Droit diplomatique*, t. II, p. 161.

⁽²⁾ *Macnaghten v. Coverdiss*, *Annual Practice*, 1923, t. I.

⁽³⁾ *Cottenet c. Rafalovitch*, *J.D.I.P.*, 1908, p. 153.

⁽⁴⁾ *Desus c. Recoy*, *J.D.I.P.*, 1907, p. 1086.

Westlake in *International Law*, Part I, Cambridge, 1904, at p. 270, states:—

"Besides the persons who are on the diplomatic staff of the mission, immunity from the territorial jurisdiction, civil or criminal, is generally enjoyed by those who are living with them as part of their family or household."

Satow's *Guide to Diplomatic Practice*, 3rd edition, London, 1932, states at p. 178:—

"The jurisdictional immunities of the diplomatic agent extend to the personnel of his mission, viz., the official suite, i.e., counsellors, secretaries and attachés, including naval, air and commercial attachés. . . . Also to the wives(*) and families of the above."

A. Merignhac in *Traité de Droit public international*, Paris, 1907, volume II at p. 262 says:—

"Egalement encore, les immunités de la suite officielle s'appliquent aux membres de la famille résidant avec les personnages de cette suite."

Jules Valéry in *Manuel de Droit international privé*, Paris, 1914, at p. 85, says:—

"Le droit des gens étend les conséquences de l'extraterritorialité à la famille de toutes les personnes admises à jouir de l'extraterritorialité diplomatique, peu importe qu'il s'agisse de la famille du ministre étranger lui-même ou bien d'un membre de sa suite."

"*Civ. Seine, 4 avril 1906. Cl. '07, III."

L. Strisower in *Recueil des Cours*, volume I, 1923, Academy of International Law at The Hague, in *L'extraterritorialité et ses principales applications* at p. 262 states:—

"Souvent, mais non pas toujours et non pas toujours à tous les égards, l'extraterritorialité des membres de la suite officielle a été comprise par les auteurs comme embrassant aussi leurs habitations et comme s'étendant aussi à leur famille et à leurs domestiques. Ces applications de l'extraterritorialité se trouvent aussi confirmées par la pratique, ainsi, par exemple, à tous les points mentionnés ci-dessus, dans une note du Sénat de la ville de Francfort de 1816, pour l'épouse dans plusieurs jugements français, pour la famille et les domestiques, mais non pour l'habitation, de la part du Département de Justice et de Police de Berne. . . . D'autre part un certain nombre d'auteurs se sont opposés à ces applications de l'extraterritorialité.* Il semble qu'il faut les accepter en tant que l'analogie avec l'extraterritorialité du chef de la mission est pleinement fondée. Il faut donc reconnaître ces immunités, en tant qu'il s'agit du personnel diplomatique, c'est-à-dire des membres de la suite qui gèrent les affaires de la mission comme le ministre lui-même, quoique dépendant de lui. . . ."

*Cf. Van Praag, *Juridiction et Droit international public*, p. 485, 487 et suiv. Hübler *Die Magistraturen des völkerrechtlichen Verkehrs*, p. 87. Ozanam, p. 82 et suiv.

Jean Roederer in "De l'application des immunités de l'ambassadeur au personnel de l'ambassade," Thèse, Paris, 1904, states:—

"Les immunités accordées à la famille de l'ambassadeur sont étendues aux familles des personnages officiels de la mission. C'est ainsi que dans son arrêt du 31 juillet 1878 (Clunet, 1878, p. 500) . . . le tribunal de la Seine décide que la femme d'un attaché militaire peut se prévaloir des prérogatives diplomatiques."

"Attendu, dit ce jugement, 'que Mme. de la Jara est protégée par les mêmes immunités.' M. Pradier-Fodéré considère qu'il est excessif d'accorder des immunités à la femme d'un tel personnage, mais nous ne voyons pas, pour notre part, qu'il y ait de différence à établir entre la femme d'un ambassadeur et celle d'un simple attaché militaire. Quelle que soit en effet la préséance que la première peut avoir sur la seconde, le même lien les unit toutes les deux à leurs maris et ceux-ci jouissent pareillement des immunités diplomatiques."

(*) Even if living apart, according to English and French decisions: Cottenet c. Rafalovitch, Clunet (1908), 153; Macnaghten v. Coverdias, *Annual Practice*, &c. (1923), volume I.

"L'accord d'ailleurs semble régner dans la doctrine comme dans la pratique moderne, pour protéger la famille en ligne directe de l'ambassadeur par des immunités diplomatiques. Seuls les auteurs opposés à toute espèce d'immunités contestent celles de la femme de l'ambassadeur comme ils contestent celles de ce dernier."

Charles Ozanam in *L'Immunité civile de Juridiction des Agents diplomatiques*, Paris, 1912, at p. 81 states:—

"Il est également certain que la femme et les membres de la famille du chef de mission bénéficient de son immunité. . . ."

"Mais la jurisprudence a étendu l'immunité aux femmes des attachés militaires et des secrétaires de légation et une grande partie de la doctrine a protesté,* avec raison selon nous. Que l'immunité soit étendue au personnel de l'ambassade nous l'admettons fort bien et nous avons vu là une condition essentielle de l'exercice des fonctions du chef de mission. Pour la même raison, il nous paraît logique d'en investir la famille de celui-ci. Mais il ne faudrait cependant pas aller trop loin dans cette voie. Or, il nous semble que, dans le cas présent, cela est étendre le privilège bien au delà des limites où il est nécessaire pour assurer l'indépendance réciproque des États, et le fonctionnement régulier de la légation."

*Notamment Despagne, *Cours de Droit int. pub.*, p. 348 et s.; Laurent, *Droit civil international*, t. IV, p. 83 et s.; Lehr (*R.D.I.*, 1905, 412); Pradier-Fodéré, *Cours de Droit dipl.*, p. 185.

As regards wives of military attachés and secretaries a note refers to the cases of Trib. Seine, 31 juillet 1878, Dientz [*J. Dr. int. pr.*, 1878, p. 500], Trib. Seine, 4 avril 1906 [*Revue de Dr. int. priv.*, 1907, p. 552], 18 novembre 1907 [*Rev. de Dr. int. priv.*, 1908, p. 615].

L. van Praag in *Juridiction et Droit international public*, La Haye, 1915, at p. 487, states:—

"L'extraterritorialité des épouses (et respectivement des autres personnes de la famille) des membres de la suite officielle des ministres publics étrangers est souvent admise, surtout dans la jurisprudence française (Note 1293). Cette manière de voir est pourtant attaquée (Note 1294). Et ces attaques ont, à mon avis, de bonnes raisons. . . ."

"NOTE 1293.—Ainsi Trib. de la Seine, jugements 31 juillet 1878, *J.D.I.*, 1878, p. 500, du 25 avril 1907, et du 18 novembre 1907; ces deux derniers [cités aux notes 704 et 792 (these citations quote *J.D.I.*, 1907, p. 1090; *R.D.I.*, Pr. 4, p. 154, and Dalloz, *Jurisprudence générale, Recueil périodique*, 1908, 5, 49; *R.D.I.*, Pr. 4, p. 616)] ont même admis l'extraterritorialité pour une femme qui vivait séparée de son mari en vertu d'une autorisation judiciaire provisoire. Valéry *Manuel de Droit international privé*, 1914, et Tobar 'Du conflit international au sujet de compétences pénales'—thèse de Fribourg (Suisse), 1910, p. 359-360, partagent cette opinion. Ozanam p. 84-85, Leven dans *R.D.I.*, Pr. 4, p. 592, et la Rédaction de cette Revue, 5, p. 176-177, sont pourtant, et avec raison selon moi, de l'avis opposé. Cette dernière nie aussi en général l'extraterritorialité des femmes des membres de la légation autres que le ministre public lui-même. Quoique cela soit juste à mon avis, les arguments invoqués à cet effet *l.c.* me semblent avoir peu de valeur pour le droit des gens positif. Comp. aussi cette même Rédaction *l.c.* 4, p. 156. En Suisse, le Département de la Justice a admis implicitement en 1895 la doctrine de la sentence du Trib. de la Seine de 1878. Dans le même sens *v. Liszt Das Völkerrecht*, 10 ed., 1915, p. 133, Piétri "Etude critique sur la fiction d'extraterritorialité," thèse de Paris, 1895, p. 197."

"NOTE 1294.—V., outre la Rédaction de la *R.D.I.*, Pr., citée à ce sujet dans la note 1293, *Répertoire D.I. privé et de Droit pénal international* 1. 1914, *verbo citato* No. 192, Despagne *Cours de Droit international public*, 4 ed., par de Boeck, 1910, No. 250, p. 345, note 2, et Ozanam, p. 82-84. Contrairement à ce dernier Jordan, préface d'Ozanam p. XII, prétend—ce qui est une affirmation exagérée—que l'extraterritorialité des personnes dont il s'agit ici est nécessaire pour que le personnel de la légation ne soit pas troublé dans son repos."

Maurice Travers in *Le Droit pénal international*, volume II, Paris, 1921, at p. 318 in the section headed "Personnes bénéficiant de l'immunité diplomatique de juridiction en matière pénale," states:—

"L'immunité ne s'étend pas aux membres de la famille de personnes composant la suite officielle de l'agent diplomatique, femme de secrétaire d'ambassade,* femme d'attaché militaire,† &c.

* *Contra*, rendu en matière civile, trib. Seine, 4 avril 1906. Reichenbach c. Ricoy, Cl. 1907, p. III.

† *Contra*, rendu en matière civile, trib. Seine, 31 juillet 1878, Dientz c. de la Jara, Cl. 1878, p. 500.

"Les raisons sont celles déjà données *supra* pour la famille du chef de la légation, de l'ambassade ou de la mission." [The reasons given are that none of the members of the family of the head of the mission has a representative character; none can act or speak in the name of a foreign State; none is invested with an official mission for which any independence is needed; none can say that an act affecting him or her affects the dignity of the foreign sovereign State.]

In the limited time at my disposal I have not been able to look at all the books which may possibly mention the subject. Moreover, even the Fry Library does not possess all the works to which I have found references. The above extracts are, however, sufficient, I think, to show that, although the text writers are not unanimous, the preponderance of opinion and the few recorded cases favour the view that wives of the diplomatic personnel of an embassy do enjoy diplomatic privilege.

May 23, 1939.

O. J. HUBBERT.

Annex C.

(Paper No. 8.)

[T 6451/282/373]

Belgian Embassy,
London, May 16, 1939.

My Lord,

IT has come to my notice that proceedings have been brought in the English courts by Mme. Hemeleers-Shenley against the British Linen Bank regarding securities actually in the name of Commandant Hemeleers-Shenley, Assistant Military Attaché in this embassy, but which she claims as her property.

I am not concerned with the ownership of these securities, a matter which is now submitted to the Belgian courts by both Commandant Hemeleers and his wife.

I wish, however, to point out that I have not given my consent to either Commandant or Mme. Hemeleers-Shenley waiving their diplomatic privileges to entitle either of them to submit to the jurisdiction of the English courts, whether in the capacity of a plaintiff or of a defendant.

I venture to bring this to your Lordship's notice, as I believe it to be recognised that the privileges cannot be waived without official consent, and I should therefore be very much obliged if your Lordship would take such steps as may be deemed advisable to have these matters brought before the notice of the court.

I am informed that Mr. Beckett, the Assistant Legal Adviser to the Foreign Office, has already been informally advised of the position.

I have, &c.

E. DE CARTIER.

GENERAL

[J 1094/118/16]

No. 1.

[March 17, 1939]

Foreign Office to the Law Officers of the Crown.

Gentlemen,

Foreign Office, March 1, 1939.

I HAVE the honour, by direction of His Majesty's Principal Secretary of State for Foreign Affairs, to request that you will be so good as to favour him with your opinion in the matter indicated below.

2. Hitherto, His Majesty's Government have not concluded consular conventions with foreign countries, although it is the practice of almost every other country to conclude such conventions. In the past when the question of concluding such conventions has been considered the suggestion was abandoned because it was found that, in order to enable His Majesty's Government to accept many of the provisions which foreign countries habitually include in such conventions, somewhat complicated legislation in this country would be necessary. It has been found, however, that the absence of such conventions leads to doubt and difficulty with regard to the rights and status of British consuls abroad and also considerable dissatisfaction on the part of foreign Governments with regard to the position of foreign consuls in this country.

3. Further, owing to the disappearance of the Capitulations in Egypt it has become particularly necessary to conclude a convention with Egypt regulating the position of British consuls in that country. Under the convention for the abolition of the Capitulations in Egypt the *status quo* as regards most of the matters affecting the position of foreign consuls is maintained for a period of two years from October 1937 in order to permit the matter to be regulated in the interval by bilateral reciprocal arrangements.

4. Under the existing practice the only treaty arrangements concluded by His Majesty's Government with regard to consuls are, speaking generally, one or two articles dealing with particular matters and a general article providing for most-favoured-nation treatment subject to reciprocity. These articles are inserted in commercial treaties. The qualification providing for reciprocity in regard to each particular matter in these general articles, coupled with some uncertainty and misunderstanding as regards the position of foreign consuls in England, has rendered the provisions of this article of very uncertain value for the purposes of British consuls abroad. In the case of Egypt in particular, having in view the predominant British position in that country and the position which British consuls have held there in the past, it has been thought to be particularly undesirable that the position of British consuls in that country in the future should depend upon so uncertain a basis as the general article referred to above.

5. Reconsideration has therefore been given to the question of the conclusion of consular conventions, with Egypt in the first place and later with other countries and a draft consular convention has been prepared which it is hoped may improve the present position without entailing obligations which would require legislation in this country before they could be undertaken. It has been found that by suitable modifications in many provisions usually included in foreign consular conventions they can be adapted so as to render them consistent with the law and practice of this country. It is further hoped that in a consular convention drawn up on these lines, it would be possible to include a general most-favoured-nation provision which would be unconditional (*i.e.*, not subject to reciprocity in detail) save so far as fiscal privileges were concerned. If conventions on these lines can be concluded with foreign countries, the Secretary of State is of the opinion that the position of British consuls abroad will be rendered considerably more satisfactory and further that certain difficulties as regards the position of foreign consuls in this country will be eliminated.

[21632]

E* 2



1939

12

GENERAL

6. Amongst the provisions included in the draft convention which has been referred to above are two articles, articles 9 and 10, and Lord Halifax desires your opinion on the question whether obligations in the terms of these articles could be entered into by His Majesty's Government without legislation. It has been suggested that the answer to this question is in the affirmative because these two articles are merely declaratory of general international law. The question is fully discussed in a memorandum by the Second Legal Adviser of this Department which is enclosed herewith, and the text of the articles appear as annex I to that memorandum. The Lord Chancellor, the Secretary of State for the Home Department and the Secretary of State for Scotland have been consulted with regard to this question and they see no objection to the proposed articles provided that you are of the opinion that they can be accepted without legislation. If you should be of a contrary opinion they would see no objection to the necessary legislation being introduced, but it would seem to be preferable to accept them on the basis that they are merely declaratory of rules of international law which would be recognised by the English courts if you consider that this course is possible. These departments have also been supplied with copies of the enclosed memorandum and, while expressing no opinion on the correctness of the conclusions drawn in that memorandum, have no further material to lay before you in this connexion.

7. The Lord Advocate and the Solicitor-General for Scotland are being consulted simultaneously as regards the position under Scottish law.

8. I am therefore to request your opinion whether you consider that, so far as England and Wales are concerned, in the light of the authorities on international law referred to in the enclosed memorandum, it would be justifiable for His Majesty's Government to enter into obligations in the terms of these articles without legislation. Lord Halifax would also be grateful for any observations of a general character which you may be good enough to make.

I have, &c.

D. V. KELLY.

LIST OF PAPERS.

1. Memorandum by Mr. W. E. Beckett respecting Articles 9 and 10 of the Draft Consular Convention (Confidential 15569): Annex.

Report.

We understand that there is no objection to altering the wording of paragraph 1 of article 10 so as to read as follows:—

“The consular officers of one high contracting party shall not be liable in proceedings in the courts of the territories of the other high contracting party, in respect of acts performed in their official capacity and falling within the functions of consular officers under international law.”

Although these words would cover criminal proceedings, we think the express mention of such proceedings might be regarded as indicating an intention that the paragraph should be given a wider construction than is, we think, intended. It is only in very exceptional circumstances, such as libel, that an official act would be a crime.

In view of the vast number of consuls in the world, it is remarkable that there is little, if any, judicial authority clearly dealing with the point raised. Nor is there any clear rule formulated and accepted by writers of text-books. There would therefore be difficulty in maintaining that the provisions of the

GENERAL

13

proposed convention embodied a rule which nations accept among themselves, to use Lord Atkins's words quoted in the footnote on p. 1 of the case. Professor Brierley summarises the position by stating that consuls are not immune from civil or criminal proceedings, though there is a general sentiment that if possible these should not be allowed to interfere with their official duties or with the inviolability of the archives of the consulate. A general sentiment obviously falls short of an established rule. It is therefore by no means certain that the courts would regard the articles as embodying principles to be applied by English courts. We are, however, of opinion that, subject to the qualifications set out below, the courts would probably grant immunity to archives and protect from liability official acts, *i.e.*, acts done under the express instructions or under the authority of the foreign Government. In spite of the confusion and absence of authority, we feel this is in conformity with the general principles applicable to foreign Governments, and there is at any rate a large body of opinion that some regard should be had in law to the official position occupied by consuls.

So far as official archives and papers are concerned, we presume that if the latter related to a contract excluded by paragraph 3 of article 10 from the operation of paragraph 1 of that article it is not suggested that the immunity would apply. We can also imagine official papers relating, for example, to some commercial matter in which the consul had played a part and which had become the subject of litigation. A refusal to produce such papers might be, or might be regarded by the court, as unreasonable, and, in the absence of a clear rule, the court might regard itself as entitled to order their disclosure. So far as official acts are concerned, one can distinguish acts done *bona fide* and acts which, though done or purporting to be done as consul, had an unofficial and improper motive. Suppose, for example, a libel in a consular report on a commercial firm could be shown to be due to malice or bribery by a competitor. The court might, we think, well hold that in such a case the consul was not protected from liability on the broad ground that the act, though official in form, was in substance personal. Difficult questions of this kind might arise even though the articles were given legislative effect.

We do not feel, therefore, that we can give a definite affirmative answer to the question put. There would be some risk if there was no legislation of the courts declining to give effect to the principles embodied in the articles or giving a more limited freedom from liability, though we agree with the suggestion put to us that the existence of such conventions would assist towards the establishment of the rules therein embodied. We think that it would be difficult to avoid legislation if the Government were pressed either by the foreign States or by persons interested here to remove all doubts. On the other hand, if no such pressure is brought and the Government feel justified in leaving the matter in some uncertainty, we think there are, for the reasons we have given, reasonable grounds for anticipating that the courts would give effect to the general principles embodied in the articles.

D. B. SOMERVELL.
T. O'CONNOR.

Law Officers' Department,
March 17, 1939.

[21632]

F*

ANNEX.

[J 338/118/16]

Memorandum by W. E. Beckett respecting Articles 9 and 10 of the Draft Consular Convention.

THE object of this memorandum is to consider whether the provisions of articles 9 and 10 of the Draft Consular Convention (the texts are given in Annex I) can be accepted by the United Kingdom without legislation.

2. The two relevant rules of English law are:

- (a) That international law is part of the common law and that English law recognises any privilege or immunity which international law requires.⁽¹⁾ This was so stated (*inter alia*) in the old cases of *Barbuit* (Cases *tempore* Talbot 281), and *Triquet v. Bath* and is still the law.
- (b) That the Crown cannot by treaty create a privilege or immunity not recognised by English law (Parlement belge, 1880, P.D. 197).⁽²⁾

(a) Preliminary Remarks.

3. In the end of the eighteenth and the beginning of the nineteenth centuries, the question was debated amongst the publicists and in the courts whether consuls were "public ministers" and as such entitled to all the privileges and immunities of diplomatic representatives, which include complete immunity from process in respect of official or private acts. After some divergence of opinion, the view prevailed everywhere that, as consuls had no "representative character" (*i.e.*, were not intermediaries through whom matters of State were discussed between Government and Government), they were not, and therefore could not claim the general immunity and "extraterritoriality" which attaches to diplomatic representatives, except in eastern countries where extra-territorial jurisdiction prevailed and where consuls have the same immunities from the local law as public ministers.

4. For a short time after this, it seems to have been concluded that since they could not claim privileges as "public ministers," they could not claim any privileges at all. The old English cases of *Heathfield v. Chilton*, 4 Burr. 2015, and *Barbuit's* case belong to this stage of development. Then the view prevailed that, though consuls were not "public ministers," they had a status of their own under international law. They were appointed by commissions from their own Sovereigns, and received "exequaturs" from the Sovereigns of the foreign country of their residence to perform important duties as State agents. They

⁽¹⁾ The relation between international law and municipal law is a subject on which authorities differ. It is discussed in Wheaton, sixth edition, pp. 24-27, and in Oppenheim, fifth edition, volume 1, p. 36. Perhaps the best statement is in Wheaton at p. 27, "The true conclusion accordingly appears to be, as Westlake contended, that English Courts in matters within their normal jurisdiction as respects persons and places, must administer international law as well as the law of the land in its narrower sense, subject to the rules of that law which prevent the Crown divesting or modifying private rights by treaty, and forbid courts dealing with acts of State. In dealing with customary international law, the courts must clearly treat it as they do the common law, and must assist in developing its acknowledged principles in the same manner as they assist in developing those of the common law."

Lord Atkin in the recent Hong Kong murder case, *Times Law Report*, the 9th December, 1938, says: "It must be always remembered that, so far as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules on our own code of law and procedure. The courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they treat it as incorporated into the domestic law so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."

⁽²⁾ McNair, *The Law of Treaties*, pp. 19-22, says that there exists some indirect and inconclusive authority for the view that an immunity from suit which the Crown agrees to confer upon the representatives of foreign States admitted to this country—including consuls—will be upheld by the court, even if it exceeds the ordinary requirements of international law and, in consequence, British municipal law. He quotes certain old Law Officers' Opinions and *Fenton v. Krassin*, 1922, 38 T.L.R. 259. As the authority is inconclusive, I have not relied upon this supposed exception to the ordinary rule.

were charged with the protection of the nationals of their country and their interests in the foreign country and the furtherance of trade. They were the representatives of their States with regard to its merchant shipping abroad, charged with important functions with regard to internal discipline on the vessels, and had a special duty with regard to the property in the country of nationals who had died. It was consequently recognised that consuls enjoyed under international law such protection and immunity as is required for the performance of these duties. The United Kingdom has always been justly regarded as the absolute "low water mark" in regard to consular status and privileges as compared with other countries, but the beginning of the view that consuls have some privileges is seen in the judgment of Lord Ellenborough in *Viveash v. Becker*, 1814 3 M & S 285, where a resident merchant of London who was a consul of a foreign prince was held not to be entitled to immunity from arrest on mesne process in respect of a private trading debt. Lord Ellenborough says the consul enjoys a special protection under the law of nations, including the right to the liberty and safety necessary for the discharge of his functions, and to safe conduct to enter and leave the country. In *Clarke v. Cretico*, 1 Taun 106, where the issue was the right of a consul to claim immunity from arrest, the court was at pains to decide on the ground that the man was no longer a consul rather than to deny any right for a consul to claim any privilege from arrest.

5. The scope of consular functions has very greatly increased during the last century, and now includes in addition to those mentioned in the preceding paragraph the issue of passports and travel documents to nationals and visas to foreigners; the registration of births, deaths and marriages of nationals and other duties in connexion with the nationality law of their countries; the celebration (in some countries) of marriages; the performance of the functions of a notary or commissioner for oaths; the issue of certificates with regard to merchandise. Their functions have always been such as involve much correspondence, with their Governments and with their diplomatic missions, of a secret and confidential character, and this tendency has increased in recent years owing to the fact that they report regularly and constantly for the information of their Governments on the political conditions in the country where they reside, *e.g.*, movements of public opinion, signs of unrest, &c.

6. Foreign countries, almost with exception, have included consular conventions setting out in some detail the functions of consuls and the privileges and immunities which they should enjoy. The provisions of these conventions are partly declaratory of international law and practice and partly give privileges and immunities exceeding those which are required under general international law. The fact that a given privilege or immunity appears in a convention affords no indication that it is or is not something which rests upon convention only. The most that can be said is that if a given privilege or immunity appears in almost every convention that is concluded this is strong evidence, though not conclusive evidence, that this privilege or immunity is established under international law and practice of nations.⁽³⁾ In addition to various bilateral conventions there have been a number of draft general conventions prepared which purport to be a codification of the general law and practice with regard to consuls. In particular, such drafts were prepared by the Institute of International Law in 1896; by an Inter-American Committee of Jurists in 1927, which resulted in the signature of a pan-American Convention of consular agents at Havana in February 1928; and by the Harvard Law School Department of Research in International Law in 1932 in connexion with the

⁽³⁾ Wheaton says at p. 14: "What has been called the positive or practical law of nations may also be inferred from treaties; for though one or two treaties, varying from the general usage and customs of nations, cannot alter the international law, yet an almost perpetual succession of treaties, establishing a particular rule, will go very far towards proving what that law is on a disputed point." Wheaton then quotes Madison as saying: "Treaties may be considered under several relations to the law of nations, according to the several questions to be decided by them. They may be considered as simply repeating or affirming the general law; they may be considered as making exceptions to the general law, which are to be a particular law between the parties themselves; they may be considered explanatory of the law of nations on points where its meaning is otherwise obscure or unsettled, in which they are, first, a law between the parties themselves, and, next, a sanction to the general law, according to the reasonableness of the explanation, and the number and character of the parties to it; lastly, treaties may be considered a voluntary or positive law of nations."

League of Nations codification work. Except the general convention, signed in 1928 at Havana, which is in force as regards the United States and most of the Latin American countries, these are drafts only. As evidence of what the general rules and practice of international law are, they are perhaps of a little more weight than the bilateral conventions, but it is clear that some of their provisions, at any rate, go beyond the minimum requirements of international law.

(b) *Article 9 of the Draft Consular Convention.*

ARTICLE 9.

7. Article 9 provides:—

- (a) That consular officers may correspond with their Government by bag, post and cypher and that such correspondence shall be free from detention and examination (paragraphs 2 and 3).
- (b) That their official archives and papers shall be inviolable and they cannot be compelled to produce them in litigation or give evidence with regard to matters coming within their official duties (paragraphs 1 and 4).

8. The first part of these provisions (a) is one which can clearly be implemented without legislation since it only limits the action of the administration and does not affect other persons. It is a right which is enjoyed by foreign consular officers in the United Kingdom at present and it has been drafted with careful reference to the measures with regard to censorship proposed in time of war. In preparing these measures it was recognised that they must not interfere with this right. British consular officers abroad enjoy this right and the Foreign Office attach the greatest importance to their continuing to do so. It does not appear that provisions with regard to this matter are by any means invariably included in consular conventions though the Harvard model draft does so (article 13) and so does the treaty of 1924 between Italy and Czechoslovakia (article 9 (4) and (5)), and a treaty between the United Kingdom and Afghanistan of 1921 (schedule 2, paragraph 7). It seems desirable to include them in this draft convention.

9. The right is one which can be claimed under international law. The following authorities refer to it, though many say nothing about it. Hyde, *International Law*, Volume I, p. 799. Moore, *Digest*, Volume IV, p. 721, V, p. 98. Pradier-Fodéré, *Traité de Droit international*, Volume IV, p. 700. Institute of International Law: *Annuaire*, 1896, p. 307. *Foreign Relations of the United States*, 1897, pp. 501-2.

10. The inviolability of the consul's archives dealt with in the second of these provisions is justly stated by the Harvard Research Committee (p. 322) to be "the most universally recognised of all consular immunities." It may also be said to be the one most obviously essential for the carrying out of their duties. The necessity for it is hardly less than the necessity for the inviolability of the papers of a diplomatic mission, in view of the fact that consular papers frequently contain material whose secret and confidential character is practically as important as those of a legation. His Majesty's Government claim this right for their consulates abroad, e.g., the British Consular Instructions, 1921, Chapter I, paragraph 4, provide "They (consuls) cannot be compelled to disclose correspondence which has passed between themselves and any Department of His Majesty's Government, Dominion and Colonial Governments and British diplomatic and consular representatives. All such correspondence must be regarded as privileged and consular officers should refuse to disclose it pending the receipt of a reply to a reference home."

Practically every consular convention, bilateral or multilateral, and every draft prepared by research committees provides for this immunity, and, though a few authors do not mention it (e.g., Oppenheim), nearly every author asserts it and no author denies it.^(*) The following authors, *inter alia*, assert the right:—

Bluntschli: *Droit international codifié*, 1894, para. 268.

Phillimore: *International Law*, vol. II, p. 275.

Fiore: *Le Droit international codifié*, 1911, para. 376.

(*) Brierly (*The Law of Nations*, pp. 135-36) refers to it in rather uncertain terms as a general sentiment that if possible legal proceedings should not interfere with immunity of archives.

- Stewart: *Consular Privileges*, p. 35.
 Pradier-Fodéré: *Traité de Droit international*, 1888, vol. IV, p. 700.
 Hall: *International Law*, eighth edition, p. 375.
 Fauchille: *Traité de Droit international*, 1926, vol. I, Part III, p. 129, para. 760, p. 136 in 1935 edition.
 Anson: *Law of Constitution*, vol. II, Part II, p. 102.
 Hyde: *International Law*, vol. I, p. 799.
 Guerrero: *Dictionnaire diplomatique*, vol. I, p. 555.
 Bustamante: *Droit international public*, vol. I (1934), p. 410.
 Strupp: *Eléments de Droit international public* (1930), p. 229.
 Verdross: *Völkerrecht* (1936), p. 15.

The principle is asserted in regulations or official statements emanating from the following Governments:—

- Austria: Decree, April 1928, § 32.
 Belgium: Regulations for the Congo, §§ 3 and 4.
 Bolivia: Regulations of July 1887, Article 98.
 Brazil: Decree of November 1851, Article 19.
 Honduras: Law 1906, Article 35.
 Italy: Memorandum to United States Ambassador, October 1930.
 Japan: Order of Department of Justice, December 1923.
 Mexico: Law 1859, Article 29.
 Salvador: Law 1920, Articles 37 and 41.
 U.S.S.R.: Regulations of January 1927.
 Venezuela: Decree of 1883.

11. Fauchille (see above) says the rule is recognised by every country *except England*.^(*) This statement as regards England, which is certainly incorrect so far as His Majesty's Government are concerned, seems to rest on (1) a statement by W. B. Lawrence (the United States author) that the consular archives of the United States consular officer at Manchester were in 1850 seized in execution of a private debt of the consul—an incident which Hall's *International Law* says is fictitious; and (2) a statement in Calvo's *Droit international*, section 1395, that the archives of a consulate in London were seized as security for payment of taxes—M. Clunet investigated this alleged incident, and, on the authority of the Foreign Office and the Inland Revenue, relegated the story to the domain of fiction (J.D. 1, P. 1888, p. 66).^(*)

12. No case where the point has arisen in any English court has been found. In the case of *Kessler v. Best*, 121 Fed. Rep. 439 (1903), a Federal court of the United States upheld the right of a German consul to refuse to answer questions about documents in his archives, and on this application (supported by his minister) struck out certain answers to interrogatories which he had already given relating to these documents, on the ground that the privilege against disclosure belonged not to the consul but to the German Government. It would appear that there can be no doubt that consular archives and official papers are inviolable under international law: that the international rule is so clear that the English courts would recognise it, and that, therefore, paragraphs 1 and 4 of article 9 can be implemented in the United Kingdom without legislation. It is obvious that if the archives cannot be produced the consul cannot be compelled to testify orally to their contents or to testify orally to official acts or communications merely because they have not (yet) actually been recorded in writing.^(*)

(*) The same statement "except England" is found in Guerrero's article in the *Dictionnaire diplomatique* and in Morton, *Les privilèges et les immunités diplomatiques* (1927), p. 114.

(*) N.B.—Apart from the inviolability of the archives, they were certainly not the private property of the consul, and it is difficult to see how they could be seized to satisfy his personal debts.

(*) The last sentence of paragraph 4 of article 9 has been inserted because it has happened that subpoenas have been served on foreign consular officers to give (under compulsion) expert evidence on the law of their own country—a course which has rightly provoked protest from their Government. It is suggested that it is contrary to the law to subpoena an expert witness, whoever he may be (see *Webb v. Page*, 1 Carrington and Kirwass 23; a copy of the report is in Annex IV of this memorandum), apart from the fact that it is incorrect in the case of a consul because he only acquires knowledge of the law of his own country in his official capacity as consul.

(c) *Article 10 of the draft Consular Convention.*

13. Paragraph 1 of this draft article provides for immunity from process in respect of acts performed by a consul in the course of his official duties in the sense that, if a proceeding is brought and the court finds that it is based on an official act "falling within the functions of the consul under international law" this finding negatives liability. The question for consideration is whether there is authority for the existence of a rule of general international law to this effect sufficiently conclusive for His Majesty's Government to be reasonably sure that the English courts would recognise the rule. Paragraphs 2 and 3 merely define or qualify the provisions of paragraph 1; paragraph 2 making an exception to paragraph 1 where the consul's Government assents, and paragraph 3 making it clear that there is no immunity against an action in contract where the consul did not expressly contract as agent for his Government and the other party gave credit to the consul.

14. The authority which has to be considered on the question of the existence of this rule in international law is:—

- (a) official statements by Governments and laws and regulations issued by them: subsidiarily the provisions of conventions concluded by them;
- (b) the decisions of courts in proceedings brought against consuls recognising or denying the international rule;
- (c) the views expressed by the writers, including draft conventions prepared by unofficial bodies of international lawyers.

(a) *Official statements by Governments and laws and regulations issued by them: Provisions of Conventions.*

15. There are many official statements and regulations issued by Governments, which state generally that consuls cannot claim diplomatic immunity and are subject to the jurisdiction of the local courts and make no special reference to process relating to acts performed in their official capacity.^(*) No statements or regulations have been found which deny the existence of immunity specifically in regard to this class of acts. The immunity from process in respect of official acts is specifically recognised in the following official statements and regulations:—

Denmark.—Resolution of the 25th April, 1821:—

"Foreign consuls (whether of Danish or other nationality) do not come under the jurisdiction of the country so far as their consular affairs are concerned." (Feller and Hudson: *Diplomatic and Consular Laws and Regulations*, p. 411.)

Italy.—Memorandum from Italian Government to the United States Ambassador of October 1930:—

"As regards the prerogatives of consuls, it is to be noted that they are more restricted than those of diplomats . . . Immunity from the local jurisdiction is limited to acts performed by the consuls in the exercise of their functions, aside from special conventions." (Feller and Hudson, 1, p. 714.)

Sweden.—Memorandum from the Swedish Government to United States of America Legation of April 1930:—

"Through the application of international usage, as well as by virtue of various treaties, according to consuls under the conditions of reciprocity the benefit of the most-favoured-national treatment, the Swedish authorities would probably recognise for them exemption from jurisdiction for all acts attaching to their quality of public agents" (goes on to say that there have been no judicial decisions in Sweden on the point, as the Ministry for Foreign Affairs has been generally able to arrange settlements). Feller and Hudson, 1, p. 1156.

(*) The negative evidence of omissions to mention is never very strong: in this case it may, moreover, be explained in some instances on the ground discussed in paragraph 28 below.

U.S.S.R.—Regulations of the 14th January, 1927:—

"Article 11. The consular representatives of foreign States enjoy on basis of reciprocity the rights and privileges attached to their functions in conformity with the rules of international law. In particular the consular representatives—

- (a)
- (b)

(c) are not subject to the jurisdiction of the judicial institutions of the U.S.S.R. and of the Federated Republics because of offences committed in the discharge of their office." (Feller and Hudson, p. 1220.)

Switzerland.—A letter from the Swiss Federal Political Department to the judge of a court of the Canton of Berne, who had asked whether it was permissible to attach a bond deposited with a foreign consulate, gives the following ruling:—

"In principle consuls are subject to the jurisdiction of the receiving State except with regard to acts done in the exercise of their official duties and within the sphere of their authority. A seizure or attachment of property in the possession of a consul is permissible as in the case of any other third party, unless the property in question is held by the consul in the exercise of his internationally recognised official capacity or unless the consulate as such is the debtor.

This distinction may entail certain difficulties. If, as may be assumed, the bond is in the office of the consulate, the attachment cannot be effected under the provisions of Articles 91–109 of the Federal Execution and Bankruptcy Act. The consular archives enjoy immunity not only under general rules of international law, but also under positive provisions of particular conventions to which Switzerland is a party. For this reason representatives of the authorities of the receiving State are not allowed access to the consular archives without the consent of the principal officer in charge. Accordingly, a writ of execution against a consulate can never be issued in the usual form; in practice it will be couched in the form of a simple notice of the writ of attachment, thus being in substance a request for judicial assistance." (*Annual Digest of Public International Law Cases*, 1931–32, p. 337.)

United Kingdom.—No official pronouncement by the Government of the United Kingdom has been found, but Stewart (*Consular Privileges*, p. 151) records that in 1910, when two British seamen brought an action against a British consular officer in Cuba on a set of facts arising out of an official act by the consul, the Government of the United Kingdom took the matter up with the Cuban Government; that the Cuban Government transmitted the British Minister's note to the Cuban Supreme Court and the judgment of the Supreme Court admitted the principle that "in conformity with the principles of international law consular officers are not subject to the jurisdiction of the courts of the countries to which they are accredited in respect of acts performed in the exercise of their official character and in the name of the Government they represent."

In addition the law and regulations of the following countries direct these consuls to claim in foreign countries as essential for the service of their charge . . . "the freedom of those acts appropriate to their consular character." . . . "the freedom of those acts appropriate to their consular character." (Bolivia (article 93 of organic law for diplomatic and consular service); Bolivia (Regs. 1887: article 21); Chile (Regs. 1915, article 113); Costa Rica (Regs. 1888, article 27); Honduras (Law, article 40); Liberia (Regs. article 113); Uruguay (Regs. 1917, article 57); Dominica (Law, 1887, article 18); Ecuador (Regs. 1870, article 17).

16. Nearly all modern consular conventions contain an express provision on the following lines:—

"Consuls shall not be subject to the jurisdiction of the State in which they reside officially as regards the carrying out of their official duties." Article X of the Convention of March 1925, Germany/Estonia; cf. article 4 of Convention of March 1924, Italy/Czechoslovakia; article 5 of Convention of July 1924, U.S.S.R./Poland; article 4 of Convention of December 1925, France/Poland. But there are innumerable other instances.

Modern conventions generally also contain another provision providing for the immunity of consuls from arrest in all civil actions and from preventative detention except for very serious crimes (e.g., article 4 of convention of December



1925, France/Poland, &c.). The old consular conventions generally contain more or less extensive provisions with regard to immunity from arrest, but no provision dealing with immunity in respect of official acts (viz., the convention of 1853 between the United States and France), but nevertheless, the applicability of the rule of immunity for official acts as a rule of general international law has been recognised by the French courts to a United States consul in France (see *Zizianoff v. Kahn and Bigelow*: Case No. 11 in Annex II to this memorandum).

The Pan-American Convention signed at Havana in February 1928 to which the United States is a party provides in article 16:—

"Consuls are not subject to local jurisdiction for acts done in their official character and within the scope of their authority. In case a private individual deems himself injured by the consul's actions he must submit his complaint to the Government, which, if it considers the claim to be relevant, shall make it valid through the diplomatic channel."

(b) *Judicial decisions.*

17. There are very many judicial decisions given by courts in several countries in the case of proceedings brought against consuls in respect of private acts, which state that consuls have no immunity from process, and are in the same position as regards process as private persons and make no reference to any special rule as regards official acts.^(*) These are particularly numerous in the United States, where there are many reported cases dealing with proceedings against consuls, because there is a provision in the Constitution and in certain statutes of the United States giving the Federal courts exclusive jurisdiction in respect of all kinds of proceedings against consuls and to the Supreme Court a concurrent original jurisdiction. On the other hand, no reported case has been found in the courts of any country in which the process has been based on an official act, and the rule that there is immunity for official acts has been denied, and there are several cases where this rule has been recognised. Notes of some of these cases will be found in Annex II to this memorandum.

18. It will be seen that in the case of *R. v. Ahlers* (Case No. 1 in Annex II) the Court of Criminal Appeal in England quashed the conviction of the German consul at Sunderland, a British subject, for high treason for assisting German nationals of military age to return to Germany at the beginning of the war on the ground that the judge should have directed the jury to consider whether Ahlers acted in *bona fide* belief that it was his duty as consul to assist Germans to return to Germany. Though no doubt this decision is based on the principle that the jury's finding must be directed to the question of *mens rea* and no reference to any rule of international law was made, this decision is certainly not inconsistent with the recognition—in a very strong case—of the rule of immunity for consular acts and in fact applies this rule. Apart from this case, no reported decision has been found in which a consul has been liable in England for an official act, and no decision where a consul has been sued, pleaded immunity and succeeded. In an unreported case at Manchester Assizes in 1927 a husband brought an action for conspiracy to entice his wife away from him against his wife's parents and the Greek consul at Manchester—part but not the whole of the complaint against the consul was that he had supplied the wife with travel documents—and obtained damages against all the defendants. The consul did not plead immunity under the international law in respect of official acts and it was plain from the judge's summing up, of which a copy is in the Foreign Office, that the case against him was that he had gone far beyond his capacity as consul, and this was explained by the Foreign Office to the Greek Minister who had expressed concern about the case. The Greek Minister did not contest the correctness of the court's action in holding the consul liable in this case, but only expressed anxiety in case the proceedings showed that the English courts would entertain proceedings against foreign consuls in respect of acts which were official and he was assured that for the reasons given above the decision did not show this at all.

19. In the Canadian case of *Maass v. Seelheim* (Case No. 2), the consul did not plead immunity; he only pleaded qualified privilege in respect of a

(*) Please see footnote to paragraph 15 above.

defamatory statement made in the course of his official duties and succeeded. Similarly, in *Campbell v. Cour des Sessions générales de la Paix* (Case No. 3), a Quebec case, the consul only pleaded complete immunity from the jurisdiction which was denied and did not plead that he had acted in the course of his official duties—it is doubtful if this could have been sustained on the facts. In the two other Quebec cases (noted in Annex II, Nos. 4 and 5) no question of official duties arose.

20. In the United States, no decisions have been found in which, apart from convention, either (1) a consul has pleaded immunity for official acts and the immunity has been denied in principle as opposed to cases where it was held on facts that the acts were not official; or (2) a consul has obtained the dismissal of action on the ground that the case arose out of official duties; but the principle that the court should not accept jurisdiction where the case does arise out of official acts seems to be recognised in *Lyders v. Lund* (Case No. 6), *Patch v. Marshal* (Case No. 7), (indirectly), in *Castro v. de Uriate* (Case No. 8) and in *Commonwealth v. de Silvestro* (Case No. 9).

21. In the French courts, the rule that under international law and apart from convention a French court has no jurisdiction to entertain proceedings against a foreign consul in respect of official acts seems to be firmly established and regularly applied—see *Murphy v. L. Jortin* (Case No. 10); *Zizianoff v. Bigelow* (Case No. 11); *Khang v. Guthman* (Case No. 12); *Faucompré v. Polish Consul-General* (Case No. 13) and *Wemberg v. Hellevig* (Case No. 14).

22. The position seems to be the same in the courts of Italy—see *Little v. Riccio and Fischer* (Case No. 15) and *Mazzuchi v. American Consulate* (Case No. 16).

23. The *Lalezar* case (Case No. 17) is an instance of the rule being recognised by the Persian courts and Case No. 18 a similar instance in Cuba. Case No. 19 may be an instance of the recognition of the rule by the Greek courts—but the *ratio decidendi* may in that case be the immunity of the consul's State. It is clear from paragraph 15 above that the rule is also recognised by the Swiss courts. In cases Nos. 20 and 21, the rule was recognised by the Egyptian Mixed Courts as regards consuls, who could not claim, as some consuls in Egypt could, the superior immunities of Diplomatic representatives.

24. It will be seen from the preceding paragraphs that on the basis of official Government statements and regulations and judicial decisions alone (and without relying on the opinions of writers), clear evidence for the recognition of the rule of immunity for official consular acts has been produced in the case of 19 countries, viz., Denmark, Italy, Sweden, U.S.S.R., Switzerland, U.S.A., France, Persia, Cuba, Salvador, Chile, Costa Rica, Bolivia, Honduras, Liberia, Uruguay, Dominica, Ecuador and Egypt, and no positive evidence of non-recognition in the case of other countries.

25. Annex III of this memorandum is a note prepared by Mr. Hubbert of the Foreign Office with regard to the opinions on this question expressed by writers on international law, many of whom merely state that consuls unlike diplomatic officers possess no immunity from process and make no reference to any special rule with regard to proceedings relating to their official acts, though (in some cases) stating that consuls have some special immunities. Into this class fall Phillimore (No. 2),⁽¹⁰⁾ F. de Martens (4), Féraud-Giraud (7), Hannis Taylor (10), Oppenheim (24), Moore Digest (25), Hyde (26), Pitt Cobbett (27), Wheaton (29), Strupp (32) and Pallieri (33).⁽¹¹⁾ It is thought that the weight to be attached to the purely negative evidence of omission of any reference to this point must be less than that to be attached to positive statements, especially as in all these works the subject of consuls is treated shortly in a chapter or part of a chapter in a general treatise. Moreover, in so far as the immunity of consuls in respect of official acts is regarded, as clearly some authors and judicial decisions regard it, as flowing from the immunity of their Governments rather than as a consular immunity (see paragraph 28 below), the omission to mention it in connexion with the discussion of consuls has still less significance. One author

⁽¹⁰⁾ The numbers correspond to the paragraph number in Annex III.

⁽¹¹⁾ Brierly (34) refers to a general sentiment that, if possible, proceedings should not be allowed to interfere with official duties.



only—Travers (14)—a writer on international penal law, expresses a definite opinion against the rule, an opinion which he admits to be contrary to French jurisprudence. The following seventeen authors, nationals of different countries, refer to exemption in respect of official duties in terms which imply—though with varying degrees of emphasis and confidence—that they consider it to be established law, viz.:—

Charles de Martens (1), French.
 Fiore (3), Italian.
 Pradier Fodéré (5), French.
 Halleck (6), American.
 Rivier (8), French (in favour of immunity from criminal process only).
 Calvo (9), Argentine.
 von Ullmann (11), German.
 E. C. Stowell (12), American.
 de Louter (13), Dutch.
 Hall (15), English.
 Fenwick (16).
 Fauchille (17), French.
 Stewart (18), American.
 Lapradelle and Niboyet (19), French.
 A. Heyking (20), ? Swedish.
 Irizarry y Puente (23), ? Spanish or Latin American.
 P. de Paepe (28), Belgian.
 François (30), Dutch.
 Fedozzi (31), Italian.
 Verdross (35), Austrian (criminal process only).

In addition, opinions in favour of the existence of this immunity were expressed by the League of Nations Preparatory Codification Committee of 1927 (21 of Annex III); by the Harvard Law School in 1932, *Research in International Law*, pp. 338-39; inter-American committee of jurists, 1927 (article 18 of draft); Institute of International Law, 1896 (article 5). In effect, every author, or committee of experts, who treat the question of consuls in any detail express views in favour of the existence of the rule.

26. Hall appears to treat the exemption as something almost too obvious to need stating, as he simply says: "For obvious reasons a consul is not liable to the courts for acts done by order of the Government from which he holds his commission." It would seem that routine acts done in the course of his ordinary consular duties must be intended to be covered by these words. The Harvard Law School say that the exemption "is a consequence of the rule of general international law regarding the recognised public acts of one State in the territory of another. The performance of such an act should entail no responsibility, either civil or criminal, on the officer performing such an act." It is further argued (see, for example, Irizarry y Puente, Annex III, No. 23) that the official acts of a consul are to be regarded like the administrative acts of the consul's Government, and that for the local courts to exercise jurisdiction over them is equivalent to their exercising jurisdiction over the governmental acts of a foreign Government. It is further contended that the immunity results by implication from the fact that the consul possesses a commission from his own sovereign to perform consular duties and an exequatur from the sovereign of the country where he resides agreeing to his performing them, and from the fundamental principle that the consul must have such immunities as will enable him to carry out his duties, and the fact that he could not carry them out properly if he was liable to the jurisdiction of the local courts in regard to them.

27. It is, perhaps, desirable to consider whether the immunity of the consul from process in respect of his official acts is covered otherwise than by a specific rule relating to consular acts. It is, of course, true that, as the law of the country where the consul resides does not enjoin upon him the performance of any consular functions, he could not be liable under that law and before the local courts for mere failure to perform them. But this would not cover nearly all the ground, as a person, who is under no pre-existing obligation to perform any service, may become liable for failure to perform it or for performing it negligently or too late, if he undertakes to do so, especially if (as often for

consular services) he receives payment for it. Further, a consul would not be exempt on this ground against claims that, in the course of his official duties, he had committed a tort, such as defamation in a consular report, or false imprisonment or malicious prosecution in cases where he had ordered a seaman from one of his ships to be imprisoned on board, as it is part of his duty to do in certain circumstances.

28. It must next be considered whether the immunity of a consul for his official acts is covered by the immunity of his Government from process. It is clear that in some cases the immunity of the foreign State does cover the official acts of its consul, e.g., actions based on a contract which the consul has concluded as agent for his Government and process against consular property which belongs not to the consul but to his Government (*vide*, for example, Annex II, Cases No. 6, No. 13 and No. 19 and Annex III, No. 25, instances quoted in *Moore's Digest*). (In cases where the consul has not contracted as agent for his Government and the other party has given credit to the consul, it is proper that there should be no immunity, *vide* paragraph 3 of article 10 of the draft convention, Annex I.) Further, perhaps the principle that an agent of the Crown is not liable for breach of warranty of authority to conclude a contract (*Macbeath v. Haldimand*, L.T.R. 172) also applies to the agent of a foreign Government, but no case on this point has been found.

29. But in cases of tort, the usual principle is that the orders of the principal are no defence to the agent, and this principle applies to the servants of the Crown. Is it the case that the orders of a foreign sovereign are in all cases a defence to an action in tort against his agent—whether consul or otherwise? If the immunity of a foreign sovereign extends so far, then no doubt it does cover most, if not all, the cases while the consul could be sued in regard to matters arising out of his official duties, and there is little necessity for any special rule with regard to consuls. Certainly some of the arguments referred to in paragraph 26 above as to the grounds on which the immunity of official consular acts rests, and the reasoning of some of the foreign decisions in Annex II (e.g., Nos. 15 and 16), suggest at first sight such a view as to the scope of the immunity of foreign Governments. The Italian writer Fedozzi (Annex No. III) puts the immunity expressly on this ground. If this view as regards the scope of the immunity of a foreign sovereign is correct, no doubt the English courts will give effect to it and Article 10 of the draft convention can be accepted because it is covered in this way. Moreover, if the ground for the immunity of the consul in respect of his official acts is regarded as a branch of the immunity of his Government (as it is in the minds of some authors), then a failure to mention it in treating of consuls is explained and the omission becomes of no significance as regards the existence or otherwise of the immunity.

30. I am not sure, however, whether in England, at any rate, the immunity of a foreign sovereign does protect his agents of any kind in respect of torts committed by them as agents, and if this is so in case of torts *a fortiori* in the case of crimes.⁽¹²⁾ There is little authority on the point, but I notice that in the case of *Vavasseur v. Krupp* 1878, 9 Ch., where an agent of the Emperor of Japan introduced shells into England which violated the plaintiffs' patent rights, there are dicta (at pp. 355 and 358) to the effect that an action for damages will be against the agent, although the shells—the Emperor's property—must be released. I also notice that in an opinion given on the 9th August, 1855, Attorney-General Cushing of the United States stated that violations of United States Foreign Enlistment Acts by foreign consuls would be punishable in the courts. These acts were of course outside consular duties, but done on the orders of their Governments. Moreover, in the arguments referred to in paragraph 26 and in the foreign decisions stress is laid on the words "*recognised public acts*," "*administrative acts*," that is to say, that they are acts of a certain character of a foreign Government, and the most solid basis for the rule as regards consular acts is that the consul is received by the country where he resides as a consul to perform consular duties as the officer of the foreign State—considerations which

⁽¹²⁾ It seems unlikely that many consular acts done in the performance of official duties recognised by international law could be criminal, and in any case most prosecutions are in England Crown prosecutions, where it is open to the Law Officers of the Crown, the Director of Public Prosecutions or the police to prosecute or not to prosecute.



1939

do not apply to any person who acts as agent for a foreign Government—and it must be implied from this that the consul shall enjoy independence from the local jurisdiction as regards the performance of his consular duties. I think it is safer therefore to base the immunity on the narrower ground of an express immunity for official consular acts for which there is so much specific authority rather than on an extension of the immunity of a foreign sovereign which would cover the acts of agents who were not diplomats or consuls and held no official office recognised by the State on whose territory the acts were performed.

31. I think that it can hardly be contested that it is an immunity essential for the proper discharge of consular duties that a consul should be immune from process in the local courts in respect of them. The instances of possible actions if this principle is not recognised referred to in paragraph 27 above show the dangers to which he would otherwise be subject. No doubt other instances could easily be given. In the interest of the performance of their functions by British consular officers abroad, His Majesty's Government have every reason to uphold the principle. As indicated in 15 above, on one occasion His Majesty's Government invoked the principle to relieve a British consul, and the cases quoted in Annex II show a number of cases where British consuls have benefited by the recognition of this principle by foreign courts. In countries where the local courts are sometimes biased or open to improper influence the position of British consuls would be particularly difficult. Further, if foreign consuls were held liable in this country in respect of consular acts, it seems certain that strong protests from their Governments would follow. The recognition of the immunity in this case does not of course mean that if a British subject is wrongfully injured by the official act of a foreign consul there is no remedy, but merely that the remedy must be sought through the Foreign Office and the diplomatic channel as is the practice in the case of diplomatic officers, and, speaking generally, this remedy is not less efficacious and is certainly cheaper than recourse to the courts. The taking up of a case with the diplomatic mission is itself a strong means of pressure which is generally sufficient, and as a last resort in a flagrant case the exequatur can be withdrawn. Moreover, in some cases waiver of the immunity may be asked for and given. Indeed, in certain cases it may be the consul's own Government which desires that the consul should be punished or made personally liable. Requests have been received for the prosecution of foreign consuls for peculation, and Case No. 3 is another type of case where a request for prosecution might have been made by the consul's Government. It would be for the court to decide whether a given case fell within the scope of consular duties or not, but no doubt it would pay great weight to any views on this point expressed to it by or on behalf of the Law Officers. It is not thought that there is any danger of any undue extension being given to consular duties such as would lead to a consul being held exempt from penalties for driving a motor car contrary to the law because he was on his way to his office and not on the return journey home.

32. The legal authority referred to in the preceding paragraphs in favour of the existence of the rule seems to be no less than that which can be cited in support of most international rules and sufficient to secure the recognition of the rule by the English courts. If the rule were embodied in a convention to which His Majesty's Government were a party, the courts would be even more disposed to recognise it.

W. E. BECKETT.

January 17, 1939.

ANNEX I.

ARTICLE 9.

The archives and all other official documents and papers kept in a consulate shall at all times be inviolable and the local authorities may not under any pretext examine or detain any of these documents or papers. The archives and official papers of a consulate shall always be kept completely separate from all papers, books or correspondence of the consular officers relating to other matters.

2. In the territory of each high contracting party, the consular officers of the other high contracting party may correspond with their Government or with the diplomatic mission under whose superintendence they are, by post and telegraph. In addition, consular officers may send and receive such correspondence by bag and in the case of telegrams use cipher. This right shall also extend, except when the high contracting party in whose territory the consular officers are resident is at war, to correspondence with other Governments of the same high contracting party and colonial protectorate and mandated territory Governments of that high contracting party and with other consulates and diplomatic missions of that high contracting party. Further, if the high contracting party, in whose territory the consular officers are, is at war, such high contracting party may subject the use of cipher in telegrams to such conditions as are necessary in the interests of national security.

3. The consular correspondence referred to in the preceding paragraph shall be inviolable and the local authorities shall not examine or detain it. In special cases they may, however, request that a bag should be opened by the consular officer in their presence in order to satisfy themselves that the bag does not contain anything except correspondence.

4. Consular officers and their employees shall be entitled to refuse requests from the courts or local authorities of the country where they reside to produce documents from their archives or other official papers or to give evidence relating to matters within the scope of their official duties. Such requests shall, however, be complied with in the interests of justice if it is possible to do so without prejudicing the interests of the high contracting party appointing them. Consular officers are also entitled to decline to give evidence as expert witnesses with regard to the law of the territories of the high contracting party by whom they are appointed.

ARTICLE 10.

1. The consular officers of one high contracting party shall not be liable, in criminal or civil proceedings, in respect of acts performed in their official capacity and falling within the functions of consular officers under international law.

2. The provisions of paragraph 1 of this article do not apply if the high contracting party by whom the consular officers were appointed requests or assents through his diplomatic representative to the proceedings.

3. It is understood that the provisions of paragraph 1 of this article do not preclude consular officers from being held liable in civil actions arising out of contracts concluded by the consular officer, in which the officer did not expressly contract as agent for his Government and in which the other party looked to the consul personally for performance.

ANNEX II.

CASE NO. 1.

R. v. Ahlers 1915 1 K.B. 616 (*England*).

Ahlers was a British subject by naturalisation and German consul at Sunderland. He was prosecuted for high treason, viz., aiding King's enemies in that he assisted German subjects of military age to return to Germany after the declaration of war, and convicted.

Held by the Court of Criminal Appeal who quashed the conviction that jury should have been directed that they must consider whether Ahlers acted with intention of assisting King's enemies or in *bona fide* belief that it was his duty as consul to assist Germans to return to Germany (see p. 625).

CASE No. 2.

Maass v. Seelheim, 1936, 4 D.L.R. 267.

The plaintiff brought an action for libel and slander in the Dominions courts in Manitoba against the German consul in respect of a report written by the defendant about the plaintiff, a German national, to the plaintiff's superior officer in a German shipping line. The statements were *prima facie* defamatory, but the defendant pleaded qualified privilege on the ground that the words were written by him *bona fide* and without malice in the course of his official duties as consul, and the action was dismissed on this ground.

The defendant did not apparently plead immunity from the jurisdiction because the matter arose out of his official duties and there is no pronouncement by the court on this point.

CASE No. 3.

Campbell v. Cour des Sessions générales de la Paix, 49 Quebec Law Reports, King's Bench 65.

In this case Campbell appealed to the Court of King's Bench in Quebec against a judgment of an inferior court refusing to dismiss a prosecution against him for taking money for assisting certain persons to enter the United States by means of false nationality declarations. He claimed that it should be dismissed because he was a consul and as such possessed immunity. The report merely records that the Court of King's Bench dismissed the appeal because "under the English doctrine applied in Canada, consuls are not diplomatic representatives and do not enjoy personal immunity." The report does not state of what country he was a consul, whether he was *de carrière* or not and whether his Government had acquiesced in or even asked for the prosecution. He may have been a United States Consul, and, in view of the facts, the United States Government may well have requested the prosecution. The question whether the facts complained of could be said to be within his official duties was not raised.

CASE No. 4.

Maluquer v. R., 1924, Quebec Reports, King's Bench 1.

Maluquer, Spanish Consul at Montreal, was convicted of conspiracy with two other persons to defraud the revenue by importing into Canada goods on false documents to avoid payment of customs duty and for importing narcotic drugs. The house where his consulate was situated was searched under a warrant issued by the court and a number of letters and papers seized. Maluquer pleaded not guilty and opted for speedy trial before a magistrate. Maluquer appealed from his conviction on various grounds, including the ground that the search and seizure of papers at the consulate was illegal under international law.

Held, that even if search was illegal it would not render trial void; that consul possessed no personal immunity from suit;⁽¹³⁾ that his official residence enjoys no inviolability from search except as regards the archives and official papers (citing *Hall's International Law*).

CASE No. 5.

Leonard v. Premio Real, 1885, 11 Quebec Law Reports 128.

Action for a private debt against Spanish Consul. Immunity claimed on the ground that he was not only Spanish Consul, but the only representative of Spain in Canada. Rejected because he had not proved he was entrusted with more than consular duties. Foelix cited, to the effect that consuls are justiciable by tribunals "quant à leurs affaires privées."

⁽¹³⁾ N.B.—No question of the act being done in the course of official duties was or could have been raised here.

CASE No. 6.

Lyders v. Lund, Consul. United States, District Court, N.D. California.
April 12, 1929 (Kerrigan, District Judge).

The Facts.—This was an action in equity brought by an American citizen against Lund, "as consul of Denmark at San Francisco," seeking an accounting for disbursements and fees as attorney to the consulate and a sale of certain assets assigned to plaintiff as security. The defendant appeared specially, "as consul," and moved to dismiss the action on the ground that it was a suit against the consul of Denmark in his official capacity. It was contended that this amounted to an action against the Government which he represented. Upon the motion,

Held, that the motion to dismiss should be denied. The suit was not against the Government. The court said: "In actions against the officials of a foreign State not clothed with diplomatic immunity, it can be said that suits based upon official authorised acts performed within the scope of their duties on behalf of the foreign State, and for which the foreign State will have to respond directly or indirectly in the event of a judgment, are actions against the foreign State. Acts of such officials, beyond the scope of their authority and in connexion with their private business, cannot be regarded as acts of the foreign State, and the official may be sued on account of any such acts. . . . The Kingdom of Denmark is not joined as a defendant in the suit, nor has it been made clear that, as between that kingdom and the defendant consul, such transactions as those sued upon are not considered as the personal acts and liabilities of the consul in the event of suits by third parties."

CASE No. 7.

Patch v. Marshall, 1853, 1 Curt 452 (U.S.A.).

Action for damages by member of crew, a United States citizen, against captain of British ship, a British subject domiciled in United States, arising out of events connected with voyage from Boston to Cuba and back. District Court decided in favour of plaintiff. Defendant appealed. British consul intervened and contended the United States had no jurisdiction because the investigation of claim would call in question official acts and conduct of consul in regard to British subjects. The intervention was dismissed on grounds:—

- (1) If intervention was successful appeal would be dismissed and decision against captain of District Court would stand;
- (2) It would be a denial of justice to plaintiff for United States courts to hold that they had no jurisdiction against this British captain who was domiciled in the United States;
- (3) "It is true that this court should not call in question a British Consul for his official acts respecting crew of British vessel in a foreign port."⁽¹⁴⁾ It is correctly stated in the protest that he is responsible solely to his own Government or if to individuals such responsibility arises out of the law of his own country, which this court would not undertake to administer. But it does not follow that the conduct of the master of the vessel in procuring official intervention of an American citizen by imprisonment in a foreign jail is not here investigated.

CASE No. 8.

Castro v. De Uriate, 16 Fed. Rep. 93, 1883.

Action against defendant, Consul-General for Spain, for false imprisonment and malicious prosecution in connexion with extradition proceedings for extradition of plaintiff which consul had instituted in official capacity. Dismissed, but on finding no malice and that probable cause must be presumed.

⁽¹⁴⁾ Cf. *Chester v. Benner* Fed. Cases 2 660, where it was stated that in suits between master and crew an imprisonment by order of a consul must be assumed to have been necessary.

CASE No. 9.

Commonwealth v. di Silvestro, 31 Pa. Supr. Ct. 537.

United States courts have no concern in alleged abuses by foreign consuls in charging fees or in expending money entrusted to them by foreign Governments.

CASE No. 10.

Murphy v. Lee Jortin, *Clunet*, 1900, p. 130 and 958.

The defendant, British Vice-Consul at Dieppe, was summoned before the "tribunal correctionnel" at Dieppe for defamation because he told the plaintiff in the office of the vice-consulate, before three witnesses, that he was a drunkard. The remark was made because the plaintiff complained that the defendant had not assisted the plaintiff in connexion with the latter's arrest by the local authorities.

Held that (1) the remarks were made by the defendant in the performance of his official functions;

(2) That consuls, though they do not possess the extritoriality and exemption from jurisdiction of diplomats, and are subject in France to the criminal law and the jurisdiction of the courts, are "public officers of a foreign sovereign" invested with the function of defending the interests of their nationals; and consequently possess a personal immunity "tant qu'ils restent dans les limites de leurs fonctions officielles et que l'ordre public n'est pas compromis." This is not an exemption from jurisdiction, but an essential immunity resulting from the institution of consulates and required by rules of international comity; consuls could not perform their functions with the necessary independence if they could be proceeded against by their nationals in respect of matters coming within the sphere of their official functions;

(3) That for the reasons given above the court must declare itself incompetent to decide whether the statements made by the defendant were defamatory or not. The editorial note in *Clunet* approves the decision and refers to V. Lehr: *Agents diplomatiques et consulaires*, n. 128, 64 et seq. The above decision was confirmed by the Court of Appeal at Rouen on precisely the same grounds (*Clunet* 1900, p. 858). Murphy brought a further action against Lee-Jortin for defamation because the latter had written a letter to *The Times* (reproduced in a local Dieppe paper), in which he defended his action in refusing to assist Murphy, and stated *inter alia* that Murphy had claimed untruly to be an officer of the army; had been arrested for breaking a street lamp and brandishing a revolver, and had falsely stated that his wife was a sister of the wife of the British Ambassador at Paris.

Held by Dieppe tribunal (1) that this letter was not written by defendant in his official capacity, and therefore the tribunal was competent;

(2) That statements were made without malice and with intention to serve public interest and to defend his reputation. This judgment was confirmed by the Court of Appeal at Rouen.

CASE No. 11.

Zizianoff v. Kahn and Bigelow, *Annual Digest*, 1927-28, p. 384.

Prosecution for defamation against director of passport section of United States consulate at Paris, because he, after refusing a visa to Zizianoff, issued to journalists information defamatory of Zizianoff. Bigelow claimed no jurisdiction on two alternative grounds: (1) on basis of consular treaty (not relevant); (2) on ground that the act was done in the course of official duties and under rule of international law there is no jurisdiction.

Courts held as to (2), that the rule is admitted, but the act complained of was distinct from the official act of refusing a visa, and not in course of official duties.

CASE No. 12.

Khanghi v. Guthman. *Justice de Paix mixte at Damascus: Clunet* 34, p. 980.

Action against Austrian Consul for damage to a car which he had hired. Held by the tribunal:

(1) That as a matter of general international law and apart from convention, members of the consular corps enjoy like members of the diplomatic corps immunity from the jurisdiction in civil matters if obligations contracted by them in their official capacity and in the limits of their powers are in question.

(2) That this immunity rests on the basis that consular and diplomatic agents represent in the exercise of their functions the sovereign authority of the country which has appointed them and that to exercise jurisdiction over these acts would be to exercise jurisdiction over a foreign sovereign authority (a decision of the Cour de Cassation of the 30th June, 1884, is cited in support of this proposition).

(3) That in the course of the 19th century the immunity of a diplomatic agent has been extended to cases which he has dealt with in a purely private capacity and relating to purely civil matters having no connexion with his official duties, matters relating to real property and commercial matters when the agent engages in commerce excepted.

(4) The above states the position under international law in an ordinary western country, but Christian consuls in non-Christian countries enjoy privileges more extensive than those enjoyed by consuls in Christian countries. In particular, they enjoy full diplomatic immunity as regards the jurisdiction civil and criminal.

(5) For this reason the action against the Austrian Consul must be dismissed.

CASE No. 13.

Faucompré v. Polish Consul-General. *France, Civil Tribunal of Lille, May 7, 1932.*

The Facts.—An action was brought before the "Président des référés" (15) against the Polish Consul-General, in his capacity as representative of the Polish Government, with regard to the lease of the consular premises. The consul invoked jurisdictional immunity.

Held: that the French courts had no jurisdiction. "A foreign State is in general immune from the jurisdiction of another State." The Président des référés had no competence to hear the action brought against the consul. "The inclusion in the lease of a clause providing for the submission to the jurisdiction of the place of domicile is without effect in view of article 4 of the Franco-Polish Consular Convention of 30th December, 1925, which provides that the courts will refrain from jurisdiction when an agent invokes diplomatic [sic] immunity."

NOTE.—This decision conforms with other French decisions on the subject. Before 1840 the French Courts refused to grant immunity from jurisdiction to consular agents, but from 1840 onwards this attitude has been reversed (see the decisions mentioned in Challine, *Le droit international public dans la jurisprudence française de 1789 à 1848* (1934), pp. 208-222). Contemporary jurisprudence has confirmed this change: see the decision of the Conseil d'État of the 22nd March, 1929, in *Ministre des finances v. Héritiers X* (*Annual Digest*, 1929-1930, Case No. 213); and the decision of the Civil Tribunal of the Seine of the 30th October, 1929 (*Dalloz hebdomadaire*, 1930, p. 15). It will be noted that the immunity granted to consuls applies only to their official activities, as distinguished from purely personal acts.

CASE No. 14.

Wemberg v. Hellevig. *Civil Tribunal of Marseilles, December 28, 1912.*

The plaintiffs sued the defendant, the German Consul at Marseilles, because they had been dismissed from employment at the German Seamen's Mission at Marseilles without notice. The consul acted as president and manager of the mission on the orders of the German Government and in his official capacity.

(15) This is a summary jurisdiction concerned mainly with decreeing conservatory measures.



The tribunal held that it had no jurisdiction, because, although the consul possessed no complete immunity from the jurisdiction of a French court, the act complained of was one performed by the consul in the course of his official duties, and the French courts cannot assume jurisdiction over acts done by consuls on the orders of their Government.⁽¹⁶⁾

In a case in March 1913 brought against the consul of Colombia at Marseilles, the same tribunal accepted jurisdiction expressly stating as the ground of its doing so that the cause of action had nothing to do with his official functions.

CASE No. 15.

Little v. Riccio and Fischer 1934, *Clunet*, p. 1071, *Court of Appeal at Naples*.

The Court of Appeal declared itself incompetent to entertain an action arising out of a contract of employment relating to a cemetery maintained for the burial of British subjects at Naples and owned by His Majesty's Government, against the British Consul-General on the ground that the consul-general represented his country in concluding this contract, and in the arrangements made for the maintenance of the cemetery His Majesty's Government were exercising "un droit public."⁽¹⁷⁾

CASE No. 16.

Mazzucchi v. American Consulate. Italy, Court of Appeal of Naples, April 7, 1931.

The Facts.—Mazzucchi, who had been employed at the American Consulate at Naples, was dismissed in August 1930. The nature of his duties is stated below. On the 30th October he brought an action before the Court of Naples asking for compensation for wrongful dismissal. The court dismissed the action on account of lack of jurisdiction. On appeal,

Held: that the court had no jurisdiction. "Consuls do not possess the true and proper quality of representing the State in its international political relations; neither are they diplomatic agents. Nevertheless, in fulfilling their mission and in exercising the powers belonging to them they must be considered as official agents of the Governments by whom they are appointed. It follows that, if consuls enter into relations with private persons in order to carry out duties which appertain to the political activity of the State which they represent, no action in respect of such relations can be brought before the courts since a foreign State cannot, in the exercise of its political functions, be subjected to the jurisdiction of another State without suffering a denial of its sovereignty. If, on the other hand, consuls engage in private activities, then they assume the character of foreign private persons, and as such are admitted to the enjoyment of the civil rights which the law confers upon citizens. In such a case consuls are subject to the jurisdiction of the Italian courts.

"In the dispute in question the plaintiff maintains that this court can hear his claim having regard to the fact that the modest duties entrusted to him were not of a consular character. In fact, he asserts that he had first the task of disinfecting emigrants, and then that of stamping the papers issued by the American Consul so as to make it possible to ascertain, at the moment of embarkation, that the emigrants had been medically examined by the sanitary officer of the consulate. He does not appreciate that, although his duties were simple, they were nevertheless still relative to a service of a political nature which the American State carries on in Italian territory by means of its consuls.

"In order to be able to declare whether Mazzucchi should have a right to compensation, the Labour Court would have to ascertain, as a preliminary step, whether the cause of the dismissal was just. It would have to submit to examination the motives which led the consul to dismiss a person employed

⁽¹⁶⁾ N.B.—No consular treaty was relied upon in this case.

⁽¹⁷⁾ N.B.—In Italy the immunity of foreign States from the jurisdiction is only recognised as regards their "public acts" as opposed to acts performed by States which are considered not to be of an essentially public character, viz., commercial contracts, &c.

in a service of a political nature. It would have to give judgment on a step taken by the consul with regard to the execution of a duty which has its origin in the sovereignty of a foreign State. Such examination and judgment lie outside the jurisdiction of the Italian courts."

CASE No. 17.

Lalezar v. His Britannic Majesty's Consul at Kermanshah, 1933 (Persia).

This was an action against the consul for damages for delay in refunding a sum of money paid.

Held that no action lies against consul in respect of measure taken in discharge of official duties and the matter must be taken up with consul's Government through the diplomatic channel.

CASE No. 18.

Extract from judgment of Supreme Court of Court of Cuba in 1910—action by two British seamen against consul in respect of acts performed in his official capacity.

"Notwithstanding all this, there is no objection to admitting, with a view to avoiding future difficulties, the claim that charges made against foreign consuls should not be recognised by the judges when it is evident that the matter in complaint is an act performed by the consul in his official character for which he is responsible to his Government alone, since in conformity with the principles of international law consular officers are not subject to the jurisdiction of the courts of the countries to which they are accredited in respect of acts performed in the exercise of their official character and in the name of the Government that they represent, as the British Minister states in his note as the basis of the claim.

It is agreed therefore to advise the judges . . . that they should not recognise charges that are made before them against foreign consular officers when it is evident that the matter which is the object of the complaint does not come within the jurisdiction of the Cuban courts because the act performed by the consul was done in his official character for which he is responsible to his Government alone."

(The decision is published in No. 128 of the *Gaceta Oficial*, p. 5623.) Quoted from *Stewart*, 1. c. p. 151.

CASE No. 19.

Consular Premises (Greece) Case. Greece, Court of Athens, 1931.

The Facts.—This was a case of distress levied for rent of the premises occupied by the British Consul-General in Athens. The consul appealed on the ground of immunity from jurisdiction.

Held (by a majority), that the distress was invalid. Although a foreign State did not enjoy jurisdictional immunities with regard to acts of a private law nature, such as contracts of sale, relations of landlord and tenant, lending of money, &c., the renting of premises for the purposes of consular service was an act of a public character having reference to the exercise of sovereign rights of the foreign State. Such acts were covered by the privilege of immunity from jurisdiction.

The court also pointed out: (a) that diplomatic representatives, including consuls performing diplomatic functions, enjoyed immunity with regard to all acts whatsoever, including acts in the field of private law. This was so in order to safeguard the inviolability of diplomatic envoys and the unhampered exercise of their duties; (b) that it was not necessary to go into the question whether execution was admissible with regard to such acts of foreign States as were of a private law nature seeing that "one must assume that a foreign State will voluntarily submit to execution."

CASE No. 20.

Immunité.—Le décret du 1^{er} mars 1901 réglant la situation juridique des fonctionnaires diplomatiques et consulaires étrangers consacre deux principes distincts, celui de l'immunité de juridiction lorsqu'ils agissent dans l'exercice de leurs fonctions, et celui de la compétence de la juridiction mixte lorsqu'ils n'agissent pas dans l'exercice de leurs fonctions.

Aux termes du traité d'amitié conclu le 28 novembre 1928 entre l'Égypte et la Perse, les sujets persans sont justiciables des tribunaux indigènes, sauf le cas où, comme représentants diplomatiques ou consulaires de leurs pays et dans l'exercice de leurs fonctions officielles, ils bénéficient du privilège d'extraterritorialité.

Égypte, Cour d'Appel mixte, 7.3.'35.—Ahmed Bey El Saadani/El Sayed Mohamed Dessouki.—B. de J. et L. ég., 1934/35, p. 192. (*Bulletin de l'Institut juridique international*. Vol. 33, p. 309.)

CASE No. 21.

Immunité.—L'immunité juridictionnelle absolue prévue au décret du 1^{er} mars 1920 ne vise que les fonctionnaires diplomatiques ou consulaires *missi* et leurs familles, soit pour les affaires concernant leurs fonctions officielles soit pour les affaires d'ordre privé, à moins qu'ils ne s'occupent de commerce ou d'industrie ou possèdent ou exploitent des immeubles en Égypte, auquel cas ils sont soumis, pour ce qui concerne les susdites affaires, à la juridiction mixte, tandis que les fonctionnaires diplomatiques ou consulaires qui ne sont pas *missi* et leurs familles ne jouissent d'aucune immunité juridictionnelle, sauf pour les affaires concernant leurs fonctions officielles.

Alexandrie, Tribunal sommaire mixte, 3.4.'34.—Curt Boehme/Laura Stross.—G. d. T. M., 1936, p. 221. (*Bulletin de l'Institut juridique international*, Vol. 36, p. 273.)

ANNEX III.

Statements in Text-Books on International Law relating to the Liability of Consuls for Acts performed in the Course of their Official Duties.

The fifth edition (1937) of *Oppenheim's International Law*, Volume I, edited by H. Lauterpacht, gives a number of references at the top of the chapter headed "Position and Privileges of Consuls." Most of these have been looked up and extracts from them are given below. The first extract, however, is from a book in the Printed Library, not mentioned in *Oppenheim*.—

(1) The fifth edition of the *Guide diplomatique*, by Baron Charles de Martens, revised by M. F. H. Geffcken, Leipzig, 1866, states on p. 234 of Volume I: "Il est de droit que les consuls ne puissent être poursuivis par les tribunaux du pays de leur résidence pour des actes qu'ils y auraient exercés par ordre de leur Gouvernement dans les limites de leurs attributions et sous l'autorisation tacite du Souverain territorial."

This is preceded by a paragraph which commences: "En principe, les consuls ne peuvent prétendre, comme les agents diplomatiques, à être indépendants de la juridiction du pays. Toutefois, ceux qui ne sont pas nés ou reconnus sujets de l'État qui les reçoit, qui y ont été envoyés, n'y exercent aucune profession industrielle et n'y acquièrent point d'immeubles, quoique soumis à la juridiction civile et criminelle du pays où ils résident, ne peuvent cependant être arrêtés et incarcérés à moins de crime. Quant à ceux qui sont sujets du Souverain territorial, l'usage, conformément aux convenances, veut, s'ils se rendent coupables de crime, qu'on leur retire l'exequatur avant de les mettre en jugement."

(2) *Commentaries upon International Law*, third edition, Volume II (1882) by Phillimore, says nothing in regard to acts done by consuls in the course of their duties. At p. 270 there is the following: "Consuls in Christian countries are not, legally speaking, public ministers of the State to which they belong, though having a public character, they are under a more special protection of

International Law than uncommissioned individuals. This protection they have a right to claim both from the State which sends and from the State which admits them. But they are not *representatives* of their State, nor entitled to any of the privileges and immunities accorded to such *representatives*. . . . As a general rule, they are amenable to the civil and criminal jurisdiction of the country in which they reside. Vattel's position, that they are exempted from the latter is wholly unsupported by the requisite proof." On p. 275 he says: "The privileges of consuls, so far as they are derived from the country to which they are sent, are . . . as a general rule, the muniments and papers of the consulate are inviolable and under no pretext to be seized or examined by the local authorities."

(3) Pasquale Fiore, in *Trattato di Diritto Internazionale Pubblico*, Turin, 1882, says at p. 447 of Volume II, when enumerating the principles of international law which should govern the exercise of the duties of consuls, "I consoli sono soggetti alle leggi e alla giurisdizione del paese di loro residenza per tutti gli atti che sono fuori dell'esercizio delle loro funzioni . . ." ("Consuls are subject to the laws and jurisdiction of the country where they reside in respect of all acts which are outside the exercise of their duties . . .").

(4) Friedrich von Martens in *Völkerrecht*, German edition, Berlin, 1883-86, Volume II, when discussing in paragraph 22 the rights and privileges of consuls, says nothing in regard to the liability of consuls for acts done in the course of their duties. As regards the liability of consuls generally he says: "Sie sind principiell nicht nur in civil und handelsrechtlichen sondern auch in strafrechtlichen Sachen durchaus den Justizbehörden des Aufenthaltsstaats unterworfen. Übrigens gewähren die Staaten neuerdings den fremden Consulen, namentlich den Berufsconsulen, einige Freiheiten bezüglich der Gerichtsunterthänigkeit, wodurch ihr moralisches Ansehen in den Augen sowohl der örtlichen Obrigkeiten, als auch der Privatpersonen, die mit ihnen zu thun haben, nur erhöht werden kann." (*Translation.*—"They are in principle completely subject to the judicial authorities of the State where they reside, not only in civil and commercial matters, but also in criminal matters. States are, however, of late, according to foreign consuls, particularly career consuls, some privileges as regards subjection to the courts whereby their dignity in the eyes both of the local authorities and private persons who have to deal with them can only be increased.")

(5) P. Pradier-Fodéré in *Traité de Droit international public*, Paris, 1888, Volume IV, at p. 701 says: "Les consuls ont droit à toutes les immunités . . . qui sont indispensables à l'accomplissement de leurs fonctions . . . ils doivent personnellement jouir d'une entière immunité de juridiction pour les faits accomplis par eux en leur qualité de consuls."

"Mais l'accomplissement des fonctions consulaires n'a rien de commun avec les délits ou crimes que les consuls peuvent commettre, et dans un cas pareil . . . je refuserais au consul délinquant le droit de s'abriter sous l'immunité de la juridiction criminelle."

(6) *Halleck's International Law*, third edition, by Sir Sherstone Baker, Bart., 1893, states at p. 372, Volume I: "Consuls are amenable, generally, to the civil and criminal jurisdiction of the country in which they reside, and their property and effects are subject to the recourse of execution and process of the local courts. It was at one time contended that they should be exempt from criminal jurisdiction, but the position was neither sustained in practice nor in the doctrine of text-writers. They, therefore, may either be punished for their offences by the laws of the State where they reside, or be sent back to their own country at the discretion of the Government which they have offended. A distinction, however, is made between personal offences and official acts done under the authority and direction of their own Government. The latter are matters for diplomatic arrangement between the respective States, and are not properly justiciable by the local courts."

(7) L. J. D. Féraud-Giraud in *Etats et Souverains, personnel diplomatique et consulaire* . . . devant les tribunaux étrangers, Paris, 1895, states at p. 54, Volume II:—

"Les consuls sont plus que de simples citoyens étrangers, et, au point de vue où nous devons les considérer, ils sont moins que des agents diplomatiques; mais quelle place doit-il leur être faite entre le plus et moins, c'est ce qu'il est difficile à déterminer. Le consul n'est pas un agent diplomatique, parce que c'est un agent consulaire, ne représentant pas un Gouvernement étranger. Ce



n'est pas un simple citoyen, parce qu'il personnifie ses nationaux dans la circonscription territoriale étrangère pour laquelle il a été agréé par le Souverain du pays. Il doit dès lors avoir droit aux immunités, sans lesquelles il ne pourrait remplir les fonctions dont il est chargé par son Gouvernement, et dont l'autorité territoriale lui a permis l'exercice."

(8) Rivier in *Principes du Droit des Gens*, Volume I, Paris, 1896, at p. 538 says: "N'ayant pas le caractère représentatif, le consul ne saurait prétendre aux immunités des diplomates. Il ne jouit donc pas de l'extraterritorialité, ni même, en règle générale, de l'inviolabilité. Cependant, ces privilèges lui sont accordés dans plusieurs pays, par convention, au moins partiellement et ceci paraît devoir se généraliser" At p. 539 he writes: "Plusieurs auteurs anciens reconnaissent aux consuls l'inviolabilité. Ainsi Borel, Miruss; Heffter aussi, tout en la montrant plus ou moins étendue d'après les traités, et sans distinguer d'ailleurs entre les consuls de carrière et les consuls non de carrière." On p. 540 Rivier mentions that Engelhardt is a partisan of the personal immunity of consuls de carrière. He quotes from Engelhardt: "Considérée dans son application aux consuls *missi*, l'immunité personnelle que stipulent la plupart des conventions modernes, répond tout d'abord à la notion d'inviolabilité, telle que la définit le droit des gens dans son acception générale, c'est-à-dire qu'elle est une qualité, un caractère qui assure à l'envoyé étranger respect et liberté dans l'accomplissement de son mandat public. . . . La souveraineté même des États que les consuls effectifs représentent, entraîne pour eux, tout aussi bien que pour les diplomates, l'irresponsabilité personnelle, je veux dire l'immunité de juridiction, dans le domaine de leur compétence officielle. C'est au nom de cette souveraineté et en vertu d'une entente positive, que des exceptions peuvent être faites à cette loi incontestée. Pour les actes étrangers à leurs fonctions, les consuls envoyés ne devraient point relever des tribunaux locaux en matière criminelle, toute procédure pénale impliquant voie de fait, c'est-à-dire atteinte à l'indépendance qui est l'essence même des délégations internationales. Le même fondement rationnel n'existant pas pour la juridiction civile, les consuls seraient soumis au droit commun, sous réserve de l'intervention diplomatique en cas de nécessité."

(9) Calvo in *Le Droit international, théorique et pratique*, fifth edition Paris 1896, Volume III, states at p. 233:—

"Lorsque l'autorité territoriale se croit en droit de prendre des mesures de rigueur contre un consul étranger, les convenances aussi bien que la prudence lui font un devoir de distinguer si le délit qui lui est imputé est personnel, ou s'il a été commis dans l'exercice et à l'occasion de ses fonctions, c'est-à-dire en vertu d'ordres ou d'instructions de son Gouvernement; dans cette seconde hypothèse, le délit échappe à l'appréciation de la juridiction territoriale et donne lieu à des transactions et à des arrangements diplomatiques.

"C'est sans doute à ce point de vue qu'il faut envisager le différend survenu entre l'Angleterre et la France à propos du missionnaire Pritchard, consul anglais à Taïti, et le mode dont il a été réglé."

At page 235 there is the following:—

"La France, sauf stipulation contraire dans les traités, attribue à ses consuls et reconnaît, par réciprocité, aux agents étrangers, un caractère public, qui tend à élargir le cercle de leurs immunités.

"De cette attribution, elle fait résulter pour eux le droit à l'immunité personnelle, excepté dans le cas de crime. . . .

"Ils ne peuvent être poursuivis devant les tribunaux pour les actes qu'ils font par ordre de leur Gouvernement et avec l'autorisation du Gouvernement du pays où ils résident. Ils ont le droit de décliner la compétence des tribunaux dans les questions où leur qualité d'agents publics de leur Gouvernement est mise en cause, à moins qu'ils n'appartiennent aux pays qui refusent le même avantage aux consuls de France."

(10) Hannis Taylor in *A Treatise on International Public Law*, London, 1902, cuts down consular immunities to the minimum and makes no mention of any exemption from liability for acts done in the course of a consul's official duties. After stating that a consul cannot be arrested for political reasons and cannot be burdened with local obligations as might conflict with the discharge of his duties, he states at p. 358: "Such privileges conceded to consuls with the

view of enabling them efficiently and safely to discharge their official duties, do not withdraw them either from the civil or criminal jurisdiction of the courts of the country in which they officiate. Leaving such privileges out of view, even consuls who owe no allegiance to the State in which they reside, and the sole object of whose residence is the discharge of their consular functions, possess only the ordinary personal exemptions and disabilities incident to aliens who are mere sojourners."

A footnote is added to the effect that a foreign consul in the United States possesses the privilege of being sued only in a Federal court, a privilege which belongs not to him personally, but to the sovereign he represents.

(11) Dr. E. von Ullman in *Völkerrecht*, Volume III, Tübingen, 1908, paragraph 62, at p. 222, says: "Im übrigen dürften jene Handlungen der Konsulen, die sie in Ausübung ihres Amtes innerhalb der Grenzen ihrer Kompetenz vornehmen, im Interesse der freien Ausübung ihres Berufes von der Jurisdiktion des Amtssitzes schlechthin zu eximieren sein." ("Moreover, those acts which consuls perform in the exercise of their office and within the sphere of their competence, should, in the interest of the free exercise of their calling, be absolutely exempt from the jurisdiction of their official place of residence.")

(12) E. C. Stowell in *Le Consul: Fonctions, Immunités, Organisation, Exequatur*, Paris, 1909, says at p. 141:—

"Les immunités que l'État étranger accorde au consul doivent être conçues de façon à lui permettre de remplir efficacement ses fonctions. Chaque fois qu'il remplit une fonction qui lui est reconnue comme propre, les privilèges nécessaires à son accomplissement s'y trouvent attachés. Aussi est-il difficile de séparer exactement ses fonctions et ses immunités."

At p. 148 Stowell writes:—

"Le consul ne doit avoir rien à redouter dans l'exécution des instructions de son Gouvernement et dans l'accomplissement de sa fonction: les autorités locales ne peuvent pas discuter ses actes et il appartient à son Gouvernement seul de le punir s'il a dépassé ses droits. Ce principe qui est aujourd'hui universellement reconnu paraît le seul praticable dans les conditions actuelles des relations internationales."

In a footnote on p. 149 there is the following:—

"Dans l'opinion unanime des auteurs européens le consul qui exécute les ordres de son Gouvernement n'a de comptes à rendre ni à l'État étranger, ni à aucun de ses citoyens. La réparation des injustices ou des dommages que cet État ou ses citoyens peuvent avoir éprouvés de son fait, doit être poursuivie par la voie diplomatique. Nous acceptons, à notre corps défendant, cette opinion parce que nous estimons que la responsabilité personnelle de l'agent est la base des libertés individuelles et la garantie d'un Gouvernement libre. . . . Si un agent consulaire vient aux États-Unis et réussit à obtenir, au moyen de papiers frauduleux, l'extradition d'un citoyen ou d'un étranger domicilié dans le pays, les garanties que nous possédons ne nous protègent plus contre ses agissements. Est-il, en vérité, admissible qu'un État étranger dispose de plus de privilèges pour agir comme il l'entend dans le territoire des États-Unis, qu'un service quelconque de notre administration publique. . . .

A cela on peut répondre qu'un État ne peut avoir la prétention de contrôler les actes d'un autre État."

(13) J. de Louter in *Le Droit international public positif*, Volume II, Oxford (1920), at p. 75 says:—

"Il est établi par une jurisprudence constante et l'opinion presque unanime de la doctrine, que les consuls sont, tout comme les personnes privées, soumis à la juridiction territoriale en matière civile et pénale: ils courent donc le risque d'être emprisonnés quant à leur personne et saisis quant à leurs biens; l'exercice de leurs fonctions est rendu impossible par la réalisation de l'une ou l'autre de ces possibilités. C'est la raison pour laquelle plusieurs États ont, les uns de leur propre mouvement, d'autres dans des traités d'État, adopté des stipulations, plus ou moins détaillées par lesquelles des garanties suffisantes sont accordées aux fonctionnaires consulaires, pour que ceux-ci puissent exercer librement leurs fonctions. . . . Jusqu'à présent ce droit consulaire n'est pas encore devenu une institution de droit international universellement reconnue."

Further on he quotes Camille Jordan:—

"En somme, en dépit de quelques hésitations dans la jurisprudence française . . . la doctrine, comme la jurisprudence du continent européen, ne voient pas dans les clauses des traités et conventions consulaires de titre pour les consuls étrangers à l'immunité de la juridiction territoriale." De Louter adds: "Par contre, les tribunaux se déclarent généralement incompétents, même sans stipulation formelle, pour connaître des actes commis par les consuls étrangers dans l'exercice de leurs fonctions officielles, parce que, en cette matière, les consuls ne doivent de comptes qu'à leur propre Gouvernement. Ceci est seulement vrai pour les consuls de carrière, car les consuls élus sont entièrement soumis à la législation et à la juridiction territoriales."

(14) Travers in *Le Droit pénal international*, Paris, 1921, Volume II, at p. 256 says:—

"Le principe est, pour les pays de chrétienté ou assimilés, qu'aucune immunité de juridiction n'appartient, en matière répressive, aux consuls, vice-consuls, agents consulaires."

"Peu importe que le fait, en raison duquel consuls ou agents consulaires seraient incriminés, se rapporte, de façon plus ou moins directe, à leurs fonctions."

Reference is made to the case where an action was brought against the British Vice-Consul at Dieppe for defamation. Travers does not approve of the reasons given by the court for acquitting the vice-consul. He says: "Rien ne serait plus dangereux que de vouloir distinguer selon que l'acte incriminé aurait ou n'aurait pas de rapport avec les fonctions du consul ou les instructions de son Gouvernement; pareille recherche serait une cause féconde de froissements et de conflits."

"Enfin, les consuls n'ont, même lorsqu'ils agissent dans l'exercice de leurs fonctions, aucun caractère représentatif."

(15) *Hall's International Law* (eighth edition, 1924) says at p. 375, speaking of the position of a consul: "It is agreed . . . that he must be conceded whatever privileges are necessary to enable him to fulfil the duties of his office except such as would withdraw him from the civil and criminal jurisdiction of the courts." To this there is a footnote: "For obvious reasons a consul is not liable to the courts for acts done by order of the Government from whom he holds his commission."

(16) *International Law*, by C. G. Fenwick, 1924, says at p. 377: "The subject of consular immunities received constructive treatment at the hands of the Institute of International Law at its session at Vienna⁽¹⁸⁾ in 1896, when a series of rules, arranged in codified form, was adopted. The rules distinguish between professional consuls and consular agents, specify the conditions under which consuls shall enjoy a large measure of personal immunity, and restrict the immunities to be enjoyed by consular agents. While consuls are left amenable in general to the local civil and criminal jurisdiction, an exception is made in the case of acts performed in their official capacity and within the limits of their powers."

The "Projet de Règlement," to which reference is made above, contained the following under Titre I—Des Consuls:—

"Art. 3. Ils ne sont justiciables des tribunaux locaux pour les actes qu'ils accomplissent en leur qualité officielle et dans les limites de leur compétence. Les exceptions qui sont faites à cette règle doivent être prévues et définies par traité."

"Si un particulier se croit lésé du fait d'un consul agissant dans la sphère de ses attributions, il adressera sa plainte au Gouvernement territorial, qui y donnera suite, s'il y a lieu, par la voie diplomatique."

M. Ed. Engelhardt, in a report, printed before the règlement quoted above, at p. 132 of the *Annuaire de l'Institut de Droit international*, 1896, says in regard to the legal position of consuls:—

"La jurisprudence en cette matière est singulièrement variable; car on observe des différences non seulement dans les usages et dans les traités qui président aux relations d'Etat à Etat, mais encore dans les décisions des tribunaux d'un même Etat."

(18) Vienna is a mistake. The place of meeting was Venice.

"Trois principaux systèmes sont ici en présence et ils ont chacun leurs partisans."

"Le premier consiste à exempter les consuls de la juridiction indigène, tant au civil qu'au criminel, comme les diplomates."

"Le second rend les consuls justiciables des tribunaux locaux sauf pour leurs actes officiels."

"Le troisième est la consécration du second, mais avec cette clause que les consuls ne peuvent être poursuivis sans que leur Gouvernement ne soit préalablement appelé à intervenir."

"Il y a même un quatrième système mixte, d'après lequel les consuls, soustraits à la juridiction pénale, sauf en cas de crime, seraient soumis à la juridiction civile, à l'exclusion de la contrainte par corps et de la saisie."

(17) P. Fauchille in *Traité de Droit international public*, eighth edition, revised by H. Bonfils, Paris, 1926, Volume I, at p. 126 says:—

"Immunités.—Si les consuls n'ont pas le caractère représentatif et diplomatique, ne faut-il pas leur attribuer quelques immunités sans lesquelles il leur serait très difficile de remplir leur mandat? Les publicistes ne s'accordent pas sur cette concession."

"Les uns pensent, avec Engelhardt, qu'il n'est pas possible de refuser aux consuls de carrière la plénitude du bénéfice de l'inviolabilité personnelle. Les consuls sont des fonctionnaires étrangers, investis par une délégation émanée de leur propre Souverain, délégation dont le Gouvernement territorial a reconnu l'autorité et la valeur par l'exequatur accordé. Bynkershoek, Calvo, de Garden, Geffcken, Holtzendorff, Hyde, Klüber, G. F. de Martens, Moore, Oppenheim, Vattel, Wicquefort délient en principe aux consuls les immunités diplomatiques et notamment l'immunité de juridiction."

"En droit positif, les exemptions, immunités, prérogatives des consuls sont déterminées par les législations intérieures des Etats ou par les conventions consulaires."

"L'inviolabilité personnelle reconnue aux consuls doit s'entendre en ce sens que les consuls doivent être respectés dans leur personne."

"Mais l'inviolabilité personnelle n'entraîne pas l'exemption de la juridiction répressive. Les tribunaux locaux peuvent connaître des crimes, délits ou contraventions commis par les consuls étrangers. Telle est la doctrine générale des criminalistes français, Faustin Hélie, Morin, Ortolan, Garraud, Le Sellyer, &c. . . . en France, en Allemagne, en Autriche, en Angleterre, en Belgique, en Danemark, en Espagne, aux Etats-Unis, en Portugal, dans l'Amérique du Sud, &c., les consuls étrangers sont soumis à la juridiction répressive des tribunaux locaux. Il en est toutefois autrement si le consul a agi dans sa qualité officielle."

"Les consuls sont-ils aussi subordonnés à la juridiction des tribunaux civils ou commerciaux de leur résidence? Sans l'ombre d'un doute, le consul ne peut être cité devant la juridiction civile locale à l'occasion des actes accomplis par lui en sa qualité officielle et dans les limites de ses pouvoirs. Ces actes sont la manifestation publique de la volonté de son Gouvernement et celui-ci ne saurait être soumis à un pouvoir étranger (Cass., 30 juin 1884). Quant aux actes non officiels du consul, nul traité (à notre connaissance) ne fixe la limite exacte du pouvoir juridictionnel des tribunaux civils ou de commerce. Pour la France il n'existe que de simples instructions ministérielles. En principe, dans le droit actuel, le consul est justiciable de la juridiction civile locale pour les actes de sa vie non officielle."

(18) Irvin Stewart in *Consular Privileges and Immunities*, New York, 1926, says at p. 147: "To-day there can be no doubt about a consul's liability to suit. . . . However, a distinction must be made between the cases involving action of the consul in his official capacity and those which concern the consul personally. In the first type of cases, some courts hold that a consul may not be sued. Thus the French courts refused to entertain a suit against an English consul for slander when the consul defended himself on the grounds that the remarks complained of were made by him in his official capacity and in the conduct of the consular business."

"The reason given by the French courts in making the distinction is this: the consul in performing his official acts is proceeding under the authority of his



Government and the court in permitting a suit against the consul would in fact be allowing a suit against the Government which appointed the consul. Furthermore, inasmuch as the consul in receiving his exequatur is authorized by the Government which receives him to perform his functions, the official act is one done with the authorization of the receiving as well as the appointing Government. No record has been found to indicate that the Government of the United States has recognized this distinction. . . .

"One result of the consul's residence is that the territorial court is the one to pass upon the character of the act which is being challenged. Where consuls are not liable to suits for their official acts, there remains the problem of determining what acts are official. In the first instance, the determination of the question rests with the court in which the suit is filed. This determination, however, is subject to a review in diplomatic negotiations which will arise if the court's decision is believed to be incorrect."

(19) *Répertoire de Droit international* by A. de Lapradelle and J. P. Niboyet, Paris, 1929, Volume V, at p. 46, states:—

"Actes de la fonction. Même en l'absence de traités, il convient aussi de reconnaître aux consuls étrangers l'immunité pour les actes de leurs fonctions dont ils ne doivent compte qu'au Gouvernement qui les a nommés."

"En l'absence de conventions, les consuls anglais ne peuvent élever en France aucune prétention à l'immunité de juridiction. Cass. crim. 23 décembre 1854, Featherstonhaugh, consul britannique au Havre (S. 1854, 1.811)."

There follows a mention of a case at Dieppe, where an action was brought against a British vice-consul, Lee Jortin, for defamation (Clunet, 1900, p. 130).

Further on there is the following:—

"Il existe une certaine analogie entre la théorie des actes de la fonction et la théorie de l'acte administratif, des actes de Puissance publique dont les tribunaux n'ont pas à connaître."

"Mais les consuls étrangers ne peuvent être assimilés aux fonctionnaires publics français. Il y a analogie, et non assimilation."

(20) Baron A. Heyking in a study, *La Théorie et la Pratique des Services consulaires*, published in the 1930 volume of *Recueil des Cours* of the Académie de Droit international, says (pp. 859-860):—

"Les privilèges consulaires vis-à-vis de la juridiction locale ont trait . . . à l'exemption de toute poursuite judiciaire pour les actes que les consuls étrangers accomplissent dans l'exercice de leurs fonctions officielles. Les traités internationaux ne contiennent pas de dispositions à ce propos, pour la simple raison que cette exemption découle de la nomination même du consul et de l'exequatur qu'il a obtenu du pouvoir territorial. En conséquence, si une action officielle du consul était considérée par les autorités locales comme incompatible avec les lois du pays, on ne pourrait protester contre elle que par la voie diplomatique."

A footnote refers to Irvin Stewart's *Consular Privileges and Immunities*, p. 149.

(21) A sub-committee (J. Gustavo Guerrero, rapporteur, and A. Mastny) of the League of Nations Committee of Experts for the Progressive Codification of International Law reported in 1927 on the question of the possibility of establishing by way of a general convention provisions as to the legal position and functions of consuls. The sub-committee's report contained the following:—

"Immunity from civil jurisdiction.—This immunity, and indeed all immunity from jurisdiction, depends on the fiction of extra-territoriality which can really only apply to diplomatic agents. Consuls, accordingly, are subject to local jurisdiction, and, indeed, a civil action could hardly prevent a consul from carrying on his duties."

"Immunity from criminal jurisdiction.—It would seem that, as a consul could not carry out his duties if he were placed under arrest, he should be allowed immunity in criminal matters. Against this, it may be argued that, as the consul and the consulate are not the same thing, the arrest of the consul would not mean the discontinuance of the work of his country's consular service."

"Such cases have often arisen in various countries and judicial decisions have answered the question in the sense of disallowing any immunity, either civil or criminal, for consuls

"The foregoing observations may be modified by bilateral treaties."

The conclusions of the sub-committee as amended as a result of discussion in the committee were:—

"Immunity from civil jurisdiction.—The immunity from civil jurisdiction which is accorded to diplomatic agents cannot be applicable in a general manner to consuls, who should only enjoy such immunity in connexion with the exercise of their functions."

"Immunity from criminal jurisdiction.—Consuls do not "possess this immunity."

(22) The Faculty of the Harvard Law School decided in 1927 to organise a research in international law for the purpose of preparing drafts of international conventions dealing with various subjects, one being the legal position and functions of consuls. The draft convention on this subject contained the following article (21):—

"A receiving State shall exempt a person from liability and from its judicial and administrative jurisdiction for an act done by him while he was consul in the performance of consular functions which he was entitled to exercise: the receiving State decides, subject to diplomatic recourse by the sending State, whether the act was done in the performance of such functions."

(23) J. Irizarry y Puente, in his book *Traité sur les Fonctions internationales des Consuls*, Paris, 1937, devotes chapter II to the "Situation juridique des Consuls." This chapter contains a section of twenty pages headed "Irresponsabilité pour les Actes officiels." He begins as follows:—

"Les actes officiels d'un consul étranger, nous le savons, sont 'sous la sauvegarde du droit international et ne peuvent faire l'objet d'enquête de la part des autorités de l'Etat.'⁽¹⁾ Cela signifie, selon les termes affirmatifs de l'*Acuerdo sobre Consules* du Congrès de Caracas de 1911, que les consuls 'en tout ce qui est relatif à l'exercice de leurs fonctions, devront être entièrement indépendants de l'Etat dans le territoire duquel ils résident.' De ces déclarations nous déduisons le principe, universellement reproduit dans l'usage et dans la pratique internationale, même en l'absence de traité ou de mesures législatives formelles, qu'un consul ne peut pas, pendant ou après l'occupation de sa charge, être poursuivi personnellement, en matière civile ou criminelle, par ses propres nationaux ou par les nationaux ou les fonctionnaires de l'Etat d'admission ou d'un Etat tiers, devant les tribunaux de l'Etat d'admission, pour les actes officiels, de quelque caractère que ce soit, faits par lui dans l'exercice des obligations de sa charge et dans les limites de ses fonctions consulaires. L'admission du consul, en vertu d'un exequatur exécutif, à accomplir ses fonctions consulaires pour le compte d'un Etat étranger, entraîne avec elle cette limitation sous-entendue de l'action des autorités de l'Etat d'admission; et les lois territoriales, en matière civile ou pénale, ne sont pas destinées à réglementer et contrôler les actes faits par des agents étrangers en leur qualité officielle. Cette règle est basée sur des arguments puissants, juridiques et politiques. Permettre les poursuites contre les consuls en raison de leurs actes officiels équivaldrait à poursuivre l'Etat d'origine dont le consul n'est qu'un agent sans son consentement, à une infraction à sa souveraineté et à son indépendance et à un affront à son Gouvernement. Ce serait aussi contraire à la politique publique qui cherche toujours à éviter toute intervention hors de propos dans l'exercice des fonctions gouvernementales. Ces raisons juridiques et politiques sont particulièrement puissantes en ce qui concerne les agents gouvernementaux étrangers travaillant dans l'Etat d'admission avec son consentement tacite ou exprès. La réparation de torts éprouvés en raison d'actes officiels d'un consul étranger doit être plutôt obtenue par les voies diplomatiques que par l'action privée. Les actes officiels présupposent la sanction et la responsabilité gouvernementale, et cette responsabilité ne peut être jugée et déterminée par les tribunaux locaux sans le consentement du Gouvernement proprement responsable."

Subsequently when discussing "délits fonctionnels" the author states "les jugements rendus soutiennent uniformément que le consul n'est pas responsable civilement et criminellement devant les tribunaux de l'Etat d'admission pour les délits engageant sa responsabilité officielle, mais qu'il est responsable des délits commis par lui au delà des limites des fonctions consulaires et qui engagent seulement sa responsabilité personnelle."

⁽¹⁾ Reference to a Honduran decree of 1906 and a Salvadorean law of 1901.

(24) *Oppenheim's International Law*, Volume I, "Peace," 5th edition, edited by H. Lauterpacht, London, 1937, states at p. 656: "From the undoubted official position of consuls no universally recognised privileges of importance have as yet been evolved. Apart from the special protection due to consuls according to international law, there is neither a custom nor a universal agreement between the Powers to grant them important privileges. Such privileges as consuls actually enjoy are granted to them either by courtesy or in compliance with special stipulations in a commercial or consular treaty between the sending and the admitting State."

The question whether consuls are liable for acts performed in the course of their official duties is not discussed.

(25) J. B. Moore, in *A Digest of International Law*, Washington, 1906, when dealing with consuls in Volume 5, has a section at p. 61 headed: "Amenability to Local Jurisdiction." He does not discuss the point whether consuls can be sued for official acts, but says: "Consular privilege cannot protect a consul as to mercantile matters engaged in by him independent of his official business." Reference is made to the case of *Caldwell v. Barclay et al.*, 1788, 1 Dallas 305. Moore continues: "In a suit brought against a consul-general of France, for transactions of a public nature, in which he acted as the commercial agent of his country, the President has no constitutional right to interfere, but must leave the matter to the tribunals of justice, Lee, At.-Gen., 1797, 1 op. 77, but he goes on to say that he did not think the right to sue the consul in this case could be maintained, since the contract was made on the credit of the French Republic. At.-Gen. Lee, in another opinion of the same year, stated: "It is well settled in the United States, as in Great Britain, that person acting under a commission from the Sovereign of a foreign nation is not amenable for what he does in pursuance of his commission to any judiciary tribunal of the United States."

"A consul cannot be held personally liable on a contract which he enters into on account of his Government, the credit being given to that Government. *Jones v. Le Tombe* (1798), 3 Dallas, 384."

(26) C. C. Hyde, in *International Law chiefly as Interpreted and Applied by the United States*, Boston, 1922, says at p. 806: "A foreign consular officer is not, according to the law of nations, exempt from local jurisdiction. The territorial sovereign is not obliged to yield to him so great a privilege. He is amenable to civil process. Such amenability implies an obligation to submit to an adjudication when he is duly served."

Nothing is said in regard to acts performed in the course of official duties.

(27) Pitt Cobbett's *Cases on International Law*, Volume 1, "Peace," 5th edition, by F. T. Grey, London, 1931, makes no mention at all of the question of the liability of consuls for acts performed in the course of official duties.

(28) M. P. de Paepe, counsellor at the Court of Cassation of Belgium, in an article in the *Journal du Droit international privé* of 1895, at p. 44 writes as follows:—

"La distinction entre les actes politiques et les actes civils, que l'on se refuse généralement à admettre pour les agents diplomatiques, est, au contraire, appliquée sans contestation aux consuls étrangers."

"Dans les pays de chrétienté, dans les pays civilisés, ils sont justiciables des tribunaux pour leurs faits personnels, mais non pour les actes qu'ils accomplissent en leur qualité officielle."

(29) Wheaton, *International Law*, 5th edition, pp. 352-3, quotes Phillimore as set out in (2) above, and says:—

(1) Consuls are not entitled to the peculiar immunities of ambassadors whatever special privileges they may have.

(2) In civil and criminal cases they are subject to the local law in the same manner as other foreign residents, but, none the less, have some privileges and immunities not enjoyed by private persons.

(30) François, *Handboek van het Volkenrecht*, Vol. II, Zwolle (Netherlands), 1933, p. 34:—

"They (consuls) are entitled, however, to immunity from the jurisdiction of the courts in matters of civil and penal law in respect of acts performed in the exercise of their public functions and within the strict limits of their competence."

(N.B.—François is an official of the Dutch Foreign Office.)

(31) Fedozzi, *Introduzione al Diritto internazionale*, 3rd edition (1938), p. 459:—

Translation.—"The consul has no immunity from civil jurisdiction. If the contrary may have appeared to be the case in practice, it is due to the fact that the consul was brought before the court for matters done on behalf of or against his country and hence as the representative of it; where the jurisdictional immunity of foreign States is admitted, the declaration of the lack of jurisdiction on the part of the local judicial authorities has regard to the State and not to the person of its representative."

(32) Strupp, *Éléments de Droit international public*, Vol. 1 (1938), p. 229:—

"Les consuls ne jouissent pas d'exterritorialité, mais leurs papiers et leurs archives sont inviolables. En général et dans la mesure où les traités consulaires le reconnaissent, ils ne peuvent être ni arrêtés, ni emprisonnés et ne sont pas obligés de déposer comme témoins."

(33) Balladore Pallieri, *Diritto internazionale pubblico* (1937), p. 381, affirms the immunity of consular archives and says:—

Translation.—"According to general international law no immunity is vested in consular officers, who are subject to the ordinary rules in force for foreigners in and for all matters. The immunities which they sometimes enjoy are either accorded to them by way of courtesy or find their basis in consular conventions and in particular legal obligations which the States have undertaken in that manner."

(34) Brierly, *The Law of Nations*, pp. 135-6: "Consuls are not diplomatic agents; they perform various services for a State or its subjects in another State, without, however, representing the former in the full sense. They may be nationals of either State, and generally they are made subject to the authority of the diplomatic representatives of the State for which they act. They watch over commercial interests of the State for which they act; collect information for it; help its nationals with advice, administer their property if they die abroad, and register their births, deaths, and marriages; they authenticate documents for legal purposes, take depositions from witnesses, and the like. They also have important functions concerned with shipping, sending home, for instance, shipwrecked or destitute persons, and settling disputes between master and crew. Their immunities are indefinite, and exist by courtesy or by special conventions between particular States rather than by rules of law. They are generally exempted from direct taxation and from service on juries; but they are not immune from civil or criminal proceedings, though there is a general sentiment that, if possible, these should not be allowed to interfere with their official duties, or with the inviolability of the archives of the consulate."

(35) Verdross, *Völkerrecht* (1936), p. 15, has no doubt as to the immunity of consular archives, and says that consuls are, in principle, liable to jurisdiction but that they are not liable to criminal jurisdiction in respect of their official acts.

O. J. HUBBERT.

November 18, 1938.

ANNEX IV.

CARRINGTON AND KIRWAN'S REPORTS, VOL. I, P. 23.

COURT OF COMMON PLEAS.

Sitting in London in Easter Term, 1843.

Before Mr. Justice Maule.

WEBB v. PAGE.

CASE for negligence in carrying goods.

A witness was called for the plaintiff, to speak to the nature of the damage sustained by the goods (which consisted of cabinet work), and the expense that



would be necessary to restore or replace the injured articles. Before being sworn, the witness applied for compensation for his loss of time.

Maule, J.—There is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge—without such testimony, the course of justice must be stopped. The latter is under no such obligation. There is no such necessity for his evidence, and the party who selects him must pay him.

Mr. Wyche, the plaintiff's attorney, gave his undertaking to pay the witness, who was then examined.

Dowling, Serjt., and Petersdorff, for the plaintiff.
Bompas, Serjt., and Kennedy, for the defendant.

[J 1110/118/16/1939]

No. 2.

[March 18, 1939]

*Opinion of the Law Officers of the Crown for Scotland.**

1. Article 9.

THE question which falls to be answered with regard to this article is whether the Scottish courts would refuse to order "consular officers and their employees" to produce "documents from their archives or other official papers." The rule of practice in Scotland as regards the confidentiality attaching to British Government documents is that written communications passing between public officials in their official capacity are normally immune from disclosure; but that it is for the court to determine, according to the nature of the communication and the circumstances under which it was made, whether a communication passing between an official or department and a third party is entitled to protection. The recent tendency has been in the direction of weakening the plea of confidentiality, even when stated by the Lord Advocate on behalf of a public department on the ground of public interest. While great weight attaches to the plea of confidentiality when so stated, it is impossible to affirm that the court will not decline to sustain it.

If, therefore, the suggested claim for the inviolability of consular archives and other official papers is well founded, the consular officers and their employees are entitled to a higher degree of protection than the Scottish courts are in use to extend to the British Government; and the basis of the claim must be a rule of international law accepted by, or acceptable to, the Scottish courts. Is there such a rule?

In examining this question, we apply the rule laid down by Lord Macmillan in the *S.S. Cristina* (1938, A.C. 485, at 497), that "it is manifestly of the highest importance that the courts of this country, before they give the force of law within this realm to any doctrine of international law, should be satisfied that it has the hall-marks of general assent and reciprocity."

Having studied the authorities cited in the Foreign Office memorandum (to which we would add references to *Anson*, II, 136; *Ridges, Const. Law*, 303; *Halsbury, Dict.*, VI, 519; and *Encycl. of Scots Law*, VIII, 374), we conclude that the general result reached by British writers is accurately stated by *Brierly, Law of Nations*, 135-6, in the proposition that there is a "general sentiment that, if possible, legal proceedings should not interfere with immunity of archives."

In our opinion, this is a slender basis on which to rest the claim for the very high degree of confidentiality suggested by the draft article, especially in view of the vagueness of the expression "other official papers." We think it highly probable that the Scottish courts would attach the greatest weight to a claim

[* The case submitted was identical with that to the Law Officers of the Crown in England—J 1094/118/16/1939.]

made to the inviolability of "archives" or "muniments," in the strict sense of these terms, and would be very unlikely to force production; but we think that in certain cases the courts might well require a consul to produce a letter or other document received by him from some source other than his own Government. We are, therefore, unable to affirm that the proposition formulated at the beginning of this answer would be accepted in its full sense as a rule of Scots law.

We desire to add that no difficulty need be apprehended under Scots law and practice in regard to the giving of expert evidence with reference to foreign law; but that it is impossible to be confident that a consul might not be required to give evidence as to matters of fact "within the scope of official duties."

2. Article 10.

In view of the general principles of the law of agency, and the express provisions of article 10 (3), we do not consider that any serious difficulty need be apprehended so far as contractual liability is concerned. But as regards liability for a crime, offence or wrong (tort, delict, quasi-delict, &c.), everything appears to us to depend on the precise scope to be assigned to the language of article 10 (1). If the acts in question are performed in *bona fide* and without malice or other oblique motive, and are performed by a consular officer (a) in his official capacity, and (b) within the functions of consular officers under international law, we have difficulty in imagining many instances of possible crimes or torts which could conceivably be committed under such conditions. In the case of libel, which is probably the likeliest instance, the consul would be protected in a civil action by the law of privilege; and criminal libel is unknown to Scots law. Upon this view the immunity claimed by the article would be indistinguishable from that enjoyed under domestic law by such public functionaries as a town clerk or a permanent secretary. If, on the other hand, it is desired by article 10 (1) to confer on foreign consuls in this country (and to secure for British consuls abroad) that much wider degree of immunity which would protect them from the possibility of having their *bona fides* investigated by a court, and which would secure them against the consequences of any wrong or criminal offence committed in the course of the general performance of official duties, we are unable to regard the authorities cited by the Foreign Office as sufficient evidence of "the hall-marks of general assent and reciprocity," least of all in view of the fact that, against the footnote in *Hall's International Law*, it is possible to set not only the qualified or contradictory statements quoted in the Foreign Office memorandum, but also the statements of British writers in such works as *Halsbury, loc. cit.*; *Encycl. of Scots Law, loc. cit.*; *Anson, loc. cit.*; *Hood Philips, Const. Law* (1939), 436; and *Gibb, Intern. Law of Jurisd.*, 12.

In the result, if the protection sought to be afforded by article 10 is intended to be confined to strictly official acts performed in *bona fide* by a consular officer, we consider that the risk of this immunity being impaired is small, though it is manifestly not feasible to figure all the possible cases which might well arise in practice. If, on the other hand, a more comprehensive degree of immunity is intended to be conferred, we are unable to advise that the Scottish courts would be likely to afford it.

T. M. COOPER.

(Also approved, although not signed,*
by the Solicitor-General for Scotland.)

Lord Advocate's Chambers,
March 18, 1939.

PROPRIETARY STATEMENT

This film cannot be reproduced in whole or in any substantial part by use of film or microfiche either commercially or for gift without the consent of the publisher, Trans-Media Publishing Company of Dobbs Ferry, New York. Users are free to make reproductions of the decisions for reference use.

Copies of this film may be purchased from Trans-Media Publishing Co.

Trans-Media Publishing Co.
Dobbs Ferry, New York 10522

END